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STILL STANDING:

DOES THE GOVERNMENT EVER WAIVE A RIGHT TO CHALLENGE STANDING IN FOURTH AMENDMENT CASES?

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I. INTRODUCTION

Suppose you, in a criminal proceeding, successfully excluded evidence obtained in a search of a car in which you were a passenger. At the district court level, the government made no argument to suggest you lacked a personal, reasonable expectation of privacy in the vehicle. You beat the odds. But at the appellate court, the government posits that you, as a mere passenger, lack proper standing to assert a reasonable expectation of privacy in the car and may not exclude the evidence. Didn't the government waive the standing challenge when it failed to assert it at the district court level? What if the government failed to mention it in a

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brief on appeal? Depending on your circuit, the answer varies.

The Fourth Amendment, at its core, prohibits unreasonable government searches and seizures.[2] That right is an individual, personally held right.[3] In essence, a third party may not assert the reasonable expectation of privacy of another.[4] A defendant seeking to suppress seized evidence must demonstrate a violation to *her* reasonable expectation of privacy in the place or thing searched.[5] This is known as "standing" in Fourth Amendment search and seizure jurisprudence.[6] This "standing" is a substantive element of a Fourth Amendment claim, not "standing" as understood in jurisdictional or Article III contexts.[7] This is the standing contemplated in the scenario above.

At the same time, the right, through the exclusionary rule, also protects the collective.[8] The exclusionary rule gives force to the Fourth Amendment. Evidence obtained through an illegal governmental search and seizure may be suppressed from use at trial.[9] The exclusionary rule functions to regulate the behavior of governmental actors and, in doing so, protects the rights of those who may be targets of future governmental intrusions.[10] The protection comes in the form of bright-line rules of what is and is not

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[2] Torres v. Madrid, 141 S. Ct. 989, 995 (2021).

[3] Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.").

[4] Rakas v. Illinois, 439 U.S. 128, 134 (1978). *See also* Brown v. United States, 411 U.S. 223, 230 (1973); Simmons v. United States, 390 U.S. 377, 389 (1968); Wong Sun v. United States, 371 U.S. 471, 492 (1963).

[5] *Rakas*, 439 U.S. at 140.

[6] *Id.* at 133.

[7] *Id.* Though the Court reiterates reluctance to call this tenant "standing" because of the risk of confusion, several opinions continue to use the term. For the sake of clarity I will use the term "standing" in this note.

[8] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

[9] *See* Weeks v. United States, 232 U.S. 383 (1914).

[10] *See* Elkins v. United States, 364 U.S. 206, 222 (1960).

permissible police action.[11] All that said, where the exclusionary rule acts to protect Fourth Amendment rights by rendering evidence inadmissible, the standing requirement limits the effectiveness as well as the regulatory nature of the exclusionary rule.[12] In essence, the standing requirement limits the number of individuals who may use the exclusionary rule.[13]

But what happens when the government fails to challenge a party's standing to move to suppress evidence? Did the government concede—forever abandon the right to challenge—the issue of standing by failing to address it at the district court level? May the government challenge a defendant's standing for the first time on appeal? The rationales of the exclusionary rule and standing seem to conflict with respect to this question of waiver. Should the court acknowledge the waiver and thereby extend the exclusionary rule to a defendant, regulate police and prosecutor behavior, and protect the collective? Or should the government be permitted to challenge a defendant's standing on appeal, and thereby allow standing to function as a greater check on the exclusionary rule by ensuring only those personally aggrieved exercise the right?

While the Supreme Court of the United States continues to confront and resolve many questions about the Fourth Amendment and searches,[14] the Court has yet to

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[11] Andrew McLetchie, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit's Bright-Line Test for Determining the Voluntariness of* Consent, 30 Hofstra L. Rev. 225, 230 (2001) ("The exclusionary rule is the seminal bright-line rule in Fourth Amendment jurisprudence . . .").

[12] Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1702-03 (Feb. 2007) ("[I]t is suppression - and not violation of the Fourth Amendment itself - that is at issue when a court grants or denies a criminal defendant standing to suppress the products of a Fourth Amendment violation.").

[13] *Id.* at n. 1.

[14] *See* Carpenter v. United States, 138 S. Ct. 2206 (2018) (holding a warrantless search and seizure of cellular phone records violates the Fourth Amendment). *See also* Byrd v. United States, 138 S. Ct. 1518 (2018) (holding a driver of a rental car with permission to operate the vehicle but not on the rental agreement has a

directly address questions surrounding the government's failure to challenge standing at the district court level, leaving inconsistent results across the circuits.

A minority of circuits allow an objection to standing at any time, including on appeal.[15] Many circuits, however, consider the objection waived on appeal if not initially brought up in the lower court, never to be raised again.[16] This fully extinguishes the argument.[17] Simply put, the issue may never be argued, initially, on appeal. By contrast, two circuits, the Sixth and Ninth, are "waive-friendly" in that they do permit an initial objection on appeal in some scenarios. The approaches differ on when the circuits consider the issue waived.[18]

At the heart of the split seems to be a question of the importance of standing. The decisions reflect the ongoing tension between champions of a broad exclusionary rule and those who would seek to limit its effects through standing. The nine circuits considering whether the government may

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reasonable expectation of privacy in the vehicle); Lange v. California, 141 S. Ct. 617 (2021) (finding exigent circumstances exception to the Fourth Amendment's warrant requirement is not categorically triggered when police are pursuing a suspect whom they believe committed a misdemeanor); Caniglia v. Strom, 141 S Ct. 1596 (2021) (holding the community caretaking function exception to the warrant requirement does not extend to the home).

[15] United States v. Bouffard, 917 F.2d 673 (1st Cir. 1990); *see also* United States v. Rodriguez-Arreola, 270 F.3d 611, 616 (8th Cir. 2001).

[16] United States v. Golson, 743 F.3d 44 (3d Cir. 2014); United States v. Gonzales, 79 F.3d 413 (5th Cir. 1996); United States v. Price, 54 F.3d 342 (7th Cir. 1995); United States v. Dewitt, 946 F.2d 1497 (10th Cir. 1991); United States v. Lightbourn, 357 F. App'x 259 (11th Cir. 2009).

[17] United States v. Navedo, 694 F.3d 463, 478 n.3 (3d Cir. 2012) ("[W]hether [defendant] possessed a reasonable expectation of privacy—a necessary predicate to his invocation of the exclusionary rule—might have presented a close question in this case. But the Government waived this standing argument by failing to raise it in the District Court.") (internal citations omitted) (brackets added).

[18] *See, e.g.*, United States v. Noble, 762 F.3d 509 (6th Cir. 2014); *see also* United States v. Taketa, 923 F.2d 665, 670 (9th Cir. 1991).

waive the right to challenge standing on appeal root their decisions in both logic and law. But each court seems to arrive at a different conclusion in a different manner. The decisions provide each circuit and judge at the appellate level an opportunity to weigh in on the value and importance of standing in Fourth Amendment jurisprudence. By extension, the decisions determine the pool of individuals who may benefit from evidence exclusion.

Essentially, a court's decision on whether the government may waive standing tips the scale in favor of either the exclusionary rule or standing. The question posed becomes: should the exclusionary rule receive broad application, or should it be limited by a standing requirement? If it should be limited by standing, should the issue of waiver at the appellate level function to limit the chilling effects of standing? Effectively, the appellate decisions determine the pool of individuals who may benefit from evidence exclusion. Still, the decisions do not explicitly address the role standing should play in Fourth Amendment jurisprudence.

Part II of this comment will explore the history of the Fourth Amendment, the purpose of the exclusionary rule, and the justification for standing. Part III will analyze the four approaches taken by the varying circuits. Finally, Part IV will scrutinize these approaches against the rationales underlying the Fourth Amendment, the exclusionary rule, and the standing requirement, and examine the role waiver should play in Fourth Amendment jurisprudence. Given the importance of the exclusionary rule in enforcing Constitutional rights, a unified approach is necessary. To promote best practices and guard against stealthy government encroachment on Constitutional rights, when the government fails to challenge a defendant's standing at the district court level, an appellate court should disallow a challenge to standing in the brief or at oral arguments.

II. THE FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and persons or things to be seized."[19]

A. FIRST, A BRIEF HISTORY OF THE FOURTH AMENDMENT.

Privacy and security in persons and property have long been highly favored by citizens of the United States.[20] The Fourth Amendment, drafted into the Bill of Rights, ratified by the states in 1791, haled from the American people's desire to safeguard against unreasonable searches and seizures, such as were permitted under general warrants issued under the authority of the English government.[21] Under these general warrants, invasions of the home and privacy of the citizens and the seizure of their private papers in support of any charge made against them were commonplace and legal.[22] American colonies also suffered writs of assistance which sanctioned warrants and seizures, often without criminal accusations.[23] Indeed, the general writs and writs of assistance were often issued without specification of the place to be searched and the items to be seized.[24] Eventually, the people demanded

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[19] U.S. CONST. amend. IV.

[20] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 561 (Dec. 1999) (describing how Constitutional scholar Nelson B. Lasson "rooted the Framers' motivation for constitutional search and seizure provisions in three episodes of controversy in search and arrest authority that preceded the American Revolution").

[21] 1 HON. WILLIAM H. ERICKSON & B.J. GEORGE JR.,UNITED STATES SUPREME COURT CASES AND COMMENTS P 1.01 (2021).

[22] *Id.*; *see also* Davies, *supra* note 20 at 551.

[23] Boyd v. United States, 116 U.S. 616, 625 (1886) ("The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book.'").

[24] *Id.* at 625-626.

protection against such abuse of government power.[25] The Fourth Amendment represented resistance to these practices of general warrants and writs of assistance, drafted to ensure a man's home was, in fact, his castle.[26]

While Supreme Court jurisprudence since the 1960s evidences that the Fourth Amendment is a critical amendment in the Bill of Rights, the Supreme Court largely ignored the amendment until 1886.[27] In *Boyd v. United States*, the first case of significance for Fourth Amendment jurisprudence, the Court examined the history of the Fourth Amendment.[28] Then, for the first time, the Court held a law unconstitutional for violating the Fourth Amendment.[29] *Boyd* involved not a criminal prosecution but a civil action by the United States for the forfeiture of goods imported in violation of customs revenue laws.[30] The Court held that while there was no physical trespass, nor were there private papers at issue, compulsion to produce records in a civil matter functioned as an illegal search or seizure of private papers, used to launch criminal charges.[31] While the "search" in question did not involve physically entering a home, breaking doors, or encroaching into a private space, the Court still considered the holding one encompassing "the very essence of constitutional liberty and security."[32] At bottom, the Court recognized the Fourth Amendment as a key tenant of liberty and extended the definition of a "search"

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[25] Davies, *supra* note 20, at 567-568 (describing American colonists' memory of three episodes of controversy over English search authority and the Framer's subsequent adoption of constitutional search and seizure provisions).
[26] Davies, *supra* note 20, at 568.
[27] *Id.*; *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 106 (1937) (discussing the dearth of Fourth Amendment cases before the Supreme Court before 1886).
[28] *Boyd,* 116 U.S. at 616.
[29] *Id.* at 638.
[30] *Id.* at 617-618.
[31] *Id.* at 633-634 ("We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they be civil in form, are in their nature criminal.").
[32] *Id.* at 630.

beyond the breaking of doors or the trespassing of a home.[33] The *Boyd* Court recommended a "liberal construction" of the constitutional provisions for the security of persons and property.[34] "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[35]

At its core, the Fourth Amendment demands that protections against unreasonable searches and seizures apply to all citizens, whether or not they are accused of a crime.[36] The Supreme Court has explained: "The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusion into the privacy of one's person, house, papers or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life."[37] That said, the extent of protection and how to enforce this right differs, depending on the court's perspective.

B. TWO COMPETING PERSPECTIVES DOMINATE FOURTH AMENDMENT JURISPRUDENCE.

Two perspectives exist in Fourth Amendment jurisprudence: the atomistic view and the regulatory view.[38] The atomistic perspective views the Fourth Amendment as individualistic.[39] From this perspective, protections afforded by the Fourth Amendment exist in individual spheres of interest of individual citizens.[40] The right to be secure in papers, persons, and property should be enforced, but in a

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[33] *Id.* ("The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.").
[34] *Id.* at 635.
[35] *Id.*
[36] Weeks v. United States, 232 U.S. 383, 392 (1914).
[37] United States v. Calandra, 414 U.S. 338, 354 (1974); *see also* Illinois v. Lafayette, 462 U.S. 640, 648 (1983); New York v. Belton, 453 U.S. 454, 458 (1981).
[38] Amsterdam, *supra* note 8 at 367.
[39] *Id.*
[40] *Id.*

limited way, based on individual expectations.[41] The second perspective, the regulatory perspective, sees the Fourth Amendment protections as a method of regulating governmental conduct.[42] Rather than protect the rights of the individual, the Fourth Amendment shields the people as a collective from government infringement.[43] The primary method to deter the government from intruding is regulating and deterring police misconduct.[44] To deter misconduct, evidence, even relevant, incriminating evidence, ought to be excluded from a criminal proceeding.[45] The Supreme Court originally contemplated a wide application of this rule.[46]
Standing and the exclusionary rule are rooted in the competing perspectives of Fourth Amendment jurisprudence.[47] Standing is rooted in the atomistic, or individual perspective, allowing a person to assert only an individual right to privacy in court, while the exclusionary rule functions in modern jurisprudence as mostly regulatory and recognizes the collective.[48] While the exclusionary rule is broad and protects the collective, standing requirements often prevent a defendant from exercising the exclusionary rule because the government did not intrude upon an individual right.[49] The competing perspectives and rationales lead to tension in Fourth Amendment jurisprudence.[50] The tension is present, too, in the circuit

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[41] *Id.* ("Plainly, the Supreme Court is operating on the atomistic view, although it has never discussed the issue.").
[42] *Id.*
[43] *Id.*
[44] *Elkins*, 364 U.S. at 222.
[45] Mapp v. Ohio, 367 U.S. 643, 651 (1961) (citing People v. Cahan, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955) ("[O]ther remedies have completely failed to secure compliance with the constitutional provisions . . .") (brackets added).
[46] *Id.* at 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").
[47] Amsterdam, supra note 32 at 367.
[48] *Id.*
[49] *Id.*
[50] Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 274 (1988)(arguing the

split examined in this note. Whether a court may permit the government to challenge standing for the first time on appeal may be informed by the court's view of the Fourth Amendment as atomistic or regulatory.

C. THE EXCLUSIONARY RULE ENFORCES THE FOURTH AMENDMENT

The exclusionary rule gives force and effect to the Fourth Amendment.[51] Fourth Amendment jurisprudence now treats the exclusionary rule as regulatory or a protection of the collective.[52] Admittedly, the exclusionary rule may exclude relevant, incriminating evidence from consideration.[53] Courts justify this social cost in two ways.[54] First, and perhaps the more cited reason, is factual.[55] Excluding relevant, incriminating evidence should encourage future practices conforming with Constitutional demands.[56] The second justification is normative.[57] The normative justification enforces the belief that courts should not participate in illegal acts.[58] This should include presiding over a proceeding where illegally obtained evidence is proffered against a defendant.[59]

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exclusionary rule prevents future harms for the collective rather than redresses harm done to a defendant moving to suppress, and thus standing should play no part of the calculus); *See also* Colb, *supra* note 4 (arguing the exclusionary rule and standing are logically inapposite).

[51] *Belton*, 453 U.S. at 458.

[52] Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[53] Andrew M. Carter, Good Cops, Bad Cops, and the Exclusionary Rule, 23 U. PA. J. CONST. L. 239, 240 (2021)("But, at least on paper, there are still plenty of circumstances where the Fourth Amendment exclusionary rule contemplates a plainly guilty murderer escaping justice because of an officer's otherwise de minimis Fourth Amendment violation.").

[54] Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 668 (1970).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

To regulate against government intrusion, courts created and continue to create an elaborate tapestry of Fourth Amendment doctrine making specific decisions about what, when, and where police may investigate crime.[60] This elaborate doctrine seeks to regulate police protocol and behavior to protect privacy.[61] The exclusionary rule functions to prevent evidence collected or otherwise obtained in violation of the Fourth Amendment from being used in court.[62] The exclusionary rule is prophylactic, created by the judiciary, and formulated to protect a constitutional right.[63]

The Supreme Court of the United States first articulated the exclusionary rule in *Weeks v. United States* in 1914.[64] Justice William R. Day, penning the opinion of the unanimous court, reversed the Western District of Missouri and held a warrantless seizure of documents from a private home violated the Fourth Amendment prohibition against unreasonable searches and seizures.[65] More importantly, the Court held evidence obtained during an illegal search is

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[60] Andrew McLetchie, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit's Bright-Line Test for Determining the Voluntariness of* Consent, 30 HOFSTRA L. REV. 225, 230 (2001) ("The exclusionary rule is the seminal bright-line rule in Fourth Amendment jurisprudence . . .").

[61] Carter, *supra* note 53 at 242 ("For the modern Supreme Court, the benefit of the rule is its deterrence effect: we accept the costs of the exclusionary rule because the rule deters those police officers who--by dint of malice, recklessness, or negligence--might otherwise intrude on a suspect's Fourth Amendment rights.").

[62] *Id.* at 240; see also *Weeks,* 232 U.S. at 393.

[63] Wong Sun v. United States, 371 U.S. 471, 486 (1963) (Application of the exclusionary rule on Wong Sun's behalf protected Fourth Amendment guarantees by ". . . deterring lawless conduct by federal officers" and by "closing the doors of the federal courts to any use of evidence unconstitutionally obtained."). *See also* Elkins v. United States, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

[64] *Weeks*, 232 U.S. at 398 ("In holding [the letters] and permitting their use at trial, we think prejudicial error was committed.").

[65] *Id.*

excluded from use in federal criminal prosecutions.[66] To permit the use of private documents seized illegally in a court of law would mean the protection of the Fourth Amendment declaring a right to be secure against such searches and seizures would be of no value.[67] Further, because federal prosecutions could not rely on evidence secured by an illegal search and seizure, in the future federal law enforcement officers would adhere to the confines of a legal search and seizure.[68] In other words, because evidence obtained illegally is barred, federal law enforcement officers must operate legally in searches to secure evidence for future federal prosecution. Finally, the *Weeks* Court declared "a conviction based on unlawfully seized evidence should find no sanction in the judgment of the courts."[69] Thus, the exclusionary rule was born to direct law enforcement conduct and reinforce confidence in the judicial system.

Nearly five decades later, the exclusionary rule first pronounced in *Weeks* extended beyond federal criminal proceedings to the states by the Fourteenth Amendment.[70] The Court recognized the rule excluding illegally obtained evidence protects liberties considered "fundamental by the Constitution."[71] In sum, the exclusionary rule is constitutionally underpinned.[72] The rule is an essential ingredient of the Fourth Amendment, the Court held, and is enforced against the States by the Due Process Clause. The Court felt "led to close the only courtroom door remaining open to evidence secured by official lawlessness" by extending the Fourth Amendment's right of privacy to the states.[73] As a result, the Court determined all evidence

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[66] *Id.*
[67] *Id.* at 393.
[68] *Id.* at 391-392.
[69] *Id.* at 392.
[70] Mapp v. Ohio, 367 U.S. 643 (1961).
[71] *Id.* at 649 (quoting McNabb v. United States, 318 U.S. 332, 339-340 (1943))(citing *Boyd*, 116 U.S. at 616 and *Weeks,* 232 U.S. at 383).
[72] See *Carter*, supra note 53 at n. 4 citing *Calandra*, 414 U.S. at 348 ("In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").
[73] *Id.* at 654-655.

obtained by unlawful searches and seizures is also inadmissible in state court.[74]

When extending the exclusionary rule to the states, *Mapp v. Ohio* directly acknowledged and reinforced the purpose of the exclusionary rule stated in *Weeks*.[75] "The purpose", the Court held, "is to deter—to compel respect for the constitutional guaranty in the only effective way available —by removing the incentive to disregard it."[76] At its core, the exclusionary rule is not a remedy for an individual's injury.[77] The rule, instead, is designed to punish violators and protect future search targets.[78] By excluding illegally obtained evidence, government actors will conform their behavior in later searches and seizures to avoid the exclusion.[79] *Weeks*, *Mapp*, and the decisions that follow continue to rely on the normative and factual justifications for the exclusionary rule.[80]

D. THE COURT LIMITS THE AVAILABILITY OF THE EXCLUSIONARY RULE WITH STANDING.

While the willingness to exclude illegally obtained evidence became a federal tenant in the early 20th Century, and extended to the states in the early 1960s, a desire for a limited application of the exclusionary rule emerged in the mid-to-late 20th Century. In *Weeks v. United States* and *Mapp v. Ohio* the Court reflected a sweeping approach to exclusion.[81] The Court wrote, "[w]e hold that all evidence obtained by searches and seizures in violation of the

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[74] *Id.* at 655.
[75] *Id.*
[76] *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
[77] *Elkins*, 364 U.S. at 217.
[78] *Id.*
[79] *Id.*
[80] *See also* Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Leon, 468 U.S. 897, 909, 921 (1984); Herring v. United States, 555 U.S. 135, 141 (2009); Davis v. United States, 564 U.S. 229, 236-37 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").
[81] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Constitution is . . . inadmissible in a state court."[82] And yet in a series of cases the Court limited the availability of the remedy in multiple ways. This limitation includes requiring a defendant have standing to challenge the legality of search.

The Court requires a greater connection between wrongful state action and the person invoking the exclusionary rule by requiring "standing."[83] While the word "standing" may stir thoughts of constitutional law and Article III standing, Justices are careful to point out this is a separate, distinct concept.[84] Standing, in Fourth Amendment jurisprudence, describes the legal status of a person and whether they may seek to exclude evidence under the exclusionary rule.[85] In this sense, standing is rooted in the atomistic perspective, unlike the exclusionary rule.[86]

Today, a person must have a reasonable expectation of privacy in a thing or place to challenge a search.[87] Before *Rakas v. Illinois*, the Supreme Court required a legitimate presence on the premises to challenge a search[88]. This sense of standing, first set forth in *Jones v. United States*, precluded a person improperly present from asserting a privacy expectation in the premises searched.[89] In *Jones*, a defendant accused of narcotics possession motioned to suppress evidence uncovered in a search of an apartment in which he was a guest.[90] The government argued that, even if the defendant entered the apartment as an invitee, he lacked a possessory interest in the apartment as owner.[91] The Court rejected the idea that a possessory interest and the concept of standing should necessarily follow private property law and instead found the defendant met the standing requirement to challenge the search.[92] The defendant, the Court reasoned, was properly in the

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[82] *Id.*
[83] *Rakas*, 439 U.S. at 140.
[84] *Id.*
[85] *Id.*
[86] Amsterdam, *supra* note 8 at 367.
[87] *Rakas*, 439 at 140.
[88] Jones v. United States, 362 U.S. 257, 267 (1960).
[89] *Id.*
[90] *Id.* at 259.
[91] *Id.*
[92] *Id.* at 266.

apartment and therefore had a possessory interest in the property such that he could expect privacy.[93]

Nearly eighteen years later, the concept of standing transformed. The Court rejected the notion that standing simply required a possessory interest in the property as *Jones* suggested.[94] In *Rakas v. Illinois* the Supreme Court affirmed an Illinois Appellate Court decision denying a motion to suppress evidence.[95] *Rakas* involved a vehicle search yielding evidence of a robbery—rifle shells and a sawed-off shotgun.[96] The occupants of the vehicle moved to suppress the rifle and shells seized from the car because the search violated the Fourth and Fourteenth Amendments.[97] The petitioners conceded they did not own the vehicle, the shells, nor the rifle.[98] They were simply passengers in the vehicle.[99] The prosecutors challenged the petitioners' standing to object to the lawfulness of the search of the car because they did not own the car.[100] The trial court, as well as the Appellate Court of Illinois, agreed the petitioners' lacked an individual, reasonable expectation of privacy in the vehicle.[101]

Holding that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted" the court rejected the "target" theory permitting a defendant the right to challenge the violation of the Fourth Amendment rights of a third party.[102] The Court also rejected the *Jones* holding permitting a defendant standing to challenge the legality of a search when she was legitimately on a premises.[103] Simply put, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained.[104]

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[93] *Id.* at 265.
[94] *Rakas*, 439 U.S. at 133.
[95] *Id.* at 150.
[96] *Id.* at 129.
[97] *Id.* at 130.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 130-131.
[101] *Id.* at 131.
[102] *Id.* at 130 citing *Alderman*, 394 U.S. at 174.
[103] *Id.* at 148.
[104] *Id.* at 140.

The Court reasoned that since Fourth Amendment rights are individual, it is proper to permit only a defendant whose Fourth Amendment rights were violated to benefit from the exclusionary rule's protections.[105] The exclusionary rule is designed to enforce that individual right.[106] Benefitting from the exclusionary rule while challenging a violative search vicariously would be improper.

Justice Rehnquist bristled at labeling the inquiry as "standing" in the traditional Article III meaning.[107] The Court eliminated standing as an independent, preliminary inquiry.[108] Instead, Rehnquist framed the inquiry as "simply recognizing [the inquiry] as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge."[109] In other words, a person who challenges a search to a third party's premises or property has not had his own Fourth Amendment rights infringed. It is not the same inquiry as Article III standing, but a substantive part of determining whether the Fourth Amendment was violated during a search or seizure.[110]

The Court continues to examine issues of standing in the 21st Century as culture changes.[111] In *Byrd v. United States* in 2018 the Court addressed whether rental car drivers who are not on the rental agreement (e.g., a person given the keys to drive by a person who is authorized to drive) have standing to object to a search of the car.[112] The Court distinguished this case from *Rakas* and held that a person alone in a rental car has an individual reasonable expectation of privacy and thus has standing to challenge a search of the car.[113]

Because the Court continues to approach Fourth Amendment jurisprudence from both an atomistic and

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[105] *Id.*
[106] *Id.* at 134 citing Simmons v. United States, 390 U.S. 377, 389 (1968).
[107] *Id.* at 139-40.
[108] *Id.* at 133.
[109] *Id.*
[110] *Id.*
[111] *Byrd*, 138 S. Ct. at 1518.
[112] *Id.*
[113] *Id.* at 1531.

regulatory perspective, tension persists. This tension is seen at the appellate level when courts confront whether the government may ever waive the right to challenge standing. Courts use waiver of the standing argument to advance a broad exclusionary rule or permit standing challenges to limit the utility of the exclusionary rule. Courts do this by considering the objection waived, never waived at any point, or potentially waived, depending on the circumstances of the case. An approach never waiving an objection to standing effectively permits a smaller population to use the exclusionary rule. An approach that considers the objection waived, without question, at the appellate level, permits a larger population to use the exclusionary rule.

III. THE CIRCUIT SPLIT ON WAIVING A CHALLENGE TO STANDING

The Supreme Court of the United States addressed whether the government may waive standing once but used permissive language.[114] In *Steagald v. United States*, the Court suggested that the government *may* waive the right to raise factual issues related to standing when it makes contrary assertions in the courts below, when it acquiesces in contrary findings by those courts, or when it fails to raise such questions during litigation.[115] In *Steagald*, a Drug Enforcement Administration (DEA) agent received confidential information suggesting he could locate a federal fugitive named Lyons wanted on drug charges in Atlanta.[116] The DEA agent contacted Southern Bell Telephone Company, retrieved the address associated with the phone number the informant disclosed, and stormed the home with eleven other agents.[117] The agents did not find Lyons but detained several at the home.[118] During the search of the house, the agent observed what he believed to be cocaine.[119] While the agent waited on a search warrant, the group conducted a second search of the house (without a warrant)

[114] Steagald v. United States, 451 U.S. 204 (1981).
[115] *Id.* at 209.
[116] *Id.* at 206.
[117] *Id.*
[118] *Id.*
[119] *Id.*

and uncovered more incriminating evidence.[120] A third search, with a warrant, unearthed 43 pounds of cocaine.[121] As a result, agents arrested Steagald on federal drug charges.[122]

Steagald moved to suppress all evidence uncovered in the various searches conducted without warrants.[123] The agent testified to his belief that the arrest warrant for Lyons was enough to permit a search of the home.[124] The District Court agreed and denied the motion to suppress.[125]

On appeal, the government suggested Steagald lacked an expectation of privacy in the house and therefore lacked standing to challenge the search of the home.[126] The argument was never raised in the courts below.[127] The government, in fact, asserted in its brief in opposition to certiorari Steagald lived in the home, which suggests standing to challenge a search. Yet the government presented evidence to the contrary at oral arguments and suggested Steagald did not live in the home.[128] Mere presence in the home did not give Steagald standing to challenge the search, the government argued.[129]

The Supreme Court declined to follow the government's argument that the petitioner lacked standing.[130] The government, the Court said, was first entitled, at the district court, to defend against Steagald's motion to suppress by challenging his personal, reasonable expectation of privacy (his standing) in the place searched.[131] The government instead argued petitioners lived in the home.[132] The Court held that the government may lose the right to raise factual issues at the Supreme Court in some

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[120] *Id.* at 206-207.
[121] *Id.* at 207.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 208.
[127] *Id.* at 208-209.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 209.
[131] *Id.*
[132] *Id.*

cases.[133] On that basis, the Court then concluded this was just such a case.[134] Because the government argued inconsistent facts on appeal, the Court rejected the argument that the defendant lacked standing.[135] As a result of the permissive language of *Steagald*, there is a tri-part split within the circuits.

There are three basic approaches to whether the government may waive a challenge to standing if it is not asserted at the district court level. The First and Eighth Circuits do not permit the government to waive Fourth Amendment standing issues, even if it fails to raise them in the district court.[136] Seven other circuits hold that the government does, in fact, waive Fourth Amendment standing challenges in some cases. Within the general approach that a challenge to standing is waived if not asserted at the district court level, there are five circuits (the Third, Fifth, Seventh, Tenth, and Eleventh) that hold the government completely concedes the issue if it fails to challenge Fourth Amendment standing at the district level.[137] The Ninth Circuit gives the government lenience.[138] Fourth Amendment standing may be raised for the first time on appeal in this circuit, but a failure to place a challenge in the appellate brief will waive the challenge.[139] The government may not bring up the issue for the first time at oral arguments.[140] Finally, the Sixth Circuit is "waive-friendly" in that, like the Ninth Circuit, the government may lose the ability to appeal in some cases.[141] Still, the Sixth Circuit allows the government to object to a defendant's Fourth Amendment standing for the first time on appeal if the government can show the defendant plainly lacked standing and a failure to recognize such would "seriously

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Bouffard*, 917 F.2d at 674; *Rodriguez-Arreola*, 270 F.3d at 616.
[137] United States v. Stearn, 597 F.3d 540 (3d Cir. 2010); United States v. Lightbourn, 357 Fed. App'x 259, 264 (11th Cir. 2009); United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996); *Price*, 54 F.3d at 345; *Dewitt* 946 F.2d at 1497-1500.
[138] United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006).
[139] *Taketa*, 923 F.2d at 670.
[140] *Id.*
[141] *Noble*, 762 F.3d at 527.

affect…the fairness, integrity, or public reputation of judicial proceedings."[142] The Sixth Circuit, like the Ninth, would consider the issue waived if not raised in the opening brief on appeal.[143] The lack of guidance from the Supreme Court explains the tripartite split of the circuits, though each circuit lays out the competing government interests and need to protect the rights of defendants in case law in differing ways.

A. THE FIRST AND EIGHT CIRCUITS HOLD STANDING CANNOT BE WAIVED BY THE GOVERNMENT.

Two circuits permit the government to bring a challenge to standing for the first time at the appellate level. The First and the Eighth Circuits, respectively, permit the government to bring an initial challenge to standing despite failure to challenge at the district level, for differing reasons.

i. THE FIRST CIRCUIT APPROACH

The First Circuit, in *United States v. Bouffard*, 917 F.2d 673 (1st Cir. 1990) considered whether the government conceded the defendant's standing to challenge a search. The United States District Court for the District of New Hampshire refused to suppress a short-barreled shotgun seized from an automobile operated by Bouffard, the defendant just before the seizure.[144] Bouffard's sister-in-law loaned him the car, to be returned at 5:00 p.m. the next day.[145] When the car was not returned, the sister-in-law sought police assistance in recovering the vehicle.[146] When reporting the vehicle missing, she confirmed Bouffard was driving her husband's 1979 Mercury Cougar.[147] She reported Bouffard's girlfriend likely accompanied him on the car ride.[148] Bouffard's argument at the District Court suggested the police had little interest in recovering the vehicle until

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[142] *Id.* at 528.
[143] *Id.*
[144] *Bouffard*, 917 F.2d at 674.
[145] *Id.* at 674, n. 1.
[146] *Id.*
[147] *Id.*
[148] *Id.*

they learned Bouffard had many outstanding warrants for his arrest, at which time they issued a bulletin report that Bouffard should be considered "armed and dangerous"—to his sister-in-law's protest.[149] The police assured her the characterization was merely precautionary.[150]

The search began. Upon locating the 1979 Mercury Cougar parked at a public boat landing and verifying ownership to the Bouffard family, the defendant approached police and was handcuffed and placed in the vehicle.[151] Police located a short-barreled shotgun in the locked trunk of the car under two bags of clothing, while allegedly searching for the female suspect.[152] The weapon was not visible until the bag was moved.[153]

Bouffard challenged the search in District Court as merely pretextual.[154] The District Court rejected this argument but declined to consider whether the act of lifting the garbage bag constituted a "search" because the defendant did not challenge this.[155] The government failed to challenge, as suggested by *Rakas,* whether the defendant showed a legitimate expectation of privacy in the trunk of the automobile.[156]

The court noted that the issue in this case, whether remand was appropriate to enable further factfinding about Bouffard's reasonable expectation of privacy, was more like the Supreme Court's decision in *Combs v. United States*, 408 U.S. 224, 227 (1972) than *Rakas*.[157] In *Combs*, a per curiam opinion, the Court ordered a remand where a prosecutor did not challenge the defendant's "standing."[158] *Rakas*, of course, refused to remand where a prosecutor challenged "standing"

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[149] *Id.*
[150] *Id.*
[151] *Id.* at 674.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 674-675.
[156] *Id.* at 675.
[157] *Id.* at 677, citing Combs v. United States, 408 U.S. 224, 227-228 (1972) (per curiam) (ordering remand where prosecutor did not challenge defendant's "standing").
[158] *Combs*, 408 U.S. at 227-228.

at a suppression hearing.[159] As in *Combs*, the *Bouffard* prosecutors conceded standing at the district court level and at arguments on appeal.[160] The *Bouffard* court wondered if, like *Combs*, the defendant failed to assert a privacy claim to the search premises because the government failed to challenge standing.[161] In other words, a defendant may rightfully fail to clearly assert his privacy interests in searched premises when the government does not suggest they lack the standing to claim such interest.

The court directed the district court to conduct a "standing" inquiry, despite the government's concession of the defendant's standing in both the district court and on appeal.[162] The court noted the clear "insufficiency of evidence to demonstrate that the defendant possessed a legitimate expectation of privacy."[163] The court reasoned the remand was necessary for three reasons.[164] First, fundamental fairness would dictate that the defendant deserved an opportunity to present evidence establishing his expectation of privacy.[165] The government's concession of standing at the district court level and at oral arguments on appeal could explain why the defendant presented no evidence to establish his private interest in the car or gun.[166] Should the government now challenge standing, fairness requires that the defendant be permitted to prove a case. Beyond fairness, a remand would allow the district court to consider, for the first time, whether the defendant can establish a legitimate expectation of privacy, this time with an adequate record.[167] The district court made no findings for the record because the defendant failed to put on evidence proving an expectation of privacy in the property searched and items seized, and the government failed to put on evidence of its lack.[168] For these reasons, the Court of

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[159] *Rakas*, 439 U.S. at 130-131, n. 1 (refusing to remand where prosecutor challenged "standing" at suppression hearing).
[160] *Bouffard*, 917 F.2d at 677.
[161] *Id.* at 677, citing *Combs*, 408 U.S. at 227.
[162] *Bouffard*, 917 F.2d at 677.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*

Appeals, though permitted to do so by appellate procedure rules, felt it could not make a reliable determination on the fact-dependent issues underpinning the Fourth Amendment claim on the record before it.[169]

ii. THE EIGHTH CIRCUIT DISREGARDS *RAKAS*

As in the First Circuit, the government may object to standing at any time, including on appeal in the Eighth Circuit.[170] The Eighth Circuit, like the First Circuit, permits the challenge to standing on appeal even if the government fails to include it in the brief or at oral arguments.[171] The Eighth Circuit's reasoning, however, is different from that of the First Circuit.[172]

The Eighth Circuit reasoning sounds in Article III standing.[173] In *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001), after a routine vehicle stop, the driver of the vehicle, Molina, answered the questions of police officers about his immigration status as well as his passenger Rodriguez-Arreola's status.[174] The officer questioned Molina whether his passenger had a green card, to which Molina replied "No."[175]

When the government later charged Rodriguez-Arreola under 8 U.S.C. § 1326(a) (Supp. IV 1998) with being an "illegal alien present in the United States after deportation," he moved to suppress all evidence obtained during the traffic stop.[176] The defendant argued police obtained his immigration status through an illegal search in violation of his Fourth Amendment rights.[177] While the defendant did not argue that the initial stop of the vehicle for

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[169] *Id.*
[170] *Rodriguez-Arreola*, 270 F.3d at 616.
[171] *Id.*
[172] *Id.* at 617.
[173] *Id.* at 617 (citing Sierra Club v. Robertson, 28 F.3d 752, 757 n. 4 (8th Cir. 1994) ("It is elementary that standing relates to the justiciability of a case and cannot be waived by the parties.")).
[174] *Id.* at 613.
[175] *Id.*
[176] *Id.* at 615 (citing United States v. Rodriguez-Arreola, No. CR 00-40071 (D.S.D. October 24, 2000) (Motion to Suppress)).
[177] *Id.*

speeding was improper, he did assert that his rights were violated when the officer posited questions about his identity to the driver.[178] The United States District Court for the District of South Dakota granted the defendant's motion to suppress.[179]

The government appealed, arguing, among other things, that even if the officer's questions to Molina constituted an unconstitutional search and seizure, the questions violated Molina's constitutional rights, not Rodriguez-Arreola's right to remain free from unreasonable searches and seizures.[180] Simply put, on appeal, the government challenged Rodriguez-Arreola's standing to suppress the evidence based on these questions. Rodriguez-Arreola argued the government waived any argument to challenge a Fourth Amendment violation when it failed to do so in the district court.[181]

The Eighth Circuit agreed with the government.[182] The opinion cited *United States v. Stallings*, 28 F.3d 58, 60 (8th Cir. 1994) which held that a defendant must have a legitimate expectation of privacy in the places or objects searched to challenge a search or seizure under the Fourth Amendment.[183] The *Rodriguez-Arreola* court held that Rodriguez, in relying on the questions asked to Molina to establish an illegal search, sought to assert another individual's rights rather than his own[184]. The court then addressed whether the government may waive a defendant's lack of standing.[185] Finding that any argument based on waiver must fail, the court determined the government cannot waive a right to challenge a lack of standing.[186] To support this notion, the Eighth Circuit cited *Sierra Club v.*

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[178] *Id.*
[179] *Id.*
[180] *Id.* at 615-16.
[181] *Id.* at 616.
[182] *Id.*
[183] *Id.* at 616 (citing United States v. Stallings, 28 F.3d 58 (8th Cir. 1994).
[184] *Id.* at 616-617 (citing *Stallings,* 28 F.3d 58, 60 (8th Cir. 1994) ("In order to have standing to challenge a search or seizure under the Fourth Amendment, the defendant must have a legitimate expectation of privacy in the places or objects searched.")).
[185] *Id.* at 617.
[186] *Id.*

Robertson, 28 F.3d 753, 757 n. 4 (8th Cir. 1994).[187] This case addressed Article III standing and justiciability.[188] The Sierra Club argued that the appellees failed to appeal the District Court's determination on standing and therefore waived the issues.[189] The *Sierra Club* court note that standing, in the Article III sense, is "elementary" as it relates to the justiciability of a case and cannot be waived by the parties.[190] The *Sierra Club* footnote reference in *Rodriguez-Arreola* further cites a 1985 Eighth Circuit case that asserts the justiciability of a case must be considered at any court, at any level, even when the parties have not raised the issue.[191]

Asserting that the government could challenge Rodriguez-Arreola's standing for the first time at the appellate level, the court then concluded the government did not violate Rodriguez-Arreola's Fourth Amendment rights.[192] The Eighth Circuit reversed the District Court's suppression order and remanded for further proceedings.[193]

At bottom, the Eighth Circuit determined the government cannot waive a defendant's lack of standing in Fourth Amendment cases based on an understanding of Article III standing, which contradicts Supreme Court precedent in *Rakas*. The decision stands in the Eighth Circuit, has no support in other circuits, and has been questioned by at least one district court in the Eighth Circuit itself.[194]

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[187] *Id.*

[188] *Sierra Club*, 28 F.3d 753, 757 n. 4 (8th Cir. 1994).

[189] *Id.*

[190] *Id.*

[191] *Id.* at n. 4 (citing Olin Water Servs. V. Midland Research Labs., Inc., 774 F.2d 303, 306 n.3 (8th Cir. 1985) (noting that the justiciability of a case must be considered by a court even when the parties have not raised the issue)).

[192] *Rodriguez-Arreola*, 270 F.3d at 619.

[193] *Id.*

[194] *See* United States v. Foster, 763 F. Supp. 2d 1086, 2011 (D Minn. 2011) ("This Court must ordinarily follow Eighth Circuit precedent regardless of whether that precedent is, in this Court's opinion, correctly decided. But when a decision of the Eighth Circuit conflicts with a decision of the United States Supreme Court, this Court must, of course, follow the decision of the United States

B. THE THIRD, FIFTH, SEVENTH, TENTH, AND ELEVENTH CIRCUITS CONSIDER THE ISSUE OF FOURTH AMENDMENT STANDING WAIVED IF THE GOVERNMENT FAILS TO RAISE IT AT THE DISTRICT COURT LEVEL.

In the Third, Fifth, Seventh, Tenth, and Eleventh circuits, failure to challenge standing at the district court level is a concession.[195] As a result, these circuits consider the concession a complete waiver and permit no contrary argument on appeal.[196] The approaches find common ground in *Rakas* and *Steagald*.[197]

In particular, the Third Circuit posits the government waives a right to challenge standing if the argument is not addressed at the district court level.[198] In *United States v. Stearn* the Third Circuit acknowledged other approaches in sister circuits in a footnote.[199] The Third Circuit formulated a rule to accord *Rakas* and *Steagald*.[200] In the Third Circuit, as in the Fifth and Seventh, when the government concedes standing, it is precluded from challenging it on appeal.[201] The Third Circuit reasoned that standing, in Fourth Amendment jurisprudence, functions as an element of a claim rather than a jurisdictional inquiry, citing *Rakas* language.[202] The Third Circuit also recognized that standing

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Supreme Court. That is the situation here, as *Rodriguez-Arreola*'s holding about Fourth Amendment "standing" directly contradicts the holding of a binding Supreme Court case — *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).").

[195] *Stearn*, 597 F.3d at 540; *Lightbourn*, 357 Fed. App'x at 264 *Gonzales,* 79 F.3d at 419; *Price*, 54 F.3d at 345; *Dewitt*, 946 F.2d at 1497-1500.

[196] *Stearn*, 597 F.3d at 570, n. 11.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.* citing United States v. Amuny, 767 F.2d 1113, 1122 (5th Cir. 1985) (holding the government "forfeited" its opportunity to challenge "standing" on appeal where it conceded "standing" in the district court) and United States v. Cellitti, 387 F.3d 618, 623 (7th Cir. 2004).

[202] *Id.* citing *Rakas*, 439 U.S. at 139.

is subject to the ordinary rule that an argument not posited at the district court is waived on appeal, citing *Steagald*.[203] In doing so, the *Stearn* court criticized the First Circuit's approach in *Bouffard*.[204] The Third Circuit found *Bouffard's* holding permitting a court to review standing sua sponte problematic, as this treats Fourth Amendment standing as "jurisdictional."[205] In effect, the Third Circuit considered the First and Eighth Circuit approaches similar, despite the First Circuit's attempt to root the *Bouffard* decision in *Rakas's* approach to standing— *not* a preliminary inquiry but part of the substantive analysis of the Fourth Amendment.

C. THE SIXTH CIRCUIT APPROACH DISTINGUISHES FORFEITURE AND WAIVER, STILL PERMITS A CHALLENGE ON APPEAL . . . SOMETIMES.

The Sixth Circuit permits the government, in some cases, to waive the ability to challenge standing at the appellate level.[206] The court addressed the circuit split in *United States v. Noble*, a case involving a defendant ("Noble") subjected to a patdown during a traffic stop.[207] Noble was a passenger in a car suspected of drug trafficking.[208] Pulled over for a window tint violation as well as an illegal lane change, Noble was asked to exit the passenger compartment of the car.[209] Noble's patdown resulted from his "nervous demeanor" and "known status as a drug dealer."[210] The patdown yielded methamphetamine, a glass pipe, a pill bottle, and a weapon.[211] The agents conducting the stop ordered a search warrant for the car and a hotel room the

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[203] *Id.* citing *Steagald*, 451 U.S. at 209.
[204] *Id.* ("We believe [the First Circuit's] view treats Fourth Amendment "standing" as a jurisdictional requirement rather than an element of a Fourth Amendment claim, and we believe it is inconsistent with *Rakas*.").
[205] *Id.*
[206] *Noble*, 762 F.3d 527.
[207] *Id.*
[208] *Id.* at 515.
[209] *Id.* at 515-16.
[210] *Id.* at 516.
[211] *Id.*

trio occupied based on the patdown and contraband.[212] The search discovered scales, ziplock bags, and more meth.[213] In court, Noble questioned the length of the stop and the patdown based on his nervous demeanor.[214] Co-defendants adopted Noble's motion to suppress.[215] The motion was denied at the district court.[216] Upon denial, Noble and his two co-defendants accepted plea deals offered by the United States Attorney.[217] Noble appealed the denied suppression.[218]

In examining the length of the stop, the Sixth Circuit found no error.[219] But to the patdown, the court agreed that "nervousness" is not part of the calculus of reasonable suspicion and ruled the search illegal.[220] Further, a passenger's presence in a vehicle suspected of drug trafficking is not reasonable suspicion to justify a patdown.[221] As a result, the motion to suppress was inappropriately denied.[222] Since Noble's co-defendants adopted his motion to suppress, this left the court with an "awkward problem."[223] The co-defendants did not address their standing to challenge the search or admissibility of the contraband.[224] By the court's estimation, they had no reasonable expectation of privacy in Noble's patdown.[225] Still, the government failed to contest the co-defendants standing to challenge the search in district court.[226] The Sixth Circuit was "at a loss to understand why," given the court's previous decisions that drivers lack standing to challenge a search of passengers in a car.[227] To determine the

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[212] *Id.* at 517.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 518.
[217] *Id.*
[218] *Id.*
[219] *Id.* at 521.
[220] *Id.* at 522.
[221] *Id.* at 525.
[222] *Id.* at 525-26.
[223] *Id.* at 526.
[224] *Id.*
[225] *Id.* ("[I]t appears that [co-defendants] lack standing to challenge Officer Ray's patdown of Noble.") (brackets added).
[226] *Id.* at 526-27.
[227] *Id.* at 526.

outcome, the court reviewed the circuit split and varying approaches to whether an objection to standing may be waived by the government.[228]

The Sixth Circuit considers "standing" analogous to an element of a claim.[229] For that reason, the government can forfeit and waive any objections to a defendant's Fourth Amendment standing.[230] The *Noble* court criticized the jurisdictional and Article III approaches to Fourth Amendment standing of the First and Eighth circuits as did the Third Circuit in *Stearn*.[231] While the court cited several cases implicitly rejecting the jurisdictional or Article III approach to standing, the court explicitly did so in *Noble*.[232] The court reasoned that the Supreme Court made clear that Fourth Amendment standing does not sound in Article III.[233]

On the other hand, in the Sixth Circuit, there are exceptions to the general rule that the government forfeits the right to challenge standing if they do not address the issue at the district court level.[234] The *Noble* court described a situation in which it would permit the government to raise an objection to a defendant's Fourth Amendment standing on appeal.[235] The court would allow the government to raise an objection to a defendant's Fourth Amendment standing for the first time on appeal as long as the government can show that the defendant plainly lacked standing and that a failure to recognize it would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."[236] A failure to brief the matter on appeal would extinguish the

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[228] *Id*. at 527.
[229] *Id*.
[230] *Id*.
[231] *Id*. ("The First and Eighth Circuits' approach is, in our view, misguided.").
[232] *Id*. (citing United States v. Washington, 380 F.3d 236, 240 n.3 (6th Cir. 2004) and United States v. Dyer, 580 F.3d 386, 390 (6th Cir. 2009)).
[233] *Id*. (citing *Rakas*, 439 U.S. at 139).
[234] *Id*. at 528.
[235] *Id*.
[236] *Id*. (citing United States v. Barajas-Nunez, 91 F.3d 826, 830 (6th Cir. 1996)) (internal quotation marks omitted) (brackets in original).

ability to challenge any error under Federal Rule of Criminal Procedure Rule 52.[237]

The Sixth Circuit explained this exception in the context of the words "forfeit" and "waive."[238] Some other circuits addressing this issue use the words "forfeit" and "waive" interchangeably, but the Sixth Circuit distinguished the two in formulating the *Noble* decision.[239] Citing the Supreme Court decision in *Olano*, the *Noble* court noted that the words have distinct meanings and consequences.[240] A forfeiture represents a failure to make a timely assertion of a right.[241] A forfeiture may be reviewed only if there is a plain error affecting "substantial rights."[242] In contrast, a waiver is the "intentional relinquishment or abandonment of a known right."[243] A waiver extinguishes the ability to challenge any error under Federal Rule of Criminal Procedure Rule 52.[244]

For those reasons, the Sixth Circuit considered the government's failure to challenge standing at the district court in *Noble* a forfeiture.[245] Thus, the government could have raised the objection for the first time on appeal. This would require evidence the co-defendants "plainly lacked standing" and a failure to recognize this would "seriously affect" the fairness, integrity, or public reputation of judicial proceedings.[246] That said, the government failed to brief the issue on appeal and thus waived the argument objecting to the defendants' standing.[247]

While the Sixth Circuit is "waive friendly," it evidences a willingness to permit a challenge to standing at the appellate level.[248] Indeed, had the government

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[237] *Id.* (citing United States v. Ford, 184 F.3d 566, 578 n.3 (6th Cir. 1999).
[238] *Id.*
[239] *Id.*
[240] *Id.* (citing United States v. Olano, 507 U.S. 725, 733 (1993)).
[241] *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) (citing *Olano*, 507 U.S. at 733).
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*

challenged the defendants' standing in the appellate brief, it may have won the matter. The *Noble* court noted, "we are at a loss to understand why the government did not contest [defendants'] standing. . ."[249] It is clear in the Sixth Circuit drivers lack standing to challenge the personal searches of passengers and the contraband found during such activities.[250] It appeared evident that the defendants in *Noble* lacked standing to challenge the passenger's patdown.[251] Indeed, had the government merely forfeited the argument at the district court, but addressed the issue in the appellate brief on the matter, the convictions of the co-defendants may have stood.

D. THE NINTH CIRCUIT "HYBRID" APPROACH

The Ninth Circuit approaches the issue of waiver in a hybrid method, different than any previously mentioned Circuit.[252] The Ninth Circuit examines the issue in two steps. First, the Ninth Circuit requires a preliminary inquiry determining the party bringing the appeal.[253] Second, the courts consider the arguments made below.[254] For example, if the government appeals a grant of a suppression motion, but failed to challenge standing at the district court or in the appellate brief, the Ninth Circuit considers the issue waived.[255] When a court grants a motion to suppress, there is a reliance on a determination the defendant had standing to challenge the search. That said, if a defendant appeals a denial of a suppression motion, and the government failed to challenge standing at the district court, the government may raise the arguments for the first time on appeal.[256] The court justifies the challenge to standing because when the defendant appeals a denial of a motion to suppress, the burden shifts to her to prove the

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[249] *Id.* at 526.
[250] *Id.* at 525.
[251] *Id.* at 526.
[252] *Taketa*, 923 F.2d at 670.
[253] *Paopao*, 469 F.3d at 765 (quoting United States v. Nadler, 698 F.2d 995, 998 (9th Cir. 1983)).
[254] *Id.*
[255] United States v. Ewing, 638 F.3d 1226, 1230 (9th Cir. 2011).
[256] *Paopao,* 469 F.3d at 764 (citing *Taketa*, 923 F.2d at 670).

district court erred.[257] Because the defendant bears the burden, and reliance on a determination of an existing privacy interest is not at issue, the issue of standing can be raised for the first time on appeal.[258]

IV. A UNIFIED APPROACH GUARANTEES PROTECTION AND ACKNOWLEDGES RISKS.

Whether the government may waive standing is a paramount question. The outcome determines the availability of the exclusionary rule to defendants. As earlier discussed, the exclusionary rule is the primary method by which the Fourth Amendment may be enforced. In essence, decisions on standing and waiver determine whether a defendant may be afforded important Constitutional rights. Because of this importance, the Supreme Court should formulate a unified approach.

A unified approach to resolving the circuit split should consider the goals of the exclusionary rule, the importance of standing, and the role standing should play in Fourth Amendment jurisprudence. The circuits considering these cases already use the issue to advance their views on the importance of standing and the availability of the exclusionary rule. With that in mind, the approach should express the importance of protecting the collective reasonable expectation of privacy in persons, places, and effects through the exclusionary rule. The approach should recognize the value of regulating government—including prosecutor—behavior. The approach should also acknowledge the social cost of extending the exclusionary rule to those asserting a right vicariously, and the risk of excluding relevant, incriminating evidence. Finally, the approach should discourage judicial sanction of illegal searches, untimely appeals, and defend against stealthy encroachments of Constitutional rights.

A. WITH GREAT POWER COMES GREAT RESPONSIBILITY.

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[257] *Id.*
[258] *Id.*

Courts examining evidence obtained in violation of the Fourth Amendment face a big task. As discussed earlier, there are atomistic and regulatory perspectives to balance. There are factual and normative justifications of the exclusionary rule to consider. There is a social cost that accompanies excluding relevant but incriminating evidence. At bottom, these courts must balance the constitutional rights of citizens with the need to fight and prevent crime in communities. That's a tough task.

The exclusionary rule matters. The exclusionary rule enforces the Fourth Amendment. Remedies other than the exclusionary rule have proved ineffective in preventing police and other agencies from violating the Fourth Amendment.[259] Money damages, agency discipline, and supervision all exist as methods to prevent and punish law enforcement misconduct in searches but cannot achieve what exclusion can.[260] Courts also point to the value the exclusionary rule provides in defining the parameters of permitted searches and seizures.[261] A rule prohibiting the use of illegally obtained evidence deters police misconduct in searches and seizures.[262] Decisions form a bright-line rulebook for what law enforcement may do during investigations.[263] The exclusion of incriminating evidence

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[259] *See, e.g.*, Carter, *supra* note 53 at 253 ("[H]istorically, § 1983 cases have not proven particularly effective at framing Fourth Amendment issues for appellate court resolution.). Debate persists about the effectiveness of the exclusionary rule and alternatives to the exclusionary rule. Some argue the effect of the exclusionary rule is actually to serve "good cops" with a list of permitted and prohibited techniques to use on the job rather than to punish "bad cops" who perform an illegal search.

[260] *Id.* The effectiveness of § 1983 is also hotly debated and, in modern times, there is perhaps little incentive for an individual to pursue such a claim given the expansion of qualified immunity. Money damages also do not lead to the exclusion of evidence at trial.

[261] United States v. Leon, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) ("[T]he chief deterrent function of the rule is its tendency to promote institutional compliance . . .").

[262] *Id*. at 251-252.

[263] *Id*. at 252.

encourages law enforcement to comply with the Federal Rules of Criminal Procedure.[264]

What is more, besides law enforcement compliance with relevant rules of criminal procedure, the exclusionary rule also promotes public confidence in the judiciary.[265] Citizens naturally lose respect for an institution that would allow prosecutors to secure a conviction using evidence obtained illegally.

Standing matters, too. The Court repeatedly reminds us that the Fourth Amendment is a personal right, one that may not be vicariously asserted. Standing prevents a person from asserting the reasonable expectation of privacy of a third party—an important point for the Supreme Court and in Fourth Amendment jurisprudence.

All that said, when relevant and incriminating evidence against a criminal defendant is excluded by a court decision, the court hamstrings law enforcement's ability to fight crime. As Justice Cardozo, then a justice on the Court of Appeals of New York, said, "The criminal is to go free because the constable has blundered."[266] Therein lies the tension. Though the effects of the exclusionary rule may be overstated, it is true that relevant and incriminating evidence is unavailable to a trier of fact.[267] The right of an individual is protected at the expense of the community. The concept of standing limits the effect of the exclusionary rule to try to strike the appropriate balance between protecting the individual right and protecting the community with effective policing. The tension—excluding relevant and incriminating evidence at the risk of the community or allowing illegally obtained evidence in a court proceeding at

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[264] *Leon*, 468 U.S. at 953.

[265] *Mapp*, 367 U.S. at 656.

[266] People v. Defore, 242 N.Y. 13, 21 (1926).

[267] Carter, *supra* note 53 at 241. Of the thousands of motions filed every year in courts across the country, a small percentage are granted. A study in Chicago in 1987 found most cases involving a granted motion to suppress involved crimes that wouldn't have received detention time anyway. See Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, U. ILL. L. REV. 223, 234-35 (1987) (reviewing study confirming that "vast majority" of granted motions to exclude involve crimes when the defendant, if convicted, "would never have been given detention time").

the risk of the individual's constitutional right—persists. And the tension is apparent in each circuit's approach to waiver addressed in this paper. Because the tension between the exclusionary rule and standing cannot disappear, resolving the circuit split over standing and waiver requires striking an appropriate balance that protects the collective and the individual.

B. THE LANGUAGE CHANGES, BUT IT'S STILL ALL ABOUT STANDING.

The circuits' approaches discussed in this paper ultimately comment on the importance of standing. A mandatory waiver approach, taken by the Third, Fifth, Seventh, Tenth, and Eleventh essentially champions the exclusionary rule as a remedy of a Constitutional violation over the need to limit the remedy through standing. The decisions in these circuits recognize that standing is important and functions to ensure the Fourth Amendment permits only those with personal, reasonable expectations of privacy invasion can challenge a search. But the appropriate time to do so is at the district court. The courts recognize that standing is not jurisdictional, but an element of a Fourth Amendment claim. The courts also acknowledge the traditional rule that arguments waived at the district court level may not be launched on appeal in most other cases. A waiver may mean relevant, incriminating evidence is excluded even when a defendant had no personal, reasonable expectation of privacy. This outcome, while not ideal, is valued by courts using this approach for three reasons. First, the exclusionary rule is the best remedy for a Fourth Amendment violation. Second, police and prosecutors must operate within the bounds of the law. Courts must not take part in presenting evidence obtained illegally. Finally, the protection of the individual right outweighs the risk to the community and the ability of the police to investigate and fight crime. The appropriate balance between exclusion and standing, in these circuits, tips more in favor of the exclusionary rule, recognizing the risks associated with excluding evidence but valuing a protection rooted in the Constitution.

In contrast, the approach of the First and Eighth circuits prize standing and a limited exclusionary rule. By permitting the court or government to challenge a defendant's standing at any time, including for the first time on appeal, the courts signal the importance of a personal, reasonable expectation of privacy and acknowledge the value in limiting the exclusion of relevant, incriminating evidence. The circuits value standing as a method to limit the availability of the exclusionary rule and curtail the number of people who may seek the remedy in court. To do so, the circuits seemingly disregard *Rakas* and treat Fourth Amendment standing more like Article III standing. As a result, a defendant at any time could face a challenge to standing even if the evidence was first suppressed at the district court. This likely reflects the circuits' desire to protect the community, permit law enforcement the space to operate effectively, and advance an atomistic view of the Fourth Amendment. But even a district court in the Eighth Circuit questions this approach and its failure to recognize the law as written in *Rakas* and *Steagald*. The First and Eighth Circuits find the language in *Steagald* permissive of waiver, rather than demanding an initial challenge at the district court.

Finally, the approaches of the Sixth and Ninth circuits seek to find the balance between the exclusionary rule and standing by permitting the government to challenge standing for the first time on appeal in some cases. This approach is first appealing because it seeks to strike a balance between two competing but important points of Fourth Amendment jurisprudence. The Sixth Circuit approach seems to value the exclusionary rule's role for protecting the right to be free from illegal searches and seizures, while also acknowledging situations that may have a "plain" indication that the defendant lacked a reasonable expectation of privacy. In other words, it appears the Sixth Circuit values the constitutional protection the exclusionary rule affords. Exclusion discourages police misconduct and encourages judicial integrity. But the Sixth Circuit also anticipates a need in some "difficult cases" that would question the integrity of the judiciary should the evidence be excluded, and a criminal permitted to go free—to limit the availability of the exclusionary rule. It affords, however, discretion to the Sixth Circuit to determine when the record

is "plain" and what the difficult cases might be that would permit the government to challenge standing for the first time on appeal. These cases are likely those that would offend the public's sense of fairness—excluding evidence in a case with public attention, etc.

While each approach reflects the circuit's own value of both the exclusionary rule and standing, and whether the protection of the Fourth Amendment should be limited, there should be a unified approach. The Supreme Court should examine the approaches and seek to strike an appropriate balance for uniformity.

C. THE SUPREME COURT SHOULD CLARIFY *STEAGALD'S* PERMISSIVE LANGUAGE IN FAVOR OF DEFINITIVE LANGUAGE ACKNOWLEDGING WAIVER ON APPEAL.

The Supreme Court should abandon the permissive language in *Steagald* to resolve the circuit split over standing and waiver. The permissive language permits the Eighth Circuit to ignore the possibility of waiver. The approach should disallow the government to challenge standing for the first time on appeal. This approach would acknowledge the importance of the exclusionary rule in enforcing Fourth Amendment rights, deter prosecutorial mistake and misconduct by stealthily encroaching on the rights of the citizens, and represents the outcome most expected in court proceedings.

First, in solving the tension between the atomistic and regulatory approaches to Fourth Amendment jurisprudence, courts that permit waiver to standing challenges are not disallowing all challenges to standing. They are simply acknowledging that the appropriate place to argue the atomistic or individual nature of the Fourth Amendment is at the district court level. Requiring this argument to occur at the district court level ensures that the remedy is only sought by persons who had an invasion of a personal, reasonable expectation of privacy. This permits the individual view of the Fourth Amendment as a personal right to persist. When the matter reaches an appeals court, the appropriate view is regulatory—a protection of the collective. The government should litigate atomistic perspectives on the

Fourth Amendment at the district court level—and a failure to do so should result in a waiver.

What is more, disallowing a challenge to standing for the first time on appeal would acknowledge that the exclusionary rule is the best way to enforce the Fourth Amendment. The Supreme Court already relies heavily on this factual justification of the exclusionary rule. And while excluding relevant, incriminating evidence does free some individuals who committed crimes, the alternatives to discourage illegal searches and seizures are inadequate to protect the right of the citizens. The Court already finds the social costs typically outweigh the public policy benefit when it argues the exclusionary rule is the best remedy for a violation of the Fourth Amendment. When an appellate court permits the government to challenge standing on appeal, it encroaches on this factual function of the exclusionary rule. It places more power in standing than perhaps the Supreme Court intended when it developed the doctrine in *Jones* and *Rakas*.

Moreover, this approach would acknowledge the value of the exclusionary rule in providing guidance for procedure—another factual function. The exclusionary rule provides bright-line rules for law enforcement investigating criminal activity. It provides bright-line rules for what is and is not permissible in a search or seizure. Similarly, preventing a government challenge to standing for the first time on appeal would tell prosecutors in the early stages of a case what is and is not permissible as well. While the social cost of permitting exclusion of relevant, incriminating evidence exists, the factual justification encourages regulation of the profession. A prosecutor should examine the case and respond to a motion to suppress in a way that addresses the admissibility of the evidence, including whether the defendant had a reasonable expectation of privacy in the place or thing searched. Though *Rakas* tells us this is not a preliminary inquiry, it should be part of the inquiry conducted by the prosecutor responding to the motion to suppress. When a prosecutor fails to address the subject of standing at the district court level, the unavailability of the argument on appeal may result in relevant, incriminating evidence remaining excluded from consideration. The *Noble* court admonished the work of the prosecutors in the case—pointing out that the defendants

who joined the motion to suppress clearly lacked standing based on well-settled law from both the Sixth Circuit and the Supreme Court. A policy of waiver provides prosecutors, like law enforcement, bright-line guidance on how to proceed in questions involving searches and motions to suppress the fruits of these searches. Disallowing challenges to standing on appeal could "compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it."[268]

Disallowing waiver also acknowledges the normative justification for the exclusionary rule. In *Boyd*, the first case to address Fourth Amendment rights, the Supreme Court reminded other judicial officers of the duty ". . . to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[269] This directive rings true in the 21st Century as well.

Simply put, permitting standing challenges on appeal is a stealthy encroachment on constitutional rights. A defendant and trier of fact have relied on a determination in the initial motion to suppress. The approaches of the First, Eighth, Sixth, and Ninth circuit, though different, all permit the government to challenge standing for the first time on appeal in some cases. Challenges on appeal permit the government to, in those cases, make the "best" argument at the district court (say, there existed an exception to the warrant requirement such as an exigent circumstance or consent) and then, if unsuccessful, they may challenge standing on appeal. This is an inappropriate advantage. It is a benefit unavailable to defendants. When the argument is "forgotten" at the district court level, the government should not be permitted to challenge standing on appeal. The issue should be considered waived, fully, and courts should not engage in allowing the argument to preserve judicial integrity. Much like the argument in *Mapp* that a court should not engage in activity that promotes including evidence obtained illegally, a court should not engage in activity that permits the government to bring an argument for the first time on appeal after exhausting other arguments at the district court level. Such conduct appears as unjust to the outside eye as including evidence obtained illegally.

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[268] *Mapp*, 367 U.S. at 656.

[269] *Boyd*, 116 U.S. at 635.

Prosecutors, too, should be discouraged from engaging in behavior that questions the integrity of the judicial system.

More support for this approach is rooted in traditional legal tenants. Circuits who permit waiver acknowledge this fact. In most legal proceedings at the district court level, a failure to address an element of a claim or defense renders the element or defense waived. The same should be true for standing. While *Rakas* instructs that standing is not a preliminary inquiry, it is a part of the substantive claim of the Fourth Amendment. If a defendant must prove standing as part of a Fourth Amendment claim in a motion to suppress, the government's failure to challenge standing in a response to the motion should be considered a waiver of the issue.

V. CONCLUSION

In conclusion, the Supreme Court should clarify the permissive language in *Steagald* and encourage a unified approach to the question of standing and waiver on appeal. Disallowing an initial challenge to standing on appeal would strike the appropriate balance between the exclusionary rule and standing, guard against encroachment on Fourth Amendment rights, and promote judicial integrity. Most other elements and defenses not claimed in district court are waived. This approach would ensure standing is given its proper prominence without excessive power. With a unified approach barring an initial challenge on appeal, prosecutors would have a bright-line rule for approaching standing, much like law enforcement officers have bright-line rules for searching persons and places. Disallowing a standing challenge for the first time on appeal adopts the approach of most circuits and provides clarity in an uncertain area of Fourth Amendment jurisprudence.