No. 17-

IN THE

Supreme Court of the United States

MICHAEL DAVID MELTON,

Petitioner,

v.

KELLY D. PHILLIPS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A law enforcement officer recklessly misidentified Petitioner in an investigative report. The report was later used in a warrant affidavit to arrest Petitioner, and he was wrongfully detained in jail for sixteen days.

Under *Franks v. Delaware*, 438 U.S. 154 (1978), an officer violates the Fourth Amendment by recklessly or deliberately including false information in a warrant affidavit. Sitting en banc, a divided Fifth Circuit nevertheless held that the officer here did not violate the Fourth Amendment because he was not the affiant and did not provide the false information for the purpose of its use in the warrant affidavit. That decision deepens a circuit split. The questions presented are:

1. Whether a law enforcement officer who recklessly or deliberately reports false information that is ultimately relied upon in a warrant application violates the Fourth Amendment.

2. Whether the law in this area was clearly established, such that an officer who violates the Fourth Amendment by recklessly or deliberately reporting false information later used in a warrant is not entitled to qualified immunity.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING.......................... i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW...3

JURISDICTION..3

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

I. Background 4

II. District Court Decision....................................6

III. Panel Decision 7

IV. En Banc Decision 8

REASONS FOR GRANTING THE PETITION 10

I. This Court should review the Fifth Circuit's decision limiting Fourth Amendment protections..11

A. The Fifth Circuit's decision deepens an established circuit split. 11

1. The Fifth Circuit's rule conflicts with decisions in the Third, Eighth, and Ninth Circuits. 12

2. Other circuits and state courts have declined to adopt the Fifth Circuit's rule. 19

3. Only the Second Circuit has adopted a rule similar to the Fifth Circuit's. 21

B. The Fifth Circuit's rule is not consistent with this Court's precedent. 22

1. The Fifth Circuit's rule frustrates the rights recognized in *Franks* and its progeny. 22

2. The Fifth Circuit's rule conflicts with principles of related Supreme Court precedent. 24

C. The case presents an important question and is the ideal vehicle for deciding it. 27

1. The question presented is important. ..27

2. This case is an ideal vehicle for deciding this important question. 32

II. This Court should review the Fifth Circuit's decision improperly applying qualified immunity. 33

CONCLUSION 36

APPENDIX A
Opinion dated November 13, 2017 of the United States Court of Appeals, Fifth Circuit – Michael David Melton v. Kelly D. Phillips. 2a

APPENDIX B
Opinion dated September 14, 2016 of the United States Court of Appeals Fifth Circuit – Michael David Melton v. Kelly D. Phillips 41a

APPENDIX C
Order dated June 4, 2015 of the United States District Court, N.D. Texas – Michael David Melton v. Hunt County, et al. 62a

APPENDIX D
Order dated February 17, 2017 of the United States Court of Appeals, Fifth Circuit – Michael David Melton v. Kelly D. Phillips. 75a

TABLE OF AUTHORITIES

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 34

Arizona v. Evans,
514 U.S. 1 (1995) 26

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 33, 34

Atwater v. City of Lago Vista,
532 U.S. 318 (2001) 30

Bailey v. United States,
568 U.S. 186 (2013) 30

Chism v. Washington,
661 F.3d 380 (9th Cir. 2011) 18, 32

Franks v. Delaware,
438 U.S. 154 (1978) ....passim

Hampton v. Oktibbeha County Sheriff Department,
480 F.3d 358 (5th Cir. 2007) 7, 33

Hart v. O'Brien,
127 F.3d 424 (5th Cir. 1997) 7, 23, 33

Herring v. United States,
555 U.S. 135 (2009) 26

Illinois v. Andreas,
463 U.S. 765 (1983) 24

Illinois v. Gates,
462 U.S. 213 (1983) 31

Jennings v. Patton,
644 F.3d 297 (5th Cir. 2011) 7, 33

Jones v. City of Chicago,
856 F.2d 985 (7th Cir. 1988) 28

KRL v. Moore,
384 F.3d 1105 (9th Cir. 2004) 18, 19

Kyllo v. United States,
533 U.S. 27 (2001) 31

Lane v. Franks,
134 S. Ct. 2369 (2014) 34

Marin v. King,
No. 16-2225, 2018 WL 272008 (10th Cir. Jan. 3,
2018)..20

Michalik v. Hermann,
422 F.3d 252 (5th Cir. 2005) 7

Mullenix v. Luna,
136 S. Ct. 305 (2015) 33

Navarette v. California,
134 S. Ct. 1683 (2014) 31

Riley v. California,
134 S. Ct. 2473 (2014) 30, 32

Salazar-Limon v. City of Houston,
137 S. Ct. 1277 (2017) 34

Silverman v. United States,
365 U.S. 505 (1961) 31

State v. Esplin,
839 P.2d 211 (Or. 1992)...21

State v. Hamel,
634 A.2d 1272 (Me. 1993)......................................20

State v. Thetford,
745 P.2d 496 (Wash. 1987)....................................21

Tolan v. Cotton,
134 S. Ct. 1861 (2014) 34

United States v. Brown,
631 F.3d 638 (3d Cir. 2011)..................................14

United States v. Calisto,
838 F.2d 711 (3d Cir. 1988).......................13, 14, 32

United States v. Chadwick,
433 U.S. 1 (1977) 31

United States v. D'Andrea,
648 F.3d 1 (1st Cir. 2011).....................................20

United States v. Davis,
471 F.3d 938 (8th Cir. 2006) 15, 16

United States v. DeLeon,
979 F.2d 761 (9th Cir. 1992) 17, 18

United States v. Kennedy,
131 F.3d 1371 (10th Cir. 1997) 20

United States v. Lakoskey,
462 F.3d 965 (8th Cir. 2006) 15, 16

United States v. Leon,
468 U.S. 897 (1984) 25, 26

United States v. Neal,
528 F.3d 1068 (8th Cir. 2008) 16

United States v. Pritchard,
745 F.2d 1112 (7th Cir. 1984) 19, 20

United States v. Shields,
458 F.3d 269 (3d Cir. 2006)...................................14

United States v. Thomas,
489 F.2d 664 (5th Cir. 1973) 23

United States v. Wapnick,
60 F.3d 948 (2d Cir. 1995).....................................21

United States v. Whitley,
249 F.3d 614 (7th Cir. 2001) 20

Whiteley v. Warden,
401 U.S. 560 (1971) 25, 26

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) 34

Statutes

28 U.S.C. § 1254 3

42 U.S.C. § 1983 ....4, 5

Other Authorities

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106 CAL. L. REV. (forthcoming 2018) 34

I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008) 28

Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) 28, 29

Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING 203 (2010) 31

INTRODUCTION TO LAW ENFORCEMENT, DEPARTMENT OF EMERGENCY SERVICES & PUBLIC PROTECTION, POLICE OFFICER STANDARDS AND TRAINING COUNCIL (2010) 29

Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721 (2005) 29

Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996) 28

U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2016 29

Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315 (2005) 28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael David Melton respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

In the seminal case on officer falsehoods in warrants, *Franks v. Delaware*, 438 U.S. 154 (1978), this Court held that the Fourth Amendment guarantees defendants the right to challenge the veracity of a warrant affidavit if they can show that the warrant included intentional or reckless falsehoods. *Id.* at 155–56. The Court further noted that officers cannot insulate a falsehood merely by relaying it through an affiant "personally ignorant of its falsity." *Id.* at 163 n.6.

Yet a divided Fifth Circuit, sitting en banc, allowed an officer to do just that. The Court of Appeals held that even an officer who recklessly or deliberately reports false information that is subsequently relied on in a warrant application does not violate Fourth Amendment rights under *Franks* unless the officer (1) actually prepares, presents, or signs a warrant application, or (2) provides the information *for the purpose of* its use in the application. *See* Pet. App. 14a, 17a.

In dissent, Judges Dennis and Graves recognized that the Fifth Circuit's ruling conflicts with decisions in other courts of appeals. Three circuits—the Third, Eighth, and Ninth—hold that an officer can violate the Fourth Amendment under *Franks* even if he or she did not act with the purpose of obtaining a warrant. Other circuits and state courts simply analyze whether the information was relied upon in the warrant application without regard to the officer's

purpose. Only the Second Circuit has joined the Fifth in adopting a "purpose" requirement to determine whether an officer violates *Franks*. In light of the en banc nature of the Fifth Circuit's decision, this Court cannot rely on further percolation to address the circuit conflict. This Court's review is amply warranted.

This case presents an ideal vehicle to address the question. Here, a reckless misidentification resulted in the sixteen-day false imprisonment of an innocent man. The Hunt County Sheriff's Office arrested and jailed Petitioner, Michael David Melton, without probable cause solely because he shared the same first and last names as the true assailant in a reported assault—Michael Glenn Melton—even though the two men shared no other identifying characteristics. The deputy who prepared the initial incident report misidentified Petitioner by using the Sheriff's Office's contact database system improperly. That system allows officers to search for suspects by name *and* identifying characteristics, but the deputy apparently checked *only* the suspect's first and last names. At summary judgment, a former lieutenant submitted an affidavit stating that no reasonable officer would have done what the deputy did—recklessly fail to check any other identifying characteristics.

Had the same events unfolded in the Third, Eighth, or Ninth Circuits, Petitioner would have been entitled to Fourth Amendment protection. A suspect who is arrested or searched pursuant to a warrant based on reckless or deliberately false information should not face fundamentally different outcomes in different circuits.

The Fifth Circuit has landed on the wrong side of the circuit split. This important question potentially affects thousands of cases, and the Fifth Circuit's rule intrudes upon the core protections of the Fourth Amendment—freedom from arbitrary police action and preservation of individual dignity. The question has been fully ventilated, and this Court should grant review now to resolve the deepening conflict. The Court should additionally grant review to confirm that the law in this area is clearly established.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 2a) is reported at 875 F.3d 256. The panel opinion of the court of appeals (Pet. App. 41a) is reported at 837 F.3d 502. The district court order denying Respondent's motion for summary judgment (Pet. App. 62a) is available at 2015 WL 13173106.

JURISDICTION

The Fifth Circuit issued its decision on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides:

> 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 the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

I. Background

In June 2009, Respondent Kelly D. Phillips, a deputy at the Hunt County Sheriff's Office ("Sheriff's Office"), was dispatched to interview the victim of an assault. Pet. App. 62a. The victim told Phillips that a man named "Michael Melton" had assaulted him. *Id.* at 63a. Phillips then generated an incident report that specifically identified "Michael David Melton" (Petitioner) as the suspect rather than the true assailant, "Michael Glenn Melton." *Id.* at 64a. Phillips did not explain how he misidentified Petitioner, but

all agree that Petitioner and the true assailant had no identifying characteristics in common other than their first and last names. *Id.* at 5a, 63a. To explain the cause of the misidentification, Petitioner submitted an affidavit from a former lieutenant from that Sheriff's Office, who explained that the Sheriff's Office had a contact database system into which officers could enter names to identify matching individuals. *Id.* at 63a. The lieutenant stated that no reasonable officer would have relied on the system without verifying the result using other identifying characteristics. *Id.* at 6a–7a. He concluded that Phillips's misidentification of Petitioner resulted from recklessly failing to do so. *Id.* at 63a–65a. Phillips submitted his inaccurate incident report to the Sheriff's Office and had no further involvement with the case. *Id.* at 43a.

A year later, the Hunt County Attorney's Office ("Attorney's Office") filed a criminal complaint against "Michael Melton" that stated it was based on Phillips's incident report. Pet. App. 64a. A Hunt County judge then issued a warrant for the arrest of "Michael Melton." *Id.* In May 2012, the Sheriff's Office arrested Petitioner using the two-year-old warrant and erroneously locked him in jail for a full sixteen days. *Id.* Indeed, Petitioner would have been held even longer, had he not posted bail. *Id.* at 4a. It took the Attorney's Office three long months to discover that it had arrested and jailed an innocent man. The Attorney's Office then—finally—dropped all charges against Petitioner. *Id.* at 64a.

Seeking redress for his unlawful detention, Petitioner filed a civil action in state court under 42

U.S.C. § 1983 against Deputy Phillips.[1] Pet. App. 64a–65a. He alleged that Phillips, in violation of the Fourth Amendment, intentionally or recklessly misidentified him as the assailant in the report that led to his arrest without probable cause. *Id.* at 43a.

II. District Court Decision

Deputy Phillips removed the suit to federal court and moved for summary judgment on the basis of qualified immunity. Pet. App. 65a. The district court denied Phillips's motion for summary judgment on Petitioner's Fourth Amendment claim.[2] *Id.* at 73a–74a. The district court cited this Court's decision in *Franks*, Pet. App. 69a, and rejected Phillips's argument that he could not be liable for the claimed Fourth Amendment violation merely because he did not sign or draft the warrant affidavit. *Id.* at 44a. The court held that "*Franks* liability extends beyond a warrant's affiant to any government official who makes a reckless mistatement." *Id.* at 69a. The court also found that the lieutenant's affidavit—introduced by Petitioner—created a genuine issue of fact as to whether Phillips was reckless in misidentifying

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[1] Petitioner also brought a Fifth Amendment claim against Deputy Phillips as well as similar § 1983 claims against the county sheriff. Pet. App. 64a–65a. The district court granted summary judgment to Phillips on Petitioner's Fifth Amendment claim and to the sheriff on all claims. *Id.* at 74a. Petitioner additionally raised several other claims not at issue here.

[2] The district court also denied Phillips's motion for summary judgment on all of Petitioner's state law claims as Petitioner conducted discovery only on potential immunity issues. Pet. App. 74a.

Petitioner in his report. *Id.* at 69a. Phillips appealed. *Id.* at 44a.

III. Panel Decision

A divided Fifth Circuit panel affirmed the district court in part and dismissed the appeal in part. Pet. App. 55a. The panel affirmed the district court's holding that Phillips *could* be found liable for a Fourth Amendment violation despite his neither signing nor drafting the warrant affidavit. Pet. App. 52a-53a. As support, the panel cited the Fifth Circuit's earlier holding in *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997),[3] that *Franks* liability extended to government officials, such as Phillips, who were not affiants. Pet. App. 46a.

The panel rejected Phillips's argument that prior Fifth Circuit decisions[4] shielded officers from liability for Fourth Amendment violations if they did not sign or draft the warrant affidavit. *Id.* at 49a–51a. The panel found that under the circumstances of this case, Phillips could be liable for a Fourth Amendment violation under *Franks*. *Id.* at 52a–53a. The panel dismissed the appeal to the extent it challenged whether there was a genuine dispute of fact regarding Phillips's recklessness. *Id.* at 55a.

In dissent, Judge Elrod argued that the majority erroneously construed Fifth Circuit precedent; she

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[3] The panel noted that in *Hart*, the court explicitly considered the stance of several sister circuits when it found that deliberate or reckless misrepresentations by non-affiant government officials could form the basis for *Franks* claims. Pet. App. 47a.

[4] *Jennings v. Patton*, 644 F.3d 297 (5th Cir. 2011); *Hampton v. Oktibbeha County Sheriff Department*, 480 F.3d 358 (5th Cir. 2007); and *Michalik v. Hermann*, 422 F.3d 252 (5th Cir. 2005).

would have held that Phillips could not be liable for a Fourth Amendment violation. *Id.* at 56a–59a. Further, she would have found that Phillips's conduct was protected by qualified immunity because (she opined) there was no evidence of recklessness and the information he provided was immaterial. *Id.* at 59a–61a.

Phillips petitioned for rehearing en banc, and the Fifth Circuit granted his petition. *Id.* at 7a–8a.

IV. En Banc Decision

Sitting en banc, a divided Fifth Circuit rejected the panel's decision, reversed the district court, and held that Phillips was entitled to summary judgment. Pet. App. 20a. Judge Elrod, the dissenter from the previous panel, wrote the en banc opinion. *Id.* at 2a, 55a. The en banc court analyzed prior Fifth Circuit decisions and announced the following rule: *Franks* liability attaches only if the officer (1) actually prepares, presents, or signs a warrant application, or (2) provides the information for the purpose of its use in the application. *Id.* at 14a, 17a. Applying this rule, the en banc court found that Phillips was entitled to summary judgment. *Id.* at 17a. The court cited several "concerns" in favor of its legal interpretation of the Fourth Amendment, including that "a broad Fourth Amendment rule could interfere with criminal convictions and be costly to society." *Id.* at 13a. Finally, the court also held that even if it were to adopt a broader liability rule, Petitioner could not have proven that Phillips violated any *clearly established* constitutional right, and thus, was entitled to qualified immunity. *Id.* at 18a–20a.

In a concurrence in the judgment, Judge Costa disagreed with the legal rule adopted by the majority, noted that it was inconsistent with decisions in the First and Ninth Circuits, *id.* at 23a, and predicted that it would "result in confusion." *Id.* at 24a. Judge Costa would have held that an officer may be liable for a *Franks* violation so long as he or she has provided information "for use in" a warrant affidavit. *Id.* at 25a–26a. Nonetheless, Judge Costa agreed with the majority that Phillips was entitled to qualified immunity in this case because (in his view) there was no violation of clearly established law. *Id.* at 25a.

Judge Haynes noted that she concurred in the judgment and did not join the portion of the majority addressing the Fourth Amendment and *Franks*. *Id.* at 2a n.*.

Judges Dennis and Graves (the two judges who composed the majority from the panel below) dissented. *Id.* at 26a, 41a. They explained that the majority's rule was "unsound and, unsurprisingly, [] not the law in any other circuit." *Id.* at 33a. Citing the Third, Eighth, and Ninth Circuits, the dissent maintained that "[o]ur sister circuits' caselaw reflects a common-sense understanding: when an officer, acting with reckless disregard for the truth, includes false, material information in an official report for further official use, leading to an unlawful search or arrest of an innocent person, there is no justification to insulate him from liability." *Id.* at 36a. "A reasonable officer can certainly foresee that such actions could lead to an unlawful search or arrest, as information relayed in law enforcement agents' reports routinely end up as support for warrant applications even if the reports are not expressly designed exclusively for that use." *Id.* at 36a–37a.

The dissenters warned that "the majority opinion's erroneous holding . . . is not limited to civil cases" but will also "limit criminal defendants' ability to challenge search warrants that are premised on fraudulent misrepresentations." *Id.* at 37a. The dissent posed a disturbing example:

> Say, for example, that a patrol officer intentionally alters an assault victim's statement in his police report with the intent to lead detectives to an individual the officer believes committed the crime. And say that this misrepresentation is later included in a search warrant, leading to the recovery of evidence that this individual possessed small amounts of marijuana in his home. Under the majority opinion's holding, that individual would not be able to challenge his search warrant in his ensuing prosecution for possession of a controlled substance simply because the culprit officer did not "participate" in the preparation of the warrant affidavit, notwithstanding his intentional misrepresentation. Such a rule is untenable.

Id. at 37a.

REASONS FOR GRANTING THE PETITION

Sitting en banc, a divided Fifth Circuit ruled that an officer who deliberately or recklessly reports false information that is subsequently relied on in a

warrant application does not violate the Fourth Amendment under *Franks* unless that officer (1) actually prepares, presents, or signs a warrant application, or (2) provides the information *for the purpose of* its use in the application. *See* Pet. App. 14a, 17a. The court thus added a "purpose" requirement to *Franks* claims. *See id.* at 14a, 17a. This en banc holding deepens a split among the courts of appeals and state courts of last resort by joining the Second Circuit on the shallow side of the split. Moreover, the Fifth Circuit's rule is not consistent with *Franks*, its progeny, or related precedent of this Court. The issue is extraordinarily significant, as it potentially affects thousands of civil and criminal cases and implicates the core protections of the Fourth Amendment. This case provides the ideal vehicle for resolving such an important question.

The qualified immunity issue provides a further reason to grant the Petition. This Court should grant review to hold that the fundamental Fourth Amendment rights in this case were "clearly established" and that an officer who deliberately or recklessly reports false information that is subsequently relied on in a warrant application is not immune from liability merely because the officer does not actually prepare, present, or sign the warrant application, or provide the information for the purpose of its use in the application.

I. This Court should review the Fifth Circuit's decision limiting Fourth Amendment protections.

A. The Fifth Circuit's decision deepens an established circuit split.

The Fifth Circuit added an element—a "purpose" requirement—to Fourth Amendment *Franks* claims against law enforcement officers who do not directly prepare, present, or sign warrant applications. Under the Fifth Circuit's rule, such officers are immune from Fourth Amendment liability so long as they do not provide false information (even deliberately or recklessly) *for the purpose of* its use in a warrant application. *See* Pet. App. 14a, 17a.

Three circuits have reached the opposite conclusion: there is no such purpose or participation requirement in the Third, Eighth, and Ninth Circuits. These circuits have found Fourth Amendment violations under analogous fact patterns while announcing rules in conflict with the Fifth Circuit's. Furthermore, most circuit and state courts have declined to adopt the Fifth Circuit's rule. Instead, they routinely decide *Franks* cases without evaluating an officer's purpose. Only the Second Circuit has adopted a similar requirement to the Fifth Circuit's.

Deputy Phillips's reckless conduct would thus violate the Fourth Amendment in the Third, Eighth, and Ninth Circuits, but not in the Fifth or Second. This Court's review is needed now to resolve the deepening split.

1. The Fifth Circuit's rule conflicts with decisions in the Third, Eighth, and Ninth Circuits.

The dissenting judges below correctly recognized that the en banc majority's rule "depart[ed] from the holdings of [its] sister circuits." Pet. App. 34a. Indeed,

the Third, Eighth, and Ninth Circuits have all held—contrary to the Fifth Circuit's decision in this case—that an officer providing false information violates the Fourth Amendment under *Franks* even if the information is provided for a purpose other than its inclusion in a warrant application. When false information is relayed through an attenuated chain of officers before being used in a warrant application, these courts have found Fourth Amendment violations without inquiring into the officer's purpose. The fundamental disagreement between the circuits means that if this case had arisen in the Third, Eighth, or Ninth Circuits, the courts would have held that Deputy Phillips violated the Fourth Amendment.

Third Circuit. Unlike the Fifth Circuit, the Third Circuit has found that even an officer who does not provide information with the purpose of its later inclusion in a warrant affidavit can violate the Fourth Amendment under *Franks*. In *United States v. Calisto*, 838 F.2d 711 (3d Cir. 1988), a police officer received information about a drug transaction from a reliable informant and conveyed that information to a second officer in order to "aid [the second officer] in his investigation" of a suspect. *Id.* at 712. The officer's purpose was thus *not* to provide information for inclusion in a warrant application. The second officer then passed the information—requesting anonymity for both himself and the first officer—to a third, who subsequently passed it to a fourth. *Id.* at 712–13. The fourth officer eventually incorporated the information into a warrant application, noting that it came from a "confidential source." *Id.* Because the application concealed the participation of the chain of police officers, the defendant alleged that the affidavit was misleading and thus invalid. *Id.* at 714.

Considering the *Franks* challenge, the Third Circuit agreed with the defendant that looking to the conduct of only the affiant, and not the other officers, would "place the privacy rights protected by [*Franks*] in serious jeopardy." *Id.* Though the court ultimately concluded that any misrepresentation was immaterial, it analyzed the conduct of each officer in the chain as a potential source of *Franks* liability—notwithstanding the fact that the earlier officers acted with the purpose of aiding in an investigation, rather than with the purpose of preparing an affidavit. *Id.* at 714–16. The Third Circuit's decision is thus irreconcilable with the rule adopted by the Fifth Circuit.

Similarly, in *United States v. Shields*, 458 F.3d 269 (3d Cir. 2006), an FBI agent investigating a child pornography website drafted a "template for a search warrant affidavit." *Id.* at 272. His purpose was to "assist the local [FBI] offices with their investigations" into the website's users, not to provide information for a warrant. *Id.* The template included several falsehoods, and the defendant challenged the affidavit in his case—which was based on the template—as misleading. *Id.* at 276–77. After noting that "laundering [a] falsehood through an unwilling affiant who is ignorant of the falsehood" is impermissible, the Third Circuit analyzed the first agent's conduct, even though he had not acted with the purpose of helping produce the specific warrant targeting the defendant. *Id.*; *see also United States v. Brown*, 631 F.3d 638, 642 n.3 (3d Cir. 2011) ("[B]oth [the original officer's] conduct and that of the officers working upstream from him are relevant to our assessment of whether the affidavit was drafted knowingly and intentionally or with reckless

disregard for the truth."). The court concluded that the falsehoods were immaterial. *Id.* Thus, in both *Calisto* and *Shields*, the Third Circuit evaluated an officer's conduct under *Franks*, despite his not having provided information *for the purpose of* its use in a warrant application.

Eighth Circuit. Consistent with the Third Circuit, the Eighth has found that an officer who has only an attenuated connection to the affiant and does not provide false information for the purpose of its use in an affidavit can still violate *Franks*. *See United States v. Davis*, 471 F.3d 938, 947 & n.6 (8th Cir. 2006); *United States v. Lakoskey*, 462 F.3d 965, 978 (8th Cir. 2006).

In *Lakoskey*, for example, a postal inspector in Arizona noticed a "suspicious" package and confronted the recipient. *See* 462 F.3d at 969. The recipient consented to a search of his home, and the officers found no evidence that the home was used to manufacture methamphetamine. *See id.* The next day, the Arizona postal inspector emailed a postal inspector in Minnesota, informing her that an incriminating package was sent from the defendant's PO box in Minnesota and, falsely, that the recipient of the package had been manufacturing methamphetamine at his home to send to the defendant. *See id.* at 969–70 & n.1. The Minnesota postal inspector determined that the email provided sufficient basis for a "mail watch" of the defendant's mail, which resulted in the identification of a suspicious package from Arizona. *See id.* at 970–71. After a positive dog sniff, the inspector prepared a search warrant affidavit, which included the false information provided by the Arizona inspector. *See id.* at 971.

To determine whether a *Franks* violation occurred, the Eighth Circuit opinion focused exclusively on the Arizona inspector's false statement that the recipient had manufactured methamphetamine. *Id.* at 978. The court did not inquire whether the Arizona postal inspector acted with the purpose or knowledge that the statement would be used in an affidavit. *See id.* at 977–79. Rather, the court held that though the Minnesota postal inspector did not know the Arizona postal inspector's email contained false information, "courts have imputed such knowledge to affiants where the information is received from another government official." *Id.* Thus, the false statement was excluded from the affidavit despite the attenuation between the Arizona postal inspector and the affiant. *See id.* at 979.

The same year, the Eighth Circuit decided *United States v. Davis* on similar grounds. In *Davis*, officers executed an arrest warrant and conducted a sweep of the defendant's property. *See* 471 F.3d at 942. During the sweep, an officer broke into a padlocked closet and discovered firearms. *Id.* The officer told a second officer at the sweep that he had seen the firearms in plain view, and the second officer conveyed this information to a third officer who was not present at the sweep but who signed the affidavit. *Id.* The affidavit falsely stated that the firearms were "observed in plain view." *Id.* The Eighth Circuit held that the statement was reckless and could be the source of a *Franks* violation even though the affiant and the second officer were not aware the statement was false. *Id.* at 946–47 & n.6. The court explicitly stated that the first officer's "statement cannot be insulated from a *Franks* challenge simply because it

was relayed through two officers who were both unaware of the truth." *Id.* at 947 n.6; *see also United States v. Neal*, 528 F.3d 1068, 1073 (8th Cir. 2008) ("[A]n officer may not circumvent the *Franks* doctrine by providing only selective information to another officer who is unaware of the full information and therefore includes false information or omits material information from an affidavit in support of a warrant.").

Ninth Circuit. Likewise, the Ninth Circuit has held that a "deliberate or reckless omission by a government official who is not the affiant can be the basis for a *Franks* suppression," and has not imposed any additional purpose requirement. *United States v. DeLeon*, 979 F.2d 761, 763 (9th Cir. 1992). In *DeLeon*, the defendant argued that evidence relating to his marijuana conviction should be suppressed under *Franks*. *Id.* at 762. A local police investigator had conducted telephone interviews with three witnesses with the purpose of gathering information about marijuana on the defendant's property. *Id.* The interviewees offered the investigator conflicting stories. *Id.* at 762–63. Two informants reported incriminating information that was later used in the warrant affidavit; the other informant provided exculpatory information that was omitted. *Id.* at 763. The affiant—a different officer—did not know that the omissions had been made, though he had apparently been present for the interviews. *Id.*

Applying *Franks*, the Ninth Circuit held that the evidence obtained pursuant to the warrant should have been suppressed under the Fourth Amendment. Though the government argued that no *Franks* hearing was necessary because the "omission may have been solely the fault of a non-affiant," the Ninth

Circuit rejected that position. *Id.* The court explained that Fourth Amendment restrictions apply to "the government generally, not merely [to] affiants." *Id.* at 764. To hold otherwise, the court reasoned, would allow government officials to circumvent *Franks*. *Id.* The Ninth Circuit stated that it was reiterating the "tacit but obvious premise" adopted by its sister circuits: "misstatements or omissions of government officials which are incorporated in an affidavit for a search warrant" may violate *Franks* "even if the official at fault is not the affiant." *Id.*

The Fifth Circuit below attempted to cast *DeLeon* as consistent with its own decision, describing that case as "applying *Franks* where the affiant was present during the non-affiant investigator's telephone interviews and based same-day affidavit on those interviews." Pet. App. 13a n.5. However, the Ninth Circuit made clear in *DeLeon* that the affiant's presence during the interviews was irrelevant to the case: the court's opinion assumed the affiant was unaware of the omission and explicitly stated that *Franks* applied even though the "official at fault [was] not the affiant." 979 F.2d at 764.

The Ninth Circuit reaffirmed *DeLeon*'s holding in *Chism v. Washington*, 661 F.3d 380 (9th Cir. 2011). *Chism* held that an officer could be found liable under *Franks* for making false statements and omissions in a search warrant affidavit that was then independently relied upon by a prosecutor to obtain a separate arrest warrant. *Id.* at 392. The court explained that the fact that the document "supporting probable cause was submitted by [the prosecutor]—not [the officer]—is inconsequential." *Id.* In doing so, the court reiterated *DeLeon*'s rule, explaining that "a 'deliberate or reckless omission by a government

official who is not the affiant can be the basis for a [suppression claim under *Franks*].'" *Id.* (alteration in original).

In an attempt to refute the circuit split, the Fifth Circuit below cited to *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004), as supporting the proposition that an officer who is involved at every stage of an investigation, but has no role in the preparation of a warrant, cannot violate the Fourth Amendment under *Franks*. Pet. App. 13a n.5. As the dissent below explained, this characterization misrepresents *Moore*. *See* Pet. App. 33a n.2. In *Moore*, the Ninth Circuit held that a non-affiant who had provided accurate information to the affiant could not be held responsible for omissions made solely by the affiant. 384 F.3d at 1108–09, 1118. Unlike the instant case, where the non-affiant's statements were at issue, in *Moore* any potential *Franks* violation was exclusively the fault of the affiant. Therefore, *Moore* is inapplicable to the rule in question here.

2. Other circuits and state courts have declined to adopt the Fifth Circuit's rule.

Most other circuits and state courts, though they have not fully waded in to the split, do not apply the additional "purpose" requirement imposed by the Fifth Circuit in *Franks* cases. Instead, these courts merely analyze whether the false information was later relied upon in a warrant application—indicating that these courts, if faced with the facts of this case, would likely reach a different conclusion than the Fifth Circuit below.

The Seventh Circuit, for example, in a case involving an FBI agent who allegedly lied to an affiant, did not mention whether the agent's lie was made for the purpose of its use in a warrant application. *United States v. Pritchard*, 745 F.2d 1112, 1118–19 (7th Cir. 1984). Instead, the court said only that *Franks* is implicated "when one government agent deliberately or recklessly misrepresents information to a second agent, who then innocently includes the misrepresentations in an affidavit." *Id.*; *see also United States v. Whitley*, 249 F.3d 614, 621 (7th Cir. 2001) ("[T]he validity of the search is not saved if the governmental officer swearing to the affidavit has incorporated an intentional or reckless falsehood told to him by another governmental agent.").

Likewise, the Tenth Circuit does not analyze an officer's *purpose* when providing information that is later used in an affidavit; instead, the court looks merely to whether that information was "relied upon by the affiant in making the affidavit." *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997); *see also, e.g.*, *Marin v. King*, No. 16-2225, 2018 WL 272008, at *11 (10th Cir. Jan. 3, 2018) (same). The First Circuit, too, looks only to whether a government official's misstatement was used in an affidavit. *See, e.g.*, *United States v. D'Andrea*, 648 F.3d 1, 13 (1st Cir. 2011) ("Nor should *Franks* be read to apply only to misrepresentations made by the affiant himself, because such a reading would allow the police to slip lies into affidavits with impunity by simply passing them through an officer ignorant of their falsehood."). "Purpose" is not part of the inquiry.

State courts of last resort also frequently scrutinize government conduct in *Franks* cases where

a government official has relayed false information to an affiant. These courts—like the First, Seventh, and Tenth Circuits—do not evaluate whether there was any connection between the purpose of the official's conduct and the eventual warrant affidavit. *See, e.g.*, *State v. Hamel*, 634 A.2d 1272, 1274 (Me. 1993) (finding that where one officer lies to the affiant, the "affidavit is just as invalid as if [the affiant] had lied himself"); *State v. Esplin*, 839 P.2d 211, 216–17 (Or. 1992) (en banc) (same); *State v. Thetford*, 745 P.2d 496, 500 (Wash. 1987) (en banc) (same).

3. Only the Second Circuit has adopted a rule similar to the Fifth Circuit's.

Only the Fifth and Second Circuits have adopted the rule that officers do not violate the Fourth Amendment (even if they recklessly or deliberately provide false information), so long as they do not provide that information *for the purpose of* its use in a warrant application. The Second Circuit created its version of the purpose requirement in *United States v. Wapnick*, 60 F.3d 948 (2d Cir. 1995). Although the Second Circuit noted that the conduct of government officials other than the affiant may be grounds for a *Franks* violation, the court concluded that the investigator in Wapnick had not made false statements "*in connection with* [the affiant's] preparation of the affidavit." *Id.* at 955–56 (emphasis added). This "in connection with" requirement serves the same function as the Fifth Circuit's "purpose" requirement—it creates an additional layer to the Franks inquiry.

The caselaw thus reflects a sharp division on the question presented. By joining the shallow side of the

split, the en banc Fifth Circuit creates an unmistakable conflict between two legal rules. This Court's review is warranted now.

B. The Fifth Circuit's rule is not consistent with this Court's precedent.

1. The Fifth Circuit's rule frustrates the rights recognized in *Franks* and its progeny.

The Fifth Circuit's rule is not consistent with the rights recognized in this Court's decision in *Franks* and the underlying rationale of protecting citizens from deliberate or reckless officer falsehoods. In *Franks*, this Court addressed the right of defendants to challenge the veracity of a warrant affidavit. *See* 438 U.S. at 155–56. There, two police officers submitted a sworn affidavit in support of a search warrant, claiming they had spoken directly to employees of a youth center and confirmed the usual dress of the defendant. *See id.* at 157. The defendant challenged the truthfulness of the warrant, claiming the employees cited in the affidavit never talked to the affiant officers. *Id.* at 158. This Court held that the defendant was entitled to a hearing to address the veracity of the warrant and concluded that the Fourth Amendment requires a hearing when "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and the false statement was necessary to find probable cause. *Id.* at 155–56.

Although the facts in *Franks* dealt with false statements made by the affiant, this Court also addressed deliberate or reckless false statements made by government agents who are non-affiants. The majority stated that the "police [can]not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity." *Id.* at 163 n.6. Many circuits have pointed to this statement to explicitly reaffirm that a Fourth Amendment violation occurs when a non-affiant officer provides false information that is later used in an affidavit. *See supra*, Part I, Section A.1–2.

While *Franks* noted the importance of preventing the insulation of non-affiant falsehoods included in affidavits, the court below allowed just that. *See* Pet. App. 16a–17a. The Fifth Circuit held that *Franks* liability attaches only if the officer (1) actually prepares, presents, or signs a warrant application, or (2) provides the information *for the purpose of* its use in that application. Pet. App. 14a, 17a; *see also Hart*, 127 F.3d at 448–49 ("A government official violates the Fourth Amendment when he deliberately or recklessly provides false, material information *for use in* an affidavit in support of a search warrant." (emphasis added)). This rule insulates falsehoods that are deliberately or recklessly provided by government agents from Fourth Amendment scrutiny, so long as the falsehoods were not specifically provided *for the purpose of* use in the affidavit.

The en banc majority's purpose requirement echoes the Fifth Circuit's pre-*Franks* test for determining whether the truthfulness of affidavits could be attacked. *See United States v. Thomas*, 489 F.2d 664, 669 (5th Cir. 1973). Before *Franks*, the Fifth

Circuit had held that affidavits containing misrepresentations were invalid "if the error . . . was committed with an intent to deceive the magistrate." *Id.* Though this test addressed an officer's intent to deceive a magistrate generally, the Fifth Circuit's new requirement is similar because it focuses on the officer's purpose—or intent—to provide the false information for use in an affidavit, which would then be used to deceive a magistrate. *See* Pet. App. 17a. However, this Court in *Franks* abrogated the Fifth Circuit's old intent test, focusing instead on intentional or reckless falsehoods included in affidavits as opposed to officers' intent to deceive. The rule announced by the Fifth Circuit in this case is old wine in new bottles—an echo of the previous "intent" test that this Court rejected in *Franks*.

2. The Fifth Circuit's rule conflicts with principles of related Supreme Court precedent.

The Fifth Circuit's rule forbids falsehoods reported *directly* for the purpose of inclusion in an affidavit but protects falsehoods reported by officers working on an investigation with the affiant officer, so long as the falsehoods are *not* supplied for the purpose of use in a warrant application. This Court's precedent disallows any such distinction. For example, in *Illinois v. Andreas*, 463 U.S. 765 (1983), a case involving an investigation conducted by two different federal law enforcement agencies working with local police, this Court noted, "where law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all." *Id.* at 771 n.5. The Fifth Circuit's rule, however, assumes

that the knowledge of the officer who initially began the investigation and wrote the incident report was not shared by the investigation's affiant officer. *See* Pet. App. 16a–17a.

This Court has already held that arrests not supported by probable cause cannot be insulated from Fourth Amendment scrutiny just because the arresting officer relied on statements made by other officers. In *Whiteley v. Warden*, 401 U.S. 560 (1971), for example, an officer filed a bare-bones complaint subsequently used as the basis for an arrest warrant. *Id.* at 562–63. The officer then issued a radio bulletin, announcing the warrant and requesting help from other police departments in making the arrest. *See id.* at 563–64. Officers from a separate police department relied on the information in the radio bulletin to arrest the suspect. *See id.* at 563. The Court rejected the argument that the arrest was not illegal because the officers had based their arrest on the radio bulletin without knowing the underlying warrant did not support probable cause: "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568.

Whiteley stands for the principle that one officer's unlawful actions and subsequent false communication to other officers cannot be insulated from challenge just because other officers acted on that information to make an arrest. *See id.* at 568. The Fifth Circuit's rule promotes the opposite—one officer's reckless falsehoods in a report *can* be insulated from challenge if an affiant officer unwittingly relied upon the information to draft an arrest warrant application.

Like in *Franks* and *Whiteley*, this Court has also rejected an approach that would insulate officer conduct from Fourth Amendment scrutiny in the context of the exclusionary rule. In *United States v. Leon*, 468 U.S. 897 (1984), the seminal case on the good faith exception to the exclusionary rule, Justice White emphasized that when evaluating officer liability for searches conducted using insufficient warrants, a court must "consider the objective reasonableness" of the officers who "provided information material to the probable-cause determination." *Id*. at 923 n.24 (citing *Whiteley*, 401 U.S. at 568). Furthermore, he noted that officers cannot simply "rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." *Id*. Likewise, in *Herring v. United States*, 555 U.S. 135 (2009), an opinion that narrowed the scope of the exclusionary rule, Chief Justice Roberts went out of his way to emphasize that the exclusionary rule would continue to apply where a warrant includes an intentional falsehood or reckless mistake even when an ignorant colleague executes the warrant. *Id.* at 146 (citing *Leon*, 468 U.S. at 923 n.24).

Similarly, this Court in *Arizona v. Evans*, 514 U.S. 1 (1995), recognized that the exclusionary rule should be used to deter unlawful police conduct. *Id.* at 15. The Court explained that this deterrence function is served when the person to be deterred is "engaged in the often competitive enterprise of ferreting out crime" and the conduct involved is sufficiently reckless or deliberate that it can be deterred. *Id*; *see also Leon*, 468 U.S at 919 ("[Officers must] have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some

right."). The conduct addressed here falls squarely within that which *Evans* and *Leon* sought to deter. Deputy Phillips was engaged in the "ferreting out" of crime when he misidentified Petitioner, and his failure to check the police database for identifying characteristics was reckless and therefore eminently deterrable.

The Fifth Circuit's rule runs afoul of these principles. It immunizes reckless and even deliberate misstatements made during police investigation and reporting and frustrates the principles established in *Franks* and its progeny.

C. The case presents an important question and is the ideal vehicle for deciding it.

1. The question presented is important.

This case presents a question of critical importance. The en banc majority's rule increases the possibility that warrants will be issued based on false or misleading affidavits—a problem that could infect thousands of cases, deprive citizens of fundamental liberty rights, and offend the principles protected by the Fourth Amendment. The Fifth Circuit's approach would allow individual investigators to avoid liability simply by having another officer sign the affidavit. The rule sweeps broadly, exempting both reckless *and* deliberate actions by officers. Moreover, these consequences are not limited to the civil context; the Fifth Circuit's rule will taint criminal cases as well, stripping defendants of their right to challenge arbitrary police action and civilians of their peace of mind.

Although precise statistics are difficult to obtain, scholars and practitioners alike agree that misrepresentations by police in reports are common and that the problem is "pervasive in some jurisdictions."[5] Indeed, the Mollen Commission, created in 1994 to investigate corruption in the New York City Police Department, found that misrepresentations—such as falsifying "the facts and circumstances of an arrest in police reports," giving false testimony, and filing misleading affidavits—are "probably the most common form of police corruption facing the criminal justice system."[6]

Officers regularly rely on reports by other officers when conducting investigations and obtaining arrest and search warrants. In fact, one of the *primary* purposes of incident reports is their use in further investigation or criminal prosecution.[7] Thus, any

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[5] *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041–43 (1996) ("Whether it is conjecture by individual observers, a survey of criminal attorneys, or a more sophisticated study, the existing literature demonstrates a widespread belief that testilying is a frequent occurrence. . . . Even prosecutors—or at least former prosecutors—use terms like 'routine,' 'commonplace,' and 'prevalent' to describe the phenomenon." (footnotes omitted)); *see also* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 869 (2008); and Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 323–24 (2005). Individual cases exemplify this problem; for example, former Seventh Circuit Judge Richard Posner once described an arrest report as "full of falsehoods." *Jones v. City of Chicago*, 856 F.2d 985, 990 (7th Cir. 1988).

[6] Zeidman, *supra* note 5, at 323–24.

[7] *See* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW

falsehoods in these reports may taint future prosecutions. The case below is an illustrative example: Deputy Phillips himself forwarded the inaccurate report to the investigative division of the Sheriff's Office, which used the report for its investigation many months later. Pet. App. 28a. As the dissenting judges observed, "information relayed in law enforcement agents' reports routinely end up as support for warrant applications even if the reports are not expressly designed exclusively for that use." Pet. App. 36a.

Moreover, these false or inaccurate police reports have the potential to disproportionately affect outcomes in criminal cases while flying under the radar of judicial review. Most criminal cases end in negotiated guilty pleas rather than trials,[8] and police

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ENG. L. REV. 1, 8 n.26 (1993). According to Professor Stanley Fisher, one department's manual explicitly addresses what ought to go in a police report: "anything that 'justifies some subsequent police action' or aids in future investigation of the crime." *Id.* at 28 (quoting anonymous police department, Introduction to Incident Reporting (unpublished training materials of anonymous police department) (on file with author)). Similarly, as part of its orientation and training, the Connecticut State government instructs that officers must be able to "[i]dentify the relationship between successful prosecution and police reports." INTRODUCTION TO LAW ENFORCEMENT, DEPARTMENT OF EMERGENCY SERVICES & PUBLIC PROTECTION, POLICE OFFICER STANDARDS AND TRAINING COUNCIL (2010), http://www.ct.gov/post/lib/post/certification/training_criteria_2010.pdf.

[8] *See* Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005); U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL

reports are often critical to establish the basic facts around which defendants and the government negotiate.[9] Unlike perjury at a judicial suppression hearing, an inaccurate police report that leads to a plea will never be subject to the truth-seeking function of trial. As a result, the high rate of plea bargains in state and federal courts removes the critical safeguard of judicial review and potentially allows many false police reports to escape detection.

What is more, inaccurate police reporting can lead to severe consequences for the citizen affected, including lengthy deprivations of liberty. This could happen to anyone. In the case below, Petitioner spent sixteen days in jail before being released on bail, even though he committed no crime aside from having the same name as the actual assailant. Pet. App. 28a. For many, the financial burden of making bail or losing sixteen days of work—not to mention the indignity and embarrassment of being locked in jail—may be crippling.

Also threatened by the en banc majority's rule are the fundamental values underlying the Fourth Amendment. As this Court has recognized, the Fourth Amendment protects citizens' interest in avoiding "suffer[ing] the indignity" of arbitrary searches or arrests,[10] which convey a "public stigma." *Bailey v. United States*, 568 U.S. 186, 200 (2013). The warrant requirement is meant to protect this interest, not to

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CASES: FISCAL YEAR 2016 ("In fiscal year 2016, the vast majority of offenders (97.3%) pleaded guilty.").

[9] *See* Fisher, supra note 7, at 38–39.

[10] *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (noting civilian's right "to live free of [the] pointless indignity and confinement" of arrest).

be "merely an inconvenience to be somehow weighed against the claims of police efficiency." *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (quotations and citations omitted). But a warrant's legitimacy depends on the truthfulness of its content. Inaccurate police reports can lead to the issuance of warrants unsupported by the normal standard of probable cause, threatening every person's "freedom to come and go . . . without police interference." *Navarette v. California*, 134 S. Ct. 1683, 1697 (2014) (Scalia, J., concurring). False or misleading reports can also allow the government to obtain a warrant and invade an innocent civilian's home, despite "the very core" of the Fourth Amendment being "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States,* 365 U.S. 505, 511 (1961)).

Unlawful warrants based on inaccurate reporting not only contravene the Fourth Amendment, but also threaten the legitimacy of local law enforcement in the eyes of the public. One valuable purpose of warrants is to "greatly reduce[] the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *United States v. Chadwick,* 433 U.S. 1, 9 (1977)). Warrants that are not based on fact may minimize this legitimizing effect and threaten the public's trust in

law enforcement.[11] Thus, the question presented implicates fundamental constitutional values.

2. This case is an ideal vehicle for deciding this important question.

This case is an ideal vehicle for considering and resolving the question presented. The question was pressed below and fully briefed by the parties in the district court, before the Fifth Circuit panel, and at the en banc stage. The decision below presents the definitive view of the en banc Fifth Circuit. Over a vigorous dissent, the en banc majority announced a clear legal rule that is in direct conflict with at least three other circuits. The contrary rule has existed for almost thirty years in the Third Circuit, *see Calisto*, 838 F.2d at 714, and it was applied by the Ninth Circuit in 2011, *see Chism*, 661 F.3d at 392. The arguments have been well ventilated, and the split is mature.

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[11] *See* Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING 203, 205 (2010) (explaining that "public perceptions of the fairness of the justice system in the United States are more significant in shaping its legitimacy than perceptions that it is effective"). The en banc majority's rule will also have the unintended consequence of creating *more* uncertainty for law enforcement officers. Rather than drawing a clear line, the majority's rule requires law enforcement officers conveying information to determine the line between providing information for the purpose of inclusion in a warrant and merely providing information for other purposes. Thus, an officer's liability turns on the interpretation of his intent, not his actions. This does not create a "workable" rule for officers, as such a rule must be applied "in an ad hoc, case-by-case fashion by individual police officers," rather than categorically. *Riley*, 134 S. Ct. at 2491–92.

Furthermore, this case presents a clear issue of law: whether *Franks* liability under the Fourth Amendment depends on an officer's "purpose." Even if this case did not involve a pure question of constitutional law, a sufficient factual record was developed in the district court for the purposes of deciding the Fourth Amendment and qualified immunity questions at issue.

II. This Court should review the Fifth Circuit's decision improperly applying qualified immunity.

The Court should grant review and decide that qualified immunity does not apply here for three reasons. First, the Fourth Amendment right at issue meets the "clearly established" test, despite the circuit split created by the court below. *Franks* and the existing precedent of the Third, Eighth, and Ninth Circuits "place[] the constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The precedent demonstrates that a law enforcement officer who recklessly or deliberately reports false information subsequently relied upon in a warrant application violates clearly established Fourth Amendment rights under *Franks*, regardless of whether the officer actually prepares, presents, or signs a warrant application, or provides the information for the purpose of its use in that application.[12]

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[12] The law was also clear in the Fifth Circuit. *Hart* established the principle that an officer who deliberately or recklessly provides false information "for use in an affidavit" violates the

Moreover, those cases have arisen in "particularized" factual contexts, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), offering clear guidance to any reasonable officer that reporting reckless or deliberately false information is improper. This case does not involve a vague or abstract legal principle defined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Rather, the law at the time "provided fair warning" that the "conduct at issue" here—recklessly or deliberately including false information in an incident report—was unconstitutional. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (alteration and quotations omitted).

Second, Justices of this Court have expressed concerns about qualified immunity doctrines, including whether they are consistent with the "common-law backdrop against which Congress enacted the 1871 Act [creating § 1983]." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring) (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. (forthcoming 2018)); *see also Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari) (citing a "disturbing trend" regarding the Court's application of qualified immunity doctrines). Any

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Fourth Amendment and cited to the Third and Ninth Circuits as support. 127 F.3d at 448–49. Here, as the dissent below pointed out, it was "certainly foresee[able]" that Deputy Phillips's incident report would later be used in an affidavit. *See* Pet. App. 36a–37a. To the extent that the majority below, and the intervening cases it cites, *see Hampton*, 480 F.3d; and *Jennings*, 644 F.3d, are inconsistent with this principle, the decision below creates an additional circuit split with respect to whether the law in this area is clearly established.

potential qualified immunity issue, then, weighs in *favor* of granting this Petition.

Finally, this Court should grant certiorari to address the important Fourth Amendment issue presented regardless of whether the qualified immunity question is granted. This Court has previously granted review on § 1983 claims presenting important constitutional questions even when the defendant may ultimately be entitled to qualified immunity. *See, e.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2374–75, 2383 (2014) (deciding in favor of petitioner on constitutional issue but dismissing claim on qualified immunity grounds). The Fifth Circuit's rule below does not apply to just civil cases. As the dissenting judges below observed, the rule will *also* "limit criminal defendants' ability to challenge search warrants that are premised on fraudulent misrepresentations." Pet. App. 37a (emphasis added). Thus, these unconstitutional consequences extend to all cases involving the Fourth Amendment, even outside the qualified immunity context. Anyone unlucky enough to encounter an unprincipled officer may find herself not only arrested, but also unable to exclude unlawfully obtained evidence.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted.

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