No. 17-1095

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

A divided Fifth Circuit, sitting en banc, created a Fourth Amendment immunity for officers who deliberately or recklessly report false information subsequently relied upon in a warrant application – so long as the officers do not provide the information *for the purpose of* its use in the application. Applying this rule, the Fifth Circuit approved a reckless misidentification resulting in the sixteen-day false imprisonment of an innocent man.

The en banc holding deepens a split among the courts of appeals and state courts of last resort. Moreover, the Fifth Circuit's rule is not consistent with *Franks v. Delaware*, 438 U.S. 154 (1978), which made clear that officers may not insulate a falsehood merely by relaying it through an affiant "personally ignorant of its falsity." *Id.* at 163 n.6. Under the Fifth Circuit's rule, officers could insulate themselves from liability simply by having another person swear to the complaint. The issue affects thousands of civil and criminal cases and implicates the liberty interests at the core of the Fourth Amendment. *E.g., Bailey v. United States*, 568 U.S. 186, 200 (2013).

This Court's review is amply warranted.

I. The En Banc Fifth Circuit Announced A Fourth Amendment Rule That Warrants This Court's Review.

Respondent stresses the factual record and insists that the Fifth Circuit simply "applied" this Court's decision in *Franks* "to the unique facts of this case." Opp. 6. But the Fifth Circuit did more than that. Sitting en banc, and over a vigorous dissent, the Court of Appeals reversed the panel and announced a

substantive Fourth Amendment rule: "an officer must have assisted in the preparation of, or otherwise presented or signed a warrant application in order to be subject to liability under *Franks*." Pet. App. 14a. The Court of Appeals held that, even where a law enforcement officer deliberately or recklessly reports false information that is ultimately relied upon in a warrant application, an officer who does not present or sign the warrant application does not violate the Fourth Amendment unless he or she provides information for the purpose of its use in the application: "because he did not assist in preparing, present, or sign the complaint, Deputy Phillips cannot be held liable under *Franks*." *Id.* at 17a.

Judges Dennis and Graves, dissenting, properly described the majority as holding that "only an officer who actually participates in preparing the warrant affidavit can violate the Fourth Amendment through his reckless or intentional misrepresentations." *Id.* at 37a. They understood the majority as articulating a substantive Fourth Amendment rule that was inconsistent with decisions in other circuits:

> The majority opinion's holding that an officer who makes a deliberate or reckless misrepresentation can only be held liable if he "assisted in the preparation of, or otherwise presented or signed a warrant application" is unsound and, unsurprisingly, is not the law in any other circuit.

Id. at 33a. They urged a different rule, one followed by the Third, Eighth, and Ninth Circuits:

> Our 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.

Judge Costa, concurring in the result, similarly understood the majority as adopting a substantive Fourth Amendment rule, one that was inconsistent with decisions in the First and Ninth Circuits, *id.* at 23a, and one that would weaken Fourth Amendment rights. He predicted that, "[i]n a future *Franks* case, an officer who provided false information 'for use in' an affidavit will no doubt argue he was not 'fully responsible' for the warrant application and thus is immune" from Fourth Amendment liability. *Id.* at 24a.

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.*. She therefore did not endorse the Fourth Amendment rule adopted by the majority.

II. Respondent's Factual Arguments Do Not Diminish the Importance of the Case and Can Be Considered On Remand.

Respondent contends this case does not warrant review because "the evidence in this case shows that no recklessness occurred," Opp. 11, and Respondent's misidentification was too "attenuated from the warrant affidavit," which was prepared a year later. *Id.* at 12. But the *legal rule* adopted by the Fifth Circuit regarding the substantive scope of the Fourth Amendment warrants review in this case regardless

of the particular facts of this case, and regardless of whether Petitioner will ultimately prevail on his Section 1983 claim. On remand, Respondent would be free to raise his factual arguments as a defense to liability. But they should not deter this Court from reviewing the *legal rule* adopted by the Fifth Circuit.

Further, Respondent's factual arguments are wrong. His contention that there was no proof of recklessness is incorrect. The assault victim told Respondent Phillips merely that his attacker was "Michael Melton." Pet. App. 63a. Respondent added a middle name and generated an incident report that misidentified "Michael David Melton" (Petitioner) as the suspect rather than the true assailant, "Michael Glenn Melton." Pet. App. 64a. By itself, adding a middle name to the identification provided by a crime victim is a reckless act and foreseeably creates great risk for the person misidentified.

To explain the likely cause of the misidentification, Petitioner submitted an affidavit from former Hunt County Patrol Lieutenant Brian Alford explaining that Respondent had misused the Personal Information Database ("P.I.D.") maintained by the Sheriff's Office. Pet. App. 27a-28a; 63a-64a. Respondent contends that the Alford declaration was "discredit[ed]" (Opp. 4) because Petitioner did not have a criminal history and therefore supposedly would not have been listed in the P.I.D. Even if true, such an argument merely means that the P.I.D. was not the cause of Respondent's misidentification; it hardly excuses his recklessness. In any event, Respondent's argument is an issue for remand. The District Court opined that "how PID operates is not entirely clear." Pet. App. 63a. Petitioner was not afforded the opportunity to take discovery on the

issue. And Petitioner (or anyone else) without a criminal record could be listed in the P.I.D. system for other reasons, such as having been a witness or having received a traffic ticket. Based on the Alford affidavit, there is a genuine dispute of material fact as to how Petitioner was named instead of Michael Glenn Melton, the true assailant.

Respondent also contends that his misidentification was too "attenuated from the warrant affidavit," because it occurred a year before the affidavit was prepared. Opp. 12. But the District Court found that "[t]he complaint against Melton was based on Phillips's incident report." Pet. App. 64a. And Judges Dennis and Graves noted that "[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. They concluded that the passage of time does not justify immunizing intentional or reckless misidentifications. *Id.* at 36a-37a.

III. The Circuit Split Is Real and Warrants This Court's Review.

As Judges Dennis and Graves recognized, the Fifth Circuit's ruling conflicts with decisions in the Third, Eighth, and Ninth Circuits holding that an officer can violate the Fourth Amendment under *Franks* even if he or she does not act with the purpose of obtaining a warrant. Pet. App. 33a-36a. As the Petition demonstrates (Pet. 12-13), the Third, Eighth, and Ninth Circuits would have held that Respondent violated the Fourth Amendment.

Third Circuit. Respondent argues that *United States v. Calisto*, 838 F.2d 711 (3d Cir. 1988), is distinguishable because "the misstatements in the warrant affidavit were made by the affiant, not others." Opp. 7. But the Third Circuit pointed to misstatements by *both* the affiant *and* other officers. *See* 838 F.2d at 715 ("Gilbride, in an effort to conceal the involvement of the Pennsylvania Crime Commission, intentionally deleted from his report to Weniger the fact that his immediate source was Dougherty."). The Court of Appeals stressed that *Franks* required it to review the statements not merely of the affiant, but also of the other officers, in order to avoid "serious jeopardy" of Fourth Amendment rights. *Id.* at 714. The Fifth Circuit in this case adopted a different rule.

Respondent argues there is no conflict between the Fifth Circuit's judgment and *United States v. Shields*, 458 F.3d 269 (3d Cir. 2006), because *Shields* supposedly involved a non-affiant who "provid[ed] information for the purpose of its use in a warrant application." Opp. 8. But *Shields* involved an FBI agent who drafted a template containing falsehoods without actually participating in preparing specific warrant affidavits. *See* 458 F.3d at 272 ("To assist the local offices with their investigations, Agent Binney provided a template for a search warrant affidavit containing general information obtained during the course of his investigation."). Under the Fifth Circuit rule, the FBI agent would have escaped Fourth Amendment scrutiny.

Eighth Circuit. Respondent acknowledges that, in *United States v. Lakoskey*, 462 F.3d 965 (8th Cir. 2006), "[t]he court did not analyze whether the incorrect information was for use in a warrant

application." Opp. 8-9. In other words, the Eighth Circuit did not apply the rule adopted by the Fifth Circuit. In fact, the court held that, even 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." 462 F.3d at 978. The Fifth Circuit adopted the opposite rule.

In *United States v. Davis*, 471 F.3d 938 (8th Cir. 2006), the Eighth Circuit found a *Franks* violation on the basis of a chain of misrepresentations arising from a sweep of a house and barn in connection with an arrest. One officer falsely reported to another that firearms were in plain view, and the second officer repeated the falsehood to a third (who signed a search warrant application). The Court of Appeals noted:

> The fact that the affiant, Agent Hodges, was not aware that the firearms were not in plain view does not change the result under *Franks*, nor does the fact that Agent Hodges's source of information, Agent Peterson, was also unaware of the truth. Patrolman Peters'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. Respondent contends that "there is no indication in the Eighth Circuit's opinion that the information provided by the offending officer was for anything other than the warrant application, making it consistent with the present case." Opp. 8. But it is equally (if not more) plausible that Officer Peters made his misrepresentation simply in an attempt to exculpate himself – to cover up the fact that he had

improperly broken into a padlocked closet and thereby exceed the scope of the protective sweep. Moreover, the fact that the Court of Appeals did not even inquire as to Officer Peters' purpose demonstrates that the Eighth Circuit does not follow the rule adopted by the Fifth Circuit.

Ninth Circuit. Respondent argues that *United States v. DeLeon*, 979 F.2d 761 (9th Cir. 1992), is distinguishable because all the relevant events transpired on the same day. Opp. 9. But nothing in the Ninth Circuit's decision suggests that the result would have changed if the events had been spread out over time. The Court of Appeals found a *Franks* violation requiring the suppression of evidence under the Fourth Amendment, even though the "omission [in the warrant application] may have been solely the fault of a non-affiant." 979 F.2d at 763. The court explained that Fourth Amendment restrictions apply to "the government generally, not merely [to] affiants" and reiterated 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.* at 764.

Respondent argues that in *DeLeon* "[c]learly, the information was provided by the interviewer for the purpose of the warrant application," Opp. 9, but the fact that the Ninth Circuit made no mention of the interviewer's purpose shows that it does not follow the rule adopted by the Fifth Circuit.

In *Chism v. Washington*, 661 F.3d 380 (9th Cir. 2011), the Ninth Circuit found a constitutional violation where a state prosecutor obtained an arrest

warrant on the basis of false information contained in a state police officer's affidavit – even though the officer's affidavit had *not* been created for the purpose of obtaining the arrest warrant (but rather for the independent purpose of procuring a search warrant). *Id.* at 392. The Ninth Circuit held the different roles of the officer and prosecutor were "inconsequential" to *Franks* and the Fourth Amendment. *Id.* Respondent's argument that "no conflict exists" (Opp. 9) ignores the point that he would have been liable in the Ninth Circuit under the rule 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*]." 661 F.3d at 392 (citation and internal quotation marks omitted; brackets in original).

Other Jurisdictions. As shown in the Petition (19-21), other circuits and state courts do not apply the additional "purpose" requirement adopted by the Fifth Circuit in this case. They do not ask whether there was any connection between the police officer's purpose and the eventual warrant application. Respondent's argument that a "purpose" requirement was met in the cited cases (Opp. 9) ignores the point that courts *do not even ask* the question. Instead, these courts look to whether the false information was later relied upon in a warrant application.

IV. The Second Question Presented Also Warrants This Court's Review.

Respondent does not deny that the Fifth Circuit's rule will apply to criminal as well as civil cases, as Judges Dennis and Graves warned. Pet. App. 37. Accordingly, this Court's review of the first Question

Presented is warranted regardless of the qualified immunity issue. Pet. 35.

Respondent contends that the factual uniqueness of this case means that he is entitled to qualified immunity. Opp. 12. But qualified immunity turns on whether the unlawfulness of the officer's conduct is "clearly established," not whether the factual context in which it arises is rare or commonplace. "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citation omitted). This Court should grant review to hold that, despite the circuit split, *Franks* and the existing precedent of the Third, Eighth, and Ninth Circuits made sufficiently clear that deliberately or recklessly reporting false information subsequently relied upon in a warrant application violates the Fourth Amendment – whether or not the officer provides the information for the purpose of its use in the application.

Respondent does not deny that 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). Respondent maintains that "[s]imply because this Court has been somewhat

critical of the application of the qualified immunity defense on two occasions, is not a reason to grant the Petition in the instant case." Opp. 13. Should the Court wish to address the problematic aspects of the qualified immunity doctrine, this case presents an appropriate vehicle for doing so. Pet. 32-33.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted.

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