No. _____

In The

# Supreme Court of the United States

ABELINO "ABEL" REYNA AND
MCLENNAN COUNTY, TEXAS,

*Petitioners,*

v.

JOHN WILSON, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

THOMAS P. BRANDT
*Counsel of Record*
STEPHEN D. HENNINGER
LAURA O'LEARY
FANNING, HARPER, MARTINSON, BRANDT & KUTCHIN, P.C.
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
(214) 860-0324
tbrandt@fhmbk.com
*Attorneys for Petitioners*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTIONS PRESENTED

In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court announced a rule of "limited scope" which allowed a criminal defendant to attack the veracity of a probable cause affidavit for a search warrant. Recognizing substantial "competing values" and heeding the warnings from the dissent, the *Franks* Court placed limitations on the rule which included "a presumption of validity with respect to the affidavit supporting the search warrant" and the requirement that the criminal defendant bear the burden of proof throughout the process.

Despite the Court's limitations on *Franks*, the lower courts have expanded it. This Petition questions the legitimacy of that expansion and presents the following questions:

1. Whether *Franks* authorizes federal courts to disregard a finding of probable cause made by a properly constituted state grand jury, given this Court's holdings in *U.S. v. Williams*, *Kaley v. U.S.*, and their antecedents?

2. Whether violation of the judicially crafted prophylactic rule identified in *Franks* provides a basis for a claim under 42 U.S.C. §1983?

3. Whether *Franks* has any application when state-provided procedures exceed those required by *Franks*, and criminal defendants failed to avail themselves of the state's procedure?

**QUESTIONS PRESENTED**—Continued

4. If *Franks* authorizes federal courts to disregard a finding of probable cause made by a properly constituted state grand jury, what standard is appropriate for determining whether a federal court can disregard a grand jury's finding of probable cause?

## PARTIES TO THE PROCEEDING AND RELATED CASES

*John Wilson; John Arnold; Roy Covey; James Brent Ensey Edger Kelleher; Brian Logan; Terry S. Martin; Robert Robertson; Jacob Wilson; John Craft; Daniel Johnson; Jason Dillard; and Ronald Atterbury v. Brent Stroman, Chief of Police for the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; Abelino "Abel" Reyna, Elected District Attorney for McLennan County, Texas, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Jeffrey Rogers, in his individual capacity; Sergeant Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:17-CV-00453; U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Boyce Rockett; Joshua Martin; Michael Kenes; Dustin McCann; Michael Baxley; Doss Murphy; Wes McAlister; Nathan Grindstaff; Michael Chaney; Nathan Champeau; Billy McRee; Lance Geneva; Dalton Davis; William Aiken v. Brent Stroman, Chief of Police for the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; Abelino "Abel" Reyna, Elected District Attorney for McLennan County, Texas, in his individual capacity; City of Waco, Texas; McLennan*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*County, Texas; Robert Lanning, Assistant Chief of Police, in his individual capacity; Jeffrey Rogers, Police Officer with the Waco Police Department, in his individual capacity; Patrick Swanton, Police Officer with the Waco Police Department, in his individual capacity; Steven Schwartz, Special Agent with the Texas Department of Public Safety, in his individual capacity; Christopher Frost, Special Agent with the Texas Department of Public Safety, in his individual capacity*, No. 1:17-CV-00471, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Robert Clinton Bucy v. Brent Stroman, in his individual capacity; Manuel Chavez, in his individual capacity; Abelino Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:15-CV-1040, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Matthew Alan Clendennen v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino "Abel" Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Assistant Chief Robert Lanning, in his*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*individual capacity; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:15-CV-1041, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Jorge Salinas v. Brent Stroman, in his individual capacity; Manuel Chavez, in his individual capacity; Abelino Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, Assistant Chief of Police; Detective Jeffrey Rogers, Waco Police Department; Patrick Swanton, Police Officer, Waco Police Department; Steven Schwartz, Special Agent, Waco Police Department; Christopher Frost, Special Agent, Waco Police Department*, No. 1:15-CV-1044, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Cody Ledbetter v. Brent Stroman, Chief of Police of the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Detective, in his individual capacity; Abelino "Abel" Reyna, Elected District Attorney for McLennan County Texas, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, Assistant Chief of Police, in his individual capacity; Jeffrey Rogers, Police Officer with the Waco Police Department, in his individual capacity;*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*Sergeant Patrick Swanton, Police Officer with the Waco Police Department, in his individual capacity; Steven Schwartz, Special Agent with the Texas Department of Public Safety, in his individual capacity; Christopher Frost, Special Agent with the Texas Department of Public Safety, in his individual capacity*, No. 1:17-CV-0479, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Martin D.C. Lewis; Ricky Wycough; Gregory Wingo; Dusty Oehlert; James Michael DeVoll; James David; Jarron Hernandez; Andrew Sandoval; Jason Moreno; John Martinez; Noble Mallard; Salvador Campos; Michael Thomas; Sergio Reyes; Mario Gonzalez; Andres Ramirez; Edward Keller, Jr.; Gregory Salazar; Jose Valle; James Rosas; Richard Cantu, Jr.; Daniel Pesina; Justin Garcia; Marco DeJong; Andrew Stroer; Kenneth Carlisle; Rolando Reyes; James Hardin; Michael S. Herring; and Valdemar Guajardo, Jr. v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino "Abel" Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:17-CV-00448, U.S. District Court, Western Division of

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Seth Tyler Smith; Keith McCallum; Matthew Folse; Joseph Ortiz v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino "Abel" Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:17-CV-0474, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Burton George Bergman v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino "Abel" Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Assistant Chief Robert Lanning, in his individual capacity; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:15-CV-1042, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*Noe Adame v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, Assistant Chief of Police; Detective Jeffrey Rogers, Police Officer, Waco Police Department; Patrick Swanton, Police Officer, Waco Police Department; Steven Schwartz, Special Agent, Texas Department of Public Safety; Christopher Frost, Special Agent, Texas Department of Public Safety*, No. 1:15-CV-1043, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*John Vensel v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:15-CV-1045, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Diego Obledo v. Brent Stroman, in his individual capacity; Manuel Chavez, in his individual capacity; Abelino Reyna, in his individual capacity; City of Waco,*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*Texas; McLennan County, Texas; Robert Lanning, Assistant Chief of Police, Waco Police Department; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 1:16-CV-00575, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Marshall Mitchell; Blake Taylor; Christopher Rogers, in his individual capacity; Richard Benavides; Brian Brinks; Rene Cavazos; Juventino Montellano; Jason Cavazos; John Guerrero; Lindell Copeland; Rudy Mercado; Richard Smith; Lawrence Garcia; Anthony Shane Palmer; Phillip Sampson; Clayton Reed; James Gray; Cory McAlister; Tommy Jennings; Larry Pina; Richard Lockhart; Glenn Walker; Ronald Warren v. Brent Stroman, Chief of Police of the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; Abelino "Abel" Reyna, Elected District Attorney for McLennan County, Texas, in his individual capacity; City of Waco, Texas; County, Texas; Robert Lanning, Assistant Chief of Police, in his individual capacity; Jeffrey Rogers, Police Officer with the Waco Police Department, in his individual capacity; Patrick Swanton, Police Officer with the Waco Police Department, in his individual capacity; Steven Schwartz, Special Agent*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*with the Texas Department of Public Safety, in his individual capacity; Christopher Frost, Special Agent with the Texas Department of Public Safety, in his individual capacity*, No. 1:17-CV-00457, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal entered April 6, 2020, and Judgment entered April 27, 2020.

*Richard Lockhart; Glenn Walker; Ronald Warren v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino "Abel" Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual; Christopher Frost, in his individual capacity*, No. 1:17-CV-00480, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal and Judgment entered April 27, 2022.

*Paul Miller; James Caffey; Nathan Farish; Robert Nichols; George Rogers v. Brent Stroman, former Chief, Waco Police Department; Manuel Chavez, Police Officer, Waco Police Department; Robert Lanning, Assistant Chief, Waco Police Department; Jeffrey Rogers, Detective, Waco Police Department; Patrick Swanton, Sergeant, Waco Police Department; Abelino Reyna, former District Attorney, McLennan County, Texas; Christopher Frost, Special Agent, Texas Department of Public*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*Safety; Steven Schwartz, Agent, Texas Department of Public Safety; City of Waco; McLennan County*, No. 1:19-CV-00475, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal and Judgment entered May 14, 2020.

*Bryan Harper v. Brent Stroman, Chief of Police for the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; McLennan County; City of Waco; Abelino Reyna; Robert Lanning; Sergeant W. Patrick Swanton; Steven Schwartz; Christopher Frost; Jeffrey Rogers*, No. 1:17-CV-00465-SS, U.S. District Court, Western Division of Texas, Austin Division. Order of Dismissal and Judgment entered May 14, 2020.

*William Brent Redding; Thomas Paul Landers; Gilbert Zamora v. Sergeant Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity; Jeffrey Rogers, in his individual capacity; Brent Stroman, Chief of Police for the Waco Police Department, in his individual capacity; Abelino Reyna, Elected District Attorney for McLennan County, Texas, in his individual capacity; and Manuel Chavez, Waco Police Department Detective, in his individual capacity*, No. 1:17-CV-00470-ADA, U.S. District Court, Western District of Texas. Order of Dismissal entered August 7, 2020. (No judgment entered)

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*John Wilson; John Arnold; Roy Covey; James Brent Ensey; Edger Kelleher, et al. v. Brent Stroman, Chief of Police for the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; Abelino "Abel" Reyna, Elected District Attorney for McLennan County, Texas, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Jeffrey Rogers, in his individual capacity; Sergeant Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 20-50367, U.S. Court of Appeals for the Fifth Circuit. Judgment issued as the mandate on June 27, 2022.

*Martin D.C. Lewis; Ricky Wycough; Gregory Wingo; Dusty Oehlert; James Michael Devoll; et al. v. Chief Brent Stroman, in his individual capacity; Detective Manuel Chavez, in his individual capacity; Abelino "Abel" Reyna, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, in his individual capacity; Detective Jeffrey Rogers, Detective Jeffrey Rogers, in his individual capacity; Patrick Swanton, in his individual capacity; Steven Schwartz, in his individual capacity; Christopher Frost, in his individual capacity*, No. 20-50375, U.S. Court of Appeals for the Fifth Circuit. Judgment issued as the mandate on June 27, 2022.

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*Marshall Mitchell; Blake Taylor; Christopher Rogers, in his individual capacity; Richard Benavides; Brian Brincks; Rene Cavazos; Juventino Montellano; Jason Cavazos; John Guerrero; Lindell Copeland; Rudy Mercado; Richard Smith; Lawrence Garcia; Anthony Shane Palmer; Phillip Sampson; Clayton Reed; James Gray; Cory McAlister; Tommy Jennings; Larry Pina; Richard Lockhart; Glenn Walker; Ronald Warren v. Brent Stroman, Chief of Police of the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; Abelino "Abel" Reyna, Elected District Attorney for McLennan County, Texas, in his individual capacity; City of Waco, Texas; McLennan County, Texas; Robert Lanning, Assistant Chief of Police, in his individual capacity; Jeffrey Rogers, Police Officer with the Waco Police Department, in his individual capacity; Patrick Swanton, Police Officer with the Waco Police Department, in his individual capacity; Steven Schwartz, Special Agent with the Texas Department of Public Safety, in his individual capacity; Christopher Frost, Special Agent with the Texas Department of Public Safety, in his individual capacity*, No. 20-50380, U.S. Court of Appeals for the Fifth Circuit. Judgment issued as the mandate on June 27, 2022.

*Paul Miller; James Caffey; Nathan Farish; Robert Nichols; George Rogers v. Brent Stroman, Former Chief, Waco Police Department; Manuel Chavez, Police Officer,*

**PARTIES TO THE PROCEEDING AND RELATED CASES**—Continued

*Waco Police Department; Robert Lanning, Assistant Chief, Waco Police Department; Jeffrey Rogers, Detective, Waco Police Department; Patrick Swanton, Sergeant, Waco Police Department; Abelino Reyna, Former District Attorney, McLennan County, Texas; Christopher Frost, Special Agent, Texas Department of Public Safety; Steven Schwartz, Special Agent, Texas Department of Public Safety; City of Waco; McLennan County*, No. 20-50408, U.S. Court of Appeals for the Fifth Circuit. Judgment issued as the mandate on June 27, 2022.

*Jade Harper, as representative of the estate of Bryan Harper v. Brent Stroman, Chief of Police for the Waco Police Department, in his individual capacity; Manuel Chavez, Waco Police Department Detective, in his individual capacity; McLennan County; City of Waco; Abelino Reyna; Robert Lanning; Sergeant W. Patrick Swanton; Steven Swartz; Christopher Frost; Jeffrey Rogers*, No. 20-50453, U.S. Court of Appeals for the Fifth Circuit. Judgment issued as the mandate on June 27, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Abelino Reyna and McLennan County respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit.



## OPINIONS BELOW

*John Wilson, et al. v. Brent Stroman, et al.*, United States District Court for the Western District of Texas, Austin Division, No. 1-17-CV-00453-ADA

- Member Cases Nos.:
  - 1-18-CV-01050-ADA
  - 1-18-CV-01051-ADA
  - 1-18-CV-01052-ADA
  - 1-17-CV-00471-ADA
  - 1-15-CV-01040-ADA
  - 1-15-CV-01041-ADA
  - 1-15-CV-01044-ADA
  - 1-17-CV-00479-ADA
- April 6, 2020, Document 59—Order Granting Defendants Reyna and McLennan County's Motions to Dismiss. Pet.App.28-44, *infra*.

*Martin D.C. Lewis, et al. v. Chief Brent Stroman, et al.*, United States District Court for the Western District of Texas, Austin Division, No. 1-17-CV-00448-ADA

- Member Cases Nos.:
  - 1-17-CV-00474
  - 1-15-CV-01042

- 1-15-CV-01043
- 1-15-CV-01045
- 1-16-CV-00575

- April 6, 2020, Document 57—Order Granting Defendants Reyna and McLennan County's Motions to Dismiss. Pet.App.45-62, *infra.*

*Marshall Mitchell, et al. v. Chief Brent Stroman, et al.*, United States District Court for the Western District of Texas, Austin Division, No. 1-17-CV-00457-ADA

- Member Case No.:
  - 1-17-CV-00480-ADA

- April 27, 2020, Document 47—Order Granting Defendants Reyna and McLennan County's Motions to Dismiss. Pet.App.63-79, *infra.*

*William Brent Redding, et al. v. Sergeant Patrick Swanton, et al.*, United States District Court for the Western District of Texas, Austin Division, No. 1-17-CV-00470-ADA

- Member Cases Nos.:
  - 1-16-CV-01153-ADA
  - 1-17-CV-00468-ADA
  - 1-16-CV-01154-ADA
  - 1-17-CV-00469-ADA

- August 7, 2020, Document 44—Order Granting Defendant Reyna's Motion to Dismiss. Pet.App.80-99, *infra.*

- *John Wilson, et al. v. Brent Stroman, et al.*,—5th Circuit Court of Appeals No. 20-50367
  - April 28, 2022—United States Court of Appeals for the Fifth Circuit Opinion. Reported at 33 F.4th 202. Pet.App.1-22, *infra.*
- *William Brent Redding, et al. v. Patrick Swanton, et al.*,—5th Circuit Court of Appeals No. 20-50769
  - April 29, 2022—United States Court of Appeals for the Fifth Circuit Opinion. Available at 2022 U.S. App. LEXIS 11721. Pet.App.23-27, *infra.*
- *John Wilson, et al. v. Brent Stroman, et al.*,—5th Circuit Court of Appeals No. 20-50367 United States Court of Appeals for the Fifth Circuit
  - June 9, 2022—Order Denying Petition for Rehearing En Banc. Pet.App.100-113, *infra.*
- *William Brent Redding, et al. v. Patrick Swanton, et al.*,—5th Circuit Court of Appeals No. 20-50769
  - June 9, 2022—United States Court of Appeals for the Fifth Circuit—Order Denying Petition for Rehearing En Banc. Pet.App.114-117, *infra.*

## JURISDICTION

The court of appeals entered its judgment in the *Wilson* cases on April 28, 2022 and in the *Redding* cases on April 29, 2022. Pet.App.1-27. The court of appeals denied timely petitions for rehearing en banc on

June 9, 2022. Pet.App.100-117. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution 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.

## INTRODUCTION

Wilson, Redding, and the other appellants (the "Bikers") were arrested and indicted in connection with a battle between rival motorcycle gangs.

Under *Franks v. Delaware*, the Fourth Amendment, and Texas criminal procedure,[1] the Bikers had the right, in their criminal proceedings, to seek a hearing challenging the veracity of their arrest warrant affidavits. Nowhere do they allege that they did so. Instead, they rested on these rights, and they raised for

[1] TEX. CODE CRIM. P. §§16.01-16.17.

the first time in a civil action seeking money damages against, *inter alia*, the District Attorney, a so-called "*Franks* claim" in which they assert that their arrest warrant affidavits and grand jury proceedings were affected by material falsehoods and omissions.

In *Franks*, this Court created a limited, procedural right in the context of criminal proceedings. *Franks* identified a specific consequence for the inclusion of intentional or reckless falsehoods in a search warrant affidavit—exclusion of the evidence from the criminal trial. Contrary to this Court's explicit intention, the Fifth Circuit has extended *Franks* well beyond its own express terms by now: (1) using *Franks* as a justification for disregarding a probable cause determination made by a properly constituted state grand jury; (2) applying *Franks* to alleged omissions of information; and (3) identifying *Franks* as a civil cause of action under 42 U.S.C. §1983.

This application of *Franks* violates more than a century of this Court's precedent regarding the role of the grand jury, and it disregards the express terms of *Franks* itself. The consequences of the Fifth Circuit's (and other circuit courts of appeals') errors are: (1) the undermining of the ancient and important institution of the grand jury; (2) a proliferation of civil litigation encompassing a wide range of law enforcement and governmental officials; and (3) a wholesale abandonment of any concept of finality with respect to grand juries' determinations of probable cause. This result is harmful for the country and unsupported by the Constitution or this Court's precedent. The Court should

take this opportunity to correct the circuit courts' errors on these important questions.

## STATEMENT OF THE CASE

On May 17, 2015, rival motorcycle gangs, the Bandidos and Cossacks, along with their affiliates, gathered by the hundreds at a Twin Peaks restaurant in Waco, Texas and engaged in the largest battle of a larger war.[2] At the end of the battle, nine people were dead, and at least twenty were wounded.[3] Law enforcement personnel responded to the mayhem, arrested at least 177 individuals, and charged them with the

[2] The Fifth Circuit has recognized the history of violent conflict between the Bandidos and the Cossacks and their respective support clubs. In *U.S. v. Portillo*, 969 F.3d 144 (5th Cir. 2020), the Fifth Circuit found that Bandidos members engaged in a pattern of racketeering activity to commit murder, deal drugs, and engage in other related activities. Jeffrey Pike, who served as national President of the Bandidos from 2005 until 2016, and another national officer, John Portillo, were convicted of multiple counts related to a RICO conspiracy following a three-month-long trial. *Portillo* described the long history of the Bandidos as a "criminal enterprise" and the RICO conviction of George Wegers, who served as President of the Bandidos immediately before Pike. It also detailed numerous murders and aggravated assaults ordered by Pike and specifically detailed the bloody rivalry between the Bandidos, the Cossacks, and their "support clubs." Finding that the Bandidos "had the capacity to harm jurors and had previously attempted to interfere with the judicial process and intimidate witnesses," *Portillo* approved the trial court's decision to employ the "drastic measure" of empaneling an anonymous jury.

[3] Pet.App.157-58 [¶51]. Citations to the record are to *Wilson v. Stroman*, No. 20-50367, the lead case of these consolidated appeals.

offense of Engaging in Organized Criminal Activity ("EIOCA").[4]

Based on information provided by police officers, personnel from the McLennan County District Attorney's Office supplied legal advice concerning the criteria which, if met, would establish probable cause to arrest individuals for EIOCA in connection with the riot at the restaurant.[5] These criteria were reflected in a form affidavit which police officers could adapt to the individuals they were investigating and use in deciding whether to arrest specific individuals.[6] The Fifth Circuit has determined that this form affidavit "sufficiently alleged probable cause to arrest those to whom its facts applied."[7]

---

[4] TEX. PENAL CODE §71.02 (an individual may be liable under EIOCA for acting "in a combination" with others who commit or conspire to commit certain crimes); Pet.App.148 [¶2].

[5] Pet.App.159 [¶59]; Pet.App.161 [¶65]; Pet.App.164 [¶¶74-76 and n.3]; Pet.App.270-77.

[6] Pet.App.164 [¶76 and n.3]; Pet.App.211-13.

[7] *Terwilliger v. Reyna*, 4 F.4th 270, 282 (5th Cir. 2021). Based on the same affidavit at issue in these appeals, the Waco Court of Appeals found that probable cause existed to arrest other bikers for the offense of EIOCA in connection with the battle at Twin Peaks. *Ex parte Pilkington*, 494 S.W.3d 330 (Tex. App.—Waco, 2015, rehearing denied). *Pilkington* involved an appeal from the denial of a writ of habeas corpus. The court held that "the magistrate had a substantial basis for concluding that probable cause existed to believe that Pilkington and Weathers committed the offense of engaging in organized criminal activity." *Id.* at 339. Four months after its decision in *Pilkington*, the Waco Court of Appeals denied as moot the bikers' motion for rehearing because the bikers had by then been indicted, "which establishes probable cause as a matter of law." *Ex parte*

The Bikers involved in this appeal were indicted for the offense of EIOCA in connection with the Twin Peaks incident. The Bikers contend that they were arrested without probable cause, and they asserted Fourth Amendment claims against District Attorney Reyna, among others.[8]

The Bikers do not allege that Reyna: (1) arrested anyone;[9] (2) signed or presented the warrant affidavits used to support their arrests;[10] (3) knew exculpatory information about any of them; or (4) provided anyone with any information about any of them.[11] Instead, the Bikers allege only generally that Reyna participated in the investigation of the riot, was provided with evidence from the scene and from interviews of the attendees, and provided general criteria for probable cause to arrest for EIOCA, which was then applied by law enforcement personnel who actually interviewed suspects and recommended arrests.[12]

---

*Pilkington*, No. 10-15-00218-CR, 2015 Tex. App. LEXIS 13144 (Tex. App.—Waco, December 23, 2015, no pet.).

[8] Pet.App.147-210.

[9] As District Attorney, Reyna lacked authority to arrest anyone or to direct peace officers from other agencies to arrest anyone.

[10] Pet.App.147-210.

[11] Appellants allege that Chavez, the detective who signed their warrant affidavits, said that Reyna never told him anything. Pet.App.170 [¶96].

[12] Pet.App.158-59 [¶¶55, 59]; Pet.App.161 [¶65]; Pet.App.164 [¶¶74-76, and n.3]; *see also* Pet.App.270-77.

Reyna sought dismissal of all claims against him, asserting, *inter alia*, that he cannot be liable for arrests made by independent third parties, that the Bikers' indictments preclude any liability, and that he is entitled to absolute or qualified immunity.[13] The district court granted Reyna's motion, finding that the Bikers' allegations of taint with respect to their indictments were no more than "rank speculation."[14]

The Fifth Circuit reversed and remanded the case, directing the district court to determine whether each Biker adequately alleged "a *Franks* violation" as to the arrest warrant and, if so, whether each Biker adequately alleged that the taint exception should apply to that Biker's indictment.[15]



[13] Pet.App.214-69.

[14] Pet.App.28-99. The trial court held that "Plaintiffs cannot satisfy the requirement in *Iqbal* to plead facts rising above the speculative level" and that their allegations regarding the grand jury proceedings were "no more than rank speculation." Pet.App.40-41; Pet.App.58; Pet.App.75-76; Pet.App.94-95. While the trial court recognized that "both federal and Texas law permit discovery of grand jury material when the party seeking discovery demonstrates a 'particularized need' for the material," it determined that the bikers "failed to even mention, let alone attempt to articulate reasons why" they met that standard. Pet.App.41-42; Pet.App.59; Pet.App.76-77; Pet.App.95-96.

[15] Pet.App.21; Pet.App.27.

## REASONS FOR GRANTING THE WRIT

### A. The Fifth Circuit Has Decided an Important Federal Question in a Way That Conflicts with This Court's Decisions.

The Court should grant certiorari to review the questions presented in these appeals because the Fifth Circuit has decided an important federal question in a way that conflicts with more than a century's worth of this Court's decisions.

The Bikers assert claims for false arrest under the Fourth Amendment in connection with their arrests for the charge of EIOCA. *Supra*, 8. The issue in these appeals is whether probable cause supported their arrests. The Fourth Amendment's requirement that arrests be based upon probable cause is satisfied by an indictment returned by a grand jury. *E.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997); *FDIC v. Mallen*, 486 U.S. 230, 241 (1988) (noting that a grand jury's "ex parte finding of probable cause provides a sufficient basis for an arrest"). Because the Bikers in these appeals were all indicted, the question of probable cause has been conclusively determined, and the district court properly dismissed their claims against the District Attorney and the county in which he served. *Infra*, 15-24.

The district court found that the Bikers' indictments were dispositive with respect to their claims against the District Attorney, McLennan County, and the law enforcement officials who arrested them. Pet.App.28-99. However, because the Bikers alleged

that their arrests were based in part on material false statements and omissions, the Fifth Circuit held that they could pursue "*Franks* claims" under 42 U.S.C. §1983. Pet.App.21; Pet.App.27. This holding violates this Court's admonitions concerning the limited scope of its decision in *Franks*, disregards the long-established function of the grand jury, and improperly transforms a prophylactic, procedural rule into a personal constitutional right.

It is a permissible exercise of this Court's discretion to undertake review of an important issue expressly decided by a federal court. *U.S. v. Williams*, 504 U.S. 36, 41 (1992); *see also* SUP. CT. R. 10(c). In the instant appeals, the Fifth Circuit expressly held that an arrestee can assert a "*Franks* claim" under 42 U.S.C. §1983 for false arrest regardless of the fact that a properly constituted state grand jury returned an indictment. Pet.App.1-27. The Court has discretion to review the Fifth Circuit's decision.

### 1. *Franks* Created a Limited, Procedural Right Which Does Not Apply to Grand Juries' Determinations of Probable Cause.

The limited, procedural right that this Court identified in *Franks* does not entitle former criminal defendants, like the Bikers, to challenge a grand jury's conclusive determination that probable cause existed to arrest them. The Court should grant this petition

because the Fifth Circuit's opinion impermissibly expands this Court's narrow decision in *Franks*.[16]

In *Franks*, this Court held that a criminal defendant has a right to an evidentiary hearing challenging the veracity of a search warrant affidavit only if the defendant meets his burden to make a substantial showing, supported by a non-conclusory offer of proof, that: (1) the search warrant affidavit contains deliberate falsehoods or statements made with reckless disregard for the truth; and (2) the affidavit does not support a finding of probable cause without such falsehoods or statements. *Franks*, 438 U.S. at 155-56, 171-72. A criminal defendant who makes this preliminary showing is entitled to a hearing, in which he bears the burden of proving perjury or reckless disregard and a lack of probable cause. *Id*. at 155-56. If the criminal defendant carries this burden, the fruits of the improperly issued search warrant are excluded from the criminal trial. *Id*.

*Franks* addressed the rights of criminal defendants in the context of the application of the exclusionary rule in criminal trials. This Court noted the "deep skepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings." *Id*. at 171. The Court explained, "the rule announced today has a limited scope, both in regard to when exclusion of the

[16] Other circuit courts of appeals have also impermissibly expanded this Court's narrow holding in *Franks*. *E.g.*, *Evans v. Chalmers*, 703 F.3d 636, 649-50 (4th Cir. 2012); *Madiwale v. Savaiko*, 117 F.3d 1321, 1326-27 (11th Cir. 1997).

seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." *Id*. at 167.

This limited scope arose in part due to substantial competing values relating to: (1) the nature of the exclusionary rule, which is not a personal constitutional right, but only a judicially created remedy extended when its deterrent benefit outweighs its societal cost; (2) the efficacy of existing penalties against perjury for protecting a citizen's privacy interests triggered by a search warrant; (3) the magistrate's ability to inquire into the accuracy of a search warrant affidavit; (4) the benefits of giving deference to a magistrate's determination of veracity of search warrant affidavits; (5) potential confusion between collateral and central issues in criminal proceedings, increased burdens upon the criminal courts, and possible improper use of veracity hearings as a source of discovery; and (6) the fact that the accuracy of a search warrant affidavit may be largely beyond the affiant's control. *Id*. at 165-167.

In his strong dissent, Justice Rehnquist, joined by Chief Justice Burger, expressed fear that the majority's numerous limitations surrounding the procedural right it was announcing in *Franks*, "will quickly be subverted in actual practice," as they "afford insufficient protection against the natural tendency of ingenious lawyers charged with representing their client's cause to ceaselessly undermine the limitations which the Court has placed on impeachment of the affidavit offered in support of a search warrant." *Id*. at 187.

The dissent also expressed concern that the procedure in *Franks* fails to take account of the interest in finality and, therefore, undermines the criminal process. *Id*. at 181-83; *see also id*. at 185-86 (quoting Mr. Justice Jackson's concurrence in *Brown v. Allen*, 344 U.S. 433, 450 (1953):

> However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. **We are not final because we are infallible, but we are infallible only because we are final**.

(emphasis added) and concluding that "[t]he same is surely true of a judge's review of the factual determinations of a magistrate.").

The Justices' concerns about expansion of the holding in *Franks* and about finality interests are well-founded. The Fifth Circuit's opinion identifies "*Franks* claims" as creating substantive rights even in the context of civil actions challenging arrests when grand juries have found probable cause by issuing indictments. Pet.App.8-21; Pet.App.27. *Franks* recognized a narrowly limited, conditional, procedural right to an evidentiary hearing in the context of criminal proceedings. This right is not applicable in the context of civil proceedings when a grand jury has conclusively determined that probable cause existed to prosecute.

### 2. Courts Are Not Free to Disregard Indictments When Addressing Fourth Amendment False Arrest Claims.

This Court has, for many decades, recognized that an indictment conclusively establishes probable cause for an arrest. This stems from the history of the grand jury as an independent institution and from the grand jury's function. The Court should grant this petition because the Fifth Circuit's opinion violates this Court's many decisions holding that an indictment conclusively establishes probable cause for an arrest.

Relying on precedent developed over more than sixty years, this Court recently explained that an indictment, fair upon its face and returned by a properly constituted grand jury "'conclusively determines the existence of probable cause' to believe that the defendant perpetrated the offense alleged." *Kaley v. U.S.*, 571 U.S. 320, 328 (2014) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 117, n.19 (1975)); *see also id*. at 331 ("The grand jury's determination is conclusive."). This Court explained that

> "conclusively" has meant, case in and case out, just that. We have found no "authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." To the contrary, "the whole history of the grand jury institution" demonstrates that "a challenge to the reliability or competence of the evidence"

> supporting a grand jury's finding of probable cause "will not be heard."

*Id*. (quoting *Costello v. U.S.*, 350 U.S. 359, 362-63 (1956) and *Williams*, 504 U.S. at 54) (additional citations omitted). Instead, "[t]he grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Id*.

In *Kaley*, this Court soundly rejected the proposition that an arrestee is constitutionally entitled to a judicial re-determination of a grand jury's finding of probable cause to believe he or she committed the crimes charged. *Kaley*, 571 U.S. at 322, 328. The *Kaley* arrestees sought a hearing to challenge a restraining order freezing assets which were subject to forfeiture upon conviction of crimes for which they had been indicted. This Court characterized the Kaleys' argument as being "about who should have the last word as to probable cause" and found that the question of whether the Kaleys were constitutionally entitled to a judicial re-determination of the conclusion that the grand jury had already reached had, "a ready answer, because a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries." *Id*. at 327-28; *see also id*. at 333 ("A defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime.").

Like the criminal defendants in *Kaley*, the Bikers "demand a do-over, except with a different referee.

They wish a judge to decide anew the exact question the grand jury has already answered—whether there is probable cause to think [they] committed the crimes charged." *Kaley*, 571 U.S. at 331. By permitting the Bikers to pursue judicial review of their indictments, the Fifth Circuit violated this Court's longstanding precedent which recognizes the grand jury's "'historical role of protecting individuals from unjust prosecution'" and the conclusiveness of the grand jury's determination of probable cause. *Kaley*, 571 U.S. at 329 (quoting *Gerstein*, 420 U.S. at 117, n.19); *see also*, *e.g.*, *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1381 (2020) (Gorsuch, J., dissenting) (noting that "an indicted criminal defendant unhappy with a grand jury's finding of probable cause isn't permitted to challenge that preliminary assessment"); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 612 n.11 (1974) (quoting *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) for the proposition that a grand jury's determination is conclusive on the issue of probable cause); *Ex parte U.S.*, 287 U.S. 241, 250 (1932) ("the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause").[17]

---

[17] This Court recently used broad language in an opinion addressing a challenge to a county court judge's determination of probable cause for continued detention of an individual who had been subject to a warrantless arrest. *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017). Explaining that challenges to pretrial detention fall within the scope of the Fourth Amendment, the Court relied on *Gerstein*, 420 U.S. at 114, 117, n.19, for the proposition that "a pretrial restraint on liberty is unlawful unless a judge (or grand

jury) first makes a reliable finding of probable cause." *Manuel*, 137 S. Ct. at 917. *Gerstein*, however, does not provide any support for a contention that a finding of probable cause by a properly constituted grand jury could be subject to judicial review based on challenges to its reliability. Instead, *Gerstein* simply acknowledged that an indictment, "'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." *Gerstein*, 420 U.S. at 117, n.19 (quoting *Ex parte U.S.*, 287 U.S. at 250 and citing *Giodenello v. U.S.*, 357 U.S. 480, 487 (1958)). To the contrary, this Court has repeatedly rejected requests for judicial review of a grand jury's determination of probable cause. *Supra*, 15-17.

Despite this Court's well-established precedent concerning the conclusiveness of a properly constituted grand jury's finding of probable cause to arrest, in a footnote responding to two Justices' dissenting opinion, the majority in *Manuel* confusingly stated that "[n]othing in the nature of the legal proceeding establishing probable cause makes a difference for purposes of the Fourth Amendment: Whatever its precise form, if the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights." *Manuel*, 137 S. Ct. at 920, n.8. The dissent recognized that a grand jury indictment constitutes a meaningfully different legal process than a county court judge's determination of probable cause at an initial appearance. *Id*. at 927-28 and 927, n.4. Justices Alito and Thomas expressed concern that the majority opinion will "inject much confusion into Fourth Amendment law" and that the opinion "has the potential to do much harm—by dramatically expanding Fourth Amendment liability under §1983 in a way that does violence to the text of the Fourth Amendment." *Id*. at 929. Indeed, the majority's statement disregards more than a century of this Court's precedent which identifies the grand jury as a unique, ancient, and independent institution whose proceedings are not subject to judicial review. *Infra*, 19-24.

The Court should grant this petition to clarify the scope of the *Manuel* opinion, address its potential for harm to the Fourth Amendment, and conform it to the Court's longstanding

### 3. No Adversarial Procedure is Necessary to Determine Probable Cause.

Notwithstanding this Court's express limitations on its holding in *Franks* and this Court's repeated rejections of adversarial challenges to grand juries' determinations of probable cause, the Fifth Circuit's holding in these appeals improperly provides the Bikers with an adversarial procedure to challenge the grand jury's determination of probable cause, based only on the Bikers' "rank speculation" that the grand jury relied on material false evidence or omissions in issuing their indictments. Pet.App.40-41; Pet.App.58; Pet.App.75-76; Pet.App.94-95. This Court should grant this petition because the Fifth Circuit's holding conflicts with multiple decisions of this Court.

This Court has long held that a grand jury's finding of probable cause is conclusive even though it does not arise via adversarial testing. Instead, "everybody agrees" that an adversarial hearing on an indictment's validity "is impermissible because it looks into and revises the grand jury's judgment." *Kaley*, 571 U.S. at 332, n.10 (citation omitted) (cleaned up); *see also*, *e.g.*, *Lawn v. U.S.*, 355 U.S. 339, 348-50 (1958) (petitioners were not entitled to a preliminary hearing to test their suspicion that the grand jury relied on improper evidence in issuing its indictment); *Costello*, 350 U.S. at 364 (rejecting a request that this Court exercise its supervisory power to establish a rule permitting

---

precedent concerning the nature and consequences of grand jury proceedings. *Supra*, 15-17; *infra*, 19-24.

defendants to challenge indictments on the grounds that they are not supported by adequate or competent evidence, explaining that such a requirement "would run counter to the whole history of the grand jury institution," and that "[n]either justice nor the concept of a fair trial requires such a change."); *Bevers v. Henkel*, 194 U.S. 73, 87-88 (1904) ("the defendant [in a removal proceeding] has no right to an investigation of the proceedings before the grand jury, or an inquiry concerning what testimony was presented to or what witnesses were heard by that body. In other words, he may not impeach an indictment by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action.").

Because probable cause is a low bar, this Court has long held that a grand jury's finding of probable cause "'can be made reliably without an adversary hearing.'" *Kaley*, 571 U.S. at 338 (quoting *Gerstein*, 420 U.S. at 120) (cleaned up); *see also*, *e.g.*, *Williams*, 504 U.S. at 51 (in a grand jury's assessment of probable cause for an arrest, "it has always been thought sufficient to hear only the prosecutor's side"). Adversary safeguards, including counsel, confrontation, cross-examination, and compulsory process for witnesses "are not essential for the probable cause determination required by the Fourth Amendment," because "[t]his issue can be determined reliably without an adversary hearing." *Gerstein*, 420 U.S. at 120. Instead, an informal procedure is justified by the lesser consequences of a probable cause determination and the nature of that

determination, which does not require fine resolution of conflicting evidence. *Gerstein*, 420 U.S. at 121.

### 4. Prosecutors Are Not Required to Present Exculpatory Evidence to Grand Juries.

The Fifth Circuit's reliance on *Franks* to justify a challenge to a grand jury's finding of probable cause based on allegations that a district attorney **omitted** material information from the grand jury proceeding is wholly unwarranted, because prosecutors have no obligation to present exculpatory evidence to grand juries. This Court should grant this petition because the Fifth Circuit's holding conflicts with this Court's decisions on this issue.

This Court expressly rejected the notion that federal courts can require prosecutors to present exculpatory evidence to a grand jury. *Kaley*, 571 U.S. at 338; *Williams*, 504 U.S. at 51. "Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with [the grand jury] system." *Williams*, 504 U.S. at 52. Indeed, this Court recognized severe limitations on any power federal courts may have to fashion rules of grand jury procedure and held impermissible "judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id.* at 50 (*see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345 (2006) (quoting *Dickerson v. U.S.*, 530 U.S. 428, 438 (2000) for the proposition that "'It is beyond dispute

that we do not hold a supervisory power over the courts of the several States.' ").

In *Williams*, this Court disagreed with the contention that a rule requiring prosecutors to present exculpatory evidence to a grand jury would assure the constitutional right to consideration by an independent and informed grand jury. "To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *Williams*, 504 U.S. at 51. Instead, this Court concluded that judicial review of facially valid indictments based on complaints that the prosecutor's evidence was incomplete or misleading " 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.' " *Williams*, 504 U.S. at 54-55 (quoting *Costello*, 350 U.S. at 364) (cleaned up).[18]

[18] Similarly, in denying an application to stay enforcement of a judgment pending disposition of a petition for certiorari, Justice Rehnquist rejected the contention that a prosecutor has a duty to correct testimony he knows to be false which was presented to a grand jury. Justice Rehnquist explained that the "applicants misconceive the function of the grand jury" whose indictments are not invalidated by consideration of evidence which would be inadmissible at trial, or which was obtained in violation of the Fourth Amendment. *Bracy v. U.S.*, 435 U.S. 1301, 1302-03 (1978).

### 5. The Exclusionary Rule Does Not Apply to Grand Juries.

The Fifth Circuit's reliance on *Franks* to authorize a federal court to disregard a grand jury's finding of probable cause is improper because the ultimate remedy in *Franks* was exclusion of evidence from the criminal trial, and the exclusionary rule does not apply to grand jury proceedings. This Court has repeatedly held that the presentation of tainted evidence to a grand jury is insufficient reason to disregard an indictment. This Court should grant this petition because the Fifth Circuit's holding conflicts with this Court's longstanding decisions.

This Court has long "rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of 'the potential injury to the historic role and functions of the grand jury.'" *Williams*, 504 U.S. at 50 (quoting *U.S. v. Calandra*, 414 U.S. 338, 349 (1974)); *see also*, *e.g.*, *U.S. v. R. Enterprises*, 498 U.S. 292, 298 (1991) (quoting *Calandra*, 414 U.S. at 349 and explaining that "[p]ermitting witnesses to invoke the exclusionary rule would 'delay and disrupt grand jury proceedings' by requiring adversary hearings on peripheral matters"). Indeed, this Court acknowledged in *Franks* that the exclusionary rule does not apply to evidence used in a grand jury proceeding. *Franks*, 438 U.S. at 166.

Although evidence obtained in violation of constitutional rights may be suppressed at a criminal trial, the presentation of such tainted evidence to a grand

jury does not provide a basis for invalidating an indictment. *U.S. v. Blue*, 384 U.S. 251, 255 and n.3 (1966) (citing *Costello*, 350 U.S. at 359, *Lawn*, 355 U.S. at 339); *see also Gelbard v. U.S.*, 408 U.S. 41, 60 (1972) (explaining that the rule from *Blue*, "is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government acquired incriminating evidence in violation of the law, even if the tainted evidence was presented to the grand jury") (internal quotations omitted, cleaned up).

### B. The Fifth Circuit Has Decided an Important Question of Law Which Has Not Been, But Should Be, Settled by This Court.

The Court should grant this petition because the Fifth Circuit has decided an important question of law which has not been, but should be, settled by this Court—whether *Franks* creates a civil cause of action under 42 U.S.C. §1983. Pet.App.8-21; Pet.App.27; SUP. CT. R. 10(c). This appeal presents an important federal question, because the Fifth Circuit's holding that *Franks* creates a cause of action under 42 U.S.C. §1983 will further increase the burgeoning civil litigation against law enforcement personnel which imposes unnecessary burdens on law enforcement personnel and their employers, distracting them from their responsibilities to protect the public.[19]

---

[19] Civil litigation against law enforcement personnel and their governmental employers relying on *Franks* has proliferated in recent years. Although only one case in the Fifth Circuit

mentioned *Franks* in the four years after this Court issued *Franks* (*Garris v. Rowland*, 678 F.2d 1264, 1273-74 (5th Cir. 1982)), at least thirty-seven cases involving *Franks* were addressed within the Fifth Circuit in 2020-21. *E.g.*, *Davis v. Hodgkiss*, 11 F.4th 329 (5th Cir. 2021); *Terwilliger*, 4 F.4th at 270; *Anokwuru v. City of Hous.*, 990 F.3d 956 (5th Cir. 2021); *Thornton v. Lymous*, 850 Fed. App'x 320 (5th Cir. 2021); *Davis v. City of Andrews*, 850 Fed. App'x 281 (5th Cir. 2021); *Loftin v. City of Prentiss*, 539 F. Supp. 3d 617 (S.D. Miss. 2021); *Crawford v. Sims*, No. H-20-3003, 2021 U.S. Dist. LEXIS 240679 (S.D. Tex. Dec. 16, 2021); *Garcia v. San Antonio*, No. SA-16-CV-01175-XR, 2021 U.S. Dist. LEXIS 158365 (W.D. Tex. Aug. 23, 2021); *Guidry v. Cormier*, No. 6:20-CV-01430, 2021 U.S. Dist. LEXIS 162955 (W.D. La. Mar. 8, 2021); *Laviage v. Fite*, No. H-20-84, 2021 U.S. Dist. LEXIS 248732 (S.D. Tex. Dec. 2, 2021); *B.B. v. Hancock*, No. SA-18-CV-1332-JKP, 2021 U.S. Dist. LEXIS 139394 (W.D. Tex. June 11, 2021); *Gonzales v. Hunt County Sheriff's Dep't*, No. 3:20-CV-3279-K, 2021 U.S. Dist. LEXIS 106879 (N.D. Tex. June 8, 2021); *Hodge v. Longview Police Dep't*, No. 6:20-cv-213, 2021 U.S. Dist. LEXIS 99438 (E.D. Tex. Apr. 30, 2021); *Poullard v. Gateway Buick GMC LLC*, No. 3:20-CV-2439-B, 2021 U.S. Dist. LEXIS 108568 (N.D. Tex. June 10, 2021); *Lucky Tunes #3, L.L.C. v. Smith*, 812 Fed. App'x 176 (5th Cir. 2020); *Forbes v. Harris County*, 804 Fed. App'x 233 (5th Cir. 2020); *McCullough v. Herron*, 838 Fed. App'x 837 (5th Cir. 2020); *Laymance v. Foster*, No. 6:19-CV-45-JDK-JDL, 2020 U.S. Dist. LEXIS 249161 (E.D. Tex. Dec. 22, 2020); *Roe v. Johnson County*, No. 3:18-cv-2497-B-BN, 2020 U.S. Dist. LEXIS 213254 (N.D. Tex. July 31, 2020); *Deshotel v. CardCash Exch., Inc.*, No. 6:19-0373, 2020 U.S. Dist. LEXIS 82794 (W.D. La. Apr. 2, 2020); *Anokwuru v. City of Hous.*, No. H-19-2209, 2020 U.S. Dist. LEXIS 98798 (S.D. Tex. Apr. 21, 2020); *Turner v. Criswell*, No. 4:19-CV-00226-ALM-CAN, 2020 U.S. Dist. LEXIS 23259 (E.D. Tex. Jan. 6, 2020); *Aubrey v. Ermatinger*, No. 3:19-CV-0056-B, 2020 U.S. Dist. LEXIS 229732 (N.D. Tex. Dec. 7, 2020); *Thomas v. Longview Police Dep't*, No. 6:19-cv-84, 2020 U.S. Dist. LEXIS 248038 (E.D. Tex. Nov. 3, 2020); *Phillips v. Whittington*, 497 F. Supp. 3d 122 (W.D. La. 2020); *Xie v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, No. H-19-5014, 2020 U.S. Dist. LEXIS 200418 (S.D. Tex. Oct. 7, 2020); *Redding v. Swanton*, No. 1-17-CV-00470-ADA, 2020 U.S. Dist. LEXIS 141419 (W.D. Tex. Aug. 7, 2020); *Yager v. Stroman*,

### 1. *Franks* Created a Prophylactic Rule, Not a Personal Constitutional Right.

On June 23, 2022, after the Fifth Circuit issued its opinion and denied Reyna's petition for rehearing en banc, this Court issued a decision which indicates that the Fifth Circuit erred in holding that *Franks* created a cause of action for damages under §1983. *Vega v. Tekoh*, 597 U.S. ___, 142 S. Ct. 2095 (2022). In *Vega*, this Court held that a violation of the *Miranda*[20] rules does not provide a basis for a claim under §1983, because the *Miranda* rules, while constitutionally based, are merely prophylactic rules geared toward safeguarding the Fifth Amendment right against compelled self-incrimination, and a violation of the *Miranda* procedure does not necessarily constitute a violation of the Fifth Amendment. *Vega*, 142 S. Ct. at 2101-02, 2106. Thus, a violation of the *Miranda* rules does not fall within §1983's provision creating a cause of action against a person who subjects another to the

---

No. 1-17-CV-00217-ADA, 2020 U.S. Dist. LEXIS 90240 (W.D. Tex. May 22, 2020); *Stallings v. Chavez*, No. 6-17-CV-00123-ADA, 2020 U.S. Dist. LEXIS 87694 (W.D. Tex. May 19, 2020); *Miller v. Stroman*, No. 1-19-CV-00475-ADA, 2020 U.S. Dist. LEXIS 84961 (W.D. Tex. May 14, 2020); *Harper v. Stroman*, No. 1-17-CV-00465, 2020 U.S. Dist. LEXIS 84956 (W.D. Tex. May 14, 2020); *Walker v. Stroman*, No. 1-17-CV-00372-ADA, 2020 U.S. Dist. LEXIS 77814 (W.D. Tex. May 4, 2020); *Mitchell v. Stroman*, No. 1-17-CV-00457-ADA, 2020 U.S. Dist. LEXIS 73267 (W.D. Tex. Apr. 27, 2020); *Rhoten v. Stroman*, No. 1:16-CV-00648-ADA-JCM, 2020 U.S. Dist. LEXIS 55717 (W.D. Tex. Mar. 31, 2020); *Eaton v. Stroman*, No. 1-16-CV-00871-ADA, 2020 U.S. Dist. LEXIS 2594 (W.D. Tex. Jan. 8, 2020).

[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

deprivation of any right secured by the Constitution. *Id*. at 2106.

The *Vega* Court also considered whether the *Miranda* rules constitute federal "law" within the ambit of §1983. *Id*. at 2106-08. Because the *Miranda* rules are judicially crafted prophylactic rules designed to safeguard a constitutional right, they apply only where their benefits outweigh their costs. *Id*. at 2107 (citing *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010)). The Court concluded that, "while the benefits of permitting the assertion of *Miranda* claims under §1983 would be slight, the costs would be substantial." *Id*. Finding that the prophylactic purpose of the *Miranda* rules is served by the suppression at trial of statements obtained in violation of *Miranda*, the Court determined that "[a]llowing the victim of a *Miranda* violation to sue a police officer for damages under §1983 would have little additional deterrent value, and permitting such claims would cause many problems." *Id*. For instance, permitting a §1983 claim based on *Miranda* would disserve judicial economy by requiring a federal judge or jury to adjudicate a question that had already been decided in a state court. *Id*. Additionally, permitting a §1983 claim based on *Miranda* could present many procedural issues, such as concerns about deference owed to the trial court's prior findings, application of harmless error rules, and availability of damages if the unwarned statement had not affected the outcome of the criminal case. *Id*. Based on these considerations, the Court refused to extend *Miranda* as a basis for a cause of action under §1983, explaining that "the

exclusion of unwarned statements should be a complete and sufficient remedy." *Id*. at 2107-08 (citation omitted).

The reasoning in *Vega* also applies to the question of whether the judicially created prophylactic rule from *Franks* created a cause of action under §1983. In *Franks*, the Court created a procedure intended to safeguard rights guaranteed by the Fourth Amendment. *Franks*, 438 U.S. at 155-56, 171-72. The *Franks* Court designed a procedure which, like *Miranda*, required the criminal trial court: (1) to make findings concerning whether law enforcement personnel had violated a constitutional right in connection with evidence that they obtained; and (2) provided as the remedy for such a violation, exclusion of any improperly obtained evidence from the criminal trial. *Id*.

As in *Vega* and *Miranda*, the prophylactic purpose of the *Franks* procedure is served by the suppression at the criminal trial of evidence obtained in violation of the Constitution. *Vega*, 142 S. Ct. at 2107. Similarly, allowing the victim of a *Franks* violation to sue law enforcement officials for damages under §1983 would have little additional deterrent value, and permitting such claims would cause comparable problems as those this Court identified in *Vega*, including disserving judicial economy and raising many difficult procedural issues. *Id*.

The sole remedy this Court created in *Franks* (and *Miranda*), exclusion of evidence from the criminal trial, is itself a prophylactic rule which was adopted to

effectuate constitutional rights and to deter unlawful conduct. *E.g.*, *Calandra*, 414 U.S. at 347 (citations omitted). The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect, not a personal constitutional right of the party aggrieved. *Calandra*, 414 U.S. at 348. The application of this remedial device is restricted to those areas where its remedial objectives are most efficaciously served. *Calandra*, 414 U.S. at 348. For the reasons identified in *Vega*, those objectives are most efficaciously served within the criminal proceedings, and not by means of a cause of action for damages under §1983. *Vega*, 142 S. Ct. at 2107.

Those remedial objectives would be particularly ill-served if the Court were to hold that *Franks* created a cause of action under §1983 when a properly constituted grand jury has issued indictments, as this Court has refused to apply the exclusionary rule to grand juries, finding that such an extension "would seriously impede the grand jury" because it would "precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." *Calandra*, 414 U.S. at 349; *see also id*. at 350 ("'Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.'") (quoting *U.S. v. Dionisio*, 410 U.S. 1, 17 (1973)).

The Court should grant this petition in order to address the important question of whether *Franks* created a cause of action for damages under §1983.

### 2. The Prophylactic Rule From *Franks* Does Not Apply When State-Provided Procedures Exceed Those Required by *Franks*.

The limited procedural right from *Franks* simply does not apply to the cases at bar, because the Bikers were afforded a procedure which exceeded the requirements identified in *Franks*.

In *Franks*, the Court provided a limited, conditional right to a hearing if a criminal defendant were able to make a substantial preliminary showing that a search warrant affidavit contained intentional or reckless falsehoods. *Franks*, 438 U.S. at 155-56, 167, 171-72. By contrast, in Texas, felony arrestees, such as the Bikers, have an **unconditional** right to an examining trial in connection with their arrests prior to indictment. TEX. CODE CRIM. P. §§16.01-16.17.[21] By means of an examining trial, arrestees can challenge the veracity of representations made in an affidavit supporting an arrest warrant. *Id*. at §16.01 (the judge presiding over the examining trial "shall proceed to examine into the truth of the accusation made"). In an examining trial, arrestees in Texas can also challenge

[21] Indeed, some Bikers who were arrested in connection with the Twin Peaks riot pursued examining trials which resulted in determinations that probable cause existed for their arrests for EIOCA. *E.g.*, Pet.App.270-77.

any omission of exculpatory evidence from an arrest warrant, and they can offer exculpatory evidence. Arrestees are permitted to make a statement, call witnesses, and examine witnesses. *Id*. at §§16.04, 16.06, 16.10, 16.11. The judge must make a probable cause determination within forty-eight hours of an examining trial. *Id*. at §16.17.

Under Texas criminal procedures, the Bikers did not need to make any preliminary showing to obtain examining trials in which they could have challenged the veracity of their arrest warrant affidavits, challenged any omission of evidence from their arrest warrant affidavits, and provided exculpatory evidence in an effort to demonstrate a lack of probable cause for their arrests.

The Bikers do not allege that they availed themselves of this procedure for challenging the veracity of their warrant affidavits.[22] Pet.App.147-210. Instead, they rested on their rights, were indicted for EIOCA, and, years later, initiated civil claims for money damages against the District Attorney. This Court's holding in *Franks* does not support such conduct.

The Court should grant this petition in order to address the important question of whether *Franks* applies when a state provides procedures which exceed the requirements this Court identified in *Franks*.

---

[22] Nor did the Bikers allege that they availed themselves of the procedure under *Franks* to challenge the veracity of their warrant affidavits.

### C. Alternatively, If *Franks* Authorizes Federal Courts to Disregard a Grand Jury's Finding of Probable Cause, This Court Should Identify the Applicable Standard and Resolve the Circuit Split on This Issue.

If the Court were to modify decades of its precedent concerning the nature and role of the grand jury as well as the conclusive effect of a grand jury's determination of probable cause and permit federal courts to impose an adversarial procedure to enable arrestees to challenge the basis for a grand jury's determination of probable cause, the Court should grant this petition, because circuit courts of appeals have entered decisions which conflict with respect to the standard to apply in such a circumstance. SUP. CT. R. 10(a).

Both the Fifth Circuit and the Sixth Circuit permit arrestees to pursue civil litigation challenging a grand jury's finding of probable cause when the arrestee alleges that the indictment was affected by material false statements or omissions which law enforcement officials made knowingly or recklessly. However, these courts apply different standards for determining when a grand jury's determination of probable cause can be disregarded.

Notwithstanding this Court's express rejection of the idea that federal courts can require prosecutors to present exculpatory evidence to a grand jury,[23] the Fifth Circuit requires that "all the facts" be presented to a grand jury for its finding of probable cause to be

[23] *Kaley*, 571 U.S. at 338; *Williams*, 504 U.S. at 51.

conclusive. *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988). When a civil plaintiff challenges an arrest based on allegations of material false statements or omissions in the arrest warrant affidavit, the Fifth Circuit does not treat a grand jury's finding of probable cause as conclusive unless the **civil defendant** demonstrates that all the facts were presented to the grand jury. *Winfrey v. Rogers*, 901 F.3d 483, 497 (5th Cir. 2018) (refusing to credit a grand jury's finding of probable cause because neither the plaintiff nor the defendant had shown whether certain information was presented to the grand jury).

By contrast, the Sixth Circuit explicitly begins with a presumption of validity of an indictment. The Sixth Circuit will disregard a grand jury's finding of probable cause only if the civil plaintiff shows that: (1) a law enforcement officer either knowingly or recklessly made false statements, or falsified or fabricated evidence; (2) the false statements and evidence, together with any misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for testimony. *Grogg v. Tennessee*, No. 18-5794, 2019 U.S. App. LEXIS 475, *6-7 (6th Cir. Jan. 7, 2019) (citing *King v. Harwood*, 852 F.3d 568, 588-89 (6th Cir. 2017)).

Neither of these standards comports with the burdens this Court imposed in *Franks*, in which the criminal defendant bore the burden to make a substantial showing, supported by a non-conclusory offer of proof, in order to obtain a hearing in the first place, and in

which the criminal defendant retained the burden of proof with respect to both the alleged falsehoods and the absence of probable cause at such a hearing. *Franks*, 438 U.S. at 155-56, 171-72.

Additionally, both standards disregard more than a hundred years' worth of this Court's precedent concerning the conclusiveness of a finding of probable cause issued by a properly constituted grand jury and the reliability of such a finding, even in the absence of adversarial procedures. *Supra*, 15-17, 19-24. If the Court were to expand *Franks* to permit civil plaintiffs to challenge a grand jury's finding of probable cause, the Court would need to develop a standard that would comport with this Court's longstanding recognition of the grand jury as an ancient, unique, independent, accusatory body.



## CONCLUSION

The Court should grant this petition in order to correct the appellate courts' errors in: (1) relying on *Franks* to permit lower courts to disregard conclusive probable cause findings made by properly constituted grand juries; (2) violating *Franks* by broadly expanding its application; and (3) violating *Vega* by identifying *Franks* as a civil cause of action under 42 U.S.C. §1983. Additionally, the Court should grant this petition to address the important question of whether *Franks* has any application when state-provided procedures exceed those identified in *Franks*. Finally, if this Court

were to determine that *Franks* authorizes federal courts to disregard grand juries' findings of probable cause, this Court should grant this petition to identify the standard applicable to such challenges.

Respectfully submitted,

THOMAS P. BRANDT
*Counsel of Record*
STEPHEN D. HENNINGER
LAURA O'LEARY
FANNING, HARPER, MARTINSON,
BRANDT & KUTCHIN, P.C.
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
(214) 860-0324
tbrandt@fhmbk.com
*Attorneys for Petitioners*