No. _____

In the Supreme Court of the United States

BRENT STROMAN, ET AL., 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 A WRIT OF CERTIORARI

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Questions Presented

This case involves issues relating to the arrest of respondents on the charge of engaging in organized criminal activity and the sufficiency of respondents' pleadings to overcome the individual petitioners' qualified immunity. On May 17, 2015, following a violent confrontation between rival motorcycle clubs (together with their affiliated support groups), which left nine people dead and at least twenty others wounded, law enforcement officers arrested 177 individuals on charges of engaging in organized criminal activity. The district court granted petitioners' motions to dismiss respondents' false arrest claims. The Fifth Circuit reversed and remanded, construing the holding of *Franks v. Delaware*, 438 U.S. 154 (1978)—previously considered by the Fifth Circuit as an exception to that court's independent intermediary doctrine—as giving rise to a separate cause of action under 42 U.S.C. § 1983. The lower court further applied its prior opinion in *McLin v. Ard*, 866 F.3d 682, 690 (5th Cir. 2017), to conclude that "mere allegations of taint" in the grand jury proceedings may be sufficient to survive dismissal "where the complaint alleges other facts supporting the inference" of taint.

The questions are:

1. Is the Fifth Circuit's decision declaring a so-called *Franks* violation to be a cause of action under 42 U.S.C. § 1983 in conflict with this Court's decisions in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) and *Malley v. Briggs*, 475 U.S. 335 (1986)?
2. Will the Fifth Circuit's decision—that "there is no requirement to show that each and every defendant

also tainted the secret grand jury deliberations"—result in the potential waiver of an officer's qualified immunity based on evidence of undisclosed testimony by an unidentified grand jury witness in contravention of this Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103 (1975), *Rehberg v. Paulk*, 566 U.S. 356 (2012), and *Ashcroft v. Iqba*l, 556 U.S. 662 (2009)?

3. Did the Fifth Circuit's decision—reversing the district court's dismissal of respondents' complaints as stating nothing more than conclusory allegations and rank speculation about what took place before the grand jury—depart from this Court's pleading standard as articulated in *Ashcroft v. Iqbal*, 556 U. S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544 (2007)?

Parties to the Proceedings

Petitioners (City Defendants) are Brent Stroman, Manuel Chavez, Robert Lanning, Jeffrey Rogers, Patrick Swanton, and City of Waco, Texas.

Respondents are John Wilson, John Arnold, Roy Covey, James Brent Ensey, Edgar Kelleher, Brian Logan, Terry S. Martin, Robert Robertson, Jacob Wilson, Mitchell Bradford, Richard Luther, John Craft, Daniel Johnson, Jason Dillard, Ronald Atterbury, 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, Robert Clinton Bucy, Matthew Alan Clendennen, Jorge Salinas, Cody Ledbetter, 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, Valdemar Guarjardo, Jr., Seth Tyler Smith, Keith McCallum, Matthew Folse, Joseph Ortiz, Burton George Bergman, Noe Adame, John Vensel, Diego Obledo, Marshall Mitchell, Blake Taylor, Christopher Rogers, 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, Paul Miller, James Caffey, Nathan Farish, Robert Nichols, George Rogers, and Bryan Harper.

County Defendants are Abelino "Abel" Reyna and McLennan County, Texas.

State Defendants are Steven Schwartz and Christopher Frost.

No non-governmental corporations are involved in this case.

Related Proceedings

United States District Court (W.D. Tex.):

Wilson v. Stroman, No. 1-17-cv-00453 (Apr. 6, 2020)

Lewis v. Stroman, No. 1-17-cv-00448 (Apr. 6, 2020)

Mitchell v. Stroman, No. 1-17-cv-00457 (Apr. 27, 2020)

Miller v. Stroman, No. 1-19-cv-00475 (May 14, 2020)

Harper v. Stroman, No. 1-17-cv-00465 (May 14, 2020)

United States Court of Appeals (5th Cir.)

Wilson v. Stroman, No. 20-50367 (Apr. 28, 2022)

consolidated with

Lewis v. Stroman, No. 20-50372 (Apr. 28, 2022)

Mitchell v. Stroman, No. 20-50380 (Apr. 28, 2022)

Miller v. Stroman, No. 20-50408 (Apr. 28, 2022)

Harper v. Stroman, No. 20-50453 (Apr. 28, 2022)

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The City of Waco, Texas, Brent Stroman, Manuel Chavez, Robert Lanning, Jeffrey Rogers, and Patrick Swanton respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in Cause Nos. 20-50367, 20-50372, 20-50380, 20-50408, and 20-50453, in accordance with this Court's Rule 12.4.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–21a) is reported at 33 F.4th 202.

The opinions of the district court, granting the defendants' motions to dismiss, are not published in the Federal Supplement but:

- *Wilson v. Stroman* is reproduced in the appendix (App., *infra*, 24a–40a).

- *Lewis v. Stroman* is reproduced in the appendix (App., *infra*, 41a–58a).
- *Mitchell v. Stroman* (App., *infra*, 59a–75a) is available at 2020 WL 1987922.
- *Miller v. Stroman* (App., *infra*, 76a–95a) is available at 2020 WL 2499757.
- *Harper v. Stroman* (App., *infra*, 96a–111a) is available at 2020 WL 2494623.

Jurisdiction

The judgments of the court of appeals were entered in Cause Nos. 20-50367, 20-50372, 20-50380, 20-50408, and 20-50453 on Apr. 28, 2022. A petition for rehearing was denied on June 9, 2022. App., *infra*, 22a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

> 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 probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable....

42 U.S.C. § 1983.

> (b) "Conspires to commit" means that a person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties....
>
> (d) "Criminal street gang" means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

TEX. PENAL CODE § 71.01(b), (d).

> A person commits an offense if ... as a member of a criminal street gang, the person commits or conspires to commit one or more of the following: (1) murder, capital murder [or] aggravated assault ....

TEX. PENAL CODE § 71.02(a).

Statement of the Case

A. Factual Background

As they did in their motion to dismiss, petitioners set out the background facts as pleaded by respondents—

On Sunday, May 17, 2015, members of the Bandidos and the Cossacks motorcycle clubs arrived as "hundreds of motorcycle enthusiasts" converged on the Twin Peaks restaurant in Waco, Texas. App., *infra*, 114a–115a (Wilson First Am. Compl. (Compl.) ¶¶ 31–32).[1] As alleged by respondents, law enforcement officers (both undercover and uniformed) were present on the scene—around the perimeter of the Twin Peaks restaurant—because of known friction, or tension, between the Bandidos and the Cossacks. *Id.* at 115a, 130a (Compl. ¶¶ 32, 97). Despite the presence of law enforcement, violence erupted leaving nine individuals dead and at least twenty others injured. *Id.* at 115a, 117a (Compl. ¶¶ 34, 51). After the altercation, firearms, knives, and other weapons were recovered from members or associates of the Bandidos and Cossacks. *Id.* at 156a (Compl. Ex. 1).

As respondents further allege, they were "arrested and charged with Engaging in Organized Criminal Activity based entirely on their presence at Twin Peaks and a predetermined criteria that essentially asked investigators to use the motorcyclists' clothing and personal effects such

[1] To streamline repetitive references to what might otherwise be identical allegations or holdings in twenty-two separate complaints and five separate orders and judgments, this Petition includes citations only to the record in *Wilson et al. v. Stroman et al.*, W.D. Tex. Case No. 1:17-cv-00453-ADA (C.A. No. 20-50367).

as keychains and bumper stickers to determine their membership in or even the loosest alleged affiliation with the Bandidos or Cossacks." *Id.* at 116a (Compl. ¶ 41).

Respondents filed these subsequently consolidated section 1983 actions, asserting that their arrests were unlawful. *Id.* at 112a. Each of the respondents was arrested pursuant to a warrant issued by a magistrate. *Id.* at 127a, 148a (Compl. ¶ 86, 217). Respondents attached a copy of the arrest warrant affidavit to their complaints. *Id.* at 154a–156a (Compl. Ex. 1). Respondents' allegations do not contest most of the contents of the arrest warrant affidavit. Notably, respondents repeatedly press the theme in their complaints that they "did not participate in any violence" and that they "were not involved in the violence," *Id.* at 115a, 116a, 131a (Compl. ¶¶ 36, 38, 41, 106)—but the arrest warrant affidavit does not assert that respondents personally committed the violent acts at Twin Peaks. *Id.* at 154a–156a. It is undisputed that respondents were charged with engaging in organized criminal activity—not capital murder, murder, or aggravated assault. *Id.* at 116a (Compl. ¶ 41).

When it comes to the actual crime charged—engaging in organized criminal activity—respondents' complaints attack the charge in the arrest warrant affidavit with wholly conclusory allegations that respondents were not members of a criminal street gang, as well as allegations (equally conclusory, but also speculative) that petitioners supposedly knew respondents were not members of a criminal street gang. *Id.* at 116a–117a, 128a, 130a–132a, 135a, 144a, 151a (Compl. ¶¶ 43–45, 88, 98, 100, 101, 108, 110, 130, 197, 229–230). Likewise, respondents' complaints deny—again in wholly conclusory form—that

any of them conspired to commit one or more of the underlying offenses requisite to engaging in organized criminal activity. *Id.* at 116a–117a, 125a–126a, 128a, 130a (Compl. ¶¶ 43, 82, 88, 97). And peppered throughout the complaints are purely conclusory assertions that probable cause did not exist or that petitioners did not believe probable cause existed to arrest the respondents. *Id.* at 116a–117a, 121a, 125a–126a, 132a, 146a (Compl. ¶¶ 43, 66, 80, 83, 109, 215).

Respondents' complaints acknowledge that law enforcement officers were positioned around Twin Peaks to observe the gathering when the violence broke out, that they subsequently conducted "hours and hours of interviews with the arrested individuals," and that they took "statements from hundreds of witnesses." *Id.* at 115a, 119a, 126a (Compl. ¶¶ 32–32, 59, 83). The only reasonable inference that can be drawn from the facts pleaded by respondents is that specific individuals at Twin Peaks were arrested based on the totality of the circumstances and "pre-determined criteria." *Id.* at 116a (Compl. ¶ 41) (complaining that criteria for arrest "essentially asked investigators to use the motorcyclists' clothing and personal effects such as keychains and bumper stickers to determine their membership in or even the loosest alleged affiliation with the Bandidos or Cossacks."). The respondents also allege that this "criteria" was decided completely by the district attorney's office. *Id.* at 124a (Compl. ¶ 75). Indeed, respondents' complaints go even further, reciting testimony from one of the criminal proceedings confirming that this "pre-determined criteria" was, in fact, applied. *Id.* at 124a n.3.

The 100 respondents in these consolidated cases were among those who were also indicted by a grand jury following their arrests.[2] *Id.* at 26a, 33a (Wilson D.C. Order).

B. Proceedings Below

1. Respondents brought suit under 42 U.S.C. § 1983, alleging that they were deprived of rights secured under the Constitution of the United States. *Id.* at 113a (Compl. ¶ 1). Thus, the basis of the district court's jurisdiction asserted by respondents was 28 U.S.C. § 1331.

Respondents sued three groups of Defendants: Brent Stroman, Manuel Chavez, Robert Lanning, Jeffrey Rogers, Patrick Swanton, and City of Waco, Texas (Petitioners – City Defendants); Abelino "Abel" Reyna and McLennan County, Texas (County Defendants); and Steven Schwartz and Christopher Frost (State Defendants).

The district court summarized the respondents' allegations as follows:

> They allege that the defendants violated their Fourth Amendment rights by obtaining arrest warrants based on a fill–in–the–name affidavit that lacked probable cause. Plaintiffs also allege that the defendants violated their Fourteenth Amendment due process right to be free from unlawful arrest. Plaintiffs allege that the defendants conspired to commit these violations.

Id. at 26a–27a (Wilson D.C. Order).

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[2] A separate set of cases, previously considered by the Fifth Circuit, involved 31 plaintiffs who were arrested on the same charge pursuant to a warrant issued by a magistrate but were not indicted. *See Terwilliger v. Reyna*, 4 F.4th 270 (5th Cir. 2021).

This consolidated appeal considers the final judgment in five separate actions in the district court, which in several instances further represents the district court's consolidation of separate proceedings—all arising out of the events that occurred at Twin Peaks. The allegations in the live complaints, as well as the district court's rulings, are nearly identical in all five district court actions.

The district court granted the City Defendants', the County Defendants', and the State Defendants' respective motions to dismiss in each of the five district court actions subsequently consolidated on appeal. In granting defendants' motions to dismiss, the district court held that respondents—asserting false arrest claims under the Fourth Amendment—could not also seek additional relief based on a Fourteenth Amendment substantive due process claim. *Id.* at 31a–32a (Wilson D.C. Order). The district court further held that the Fifth Circuit's independent intermediary doctrine applies in these cases and that, as a result, the respondents' Fourth Amendment claims for arrest without probable cause must fail. *Id.* at 34a, 39a.

2. Respondents appealed, and the Fifth Circuit reversed the district court's judgments, remanding the cases for further proceedings in accordance with its opinion. *Id.* at 1a. The Fifth Circuit held that the district court erred in requiring respondents to show that each defendant maliciously omitted evidence or misled the grand jury to overcome the independent intermediary doctrine. In reversing the district court's application of the independent intermediary doctrine, the Fifth Circuit took the "opportunity to clarify how the doctrine operates with respect to *Franks* (and *Malley*) claims, especially when two separate intermediaries are involved." *Id.* at 8a.

The Fifth Circuit further concluded that "there is no requirement to show that each and every defendant also tainted the secret grand jury deliberations." *Id.* at 18a. The Fifth Circuit also reversed the district court's judgment despite the lower court's separate conclusion—before even reaching the issue of malice—that respondents' conclusory allegations of taint were insufficient to meet the *Twombly/Iqbal* pleading standard. *Id.* at 10a–11a (C.A. Opinion); *id.* at 35a–38a (D.C. Order).

Reasons for Granting the Petition

A. The Decision Below Is Wrong

Review is warranted because the decision below is wrong. The court of appeals erred in treating a so-called *Franks* violation as a cause of action under 42 U.S.C. § 1983. Question one of this petition challenges the Fifth Circuit's attempt to "clarify" the law by treating an alleged *Franks* violation as a separate cause of action.

The Fifth Circuit also concluded that when applied to a grand jury indictment, the "taint exception" is just that—an exception to the independent intermediary doctrine—rather than a cause of action. App., *infra*, 12a. To invoke the taint exception, the court further concluded that a plaintiff need not plead that the actor who allegedly tainted the grand jury acted with "malice"; instead, a plaintiff adequately pleads that the taint exception applies by alleging that the grand jury has been misled in a fashion similar to that necessary to adequately plead a *Franks* claim—i.e., by alleging that an actor "deliberately or recklessly" included a material false statement or omission in information presented to the intermediary. *Id.* at 15a–18a. This petition does not take issue with the lower court's

holding that an allegation of taint in the grand jury does not support a cause of action, or that malice is not required to establish the taint exception to the independent intermediary doctrine.

Instead, question two challenges the Fifth Circuit's decision—that "there is no requirement to show that each and every defendant also tainted the secret grand jury deliberations," *id.* at 14a—because it permits the potential waiver of an officer's qualified immunity based on evidence of undisclosed testimony of some other unidentified grand jury witness in contravention of this Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103 (1975), *Rehberg v. Paulk*, 566 U.S. 356 (2012), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The lower court further erred in reversing the district court's judgment dismissing respondents' claims because their conclusory allegations and rank speculation about what took place before the grand jury do not satisfy the *Twombly/Iqbal* pleading standard. Question three challenges the Fifth Circuit's perpetuation of its prior error in *McLin*, permitting "mere allegations of taint" to overcome a grand jury's determination of probable cause "where the complaint alleges other facts supporting the inference." App., *infra*, 18a (citing *McLin v. Ard*, 866 F.3d 682, 690 (5th Cir. 2017)).

1. *This Court's decision in Franks v. Delaware, 438 U.S. 154 (1978), does not provide the basis for a claim under 42 U.S.C. § 1983.*

In *Vega v. Tekoh*, 597 U.S. ___, 142 S. Ct. 2095, 2101 (2022), this Court held that a violation of the *Miranda* rules does not provide a basis for a claim under section

1983. The Court in *Vega* pointed out that at no point in the *Miranda* opinion did the Court state that the violation of its new rules constituted a violation of the Fifth Amendment right against self-incrimination. "Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation." *Id.* at 2102 (citing *Miranda v. Arizona*, 384 U. S. 436, 439 (1966)).

The Court in *Vega* concluded that the rules adopted in *Miranda* do not support a freestanding cause of action under section 1983. *Id.* at 2101. Likewise, the *Franks* rules do not support a freestanding cause of action.

In this case, the court of appeals concluded that "the *Franks* violation with respect to the magistrate's warrant is the plaintiffs' cause of action." App., *infra*, 12a. By contrast, the court concluded that the "taint exception" to the independent intermediary doctrine, when applied to a grand jury indictment, "is not a cause of action—it is an exception to a doctrine that *insulates* an official who would otherwise be liable for a false arrest." *Ibid.* (emphasis in original).

The court's determination that a *Franks* violation is the plaintiffs' cause of action is new ground for the Fifth Circuit, which as recently as *Terwilliger v. Reyna*, 4 F.4th 270, 281 (5th Cir. 2021) (a related case arising out of the same incident at Twin Peaks), considered a *Franks* violation to be an exception to that court's independent intermediary doctrine.

As petitioners argued in the courts below, *Franks*, like *Malley*, is an exception that should be applied at the qualified immunity stage of the analysis, C.A. ROA 20-50367.644–648 (City Defs.' Mot. to Dismiss 9, 11, 13);

and respondents' complaints do not overcome qualified immunity because, under the totality of the circumstances, it was objectively reasonable for an officer to believe, in light of clearly established law, that there was a fair probability that respondents were members of a criminal street gang and engaged in a conspiracy to commit capital murder, murder, or aggravated assault—*i.e.*, probable cause to arrest. City Appellees' C.A. Br. 10–11, 35–57.

The Fifth Circuit previously held—albeit in an unpublished opinion—that, even in the context of an alleged *Franks* violation, it is the Fourth Amendment that sets the standard for a section 1983 claim for arrest without probable cause. As the court held in *Jones v. Perez*, "an arrest is reasonable when 'there is probable cause to believe that a criminal offense has been or is being committed,' *warrant or no warrant*." 790 Fed. Appx. 576, 580 (5th Cir. 2019) (emphasis added) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)).

In *Malley v. Briggs*, 475 U.S. 335 (1986), the constitutional violation alleged was whether a defendant police officer caused the plaintiffs to be arrested without probable cause. The Court's consideration of the officer's actions in presenting a judge with a complaint and supporting affidavit was entirely in the context of a qualified immunity analysis. *Id.* at 337. According to the Court, "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341. Only where the warrant application is so lacking in indicia of probable cause

as to render official belief in its existence unreasonable, [*United States v. Leon*, 468 U.S. 897, 923 (1984)], will the shield of immunity be lost." *Id.* at 344–345.

Of course, *Franks v. Delaware*, 438 U.S. 154 (1978), like *Leon*, was a criminal case. To the extent *Franks* has any application in a section 1983 claim, it is in the context of evaluating qualified immunity (as in *Malley*), and then only with respect to a well-pleaded complaint that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and that the allegedly false statement is necessary to the finding of probable cause. *See Franks*, 438 U.S. at 155–156. The Court in *Franks* held that, in certain circumstances, a challenge to a warrant's veracity must be permitted in a criminal proceeding. *Id.* at 164. But "[a]llegations of negligence or innocent mistake are insufficient." *Id.* at 171.

Additionally, the Fifth Circuit has extended application of Franks to "material omissions" in warrant affidavits. *See Terwilliger*, 4 F.4th at 281. But, nowhere in the *Franks* opinion, or this Court's subsequent cases citing *Franks*, have "material omissions" been recognized as a basis for challenging the veracity of a warrant affidavit.

As petitioners reminded the court below during oral argument, it remains important—in considering the probable cause question—that the plaintiffs also have the burden to plead sufficient facts to overcome the individual defendants' qualified immunity. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (holding that plaintiff must plead facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct) (citing

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Ultimately the court of appeals in this case issued an opinion that makes only a single reference to qualified immunity—in a footnote acknowledging this Court's decision in *Malley* as "qualified immunity caselaw." App., *infra*, 1a, 15a–16a, 16a n.6.

If reasonable officers could differ on the lawfulness of a defendant's actions, the defendant is entitled to qualified immunity. *See Malley*, 475 U.S. at 341. For the individual petitioners, including Detective Chavez who signed the warrant affidavits, the objectively reasonable standard demands that the warrant affidavit make a factual showing sufficient to comprise "probable cause." *Franks*, 438 U.S. at 164. As the Court in *Franks* explained, this showing (in the warrant affidavit) must be *truthful* in the sense that the information put forth is believed or appropriately accepted by the affiant as true. *Id.* at 165. Thus, in the context of a civil case under section 1983, officers are entitled to qualified immunity unless the plaintiffs plead facts (not rank speculation and mere conclusions) showing that, in light of clearly established law, no reasonable officer could have believed or accepted as true the information presented to the magistrate as the basis for a finding of probable cause.

The gravamen of respondents' complaint is that no reasonable officer could believe that probable cause existed to arrest individual respondents for engaging in organized criminal activity based on their presence at Twin Peaks—the scene of a brutal conflict between rival motorcycle gangs—wearing signs and symbols identifying each of them as a member or associate of the Bandidos or Cossacks. App., *infra*, 116a (Compl. ¶ 41). As the court below

acknowledged, it is not enough for the respondents to simply deny membership in a criminal street gang or to deny that their motorcycle club was a criminal street gang—they must point to misrepresented facts, not legal conclusions. *Id.* at 20a–21a n.8. Moreover, to overcome qualified immunity, respondents were required to plead facts showing that no reasonable officer could believe that the signs and symbols they were wearing or otherwise displaying fairly identified them as a member or associate of the Bandidos or Cossacks; or that no reasonable officer facing the totality of the circumstances—including the convergence of "hundreds" of motorcyclists at the site of a pre-planned "meeting," where both undercover and uniformed officers "were located around the perimeters of the Twin Peaks restaurant," *id.* at 114a–115a, the admitted tension between two rival motorcycle gangs, *id.* at 115a, 130a, and the ensuing gun fight that left nine people dead and at least twenty wounded, *id.* at 117a—could reasonably infer participation in a conspiracy by those present displaying gang colors. *See United States v. Portillo*, 969 F.3d 144, 156, 159, 167, 178 (5th Cir. 2020) (Higginson, J.) (recognizing the role of support clubs as a "stepping stone" to full membership in motorcycle clubs like the Bandidos; acknowledging violent altercations between Bandidos and Cossacks; noting that Bandidos violently confiscate patches worn by disloyal members; and holding that agreement, guilty knowledge, and participation in conspiracy all may be inferred from the development and collation of circumstances, including … defendant's presence and association with other members of the conspiracy), *cert. denied*, 141 S. Ct. 1275 (2021).

In *Jones,* a prior panel of the Fifth Circuit, considering a *Franks* claim in a civil case, enumerated the qualified immunity analysis as three steps: (1) whether the defendant knowingly, or with reckless disregard for the truth, provided the magistrate with false information; (2) whether, after reconstructing a problematic probable cause affidavit by excising the falsehoods (and inserting the material omissions), the warrant would be unsupported by probable cause (in other words, did the defendant lie to the magistrate; and, if so were those lies necessary to obtain the warrant?); and (3) whether any reasonably competent officer possessing the information the officers had at the time the officer swore the warrant affidavit could have concluded that a warrant should issue (in other words, did the officer have information establishing probable cause, whether or not that information was included in the warrant?). *Jones*, 790 Fed. Appx. at 579–580.

The controlling question, then, is whether a reasonable officer could believe that probable cause existed to arrest the respondents.

Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as the Court sometimes puts it, in "objective good faith." *See Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Leon*, 468 U.S. at 922–923). The Court in *Messerschmidt* recognized that *Malley* creates an exception to the "shield of immunity" otherwise conferred by the warrant when "it is obvious that no reasonably competent officer would have concluded that

a warrant should issue." *Id.* at 547 (quoting *Malley*, 475 U.S. at 341). The threshold for establishing this exception is high, and the Court began its analysis with the usual qualified immunity analysis—whether under the circumstances set forth in the affidavit, an officer could reasonably conclude that there was a "fair probability" that the scope of the warrant was reasonable. *Id.* at 547, 548–549. In concluding that it was not unreasonable—considering the facts of the crime at issue—for an officer to believe that there was probable cause to search for all firearms in the house, the Court in *Messerschmidt* also considered the following:

> Messerschmidt submitted the warrants to his supervisors—Sergeant Lawrence and Lieutenant Ornales—for review. Deputy District Attorney Janet Wilson also reviewed the materials and initialed the search warrant, indicating that she agreed with Messerschmidt's assessment of probable cause. Finally, Messerschmidt submitted the warrants to a Magistrate. The Magistrate approved the warrants and authorized night service.

Id. at 543 (citations omitted). According to the Court, the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the Magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. *Id.* As the Court observed, a conclusion that "no officer of reasonable competence" would have requested the warrant "would mean not only that Messerschmidt and Lawrence were 'plainly

incompetent,' but that their supervisor, the deputy district attorney, and the Magistrate were as well." *Id.* at 554 (citation omitted).

Likewise, in this case, a finding that no reasonable officer would have requested a warrant for each of the respondents would mean not only that the individual petitioners were "plainly incompetent," but that their supervisors, the district attorney, the magistrate, the grand jury, the state district court conducting an examining trial, and the Waco Court of Appeals were as well. *See Ex parte Pilkington*, 494 S.W.3d 330, 338–339 (Tex. App.—Waco 2015) (orig. proceeding) (holding, in a habeas corpus appeal arising out of the Twin Peaks incident, that it was reasonable for the magistrate to infer "an agreement constituting conspiring to commit" the offense and an overt act in pursuance of the agreement from the facts in the affidavit, including the criminal defendants' actions by showing up at Twin Peaks, "wearing their distinctive signs or symbols identifying each of them as a member of a criminal street gang, along with other members of a criminal street gang"; and that it was further reasonable for the magistrate to infer from their presence "wearing their distinctive signs or symbols, and from the profusion of weapons at the scene and the subsequent violence that each of them performed an overt act by either encouraging, soliciting, directing, aiding, or attempting to aid the commission of the underlying offenses of capital murder, murder, or aggravated assault") (citing TEX. PENAL CODE § 71.01(b)). Marcus Pilkington was subsequently indicted while his motion for rehearing in the Waco Court of Appeals was pending. As a result, the state appellate court dismissed the motion for rehearing as moot because

Pilkington's indictment "establishes probable cause as a matter of law." *Ex parte Pilkington*, No. 10-15-00218-CR, 2015 Tex. App. LEXIS 13144 (Tex. App.—Waco Dec. 23, 2015) (on rehearing).

In *Ashcroft v. al-Kidd*, 563 U.S. 731, 740 (2011), this Court held that because individualized suspicion was not at issue and al-Kidd did not assert that his arrest would have been unconstitutional *absent the alleged pretextual use of the warrant*, there was no Fourth Amendment violation. This holding confirms that it is the lack of probable cause, not an improper motive for obtaining a warrant, that gives rise to cause of action for violating the Fourth Amendment. And when it comes to respondents' complaint that issuance of the warrants was not supported by individualized suspicion in this case, they must still plead facts to overcome the individual officers' qualified immunity. As this Court reiterated in *al-Kidd*, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 743 (citing *Malley*, 475 U.S. at 341). As was the case with Attorney General Ashcroft, the individual petitioners in this case likewise deserve neither label, not the least because their supervisors, the district attorney, the magistrate, the grand jury, the state district court conducting an examining trial, and the Waco Court of Appeals agreed with their judgment in a case of first impression. *See id.* Accordingly, the individual petitioners deserve qualified immunity.

2. *By allowing the alleged grand jury testimony of an unidentified witness to extinguish the qualified immunity of all other officers, the Fifth Circuit's decision conflicts with this Court's holdings in Gerstein v. Pugh, 420 U.S. 103 (1975), and Rehberg v. Paulk, 566 U.S. 356 (2012), as well as Ashcroft v. Iqbal, 556 U.S. 662 (2009).*

The Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), made clear that the plaintiff must plead that "each Government-official defendant, through the official's own individual actions, has violated the Constitution."

The court below concluded that "while each defendant must fall within the scope of liability for the *Franks* violation alleged (centering on the arrest warrant obtained from the magistrate), there is no requirement to show that each and every defendant also tainted the grand jury deliberations." App., *infra*, 14a. This error would result in the potential waiver of an officer's qualified immunity based on the acts (or omissions) of another party in contravention of this Court's requirement that the plaintiff plead that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *See Iqbal* at 676.

Respondents have failed to plead facts in support of their conclusory and speculative allegations of taint to overcome the probable cause conclusion arising from the indictments. Specifically, respondents' complaints reveal that they do not know what testimony was given before the grand jury; they do not know who testified before the grand jury; and there is no transcript of the grand jury proceedings. App., *infra*, 36a (D.C. Order). As the district

court noted, respondents are simply guessing at what took place before the grand jury. *Ibid.* Thus, the district court properly concluded that respondents' allegations regarding what was presented to the grand jury are nothing more than "rank speculation." *Id.* at 37a. Respondents make an uninformed guess that Detective Chavez testified before the grand jury, and then speculate about the testimony Chavez supposedly would have given. *Id.* at 136a (Compl. ¶¶ 135–136). Even if respondents were correct in guessing that Detective Chavez testified, Detective Chavez would have absolute witness immunity for such testimony. *Rehberg*, 566 U.S. at 369-70. Furthermore, any such grand jury testimony—if it existed—could not be used to support respondents' section 1983 action or to rebut probable cause. *See id.*

Furthermore, application of a "taint exception" to a grand jury indictment conflicts with this Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Rehberg v. Paulk*, 566 U.S. 356 (2012).

In *Gerstein*, 420 U.S. at 117 n.19 (1975), the Court held that a grand jury indictment "conclusively determines the existence of probable cause." The indictment renders moot any questions concerning the prior arrest and detention.

The Court in *Rehberg* held that grand jury witnesses, including law enforcement officers, have absolute immunity from any section 1983 claim based on their testimony. 566 U.S. at 369. *Rehberg* also prohibits the use of evidence of the grand jury witness's testimony to support any other section 1983 action. *Id.* The distinction the court below seeks to make—that the proposed use of such evidence in this case is not offered *in support of* a section

1983 action, but instead to destroy any defendant officer's ability to rely on a resulting indictment as establishing probable cause, App., *infra*, 19a n.7—is merely another way to *circumvent the rule* precluding the use of grand jury evidence in support of a section 1983 action, a result the Court expressly sought to avoid in *Rehberg*. 566 U.S. at 369.

The facts, as alleged by respondents, were such that a reasonably competent officer was justified in finding probable cause based upon an understanding of the Texas Penal Code, the officers' assessment of the scene of the violent confrontation that left nine people dead and at least twenty others wounded, and information reasonably known to the officers about the rival motorcycle gangs (again as alleged by respondents). In these cases, the grand jury indictments separately, and conclusively, establish that probable cause existed to arrest respondents.

3. The Fifth Circuit's application of its prior decision in McLin v. Ard, 866 F.3d 682, 690 (5th Cir. 2017), holding that "mere allegations of 'taint' … may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference," cannot be reconciled with this Court's Twombly/Iqbal pleading standard.

To survive a motion to dismiss, a complaint must allege sufficient facts, accepted as true, to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a complaint contains well-pleaded facts that "do not permit the court to infer more than the mere possibility of misconduct," the complaint stops short of

plausibility and does not show the plaintiff is entitled to relief. *Id.*

Nevertheless, in *McLin v. Ard*, 866 F.3d 682, 690 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 739 (2018), the Fifth Circuit held that what otherwise might appear to be "mere allegations of taint" may be sufficient to survive dismissal "where the complaint alleges other facts supporting the inference" of taint.

The Fifth Circuit took another wrong turn in *Winfrey v. Rogers*, 901 F.3d 483, 489–490, 496–497 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1549 (2019), in placing the burden on the defendant asserting the independent intermediary doctrine—at the summary judgment stage—to prove that "*all the facts* are presented to the grand jury." (emphasis in original); *see also Winfrey v. Johnson*, 766 Fed. Appx. 66 (5th Cir.), *cert. denied*, 140 S. Ct. 377 (2019). As in this case, *Winfrey* involved both a *Franks* challenge to a warrant affidavit and a claim that the taint exception precluded application of the independent intermediary doctrine to a subsequent grand jury indictment.

The Fifth Circuit's error in the *Winfrey* cases was compounded when, on remand, the district court limited the evidence presented to a jury to "the issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavits when seeking arrest warrants for the Winfreys"; thus, disregarding further consideration of any other qualified immunity issues, including application of the independent intermediary doctrine to the grand jury indictment. *Winfrey v. San Jacinto Cnty.*, Nos. 4:10-CV-1896 & 4:14-CV-04482020, U.S. Dist. LEXIS 150836, at *5 (W.D. Tex. Aug. 20, 2020), *aff'd*, No. 20-20477, 2021 U.S. App.

LEXIS 33652 (5th Cir. Nov. 12, 2021, revised, Feb. 17, 2022), *petition for cert. filed*, (May 18, 2022) (No. 21-1466). The Fifth Circuit affirmed in an unpublished opinion on the summary calendar, offering no explanation regarding how their prior holding that Johnson was not entitled to summary judgment on the independent intermediary doctrine—presumably because a fact issue existed on the taint exception—was somehow converted into a determination as a matter of law against Johnson, barring resolution at trial of the independent intermediary doctrine's application to the grand jury indictment. *Winfrey*, 2021 U.S. App. LEXIS 33652, at *1.

In this case, as in *McLin*, the Fifth Circuit expressed concern that "it is understandably difficult for a plaintiff to know what was said—or wasn't said—to the grand jury absent any form of discovery." App., *infra*, 18a. Although the court below acknowledges that "that reality doesn't excuse pleading requirements" the court never offers a satisfactory explanation regarding how its suggestion—"that allegations about what was presented or omitted in the grand jury room will in some sense be speculative"—*id.* at 18a–19a, can be reconciled with the *Twombly/Iqbal* pleading standard. Instead, the court applies an alternative standard—that "plaintiffs like the ones here will need to allege 'other facts supporting the inference' of what they allege to have occurred in the grand jury room." *Id.* at 19a (citing *McLin*, 866 F.3d at 690). The court then noted that "plaintiffs allege that specific representations and omissions that were made to the magistrate were also made to the grand jury and they allege 'other facts' that support that inference." *Id.* at 20a. The court's opinion summarizes these supposed allegations of "other facts"—

more accurately described by the district court as "rank speculation"—as:

- respondents' allegation that some of the same officials alleged to have participated in preparing the warrant affidavit testified before the grand jury and made similar representations and omissions to the grand jury as they made to the magistrate;
- respondents' allegation that the same officials testified during public "examining trials" related to the Twin Peaks arrests and that this testimony also resembled the representations made to the magistrate; and
- respondents' allegations that video evidence was withheld from the grand jury, similar to how the petitioners allegedly withheld exculpatory video evidence from the magistrate.

Id. at 19a–20a. The Fifth Circuit remanded these cases for the district court to review the complaints and determine whether they sufficiently pleaded "other facts"—presumably of the type summarized above—that would support an inference that specific misrepresentations or omissions were made to the grand jury. Because the district court had already concluded that respondents' allegations were too speculative and conclusory to support such a claim, the court of appeals erred in reversing the judgment. Requiring the district court to indulge the suggested inferences cannot be reconciled with this Court's *Twombly/Iqbal* pleading standard.

Respondents complain that the only logical or plausible explanation for the indictments returned by the grand

jury is that they were misled by the use of false and inaccurate testimony. *Id.* at 138a (Compl. ¶ 142). Where a person's alleged grand jury testimony is unknown, an argument that the grand jury witness "must have testified falsely to the grand jury amounts to rank speculation." *See Rothstein v. Carriere*, 373 F.3d 275, 284 (2nd Cir. 2004).

Regarding any allegation that exculpatory evidence was withheld from the grand jury, a prosecutor has no duty to disclose exculpatory evidence to the grand jury, *United States v. Williams*, 504 U.S. 36, 51–55 (1992). Accordingly, an allegation that defendants failed to present allegedly exculpatory video evidence to the grand jury is insufficient to establish a constitutional violation. *See also In re Grand Jury Proceedings 198.G.J.20*, 129 S.W.3d 140 (Tex. App.—San Antonio 2003, pet. denied) (holding that, because Texas law imposed no duty on prosecutors to present exculpatory evidence to the grand jury, there could not be a particularized need for discovery of the evidence sought by the former criminal defendant in his federal civil rights lawsuit); *see also Robinson v. Twiss*, No. SA-01-CA-0289-RF, 2003 U.S. Dist. LEXIS 26085, at *10 n.24, 2003 WL 23879705 (W.D. Tex. July 9, 2003) ("The absence of a duty to present exculpatory material to the grand jury can hardly give rise to a constitutional violation for failure to do so"; but declining to resolve the tension between *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988), and *In re Grand Jury Proceedings*). In the absence of a duty to present allegedly exculpatory video evidence to the grand jury, the failure to do so cannot taint the grand jury proceedings. Moreover, any allegation that video evidence would show that individual respondents did not participate in the violence is simply not a required

element of Engaging in Organized Criminal Activity. *See* TEX. PENAL CODE § 71.02(a) (imposing criminal liability for conspiring to commit an offense); *see also id.* § 71.01(b) ("An agreement constituting conspiring to commit may be inferred from the acts of the parties.").

Respondents' allegations of taint fail to meet the *Twombly/Iqbal* standard, let alone overcome the presumption of regularity applicable to an indictment. Every allegation of grand jury taint in respondents' complaints is mere conclusion and speculation. This Court has not authorized a deviation from the pleading standard for allegations of taint. Creation of a pleading standard that would allow conclusory assertions and pure speculation to state that the probable cause established by the indictment was tainted would be in direct derogation of the Court's holdings. "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process …." *Twombly*, 550 U.S. at 559.

B. The Questions Presented Warrant Review

This Court has steadfastly applied the *Twombly/Iqbal* pleading standard and required qualified immunity questions to be resolved at an early stage of litigation. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 231–232 (2009).

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). And, of course, courts have discretion to decide which of the two prongs

of the qualified immunity analysis to address first. *See Pearson*, 555 U.S. at 236.

As this Court instructed in *Wesby*, when assessing probable cause, the court (1) must consider the totality of the circumstances rather than view each fact in isolation; and (2) should not dismiss outright circumstances that are "susceptible of innocent explanation"—i.e., probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts. *District of Columbia v. Wesby*, 583 U.S. ___, 138 S. Ct. 577, 588 (2018).

"Clearly established" means that, at the time of the officer's or official's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *See Ashcroft v. al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Court in *Wesby*, 138 S. Ct. at 590, held that a legal principle must be clear enough that *every reasonable officer or official* would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know. *See id.* at 592. Moreover, the "clearly established" standard also requires that the legal principle clearly prohibit the state actor's conduct in the particular circumstances before him. *Id.* at 590. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* As noted in *Wesby*, the Court has repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Id.* "This inquiry

'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2014)). The relevant inquiry is whether existing precedent placed the conclusion that the officer or official acted unreasonably in these circumstances "beyond debate." *Id.* at 12. To be "clearly established," a right must be one that is "sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right." *Id.* at 11 (emphasis added).

It is not clearly established that the type of probable cause espoused by respondents in this case would govern a situation where multiple persons are involved in a deadly melee and appear from the totality of the facts and circumstances to have been acting as a unit or competing units. *See Callahan v. Unified Gov't of Wyandotte Cnty.*, 806 F.3d 1022, 1029–1030 (10th Cir. 2015) ("We cannot ask officers to make a legal determination—that law professors probably could not agree upon—without any guidance from the courts and then hold them liable for guessing incorrectly."). *See also Carr v. District of Columbia*, 587 F.3d 401, 408 (D.C. Cir. 2009) ("A requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot"; "[t]o satisfy appellees' suggested standard of proof would require virtually as many officers as rioters ....").

Respondents acknowledge, in their complaints, the factual basis—i.e., the criteria—for the warrant issued against them. App., *infra*, 116a, 124a, 154a–156a (Compl. ¶¶ 41, 77, Ex. 1). Significantly, the Fifth Circuit in *Terwilliger* resolved in favor of petitioners the basic legal theory

supporting probable cause (and, thus, qualified immunity)—that "the events of the day" were sufficient for officers to draw conclusions, reasonably and objectively, "[t]hat members or associates of the Bandidos and Cossacks instigated and were involved in the Twin Peaks shootout, and that their conduct rose to the level of violating the EIOCA." *See Terwilliger*, 4 F.4th at 282.

Thus, respondents' complaint that petitioners lacked individualized suspicion to seek an arrest warrant against each respondent is, in reality, a complaint about the discretionary determination by officers that the totality of the facts and circumstances the officers faced supported a belief that a *fair probability* existed that each of the individual respondents were displaying signs and symbols associated with the Bandidos and their affiliates or the Cossacks and their affiliates and that each of the respondents conspired to commit an offense and performed an overt act by either encouraging, soliciting, directing, aiding, or attempting to aid the commission of the underlying offenses. *See Pilkington*, 494 S.W.3d at 338–339. Furthermore, respondents are complaining about the officers' discretionary determinations despite the absence of any law clearly establishing that *no reasonable officer* could have believed probable cause existed under the totality of the circumstances: a large gathering of rival motorcycle clubs and their associates was the scene of deadly violence, people came to the event from all over the state wearing patches and colors showing support for the rival gangs, there was no shortage of weapons, nine people died, and at least twenty others were injured. If reasonable officers could differ on the lawfulness of an officer's actions, the petitioners are entitled to qualified immunity. *See Malley*,

475 U.S. at 341. Denying the petitioners qualified immunity based upon "mere allegations" and "rank speculation" that some unidentified witness might have tainted the grand jury would significantly erode the protection of qualified immunity and deny the petitioners a resolution of the qualified immunity question at an early stage of litigation. *See Pearson*, 555 U.S. at 231–232 (2009).

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The Court should, therefore, grant certiorari to review the Fifth Circuit's decision declaring a so-called *Franks* violation to be a claim actionable under 42 U.S.C. § 1983.

Moreover, the Court should grant the writ because the Fifth Circuit's decision—that "there is no requirement to show that each and every defendant also tainted the secret grand jury deliberations"—would lead to a waiver of qualified immunity, in violation of *Iqbal*, based on something other than an officer's own individual actions; and it would also permit a waiver of qualified immunity based on an allegation speculating about the testimony of an unidentified grand jury witness in contravention of this Court's holdings, in *Gerstein* and *Rehberg*, that a grand jury indictment conclusively establishes probable cause and that evidence of grand jury testimony cannot be used to support a section 1983 action.

In addition, the Court should grant the writ because the Fifth Circuit's reversal of the trial court's order—separately determining, before even reaching the malice issue, that respondents' conclusory allegations and rank speculation about what took place before the grand jury are not sufficient to survive dismissal—is in conflict with this Court's decisions in *Twombly* and *Iqbal*.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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