No. 22-80

IN THE

Supreme Court of the United States

FRANK NAPOLITANO, *et al.*,

Petitioners,

v.

LAURENCE WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Given the unique facts of this case—in which Petitioner police officers prepared an arrest warrant affidavit that omitted material exculpatory information and that one of them described as "Bogus"—was the Second Circuit correct to affirm the District Court's interlocutory order denying Petitioners' motion for summary judgment on grounds that a reasonable jury could conclude they are not entitled to qualified immunity?

Should certiorari be denied in this interlocutory appeal, where Petitioners ultimately seek review of the District Court's finding that genuine issues of material fact precluded summary judgment, and where the Second Circuit's decision tracks this Court's precedent and the decisions of other circuits?

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INTRODUCTION

No one would say there is even arguable probable cause to charge a bank teller with robbery because he participated in the crime by handing over money from the vault during a stick-up. And if police officers prepared an arrest-warrant application that acknowledged the teller's claim that he was not involved in the robbery, but did not reveal that he acted at gunpoint, the endorsement of a neutral magistrate would not change the fact that there was no probable cause for the arrest to begin with. As a matter of clearly established law, police officers cannot make material misrepresentations and omissions to secure an arrest warrant. But that is what Petitioners Frank Napolitano and Francis McGeough did here, and the lower courts were correct to conclude that they should face trial on Respondent Laurence Washington's false arrest and malicious prosecution claims.

Washington spent nearly a year in prison battling charges that he participated in a robbery and murder that even Petitioners, the arresting officers, believed he had merely witnessed. Washington reported the crimes to police and voluntarily gave a statement to Petitioners, which they found "prudent and credible." As Washington explained, he had accompanied the murderer, Michael Gaston, to buy marijuana from the victim, Marshall Wiggins, but had no idea that Gaston had a gun and intended to rob Wiggins. During the robbery, which happened in Wiggins's SUV, Gaston fired a warning shot at the back of the vehicle, where Washington was sitting, and pointed his gun at Washington while ordering Wiggins to hand Washington his glasses and jewelry. When Wiggins and Gaston struggled over the gun, Washington escaped the vehicle and ran away, hearing a gunfire as he fled.

Because they found Washington credible, Petitioners prepared an arrest-warrant affidavit for Gaston (based almost entirely on Washington's statements), that described Washington as a "prudent and credible witness[]," not a suspect. And, recognizing the risk Washington had taken to come forward, they placed him in the witness protection program, where he remained, unsupervised, for three months. During this time, Petitioners conducted no further investigation into the murder, save for interviewing Gaston, whose story they discredited because it conflicted with Washington's. They learned nothing that would suggest Washington was anything more than a witness to the crime.

Then suddenly, Petitioners drew up an arrest-warrant application stating that there was probable cause to charge Washington with robbery and felony murder. The supporting affidavit they submitted in support of the application was nearly identical to the one submitted for Gaston's arrest. They again stated that they'd relied on the statements of "prudent and credible witnesses," without revealing that Washington was the only witness whose statements they'd credited. The only substantive change was a new paragraph acknowledging that Washington had denied any knowledge of the intended robbery, but suggesting that his denial was not credible because "Washington was sitting in the back seat of the vehicle and could have exited the vehicle if he truly had no part in the robbery." C.A. App. 95.[1] This, of course, omitted the crucial fact—which they'd previously found credible—that Washington *did* run from the car and feared for his life after Gaston had pointed the gun at him and

[1] Citations to "C.A. App." refer to the Joint Appendix filed in the Court of Appeals.

fired a warning shot in his direction. Though a magistrate signed off on the warrant, she was unaware of the material exculpatory information that was omitted. Indeed, when Washington turned himself in, Petitioner Napolitano told him the warrant was "bogus" and that Petitioners didn't want him arrested. C.A. App. 313.

Washington was eventually acquitted on all charges. In announcing the verdict, the judge who tried the case made a point of saying, on the record, "Mr. Washington, I BELIEVE YOU." C.A. App. 907. But by this time, Washington had spent over ten months in jail facing charges that even Petitioners believed to be "bogus."

When Washington sued Petitioners for false arrest and malicious prosecution, they quickly changed their tune, asserting that they should be immune from suit because a neutral magistrate had determined there was probable cause for Washington's arrest. The District Court denied summary judgment, finding that there were disputed issues of fact that, if resolved in Washington's favor, would permit a reasonable jury to conclude that Petitioners omitted material exculpatory information from the warrant application, rebutting the presumption of probable cause. Petitioners took an interlocutory appeal, and the Second Circuit affirmed.

The lower courts' rulings in this interlocutory appeal are both correct and uncontroversial. There is no dispute that Petitioners omitted relevant information from the arrest-warrant affidavit—including that Gaston instructed Washington to enter the vehicle in which the crime occurred; that Gaston fired a warning shot at the back of the vehicle; that Gaston pointed the gun at Washington when instructing Wiggins to hand over his glasses and jewelry; that Washington feared for his life and fled, not even realizing he was holding Wiggins's glasses; that Petitioners relied on Washington's

"prudent and credible" report of the crime to arrest Gaston; and that he was placed in witness protection. And there is a genuine dispute of fact over whether the omitted information would have made a difference to a neutral magistrate. Thus, summary judgment was properly denied.

In seeking further interlocutory review, Petitioners misrepresent the Second Circuit's decision by inventing conflicts with the decisions of this Court and those of other circuits. But the Second Circuit simply did not say what Petitioners claim it said. The Court of Appeals expressly recognized that a police officer's "subjective belief as to whether probable cause exists is irrelevant to the legal determination of probable cause," and that "an officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause." Pet. App. A-24, A-30 (punctuation modified). It simply agreed with the District Court that, based on the unique (and genuinely disputed) facts of this case, a jury could conclude that Petitioners knowingly or recklessly omitted material exculpatory information, including, both their assessment of Washington's credibility and the critical facts on which that assessment rested. Because Petitioners relied on their finding that Washington was "prudent and credible" in drawing up both warrant applications, it was misleading for them to omit key facts supporting his profession of innocence and affirmatively suggest that he should be disbelieved when in fact they did believe him.

Even if there was reason to question the decision below, this case does not present a useful vehicle to address the questions presented. Both the District Court and the Second Circuit expressly found that genuine issues of material fact preclude summary

judgment. Though Petitioners had a right to take an interlocutory appeal from the District Court's *legal* determinations, they have persisted in arguing that the lower courts erred in finding their omissions and misrepresentations to be material, and materiality is a question of fact for a jury. To the extent they seek review of these fact questions appellate jurisdiction is lacking. And even assuming jurisdiction exists, the facts here are so unique as to readily distinguish this case from any purportedly contrary authority.

Police officers are not always entitled to qualified immunity as a matter of law. Here, the lower courts properly recognized that the question of immunity must be put to a jury, because it turns on genuine factual disputes. If the jury resolves these questions against Petitioners, they will have every opportunity to appeal and seek this Court's review if necessary. But the Court should deny this interlocutory petition.

STATEMENT OF THE CASE

I. Factual Background

Because Petitioners seek review of an order denying summary judgment the facts must be viewed in the light most favorable to Washington, the non-moving party, with all reasonable inferences drawn in his favor. *Taylor v. Riojas*, 141 S. Ct. 52, 53 n.1 (2020).

A. Washington witnesses Michael Gaston murder Marshall Wiggins.

On the evening of May 16, 2016, Washington was watching basketball in his apartment with a friend, "Black," when another acquaintance, whom he knew only as "G," but was later identified as Gaston, arrived. Washington invited Gaston in, and the three men continued to watch basketball, drink, and smoke

marijuana. At halftime, Washington went with Gaston to a convenience store to purchase drinks and more marijuana.

At the convenience store, Washington and Gaston met Wiggins, whom Washington did not know. Gaston and Wiggins went to the back of the store, where Washington assumed Gaston was buying marijuana. Gaston and Wiggins left the store together, and Washington followed shortly behind them. Washington turned to walk back to his apartment, but Gaston instructed him to enter Wiggins's SUV. Gaston told Washington that they had to go to Wiggins's house to purchase the marijuana that they wanted, and that Wiggins would then drive them back to Washington's apartment. Gaston got into the front passenger seat, and Washington sat in the back row on the passenger's side. The SUV had a large opening between the two front seats, allowing easy access between the front and back rows.

Washington spent the brief ride to Wiggins's house resting with his eyes closed because he felt nauseous. When the car came to a stop, Washington opened his eyes and was shocked to see Gaston pointing a gun at Wiggins. He did not know that Gaston had been carrying a weapon and had never seen him with a gun before. Gaston demanded that Wiggins hand over his glasses and rings. When Wiggins hesitated, Gaston fired a warning shot into the back of the car near where Washington was sitting. Gaston then turned the gun on Washington, waved it between him and Wiggins, and ordered Wiggins to hand Washington his glasses and rings. Wiggins dropped the glasses into Washington's hand, but then made a sudden move for Gaston's gun. Washington took that opportunity to flee the car. As he jumped out, he heard gun fire.

Washington ran to a nearby park. He realized he was still holding Wiggins's glasses and threw them on the ground. Panicked that either Gaston or Wiggins (whoever survived) might follow him, he tried to change his appearance by removing his sweatshirt and letting down his hair before running back to his apartment.

There, Washington found Black and told him that Gaston had shot someone. Gaston arrived at the apartment soon afterwards. Gaston pulled Washington into the hallway and told him he needed help retrieving the murder weapon. Washington thought Gaston's request was a pretext to isolate and kill him because he was the only witness. He persuaded Gaston to leave the building separately to avoid suspicion. When he got away from Gaston, Washington ran directly to Hartford Hospital, where he checked himself in for suicidal ideation due to anxiety and trauma.

B. Washington voluntarily reports the murder to the East Hartford Police Department and is described as a "prudent and credible" witness.

The next day, Washington called the police to report what he had seen. He agreed to come to the police station to provide a statement. Once there, Washington participated in a voluntary interview conducted by Petitioner Napolitano, the lead detective on the case, together with his partner Daniel Ortiz. Petitioner McGeough, the supervising officer on duty, watched the interview intermittently through closed-circuit TV. Washington also agreed to submit to DNA and gun-residue testing.

During the interview, Washington repeatedly emphasized that he had no idea Gaston had intended

to rob Wiggins and did not even know Gaston had a gun. He explained that he had intended to walk home after they visited the convenience store, but that Gaston had directed him to get into Wiggins's car instead. Even then, he did not know that Gaston planned to rob Wiggins and was shocked to see him holding a gun. And he explained that, once Gaston produced the gun, fired it, and pointed it at Washington, he feared for his own life.

Napolitano memorialized Washington's statement in a "Case/Incident Report," which McGeough later signed. Washington also provided a written statement. *See* C.A. App. 96–103. In the report, Petitioners described Washington as a "witness," not a suspect, and noted that "Washington swore that he had no idea 'G' was going to rob [Wiggins]" or that "G" had a gun. C.A. App. 879. Washington told Petitioners that Gaston fired a warning shot toward the back of the SUV and waved the gun at Washington while ordering Wiggins to turn over his valuables. Washington feared for his life, and ran away at the earliest opportunity, while Wiggins and Gaston struggled for the gun. He was so scared when he heard the gunshot that he didn't know who shot whom. Nor did he realize that he was holding Wiggins's glasses as he ran away. The report also stated that Washington had checked himself into Hartford Hospital out of fear that Gaston would retaliate and that he voluntarily provided a statement to the police, along with a DNA sample and gun residue test.

After the interview, McGeough asked Washington whether he felt safe. Washington responded that he did not, so Petitioners got him a hotel room for the night and then arranged to have him placed in witness protection. They later admitted that witness protection is not a substitute for arresting a suspect, but a way

to keep crime *witnesses* safe. Washington remained in witness protection—unsupervised—until his arrest three months later.

Napolitano prepared an arrest-warrant affidavit for Gaston based on Washington's statement, supplemented by surveillance footage from the convenience store and physical evidence from the crime scene, which corroborated Washington's account. McGeough signed the warrant application as well. The affidavit described Washington (the only witness who provided information used in the affidavit) as "prudent and credible," and noted that the details he provided matched the physical evidence and recovered video.[2] Petitioners charged Gaston with murder, felony murder, first-degree robbery, and illegal possession of a firearm. They did not charge Gaston with conspiracy, further showing that there was no evidence that anyone else had participated in the crime.[3] Gaston was arrested and interviewed three weeks later. He denied involvement in the murder, but did not implicate Washington. Petitioners discredited Gaston's story largely because it conflicted with what Washington had told them.

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[2] Besides Washington, Petitioners spoke with a few people from "the neighborhood," but none had witnessed the murder and none "wanted to go on record or have their identity made public." C.A. App. at 91.

[3] Later, around the same time that he instructed Petitioners to arrest Washington, Assistant State's Attorney David Zagaja added a conspiracy charge to the case against Gaston. But a judge dismissed that charge before trial, finding that there was no probable cause to believe Gaston had conspired with Washington before committing his crimes.

C. Three months after placing him in witness protection, and despite conducting no further investigation, Petitioners suddenly seek a warrant to arrest Washington.

Washington remained in witness protection—unmonitored—for nearly three months after Gaston's arrest. During this time, Petitioners conducted no further investigation, aside from their interview of Gaston. And yet, on August 31st—despite having no new evidence to implicate Washington in the crime—Napolitano drafted an affidavit seeking a warrant for Washington's arrest, which McGeough reviewed and approved.

The warrant affidavit was nearly identical to the one used for Gaston. As before, it purported to rely on the statements of "prudent and credible witnesses," without revealing that Washington was the only person (other than Gaston) to provide Petitioners with a recorded statement. Instead of referring to Washington as a "witness," (as they had in the first warrant) Petitioners now described him as an "involved person." The application also specified where Wiggins's sunglasses were found. The only other substantive change was a final appended paragraph:

> That Washington stated he had no knowledge of the intended robbery and stated that Gaston acted on his own, however, Washington admitted to running away with the victim's stolen sunglasses and acknowledged that he watched Gaston point a gun at Wiggins and order Wiggins to hand over his property. Washington was sitting in the back seat of the vehicle and could have exited the vehicle if he truly had no part in the robbery. Video also

> shows Washington and Gaston arrive at the convenience store, converse with Wiggins, and leave with Wiggins, together.

C.A. App. 95.

The affidavit did not mention several key details that appeared in the Case/Incident Report that Napolitano completed in May or Washington's contemporaneous written statement, including that:

- Washington only accompanied Gaston to the convenience store to buy marijuana;
- Washington intended to head home directly from the convenience store, but Gaston instructed him to get into Wiggins's car, and surveillance video showed he had begun to walk away from Gaston before Gaston motioned him back;
- Washington did not know that Gaston had a gun or that he intended to rob anyone;
- Gaston fired a warning shot into the back seat and then pointed the gun at Washington when telling Wiggins to hand over his glasses and rings;
- Washington believed Gaston would try to kill him too and feared for his life;
- Washington only realized he was holding Wiggins's glasses as he was running away;
- After the incident, Washington checked into Hartford Hospital, and he was still wearing the hospital bracelet during his interview with Napolitano; and
- Washington repeatedly told Petitioners that he was shocked and terrified, and he was placed in witness protection at McGeough's suggestion.

The affidavit also misrepresented Petitioners' view of Washington's credibility. Although they had previously described him as "prudent and credible" and though the facts in the affidavit were taken almost exclusively from Washington's statement, they affirmatively suggested in the final paragraph that Washington's claim that he did not know about the intended robbery and that Gaston had acted on his own should not be believed. And, in casting doubt on that statement, Petitioners omitted the key facts that made it credible—that Washington did not know Gaston had a gun; that Gaston instructed Washington to get into Wiggins's car; that Gaston fired the gun and pointed it at Washington during the robbery; that Washington feared for his own life and *did* flee at his first opportunity; and that Petitioners had secured Gaston's arrest based on Washington's "prudent and credible" statement, placed him in witness protection, and learned no new information in the interim that would implicate him in the offense.

Relying only on this incomplete affidavit, a judge signed off on a warrant for Washington's arrest. Though the warrant charged Washington with serious offenses—conspiracy, robbery, and felony murder—Petitioners did not arrest him right away. Instead, they called and asked him to turn himself in. As Washington later testified, Napolitano told him: "This is not our call, this is not our work, we are not doing this. This is not what we want . . . . But we have to come and get you." C.A. App. at 181. Though supposedly wanted for murder, Washington was permitted to enjoy a Labor Day party before turning himself in the next day.

When Washington turned himself in, he asked Petitioners why they had suddenly pursued an

arrest warrant. According to Washington, Napolitano responded, "I don't know, man . . . this was the prosecutor's call." C.A. App. 181. Washington asked if the arrest had anything to do with the fact that he had left a voicemail with the State's Attorney's Office threatening not to testify against Gaston if the State pursued unrelated charges against Washington's girlfriend. Hearing this, Napolitano responded, "Oh, so that's what you did, now it makes sense, they got you by the balls now." C.A. App. 181. Napolitano did not deny making this statement. Nor did he deny telling Washington that the warrant was "bogus." C.A. App. 313.

Petitioners have offered varying and inconsistent explanations for the delay in arresting Washington. At Washington's criminal trial, Napolitano suggested it was because Washington was in witness protection, and therefore could be arrested at any time. But both McGeough and Assistant State's Attorney Zagaja testified here that witness protection is not used as a substitute for the arrest of a suspect. They testified that Zagaja had instructed McGeough to charge Washington because otherwise it would look like Washington was receiving favorable treatment, relative to Gaston. However, Zagaja was never provided with the exculpatory information in Napolitano's original Case/Incident Report or Washington's statement before instructing McGeough to charge Washington. Nor did Petitioners include it in the warrant application they prepared.

D. Washington's felony murder charge is dismissed for lack of probable cause and he is acquitted of conspiracy and robbery.

In January 2017, Washington represented himself at a probable cause hearing.[4] After the hearing, a Connecticut Superior Court judge dismissed the felony murder count because that charge depended on Washington's participation in the predicate robbery, and she found no probable cause for the robbery charge. Paradoxically, the judge did not dismiss the robbery charge because it was beyond the scope of the probable-cause hearing. *See supra* n.4. Despite the finding that there was no probable cause to charge Washington with robbery, the State pursued the robbery and conspiracy charges against Washington, while Washington remained in jail.

After a bench trial, Washington was acquitted by then-Superior Court Judge Omar Williams.[5] Judge Williams found that the State had not proved that Washington agreed with Gaston to rob Wiggins, and acquitted him of the conspiracy charge. Relying in part on the same facts missing from the warrant, the court acquitted Washington of the robbery charge too. And Judge Williams went out of his way to state:

> [I]n this particular trial, it is important to say one more thing. Mr. Washington, I BELIEVE YOU. . . . After months in jail based on

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[4] In Connecticut, any person charged with a crime punishable by death or life imprisonment is entitled to a probable cause hearing. Conn Gen. Stat. § 54-46a. The Court considered only Washington's felony murder charge at that hearing.

[5] Judge Williams is now a district court judge for the United States District Court for the District of Connecticut.

> information you provided to the police, after your cooperation and voluntary testing, and after submitting yourself to your timely arrest, you deserve to hear that the state could not meet its burden of proof and that you have been believed.

C.A. App. 907–08. By the time he was acquitted, Washington had been incarcerated for nearly a year.

II. Proceedings Below

Washington filed a *pro se* complaint in the District of Connecticut against several parties relating to his arrest and incarceration, including Napolitano and McGeough. The District Court (Vanessa L. Bryant, *J.*) issued an initial review order under 28 U.S.C. § 1915A(b) dismissing all claims against McGeough because the complaint did not state particular facts implicating him. The District Court also dismissed Washington's Fifth and Sixth Amendment claims against Napolitano and Ortiz, but allowed Washington to proceed with his claims against them under the Fourth and Fourteenth Amendments.

In April 2018, the District Court appointed pro bono counsel to represent Washington. Washington filed an amended complaint in May 2019, bringing claims for false arrest and malicious prosecution against Napolitano, Ortiz, and McGeough under 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments. The three defendants moved for summary judgment, arguing that they were entitled to qualified immunity because they had at least arguable probable cause to arrest Washington, and that they were entitled to absolute prosecutorial immunity because they acted at the direction of Assistant State's Attorney Zagaja.

The District Court granted summary judgment to Ortiz, concluding that Washington had abandoned any claims against him. But it denied summary judgment in all other respects. It held that Napolitano and McGeough had no right to absolute prosecutorial immunity because applying for an arrest warrant is not closely tied to the judicial process. As for qualified immunity, the District Court found that "there are questions of fact as to arguable probable cause" that precluded summary judgment on that basis. Pet. App. B-30. Having found that the omissions from the warrant affidavit were relevant, the District Court held that "questions of fact arise as to the weight a neutral magistrate would have given such information." *Id.* at B-29.

Petitioners filed an interlocutory appeal, challenging the District Court's conclusions on qualified and absolute immunity. In his brief in response, Washington argued that the Court of Appeals could affirm on the ground that Petitioners were not entitled to immunity as a matter of law or alternatively dismiss the appeal for lack of appellate jurisdiction because the District Court's judgment rested on its finding of genuine issues of disputed material fact.

The Second Circuit affirmed in an opinion by Judge Bianco, joined by Judge Jacobs. Judge Sullivan dissented in part. The Court (including Judge Sullivan) first rejected Petitioners' argument that they were entitled to absolute immunity, explaining that a prosecutor's direction to obtain an arrest warrant did not render all police actions in obtaining that warrant inherently prosecutorial. Petitioners do not seek review of this determination.

Next, the majority held that the Petitioners were not entitled to summary judgment based on qualified

immunity. Like the District Court, the Court of Appeals held that a reasonable factfinder could conclude that Petitioners had omitted relevant exculpatory information from the warrant affidavit, thereby misleading the magistrate as to the existence of probable cause. The majority expressly acknowledged that officers' subjective beliefs are generally not relevant to the probable-cause analysis, and that officers need not probe and discuss every protestation of innocence. But it concluded that, under the particular facts of this case, reasonable officers in Petitioners' position would have known that they could not omit exculpatory information from the affidavit or misrepresent their assessment of Washington's credibility.[6] Recognizing that the weight a neutral magistrate would give these omissions is a question of fact, the Court of Appeals affirmed the District Court's denial of summary judgment.

Napolitano and McGeough sought rehearing or rehearing en banc, which the Second Circuit denied without dissent. They then filed this petition, challenging the Second Circuit's conclusion that

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[6] As the majority noted, it was not enough for Petitioners to vaguely allude to Washington's statement that he was not involved in the offense. That would be like seeking a warrant for the arrest of a bank teller and disclosing that he denied involvement in the offense while omitting the fact that he was being held at gunpoint. Pet.App. A-27. ("[I]f a police officer simply notes in an affidavit that the defendant admitted to taking money from a bank's safe during a robbery but denied any involvement in the robbery, the judge could not properly examine the weight to be given that statement for probable cause purposes, without knowing that the defendant also told the police that he was an employee of the bank and had delivered the money to the robbers at gunpoint.").

material questions of fact preclude summary judgment on qualified immunity.

REASONS FOR DENYING THE PETITION

Petitioners claim that the Court of Appeals's decision contravenes the decisions of this Court and departs from the holdings of other circuits "with respect to the necessity of including officers' subjective opinions of protestations of innocence and exculpatory information offered by putative suspects." Pet. at 14. It does not.

The Court of Appeals properly applied this Court's precedents on qualified immunity and concluded that genuine issues of fact precluded summary judgment. Petitioners suggest that the Court of Appeals's decision departs from this Court's decision in *Devenpeck v. Alford*, 543 U.S. 146 (2004), *see* Pet. at *i*, a case they never even cited below. But the Second Circuit decision fully aligns with *Devenpeck* in recognizing that an officer's subjective intent is generally not relevant to the probable-cause analysis. It simply found that Petitioners had made an *objective* misrepresentation of their assessment of Washington's *credibility*—relying on it to describe the offense but simultaneously suggesting that his profession of innocence should not be believed. Pet App. A-30–31. Petitioners further contend that the decision below conflicts with those of other courts by suggesting that officers must investigate and discuss every protestation of innocence made by a suspect. Here again, the Second Circuit expressly acknowledged that officers need not investigate every claim of innocence, but also observed that an officer cannot disregard plainly exculpatory evidence or withhold that evidence from a reviewing magistrate. Pet. App. A-24–25.

Even if Petitioners had identified some departure from the precedents of this Court or other circuits, this case is not an appropriate vehicle for further review or clarification of the governing law. Since the lower courts rejected Petitioners' qualified-immunity defense based on the existence of genuine disputes of fact, and because Petitioners continue to press those claims on appeal, there are serious doubts about the existence of appellate jurisdiction over this case. And even assuming jurisdiction exists, the unique facts of this case make it readily distinguishable from any putatively conflicting decision.

The Court should therefore deny the petition for certiorari.

I. The Second Circuit's decision aligns with this Court's precedent.

Petitioners claim that the decision below "directly contravenes precedent set by this court on the availability of qualified immunity." Pet. at 15 (initial caps removed). They rely specifically on the Court's decision in *Devenpeck v. Alford*, 543 U.S. 146 (2004), a case they never cited, let alone discussed, below. But the decision below aligns with *Devenpeck* and other authority suggesting that the subjective beliefs of police officers are not relevant to the probable-cause inquiry.

A. The decision aligns with *Devenpeck*, a case Petitioners have not previously cited.

In their Questions Presented, Petitioners argue that the Second Circuit's decision conflicts with this Court's opinion in *Devenpeck*, 543 U.S. at 153; *see* Pet. at *i*. But they never raised that case in their briefs below, and

their petition scarcely discusses it even now. This Court has often stated that, absent exceptional circumstances, it "will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). For this reason alone, Petitioners' new reliance on *Devenpeck* can be ignored.

In any case, the decision below does not conflict with *Devenpeck*, or any other authority cited in the petition. In *Devenpeck*, the Court considered whether, under the "reasonableness" standard for arrests under the Fourth Amendment, "the offense establishing probable cause must be closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of the arrest." 543 U.S. at 153 (internal quotation marks omitted). The Court held that, where the facts known to an officer would support probable cause to conclude that a crime has occurred, but the officer erroneously invokes a different crime at the time of arrest, the officer's mistake does not render the arrest unreasonable. *Id.* at 153–55. That is because the "[s]ubjective intent of the arresting officer . . . is simply no basis for invalidating an arrest." *Id.* at 154–55.

Petitioners offer no argument to support their assertion that the Second Circuit's decision contravenes *Devenpeck*. To the extent that they claim that the majority below based its decision on the subjective intent of the arresting officers, the claim is belied by the decision itself, which states that "an officer's motivation for an arrest (or a subjective belief as to whether probable cause exists) is irrelevant to the legal determination of probable cause." Pet. App. A-30. Though it is true in this case (or at least a matter of genuine dispute) that Petitioners subjectively believed Washington had not committed a crime, that was not why the District Court denied summary judgment

or why the Second Circuit affirmed. Instead, the lower courts focused on the objective *facts* that led Petitioners to believe Washington was innocent. *See id.* ("An officer's credibility assessment of a witness whose statement is relied upon is a fact known to the warrant applicant potentially material to the probable cause analysis.") (punctuation modified).

Petitioners based their warrant applications for both Gaston's and Washington's arrests almost exclusively on Washington's own statements. In the Gaston application they described Washington as a "prudent and credible witness[]." In the Washington application, they again purported to rely on "prudent and credible witnesses," but failed to disclose that the *only* witness they relied on was Washington. And despite relying on Washington's "credible" description of events, they added a paragraph suggesting that he was *not* credible when he stated that Gaston acted alone. They therefore misrepresented their own assessment of Washington's credibility, and omitted many of the facts that led them to that assessment—facts that could have also led a neutral magistrate to conclude there was no probable cause for arrest.

As the Second Circuit properly recognized, the weight that a neutral magistrate would assign to Petitioners' misrepresentation about Washington's credibility is a question of fact. It did *not* broadly hold that probable cause for an arrest cannot exist if a police officer does not subjectively believe it.

B. The decision correctly concluded that a reasonable jury could find that Petitioners violated clearly established law.

More broadly, Petitioners contend that the Second Circuit contravened this Court's precedent "requiring that the law at issue clearly established in a particularized sense." Pet. 14 (initial caps removed). But it *is* clearly established in the Second Circuit that "an officer may not disregard plainly exculpatory evidence" when preparing an arrest-warrant application. Because a jury could reasonably conclude that the information omitted from the application for Washington's arrest was exculpatory, the District Court properly denied summary judgment and the Second Circuit properly affirmed.

1. The decision below does not require police officers to "volunteer every fact that arguably cuts against the existence of probable cause."

Petitioners claim that the Second Circuit's opinion would require them to "volunteer every fact [in a warrant application] that arguably cuts against the existence of probable cause." Pet. 25 (quoting *Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007)). But the court expressly *rejected* that standard. *See* Pet. App. A-28 ("[T]he law does not demand that an officer applying for a warrant volunteer every fact that arguably cuts against the existence of probable cause." (quoting *Walczyk*, 496 F.3d at 161)); *id.* A-29 ("To the extent that [Petitioners] and the dissent suggest that our decision means that a police officer must include every detail from a suspect's statement in an arrest warrant affidavit, *that is not our holding*.") (emphasis added). Instead, the court applied the clearly established rule

that, while an officer need not disclose *every* fact cutting against probable cause, "an officer may not disregard plainly exculpatory evidence, including facts establishing a defense, and fail to disclose those materially exculpatory facts to the judge issuing the warrant." Pet. App. A-23 n.6 (citations omitted); *id.* A-29 ("We hold only that factual details must be included where, as here, they may be critical to the assessment of probable cause for the arrest warrant by the issuing judge.").

That rule has been the law of the Second Circuit for decades. *See, e.g.*, *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991) ("Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause, the shield of qualified immunity is lost." (citations omitted)). And it aligns with the precedent of other circuits. *E.g.*, *Rainsberger v. Benner*, 913 F.3d 640, 654 (7th Cir. 2019) (Barrett, *J.*) ("[A] competent officer would—indeed, must—consider whether the Fourth Amendment obligates him to disclose particular evidence."); *Burke v. Town of Walpole*, 405 F.3d 66, 81 (1st Cir. 2005) ("[T]he intentional or reckless omission of material exculpatory facts from information presented to a magistrate may also amount to a Fourth Amendment violation."); *Humbert v. Mayor & City Council of Baltimore City*, 866 F.3d 546, 556 (4th Cir. 2017), *as amended* (Aug. 22, 2017) (holding that an officer is not entitled to qualified immunity when the plaintiff shows he "omitted from that application material facts with the intent to make, or with reckless disregard of whether they thereby made, the application misleading"

(internal quotation marks and alterations omitted)). It is, in other words, "clearly established."

2. That a judge dissented below does not mean the law is not clearly established.

Petitioners next contend that the mere fact that there was a dissenting judge below necessarily means that the law is not clearly established and they must therefore be entitled to qualified immunity. Pet. 27–28. This, obviously, is not the test. If it were, then the law would never be clearly established absent a unanimous ruling of this Court.

Petitioner's what-about-the-dissent argument is particularly misplaced in the context of this appeal. Judge Sullivan did not disagree with the precedent the majority relied on—that a police officer may not omit or misrepresent material exculpatory information in an arrest-warrant application—but with the majority's conclusion that the information Petitioners omitted was potentially material. *See* Pet. App. A-42 ("[I]t is hard to imagine that these so-called omissions, taken in context with the disclaimers actually contained in the affidavit, would have made any difference to the magistrate's probable-cause determination."). But what matters at summary judgment is whether—resolving factual disputes in Washington's favor—a reasonable jury *could* conclude that the omissions were material. *See McColley*, 740 F.3d at 825 ("The exact *weight* that the judge would have given [information omitted from an affidavit] [is] *a question of fact*.") (emphasis added); *accord United States v. Gaudin*, 515 U.S. 506, 521 (1994) ("[T]he materiality inquiry, involving as it does delicate assessments of the inferences a 'reasonable decisionmaker' would draw from a given set of facts and the significance of

those inferences to him is peculiarly one for the trier of fact.") (punctuation modified); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) ("Only if the established omissions [in a proxy statement] are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment.").

The majority properly concluded that a jury could find Petitioners' omissions material. That conclusion requires no stretch of the imagination, for the record provides a real-world example of how a judge might regard the omitted material. Under Connecticut law, Washington was entitled to a probable cause hearing, after his arrest, on the charge of felony murder, because it could result in a sentence of life imprisonment. *See* Conn. Gen. Stat. § 54-46a. At that hearing, presented with the exculpatory information that Petitioners omitted from the arrest-warrant application, the judge dismissed the felony-murder charge, finding that there was no probable cause to believe Washington committed the predicate robbery. And, of course, Washington was later acquitted of the remaining charges. Indeed, the *only* judge who ever believed there was probable cause to arrest Washington was the one from whom relevant exculpatory information was withheld.

Given all this, it should be obvious that a reasonable jury *could* conclude that the material Petitioners omitted from the arrest-warrant application was exculpatory and material. Petitioners will have the opportunity to prove otherwise at trial.

II. The decision aligns with those of other circuits applying this Court's precedent.

Petitioners next claim that the Second Circuit's decision creates a circuit split over the application of this Court's decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), which states in passing that "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Wesby*, 138 S. Ct. at 588. But the decision below never suggests as much. Instead, based on the unique facts of this case, it recognized a jury could conclude that the information Petitioners *already had*—the information that led them to rely on Washington's statement in arresting Gaston and to place Washington in witness protection—should have been disclosed in the affidavit seeking Washington's arrest. As the majority explained:

> [W]e recognize and do not disturb well-settled precedent establishing that an officer is not required to investigate an individual's innocent explanations as to an alleged crime, nor to resolve all credibility issues between witnesses, before making an arrest based on probable cause. Neither of these bedrock principles are at issue here because it is uncontroverted that appellants *already had* the exculpatory information in their possession at the time of the submission of the arrest warrant application and there is evidence that, when construed most favorably to Washington, appellants had fully credited such information.

Pet. App. A-6 (emphasis added). Petitioners point to no authority—from this Court or other circuits—squarely conflicting with this conclusion and ignore authority supporting it.

A. The "conflicting" cases Petitioners identify are readily distinguishable.

Nearly all the cases that Petitioners rely on involved (like *Wesby*) warrantless arrests. *See* Pet. 29–33 (discussing *United States v. Perry*, 908 F.3d 1126 (8th Cir. 2018); *United States v. Booker*, 612 F.3d 596 (7th Cir. 2010); *United States v. Merritt*, 945 F.3d 578 (1st Cir. 2019); *Rife v. Oklahoma Dep't of Pub. Safety*, 854 F.3d 637 (10th Cir. 2017); *Lingo v. City of Salem*, 832 F.3d 953 (9th Cir. 2016); *Prim v. Stein*, 6 F.4th 584 (5th Cir. 2021)); *see also Wesby*, 138 S. Ct. at 586. Whether an officer has violated the Fourth Amendment by arresting a suspect without probable cause is analytically distinct from whether he has violated the Fourth Amendment by filing a false or misleading affidavit. As then-Judge Barrett explained in *Rainsberger*, "[t]he Warrant Clause is not merely a probable-cause guarantee. It is a guarantee that a warrant will not issue unless a neutral and disinterested magistrate independently decides that probable cause exists." 913 F.3d at 650.

Petitioners might have had arguable probable cause to arrest Washington without a warrant if they saw him running from Wiggins's car on the night of the murder. And they would not have been required to eliminate every possible innocent explanation for his flight. But it is quite another thing for Petitioners—having already determined that Washington was credible and placed him in witness protection—to turn around three months later and draft a warrant application that affirmatively *omits* many of the statements that they'd previously found credible and misrepresents their assessment of Washington's credibility. For this reason, the cases that Petitioners cite from the

First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits are inapt.

Petitioners also fail to demonstrate any genuine conflict between the decision below and the few cases they identify that did involve warrants. In *Washington v. Howard*, for example, the plaintiff was arrested under a valid warrant, and did not assert that the arresting officer had made any material representations or omissions. 25 F.4th 891, 902 (11th Cir. 2022). However, the plaintiff's primary accuser later recanted his statement. *Id.* The Eleventh Circuit held that the arresting officer did not have to *release* the plaintiff based solely on the accuser's recantation because he did not have to believe the recantation or discount other evidence that the plaintiff had committed a crime. *Id.* That is a far cry from the position Petitioners advance here—that the arresting officer would not have to *disclose* the recantation to a magistrate if the accuser recanted before the warrant application was prepared.

And in *Sennett v. United States*, the Fourth Circuit considered a plaintiff's challenge to a *search* warrant under the Privacy Protection Act (PPA). 667 F.3d 531, 536–37 (4th Cir. 2012). The plaintiff argued that the warrant affidavit was misleading because it did not disclose that she was a photojournalist. The Fourth Circuit rejected that argument because her occupation was irrelevant for purposes of the PPA—Congress had not carved photojournalists out of the exceptions to the PPA's protections, and the court declined to override that decision. *Id.* It is hard to see how that context-specific determination conflicts with the decision below.

Finally, Petitioners assert that the Second Circuit's purported error mirrors the Sixth Circuit's purported error in *Greve v. Bass*, 805 Fed. App'x 336 (6th Cir.

2020), *cert. denied*, 141 S. Ct. 1463 (2021). *See* Pet. 34-37. But even that non-precedential decision (which this Court declined to review) is distinguishable. In *Greve*, the Sixth Circuit concluded that an officer was not entitled to qualified immunity at the summary judgment stage because there was a material dispute of fact over whether he had arrested the plaintiff without probable cause. *Greve*, 805 Fed. App'x at 347–49. The officer had arrested a man outside of a nightclub, and a reviewing judge determined probable cause after the fact. *Id.* at 340. The court rejected the officer's argument that the *post hoc* judicial review definitively established probable cause. *See id.* at 347 ("Simply put, an after-the-fact determination, be it by warrant or indictment, does not pro forma serve to validate a prior arrest." (internal quotation marks omitted)). Right or wrong, *Greve* has no application here.

B. The Second Circuit's decision aligns with decisions of other circuits.

Petitioners also fail to acknowledge precedent that supports the Second Circuit's holding. *See, e.g.*, *Rainsberger*, 913 F.3d at 654 (officer was not entitled to qualified immunity when he omitted from an affidavit, among other things, the plaintiff's innocent explanation for his suspicious actions after his mother's murder); *accord Pitt v. District of Columbia*, 491 F.3d 494, 504 (D.C. Cir. 2007) (malice inferable where officers omitted from arrest report and affidavit fact that victims did not positively identify the accused); *Burke*, 405 F.3d at 81 ("[T]he intentional or reckless omission of material exculpatory facts from information presented to a magistrate may also amount to a Fourth Amendment violation."); *Humbert*, 866 F.3d at 556 (no qualified immunity where officer "omitted from that application material facts with the intent to

make, or with reckless disregard of whether they thereby made, the application misleading" (punctuation modified)).

In particular, then-Judge Barrett's decision for the Seventh Circuit in *Rainsberger* squarely aligns with the Second Circuit's decision here. In *Rainsberger*, the court considered whether an officer violated a plaintiff's rights under the Fourth Amendment by, among other things, omitting exculpatory information from a warrant affidavit. *Rainsberger*, 913 F.3d at 643. The plaintiff found his mother bleeding on the floor of her apartment and called 911 to report that "someone had bashed his mother's head in." *Id.* at 644 (punctuation modified). A police officer obtained a warrant and arrested him for murder based on an affidavit that was "undercut by the omission of exculpatory evidence." *Id.* at 642. Among those omissions was the officer's failure to disclose an innocent explanation for the plaintiff's suspicious behavior. *Id.* at 647. The officer implied that the plaintiff showed a lack of concern for his mother by leaving her unattended and gravely injured while he waited for an ambulance, but "conspicuously omitted [the plaintiff's] explanation for doing so—that he wanted to direct the ambulance to [her] apartment, which was hard to find." *Id*. The Seventh Circuit affirmed the district court's conclusion that "a reasonable jury could find that [the officer] intentionally misled the prosecutor and magistrate" by leaving out the plaintiff's explanation. *Id.*

Similarly, here, Petitioners suggested that Washington's conduct was suspect because he could have fled the car sooner, but they failed to disclose Washington's explanation for his behavior: He feared for his life because Gaston had moments earlier fired the gun near him and pointed it at him while

demanding that Wiggins turn over his valuables. As in *Rainsberger*, these mischaracterizations and omissions, viewed in the light most favorable to Washington, would allow a jury to conclude that Petitioners intentionally misled the prosecutor and magistrate.

III. This factually unique, interlocutory appeal is not an appropriate vehicle for addressing the questions presented.

For all the reasons discussed above, and in the majority opinion below, the Second Circuit was correct to affirm the District Court's order denying Petitioners' motion for summary judgment. But even if there were reason to doubt its holding, this case is not a good vehicle for addressing the questions presented in the petition. For one thing, there are serious doubts about appellate jurisdiction to address the questions presented, as they are tied up with factual disputes that cannot be appealed before a final judgment. And even assuming jurisdiction exists, the facts here are so unique that the case would not provide a clean canvas on which this Court might paint a clearer picture of the governing law.

While defendants may appeal from a decision denying summary judgment on grounds of qualified immunity, appellate jurisdiction over such an appeal is limited to questions of law. *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995). Defendants "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.*; *see also, e.g.*, *Golino*, 950 F.2d at 868 ("Where the district court has ruled that adjudication of the immunity defense requires resolution of genuinely disputed questions of material fact, the denial of summary judgment is not immediately appealable."); *Rainsberger*,

913 F.3d at 643 ("[B]ecause our authority extends only to questions of law, an officer can obtain interlocutory review only if he refrains from contesting any fact that a reasonable jury could resolve against him.").

Here, the District Court denied summary judgment because "there are questions of fact as to arguable probable cause." Pet. App. B-30. The Second Circuit similarly held that "the district court correctly determined that summary judgment on the issue of qualified immunity was unwarranted given the factual disputes in this case." *Id.* A-6. Petitioners argue that the lower courts were wrong, but their arguments rest mainly on disagreement about the weight and materiality of the statements that were concededly omitted from the warrant affidavit. *See* Pet. 19–20 (arguing that omissions were not "sufficiently relevant and exculpatory as to create a genuine issue of material fact"); Pet. App. A-41–42 (Sullivan, *J.*, dissenting) ("In sum, it is hard to imagine that these co-called omissions, taken in context with the disclaimers actually contained in the affidavit, would have made any difference to the magistrate's probable-cause determination."). But "[t]he exact weight that the judge would have given [the omitted exculpatory] information remains a question of fact." *McColley*, 740 F.3d at 825; *accord Gaudin*, 515 U.S. at 521; *TSC Industries*, 426 U.S. at 450. There is no jurisdiction over this interlocutory appeal to the extent that Petitioners seek review of that factual question.

Petitioners seek to dress up the issues in their petition as questions of law, but the Court should not be fooled. They contend that the Second Circuit erred as a matter of law by holding that they had to disclose "their own subjective analysis regarding the Respondent's protestations of innocence in the warrant application

affidavit." Pet. 22. As explained above, that is a mischaracterization of the holding below, which expressly recognized that officers' subjective beliefs are generally irrelevant to the probable-cause analysis. *See supra* at 20. Given the unique facts of this case—where Petitioners relied exclusively on Washington's statements to establish probable cause for Gaston's arrest, but then suggested Washington's statement that he was not involved should not be credited—the majority also recognized that Petitioners' "credibility assessment of a witness whose statement is relied upon is a fact known to the warrant applicant potentially material to the probable cause analysis." Pet. App. A-30 (punctuation modified).

This is a unique case in which a jury could reasonably conclude that Petitioners "had, in fact, credited Washington's exculpatory statement," Pet. App. A-29–30, but affirmatively misrepresented that credibility determination in the arrest-warrant affidavit by suggesting Washington should *not* be believed, without disclosing either their own prior credibility determination or the *facts* on which it relied. C.A. 95 (stating that Washington "could have exited the vehicle if he truly had no part in the robbery" without disclosing that Gaston had fired a gun into the back seat and pointed the gun at Washington when ordering Wiggins to hand over his glasses). The Second Circuit's assessment of these unique facts, at an interlocutory stage, was both correct and exceptional.

This case presents a clear example of why this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Mil. Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, *J.*, statement respecting denial of cert.). There are material disputes of fact over whether Petitioners

made material misrepresentations and omissions in a warrant affidavit that would have been enough to alter a magistrate's probable-cause analysis. These disputes cast doubt on whether there is jurisdiction to grant Petitioners interlocutory request for review, and they underscore why this case is uniquely ill-suited for review at this stage. Should a jury resolve the disputes in Washington's favor, Petitioners will have a full and fair opportunity to appeal, and if necessary petition this Court, after a final judgment is entered.

CONCLUSION

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

Respectfully submitted,

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