No. 21-_____

In The
Supreme Court of the United States

LENARD JOHNSON,

Petitioner,

v.

RICHARD WINFREY, JR.
AND MEGAN WINFREY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. HELFAND
Counsel of Record
NORMAN RAY GILES
LEWIS BRISBOIS BISGAARD & SMITH, LLP
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
bill.helfand@lewisbrisbois.com
(713) 659-6767

Counsel for Petitioner

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

QUESTIONS PRESENTED

In *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978), the Court identified a right of "limited scope" "that [applies], where [a criminal] defendant makes a substantial preliminary showing that a false statement knowing and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause . . . "

Malley v. Briggs, 475 U.S. 335, 337 (1986) presented "the question of the degree of immunity accorded a defendant police officer in a damages action under 42 U.S.C. § 1983 when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and supporting affidavit which failed to establish probable cause." The question "is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id*. at 345.

The Fifth Circuit denied immunity to Deputy Johnson on the rationale affidavits he submitted *did not include* information material to probable cause.

The first two questions presented are:

1. Whether a law enforcement officer violates clearly established law under this Court's decision in *Franks v. Delaware* if the officer does not include information in an affidavit that

QUESTIONS PRESENTED – Continued

may be material to probable cause, without regard to whether an objective officer could reasonably believe the submitted affidavit supported probable cause.

2. If not, whether *Malley* provides the appropriate analytical method for determining an officer's immunity when information that may be material to probable cause is not included in the affidavit, or whether a different standard applies.

The third question presented pertains to appropriate assessment of damages in a § 1983 lawsuit.

3. Whether setoff or contribution is available in a claim brought under 42 U.S.C. § 1983 as six circuits have held, or whether § 1983 claims permit a plaintiff to obtain a double recovery, as three circuits have held.

PARTIES TO THE PROCEEDING

Petitioner San Jacinto County, Texas, Deputy Sheriff Lenard Johnson was the defendant-appellant in the court below. Respondents are Richard Winfrey, Jr. and Megan Winfrey, who were plaintiff-appellees in the court below.

RELATED PROCEEDINGS

United States Supreme Court:

Lenard Johnson v. Megan Winfrey, No. 19-155 (October 15, 2019)

Lenard Johnson v. Richard Winfrey, Jr., No. 18-1024 (April 15, 2019)

United States Court of Appeals for the Fifth Circuit:

Megan Winfrey v. Lenard Johnson, No. 18-20022 (March 26, 2019, petition for rehearing denied April 30, 2019)

Richard Winfrey, Jr. v. Lacy Rogers, Former San Jacinto County Sheriff; Lenard Johnson, Former San Jacinto County Sheriff's Department Deputy, No. 16-20702 (August 20, 2018, petition for rehearing denied September 28, 2018)

Megan Winfrey v. Keith Pikett, No. 16-20728 (September 29, 2017)

Richard Winfrey, Jr. v. San Jacinto County, et al., No. 11-20555 (July 27, 2012)

RELATED PROCEEDINGS – Continued

United States District Court of the Southern District of Texas, Houston Division:

Megan Winfrey v. Keith Pikett, et al., No. 4:14-cv-00448 (December 26, 2017)

Richard Winfrey, Jr. v. Keith Pikett, et al., No. H-14-448 (October 4, 2016)

Richard Winfrey, Jr. v. San Jacinto County, et al., No. H:10-cv-01896 (July 9, 2011)

Court of Criminal Appeals of Texas:

Megan Winfrey, *aka Megan Winfrey Hammond v. The State of Texas*, No. PD-0943-11 (February 27, 2013, petition for rehearing denied April 17, 2013)

Court of Appeals of Texas, Ninth District, Beaumont:

Megan Winfrey a/k/a Megan Winfrey Hammond v. The State of Texas, No. 09-09-00043-CR (April 6, 2011, petition for discretionary review granted November 16, 2011)

In the District Court of San Jacinto County, Texas, 411th Judicial District:

The State of Texas v. Richard Lynn Winfrey, Jr., No. 9751 (June 12, 2009)

The State of Texas v. Megan Winfrey, No. 9750 (October 6, 2008)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit filed on February 17, 2022, is set forth in Appendix B.

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit filed on November 12, 2021, *Winfrey v. San Jacinto Cty.*, No. 20-20477, 2021 U.S. App. LEXIS 33652, at *1 (5th Cir. 2021), is set forth in Appendix C.

The unpublished opinion of the United States District Court of the Southern District of Texas filed on August 20, 2020, *Winfrey v. San Jacinto Cty.*, 2020 U.S. Dist. LEXIS 150836 (S.D. Tex., Aug. 20, 2020), is set forth in Appendix E.

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit filed on March 26, 2019, *Megan Winfrey v. Lenard Johnson*, 766 Fed. Appx. 66 (5th Cir. 2019), is set forth in Appendix F.

The substituted published opinion of the United States Court of Appeals for the Fifth Circuit filed on October 9, 2018, *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018), is set forth in Appendix G.

The withdrawn published opinion of the United States Court of Appeals for the Fifth Circuit filed on February 5, 2018, *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018), is set forth in Appendix H.

The unpublished opinion of the United States District Court of the Southern District of Texas filed on

October 4, 2016, *Winfrey v. Pikett*, 2016 U.S. Dist. LEXIS 137897 (S.D. Tex. 2016), is set forth in Appendix I.

JURISDICTION

The Fifth Circuit entered judgment against Petitioner on November 12, 2021, and denied Petitioner's petition for rehearing en banc on February 17, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13(3) because within 90 days after the Fifth Circuit denied Petitioner's petition for rehearing, Petitioner filed this petition for a writ of certiorari.

Petitioner seeks the Court's review under Supreme Court Rule 10 because the Fifth Circuit decided important federal questions in a way that conflicts with the relevant decisions of this Court and other United States courts of appeal on the same matter, and the Fifth Circuit decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 United States Code § 1983 provides:

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 United States Code § 1988 provides in relevant part:

Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title,

> and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

A. Factual Background

For two years, Deputy Johnson and others investigated Murray Burr's murder. After Bill Burnett was elected district attorney, Burnett convened a conference with investigators, wherein Burnett announced he had determined probable cause supported the arrests of Respondents and their father on charges they murdered Burr. Deputy Johnson, San Jacinto County Sheriff Lacy Rogers, and Texas Ranger Grover Huff

agreed with Burnett, but no investigator sought charges until after Burnett announced probable cause supported charges. (App.82-87, 198-207).

At Burnett's direction, Deputy Johnson submitted an affidavit to a magistrate who issued warrants commanding the arrests of Respondents and their father. Johnson testified that he attempted to supply the judge with information Johnson could prove. Submitting those affidavits, was Johnson's last involvement in the investigation, prosecutions, or trials of Respondents. (App.22).

Respondent Megan Winfrey and her father, Richard Winfrey, Sr., were convicted at trial of committing the crime and their convictions were affirmed by Texas courts of appeal, but the Texas Court of Criminal Appeals later reversed the criminal convictions for insufficient proof of guilt at trial. *See Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App. 2013); and *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010). A jury found Respondent Richard Winfrey, Jr. not guilty at trial. (App.31, 626).

Respondents filed lawsuits against San Jacinto County, Fort Bend County, and several officers who investigated the murder. (App.88, 118-165).

B. Procedural History

1. Respondent Richard Winfrey, Jr.'s Fourth Amendment claim

The federal district court twice granted summary judgment in favor of Deputy Johnson and in both instances Richard Winfrey appealed. (App.38, 263). In the initial appeal, the Fifth Circuit affirmed the dismissal of claims against Johnson other than a claim he allegedly violated the Fourth Amendment under *Franks* doctrine. (App.31, 36-38, 89). The Fifth Circuit remanded that claim to the district court for additional discovery regarding the *Franks* claim. (App.89, 30-55).

2. Respondent Megan Winfrey's Fourth Amendment claim

After the Texas Court of criminal appeals, reversed Megan Winfrey's criminal conviction, she also filed suit against San Jacinto County, Fort Bend County, and several officers who investigated the murder. (App.139-165). After resolution of dispositive pretrial motions and Megan Winfrey's initial appeal, the Fifth Circuit affirmed the dismissal of claims against Deputy Johnson other than a claim he allegedly violated the Fourth Amendment under *Franks* doctrine. (App.13-27).

3. Dispositive motions and pre-trial appeals

After completion of joint discovery in both lawsuits, Deputy Johnson moved for summary judgment,

asserting his immunity. (App.37-38). The district court filed a comprehensive, consolidated summary judgment order in both suits, in which the district court meticulously analyzed the affidavit Johnson submitted. (App.82-115). The district court granted summary judgment in favor of Johnson but denied the Fort Bend County dog handler's summary judgment motion. (App.88).

During Richard Winfrey, Jr.'s appeal, Fort Bend County reached an agreement with Richard Winfrey to settle his claims against Fort Bend County and its deputy sheriff dog handler for the amount of $550,000.00. (App.208-215).

Likewise, Megan Winfrey reached an agreement to settle her claims against Fort Bend County and its deputy sheriff dog handler for the amount of $1,000,000.00. (App.216-224).

After Megan Winfrey settled her claims against the Fort Bend County dog handler, the district court entered final judgment in favor of Deputy Johnson on Megan Winfrey's claims.

On Richard Winfrey, Jr.'s appeal of the dismissal of his claims against Deputy Johnson, the Fifth Circuit identified only one inaccurate statement in the affidavit. (App.33). During the murder investigation, Ranger Huff enlisted the assistance of a Fort Bend County deputy sheriff who handled tracking dogs. (App.32-33, 94, 105-106). In one of several tracking exercises the dogs performed, the Ranger incorrectly reported a dog had tracked Richard Winfrey, Jr.'s scent to Burr's

home, when the scent tracked was actually a scent from Megan Winfrey's boyfriend. (App.33). Johnson was not present during the scent tracking exercises. In the affidavit Johnson repeated the error the Ranger had made in his report. Respondents argued Johnson should have known the dog did not track Richard Winfrey, Jr.'s scent. (App.122-138, 146-149, 154-164).

On the summary judgment record, viewing the evidence in the light most favorable to Richard Winfrey, Jr. the Fifth Circuit found the disputed evidence regarding Deputy Johnson's knowledge of the scent tracking procedures was material to determining whether the affidavit supported probable cause to arrest Richard Winfrey. (App.49).

Among the other information in his affidavit, Deputy Johnson also included statements provided by David Campbell, Respondents' father's jail cellmate, that implicated both Respondents as assisting their father murder Burr. (App.203-205). In addition to the information included in the affidavit that directly implicated Respondents and their father in the murder, Campbell also reported that Respondents' father had made other statements not included in the affidavit that were inconsistent with evidence observed at the crime scene. (App.34-35, 49, 86). Campbell reported that Respondents' father stated: (1) Burr was both stabbed and shot, but Burr was only stabbed; and (2) Respondents' father said he had cut off Burr's body part, but that evisceration had not occurred. (App.34, 49, 86).

Viewing the summary judgment evidence in the light most favorable to Respondents, the Fifth Circuit further opined Deputy Johnson should also have included in his affidavit that Campbell had identified a Winfrey cousin, instead of Respondents, as participating in the murder with Respondents' father. (App.48-50). Later at trial, the necessity for including this information in the affidavit was refuted when the evidence admitted at trial did not support the Fifth Circuit's inference under the summary judgment standard regarding a Winfrey cousin, instead of Respondents, participating in the murder. (App.175, 193-194). The jury identified this obvious discrepancy in the evidence admitted at trial through notes during jury deliberations. (App.343-353). However, the district court steadfastly directed the jury that it must accept as proven this assertion that was disproven by the evidence admitted at trial. (App.275-276, 343-358).

The Fifth Circuit had opined in an appeal before trial that "[a]lthough neither of these false statements, considered independently, would necessarily have been fatal to the affidavit – because [Respondents' father] could have told Campbell anything – together with Campbell's other statements, these would have served to undermine Campbell's credibility." (App.49).

The Fifth Circuit reversed the district court judgment in favor of Deputy Johnson on Richard Winfrey's claims, and remanded Richard Winfrey's case to the district court for trial. (App.55).

Based on the Fifth Circuit's rule of orderliness, the Fifth Circuit panel that later decided Megan Winfrey's appeal, opined it could not overrule the earlier panel decision from Richard Winfrey, Jr.'s appeal. (App.13-14). The Fifth Circuit, therefore, also reversed and remanded Megan Winfrey's claims to the district court for trial. (App.14, 27).

Respondents' cases were consolidated for trial. (App.265).

4. Pre-trial and trial proceedings

In pre-trial filings and at trial, Deputy Johnson asked the district court to instruct the jury and ask the jury to answer interrogatories regarding the objective analysis of probable cause and immunity, but the district court refused to do so. (App.233-242, 256-259, 263-272). Instead, the district court directed the jury it must accept as conclusively proven at trial, information the Fifth Circuit had considered in the light most favorable to Respondents since the Fifth Circuit was analyzing a summary judgment motion. (App.275-276). The district court also prohibited Johnson from admitting evidence at trial about police training regarding preparation of warrants, and prevented Johnson from admitting evidence regarding whether a reasonably well-trained officer in Johnson's position would have known his affidavit failed to establish probable cause and that he should not have applied for the warrant.

At trial, the district court did not rule on Deputy Johnson's immunity and the district court did not submit instructions and questions to the jury that Johnson requested to consider his immunity defense. (App.270, 305-325). The district court ruled that immunity was not an issue in the case even though Johnson had asserted that defense throughout the litigation (App.302, 316, 330).

Additionally, at trial the district court did not determine, or even consider, whether the affidavits Deputy Johnson submitted established probable cause based on the facts the jury found proven at trial. (App.9-12, 268-275, 330). Likewise, the district court did not permit the jury to determine, or even consider, whether the affidavits established probable cause based on the facts the jury found proven at trial. (App.269-270, 330).

Instead, before any evidence was admitted at trial, the district court directed the jury it must accept as proven that the affidavits did not establish probable cause. (App.275). Before any evidence was admitted at trial, the district court further directed the jury that the affidavits each had one materially false statement and two categories of omitted material facts. (App.275-276). Before any evidence was admitted at trial, the district court instructed the jury that the material omissions in the affidavits were Deputy Johnson failing to include "Campbell's statements were contradicted by physical evidence" and omitting that "Campbell identified a cousin as participating in the murder with [Respondents' father] instead of [Respondents]." (App.276).

The district court framed the only issues for trial as "the issue of intentionally is just whether or not [Deputy Johnson] intended to sign[. . .]" (App.314). To the jury's confusion, the trial court framed the questions for the jury to determine if Johnson recklessly, knowingly, or intentionally intended to sign the affidavits in question. (App.364-367). The court did not instruct or ask the jury to answer whether Deputy Johnson recklessly, knowingly, or intentionally intended to deceive the magistrate by omitting information from the affidavit. Through notes during deliberations, the jury asked several questions related to the standard for material omissions and was instructed back to the same instructions the district court gave before and after the evidence was admitted at trial. (App.333-342, 347-354).

The jury found that Deputy Johnson did not recklessly, knowingly or intentionally make a materially false statement regarding the dog scent trail. (App.373-374).

After sending notes inquiring about the lack of evidence regarding police training and seeking guidance about the directions the district court had given the jury that contradicted the evidence admitted at trial regarding Campbell allegedly identifying a cousin participating in the murder with Respondents' father instead of the Respondents, the jury ultimately capitulated to the district court's directions the jury could not consider the evidence otherwise. (App.333-342, 347-352).

During the trial, the district court also ruled that contribution and settlement credit was not available to Deputy Johnson.

5. Post-trial filings and proceedings

After trial, Deputy Johnson filed motions in the district court seeking judgment in his favor and identifying the many harmful errors the district court committed at trial, including: (1) directing the jury before evidence was admitted at trial that the jury must accept a factual contention that was not supported by the evidence admitted at trial, and certainly was not conclusively proven; (2) the findings at trial did not establish that probable cause was lacking in the affidavits; (3) prohibiting Johnson from admitting evidence relevant to whether a reasonably well-trained officer in Johnson's position would have known his affidavit failed to establish probable cause and that he should not have applied for the warrant; (4) not permitting Johnson to assert his pled immunity at trial; (5) preventing Johnson from admitting evidence at trial that a reasonable officer could have believed the affidavits Johnson submitted supported probable cause; and (6) failing to apply the law to the facts found by the Jury. The district court denied Johnson's motions and entered judgment in favor of Respondents. (App.7-8).

Deputy Johnson appealed to the Fifth Circuit, which affirmed the district court judgments, without providing a detailed opinion or rationale for its affirmation. Johnson petitioned the Fifth Circuit for rehearing en

banc, but the Fifth Circuit denied rehearing. (App.116-117).

REASONS FOR GRANTING THE PETITION

A. An officer does not violate clearly established law when he submits an affidavit that an objective officer could reasonably believe supports probable cause.

1. This Court has never held that an officer forfeits his immunity if the officer submits an affidavit which does not include information material to the evaluation of probable cause, when an objective officer could reasonably believe the affidavit supports probable cause.

To be clearly established, federal law must be identified and applied consistently in all federal courts. Deputy Johnson's case presents a stark example of the Fifth Circuit's failure to appropriately analyze and apply immunity in the circumstance when an officer does not include information in an affidavit that may be material to the evaluation of probable cause, when an objective officer could nonetheless reasonably believe the affidavit supports probable cause.

The Fifth Circuit denied immunity based on the rationale the affidavit Deputy Johnson submitted did not include information material to the evaluation of probable cause, without any consideration of whether

an objective officer could reasonably have believed the affidavit supported probable cause.

This Court identifies clearly established law. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021); *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012). This Court has never construed immunity as did the Fifth Circuit when it denied immunity. To the contrary, in *Malley*, 475 U.S. at 337, the Court generally answered "the question of the degree of immunity accorded a defendant police officer in a damages action under 42 U.S.C. § 1983 when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and supporting affidavit which failed to establish probable cause."

The Court held "the same standard of objective reasonableness that we applied in the context of a suppression hearing in [*United States v.*] *Leon*, [468 U.S. 897, 914, (1984),] defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Id*. at 344. The issue "is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id*. at 345. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon*, *supra*, at 923, will the shield of immunity be lost." *Id*. at 344-45. When "officers of reasonable competence could disagree on this issue [of whether a reasonable officer could have believed a warrant should issue], immunity should be

recognized." *Id*. at 349. In *Malley* at 341, the Court discussed that "[u]nder the *Harlow* [*v. Fitzgerald*, 457 U. S. 800 (1982)] standard . . . an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id*. at 341.

At trial, Deputy Johnson asked the district court to properly instruct the jury and ask the jury to answer interrogatories regarding the objective analysis of probable cause and whether an objective officer could have reasonably believed the affidavit Johnson submitted supported probable cause. However, the district court refused to do either, and the district court further prohibited Johnson from admitting evidence at trial regarding the central objective issue of whether a reasonably well-trained officer in Deputy Johnson's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.

The district court did not rule on Deputy Johnson's immunity at trial or after trial. On appeal after trial the Fifth Circuit simply affirmed judgments against Johnson without applying the law to the facts found by the jury, including failing to decide the issue of Johnson's immunity. Any objective officer could have reasonably believed, based on *Malley*, that an officer's immunity would be assessed based on whether an objective officer could reasonably have believed the affidavit supported probable cause, regardless of whether

the affidavit included information material to evaluation of probable cause. The Fifth Circuit denied immunity without a jury or judicial finding that no objective officer could have reasonably believed Deputy Johnson's affidavit supported probable cause.

This Court has never established, even in a general sense, that an officer forfeits his immunity if the officer submits an affidavit that did not include information material to the evaluation of probable cause. To the contrary, this Court's precedents demonstrate that further inquiry is necessary to assure that an officer had fair notice that his particular actions were clearly unlawful. *Compare*, *Malley supra*; with *Messerschmidt v. Millender*, 565 U.S. 535, 553 (2012) (question is not whether an affidavit "actually establish[es] probable cause").

Certainly, this Court has not decided any case at the requisite level of particularity to have provided Deputy Johnson fair notice he was required to include in the affidavit he submitted the information the Fifth Circuit years later opined was material to the evaluation of probable cause.

2. Deputy Johnson's petition presents an issue of national importance on which circuit courts are divided.

Even if *arguendo*, without conceding, that circuit court opinions could clearly establish federal law, there is no consensus of circuit court opinions holding that an officer forfeits his immunity if the officer submits

an affidavit that does not include information material to the evaluation of probable cause, when an objective officer could reasonably believe the affidavit supports probable cause. Whether *Malley* or a different standard provides the appropriate analytical method for analyzing and determining an officer's immunity when information material to probable cause is not included in the affidavit is an issue on which the circuits do not agree.

Smith v. Reddy, 101 F.3d 351, 355 (4th Cir. 1996) demonstrates the procedure the Fourth Circuit utilizes to address claims like those raised in Deputy Johnson's case. The Fourth Circuit rejected a district court's application of "the subjective standard set forth in *Franks* . . . to overcome a defendant's claim of qualified immunity." "Rather than engaging the *Franks* test, [the Fourth Circuit] appl[ied] the qualified immunity analysis, which examines the objective reasonableness of an officer's conduct." *Id*. (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) and *Harlow*, 457 U.S. at 815-19). "When an officer acts pursuant to a warrant, the pertinent question is whether the officer could have reasonably thought there was probable cause to seek the warrant." *Id*. at 356 (citing *Anderson*, 483 U.S. at 638-39). "[Q]ualified immunity is lost only if 'the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" *Id* (quoting *Malley*, 475 U.S. at 344-45).

The Second Circuit utilizes a different approach than the Fourth Circuit, but both circuits evaluate immunity in *Franks* claims beyond merely determining

whether the affidavit at issue establishes probable cause. In *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004), the Second Circuit first considered whether misstatements in, and omissions from, an affidavit were "necessary to the finding of probable cause." If so, to evaluate the officer's immunity, the Second Circuit examines "the hypothetical contents of a "corrected' application to determine whether a proper warrant application, based on existing facts known to the applicant, would still have been sufficient to support **arguable probable cause** to make the arrest as a matter of law." *Id*. at 743-44 (emphasis added). "Arguable probable cause exists 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause was met.'" *Id*. at 743. "If there remains an objective basis to support arguable probable cause, remaining factual disputes are not material to the issue of qualified immunity and . . . judgment should be granted to the defendant on the basis of qualified immunity." *Id*. at 744. "Only if the corrected affidavit would not 'support a reasonable officer's belief that probable cause existed' would the identified factual disputes be material to resolving the issue." *Id*.

Notably, however, *Smith* and *Escalera* involved both false statements and omissions. After the jury verdict, omissions alone served the basis of the judgment against Deputy Johnson. The Fifth Circuit did not perform an analysis that comported with *Smith* or *Escalera*.

The Ninth Circuit has discussed, "if an affidavit can be challenged because of material omissions, the literal *Franks* approach no longer seems adequate because, by their nature, omissions cannot be deleted." *United States v. Ippolito*, 774 F.2d 1482, 1487 n.1 (9th Cir. 1985).

Therefore, the first reason this Court should grant Deputy Johnson's petition is because circuit and district courts need guidance from this Court regarding identification of the clearly established federal law in the circumstance where an officer submits an affidavit that does not include information material to the evaluation of probable cause, when an objective officer could reasonably believe the affidavit supports probable cause.

3. The Fourth Amendment question of probable cause does not provide a valid measure of immunity.

Probable cause is "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). "The process does not deal with hard certainties, but with probabilities . . . " *Id.* at 231. "Probable cause 'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Gates*, *supra*, at 232). Probable cause "is 'incapable of precise definition or quantification into percentages.'" *Id.* at 589-90 (quoting *Maryland v.*

Pringle, 540 U.S. 366, 371 (2003)). "Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered.'" *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017)).

Facts must be "weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Gates, supra*, at 232. "[I]n holding our law enforcement personnel to an objective standard of behavior . . . judgment must be tempered with reason," and a court "cannot expect our police officers" to possess "a legal scholar's expertise in constitutional law." *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982). Regardless of whether it is appropriate to consider material information not included in an affidavit as false statements, probable cause and immunity are distinct issues with different elements that require separate evaluations. *Wesby*, *supra*, at 582; *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985); *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967); *Escalera*, 361 F.3d at 743; *Gainor v. Rogers*, 973 F.2d 1379, 1383 (8th Cir. 1992).

Evaluated under this Court's precedents, "[p]robable cause 'is not a high bar.'" *Wesby*, 138 S. Ct. at 586 (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). Various circuit courts have characterized the standard for whether an officer could believe probable cause existed as whether "arguable probable cause" existed. *See Escalera*, *supra*, at 744. Probable cause is not a valid measure of immunity because "[r]easonable minds frequently may differ on the question [of]

whether a particular affidavit establishes probable cause . . . " *Leon*, 468 U.S. at 914.

Despite the uncertainty inherent in the probable cause balancing test, the Fifth Circuit denied immunity without considering arguable probable cause. In doing so, the Fifth Circuit errantly merged the probable cause question with the immunity issue. The Fifth Circuit's decision is irreconcilable with precedents of this Court or a consensus of authority in circuit courts. *Compare*, *Saucier v. Katz*, 533 U.S. 194, 197 (2001); *Anderson*, 483 U.S. at 645; *Malley*, 475 U.S. at 345; *Mitchell, supra*, at 527.

Notably, the district court concluded when evaluating Deputy Johnson's summary judgment motion that a reasonable magistrate could find probable cause from Deputy Johnson's affidavit. (App.101-104). The Fifth Circuit, however, opined later, assuming all factual disputes in Respondents' favor under Fed. R. Civ. P. 56, that an affidavit containing the misstatement the jury later found not supported by the evidence admitted at trial, and the two omissions the Fifth Circuit found construing disputed evidence in the light most favorable to the Respondents, would defeat probable cause. (App.20, 49, 75, 95). Without re-examining the affidavits Johnson submitted as the jury found them, and without evaluating Johnson's immunity at trial, the district court entered judgment in favor of Respondents, without ever determining that probable cause did not arguably support a warrant, and without determining that no reasonable officer could have

believed the affidavit supported probable cause. (App.1-12).

Assuming – without the jury, the district court, or the Fifth Circuit ever deciding – probable cause was lacking based on the facts the jury found supported by the evidence, there was also no review of the record after trial to decide immunity. The district court rejected immunity outright before trial and opined, before any evidence was admitted at trial, that the affidavit Deputy Johnson submitted did not support probable cause. The district court ignored Deputy Johnson's claim of immunity. Even if Johnson violated the Fourth Amendment by not including the statements the trial court opined should have been in the affidavit, that did not divest Johnson of immunity without a determination he violated clearly established law.

"[Q]ualified immunity claims raise legal issues quite different from any purely factual issues that might be confronted at trial," which a jury need decide. *Plumhoff v. Rickard*, 572 U. S. 765, 771 (2014). "[Q]ualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-28.

Historically, courts improperly merged immunity analyses with the objective reasonableness evaluation of an officer's use of force under the Fourth

Amendment,[1] leading this Court to invoke its authority in 2001 to expressly reject the invalid procedure of merging the underlying constitutional question with the discrete immunity issue. *See Saucier*, 533 U.S. at 197.

This Court reaffirmed this long-standing distinction when it separately analyzed probable cause and immunity in a case in which the D.C. Circuit opined arrests were not supported by probable cause and violated clearly established law. *Wesby*, 138 S. Ct. at 582. In *Wesby*, District of Columbia officers responded to a party at a house neighbors told police was vacant. *Id.* at 583. Partygoers claimed they were invited, but could not say by who, and no one with legal authority had granted partygoers the right to enter the house. *Id.* at 583-84. Officers arrested and charged the partiers with unlawfully entering the house. *Id.* at 583-84.

The district court and D.C. Circuit opined officers lacked probable cause to make the arrests because partygoers denied knowing they entered the house without the owner's authorization and, according to the D.C. Circuit, this vitiated the culpable mental intent to

---

[1] The Fourth and Ninth circuit courts similarly erred merging the Fourth Amendment question with immunity, then denying immunity on claims under *Franks* based solely on a Fourth Amendment violation. *See Miller v. Prince George's Cty.*, 475 F.3d 621, 631-632 (4th Cir. 2007); *see also Chism v. Washington*, 661 F.3d 380, 393 (9th Cir. 2011). The Eighth Circuit merges the analysis only when probable cause is based solely on false information. *Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir. 1987). Although the legal error is similar, these cases are not factually analogous.

commit the crime. *Wesby*, *supra*, at 583-84. "On the question of qualified immunity, the [D.C. Circuit] panel majority determined it was 'perfectly clear' that a person with 'a good purpose and bona fide belief of her right to enter' lacks the necessary intent for unlawful entry." *Id.* at 585. This Court "granted certiorari to resolve two questions: whether the officers had probable cause to arrest the partygoers, and whether the officers were entitled to qualified immunity." *Id*.

In weighing probable cause, both the Fifth Circuit here and D.C. Circuit in *Wesby* improperly viewed facts in isolation and "mistakenly believed that [they] could dismiss outright any circumstances that were 'susceptible of innocent explanation.'" *Wesby*, *supra*, at 588 (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)). Both circuit courts failed to recognize "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Id.* at 588. Like the Fifth Circuit, the D.C. Circuit erred in its analysis, because both courts "should have asked whether a reasonable officer could conclude – considering all of the surrounding circumstances, including the plausibility of the explanation itself – that there was a 'substantial chance of criminal activity.'" *Id.* (quoting *Gates*, 462 U.S. at 244).

Under *Wesby*, regardless of how a probable cause analysis determined the Fourth Amendment question, the Fifth Circuit should have upheld immunity because the record does not establish every reasonable officer would have known the affidavit Deputy Johnson submitted failed to support probable cause. Because

the Fifth Circuit method of assessing Johnson's immunity contradicts with this Court's precedent, the Court has "discretion to correct [circuit court] errors at each step." *Wesby*, *supra*, at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). This Court's intervention is necessary to correct, again, a circuit court's refusal to apply this Court's immunity precedent.

B. No authority in 2007 would have informed Deputy Johnson he violated clearly established law.

"Qualified immunity is no immunity at all if clearly established law can simply be defined as the right to be free from unreasonable searches and seizures," *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015), but this is precisely how the Fifth Circuit denied Deputy Johnson's immunity. (App.18, 45, 116-117, 310-317). Under this Court's firmly settled precedents, the bedrock of immunity is **fair notice** to an officer warning him that his conduct is clearly unlawful in the specific circumstance the officer is encountering. *See Brosseau v. Haugen*, 543 U.S. 194, 205 (2004) (per curiam). "Without that 'fair notice' an officer is entitled to qualified immunity." *Sheehan*, *supra*, at 616. "Under [this Court's] precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *Wesby, supra*, at 589 (citing *Reichle*, 566 U.S. at 664).

> "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable office[er] would understand that what he is doing'" is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be 'settled law,' which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority[.]'" . . . [T]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him.

Wesby, *supra*, at 589-90 (internal citations omitted).

Furthermore, even if this Court or a consensus of circuit court opinions generally held that an officer forfeits his immunity if the officer submits an affidavit that does not include information that may be material to the evaluation of probable cause, that alone would not be sufficient under this Court's precedents to deny Deputy Johnson's immunity. On the question of whether an objective officer could reasonably believe the particular affidavit he submitted supports probable cause, clearly established law "requires a high 'degree of specificity'" and this 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 office[er] acted reasonably in the particular circumstances that he or she faced.' " *Id.* at 590 (citations omitted). "A rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established." *Id*. (citations omitted).

The Court has "stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.' " *Wesby*, *supra*, at 590 (citing *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). The Court has "previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment" and "frequently observed, and [its] many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson*, 483 U.S. at 643-44.

In *Anderson, supra*, at 636, the Court answered "whether a . . . law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." Creighton accused FBI Agent Anderson of performing a search not supported by probable cause. *Id*. The Eighth Circuit denied immunity to Agent Anderson based on the opinion "the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances – was clearly established." *Id*. at 638. "It should not be surprising, therefore, that [this Court's]

cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be **sufficiently clear** that **a reasonable official would understand** that **what he is doing violates that right**." *Id*. at 640 (emphasis added).

The Fifth Circuit repeated the Eighth Circuit's *Anderson* error when it cited *Franks* as its sole support for its subjective opinion the purported constitutional right "to be free from police arrest without a good faith showing of probable cause" has been clearly established. (App.18, 45, 116-117, 310-317). *Franks* did not analyze if the detective's conduct was unconstitutional and provides no warning that Deputy Johnson's submitting an affidavit to a magistrate was so clearly illegal as to divest him of immunity, even if, his affidavits violated Respondents' Fourth Amendment rights. *Franks, supra*, at 155-56, 164. "No matter how carefully a reasonable officer reads [*Franks*], . . . beforehand, that officer could not know that" submitting the affidavit Johnson presented was clearly unlawful in 2007. *Sheehan*, *supra*, at 616.

"But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow* . . . " *Anderson*, *supra*, at 639. "Plaintiffs would be able to convert the rule of qualified immunity that [this Court's decisions] plainly establish into a rule of virtually unqualified liability

simply by alleging violation of extremely abstract rights." *Anderson*, *supra*, at 639.

> Such an approach, in sum, would destroy "the balance [this Court's] cases strike between the interests in vindication of citizens" constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Anderson, *supra*, at 639-40 (quoting *Davis v. Scherer*, 468 U.S. 183, 197 (1984)).

Even if the Fifth Circuit had accurately stated a new right, the Fifth Circuit did not apply any discernible standard to show how existing case decisions in 2007 fairly warned a reasonable officer Deputy Johnson's action was clearly unlawful. The Fifth Circuit did not identify any source that would have informed Johnson every officer was obligated to view this omitted information crucial to establishing probable cause; or identify any standard a reasonable officer could have learned from in 2007 to predict either the manner the Fifth Circuit utilized, or the after-the-fact probable cause opinion regarding the lawfulness of Johnson's action. Instead, the Fifth Circuit announced a conclusory opinion, which the trial court followed, about probable cause negating immunity. (App.1-55, 302, 305). The Fifth Circuit did not identify any authority from which every officer knew Johnson was required to include the Fifth Circuit's opined material omissions,

or the failure to include those details violates clearly established law. (App.13-27, 30-55)

The Fifth Circuit never "identified a single precedent – much less a controlling case or robust consensus of cases – finding a Fourth Amendment violation 'under similar circumstances.'" *Wesby*, 138 S. Ct. at 591. *Wesby*, highlights the Fifth Circuit's error denying immunity based on its opinion Deputy Johnson's affidavit, as the Fifth Circuit opined it should have been written, failed to support probable cause. Certainly no authority in 2007 would have informed Deputy Johnson he was required to add this specific information. (App.13-27, 20-55). While the Fifth Circuit had authority to opine, *de novo* on probable cause, the Fifth Circuit cannot – consistent with this Court's authorities – deny immunity on that basis alone. The Fifth Circuit's rejection of immunity based on an over-generalized "clearly established law" departs from this Court's controlling decisions.

C. Deputy Johnson's actions in 2007 did not violate clearly established law.

The Fifth Circuit never addressed whether an objective officer could have reasonably believed Deputy Johnson's affidavit supported probable cause. Assuming *arguendo*, without conceding, the Fifth Circuit correctly concluded the affidavits failed to establish probable cause, Johnson is "entitled to immunity if a reasonable officer could have believed that probable

cause existed to arrest [Winfrey]." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam).

The Court has "recognized that it is inevitable that law enforcement office[er]s will in some cases reasonably but mistakenly conclude that probable cause is present, and [the Court has] indicated that in such cases those office[er]s – like other officials who act in ways they reasonably believe to be lawful – should not be personally liable." *Anderson*, 483 U.S. at 641. "The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* Necessarily distinct from the probable cause inquiry, the different question of immunity "is **whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant**." *Malley*, *supra*, at 345 (emphasis added).

The Fifth Circuit's error is akin to the Ninth Circuit's error, which this Court corrected, after the Ninth Circuit disagreed with the officers' and magistrate's assessments of probable cause in *Hunter*, 502 U.S. at 226. The Ninth Circuit applied a "wrong" legal standard by misplacing immunity in the hands of a jury and failing to answer the necessary question of "whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be

constructed five years after the fact." *Hunter*, *supra*, at 228. "Even if [this Court] assumed, *arguendo*, that [the agents] (*and* the magistrate) erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter*, *supra*, at 228-29. Conflict regarding a close legal question reveals reasonable minds could differ about whether the affidavit actually shows probable cause, which establishes arguable probable cause supporting immunity. *See Wesby*, 138 S. Ct. at 590.

No officer could have known when Deputy Johnson requested warrants that the Fifth Circuit would opine a decade later that probable cause was lacking based on the reliability of Respondents' father's statements. (App.11, 19, 26, 46-48, 175, 189-194).

"If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *cf. Stanton v. Sims*, 571 U.S. 3, 11 (2013). The Fifth Circuit failed to consider, evaluate, or decide whether every reasonable officer would have known the affidavit Deputy Johnson presented was clearly deficient. An objective officer relying on *Anderson, Malley*, and *Hunter* could have reasonably believed in 2007 that every officer's immunity would be judged by assessing whether the officer had fair warning when he acted, his specific action was then clearly unlawful in the circumstances the officer encountered. Deputy Johnson did not prematurely rush to judgment, he participated in the investigation

from its inception until the warrant was issued after a lengthy investigation by the Sheriff, two Rangers, and a district attorney. (App.198-207). Deputy Johnson obtained approval from District Attorney Barnett before submitting his affidavit and that fact "provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause." *See Messerschmidt*, 565 U.S. at 553; accord *Stonecipher v. Valles*, 759 F.3d 1134, 1145 (10th Cir. 2014). In three criminal trials and preliminary proceedings the prosecutor, criminal trial judges, and criminal defense counsel were all aware of the information upon which Respondents' claims are based, and the criminal courts ruled on these issues independent of any participation of Johnson. (App.1-117).

This Court's consistent method of analyzing and applying immunity demonstrates that denying immunity, without evaluating the objective legal reasonableness of an objective officer's beliefs under the circumstances Deputy Johnson encountered, is untenable. The Court highlighted in *Wesby* that, if probable cause was the immunity test, no officer could know, when he made his probable cause assessment, the standard under which his decision would be measured until after the last judicial authority issued its opinion on probable cause. This Court's intervention is necessary to restore uniformity among the circuits and to correct, again, a circuit court's improper test of immunity.

D. This case presents a matter of first impression addressing damages in a 42 U.S.C. § 1983 action.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court provided guidance on types of damages available in § 1983 actions. The Court interpreted 42 U.S.C. § 1988 to permit courts to look to both federal and state rules on damages.

> [A]s [the Court] read[s] § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969).

The Court stated "[o]ne important assumption underlying the Court's decisions in this area [§ 1983 tort liability] is that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary[.]" *City of Newport v. Fact Concerts, Inc*., 453 U.S. 247, 258 (1981). The § 1988 remedy is recognized as supplementary to the federal rights and courts were called to look to the common law to fashion a suitable one when Congress had been silent. *Carey*, 435 U.S. at 253.

In *Burnett v. Grattan*, 468 U.S. 42, 43-45 (1984), the Court set a three-part test for substantive choice of

law provisions in civil rights actions. The Fifth Circuit summarizes the test as follows:

> First, if federal law is neither deficient nor inapplicable, it will apply. Second, if federal law does not apply, state law does apply, unless, third, state law would be inconsistent with the Constitution and the laws of the United States.

Dobson v. Camden, 705 F.2d 759, 762 (5th Cir. 1983), *rev'd on other grounds*, 725 F.2d 1003 (5th Cir. 1984) (en banc).

The Court consistently sets aside a § 1988 choice of law analysis, in favor of applying "principals derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Smith v. Wade*, 461 U.S. 30 (1983); *Carey*, *supra*, at 257-58. Section 1983 permits compensatory, nominal, and punitive damages, *Stachura, supra* at 306-07, but the Court has never addressed contribution among joint tortfeasors or setoff, and if those damage issues should be governed by state or federal law.

Most circuit courts agree uniformity is necessary and that § 1983 damages are governed by federal common law. *Mercado-Berrios v. Cancel-Alegria*, 611 F.3d 18, 28 (1st Cir. 2010); *Basista v. Weir*, 340 F.2d 74, 86 (3d Cir. 1965); *Dionne v. Mayor & City Council of Baltimore*, 40 F.3d 677, 685 (4th Cir. 1994) *Busche v. Burkee*, 649 F.2d 509, 578 (7th Cir. 1981); *Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019); *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir. 1989).

Numerous circuits recognize the propriety of a setoff for damages where, as here, the plaintiff was already compensated for the same injury, based on the same allegations of fault. *See*, *e.g.*, *Burke*, *supra*, at 1046; *Corder v. Brown*, 25 F.3d 833, 839 (9th Cir. 1994); *U.S. Indus., Inc. v. Touche Ross & Co*., 854 F.2d 1223, 1259 (10th Cir. 1988); *Goad v. Macon County*, 730 F. Supp. 1425 (M.D. Tenn. 1989); *Medina v. District of Columbia*, 643 F.3d 323, 328 (D.C. Cir. 2011). The bar is clear: under § 1983 an injured party may recover damages only for the actual loss suffered, except where punitive damages are awarded. *See*, *e.g.*, *Stachura*, 477 U.S. at 306.

Conversely, the Second Circuit held setoff was not available in a § 1983 case. *Restivo v. Hessemann*, 846 F.3d 547, 586 (2d Cir. 2017). Relying on *Restivo*, the Sixth Circuit followed suit in *Nichols v. Knox Cty*., 2017 U.S. App. LEXIS 24597 *7 (6th Cir. 2017) and disallowed a setoff because "'no federal caselaw suggests that setoff is appropriate where a settling party's liability is never considered at trial by a jury.'"

The Fifth Circuit inconsistently addresses the setoff issue. In *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985), the Fifth Circuit looked to Texas law to determine damages recoverable for a wrongful death under § 1983. In *Deselma v. City of Dallas*, 770 F.2d 1334, 1337 n.5 (5th Cir. 1985), the Fifth Circuit characterized *Grandstaff* as implying that § 1988 dictates choice of law for damages under § 1983. The Fifth Circuit has previously addressed state law versus federal common law for § 1983 damages, but it has never

resolved the issue. *See Dobson*, 705 F.2d at 766; *Longoria v. Wilson*, 730 F.2d 300, 304 (5th Cir. 1984).

A review of the three-part test shows that setoff should be allowed. First, the Court has only applied § 1988 to limited examinations of survival of civil rights actions. *Robertson v. Wegmann*, 436 U.S. 584 (1978). Federal law is deficient where, as here, an absent party settles a claim that was sent to a jury, and the jury was never asked to determine the settling party's liability. *See Burke*, 935 F.3d at 1046. Respondents settled with Fort Bend County and Deputy Pikett prior to trial to release "from all liability . . . any and all claims for damages of causes of action, including but not limited to Civil Rights § 1983 due process and civil conspiracy claims, at law or in equity, which [Respondents] may now have[.]" (App.208-224). Respondents' settlements were for compensatory damages accordingly caused by all defendants, as set forth in their respective complaints. (App.211,220). The settlements were "not an admission of liability on the part of Fort Bend County and Fort Bend County Deputy Keith Pikett[,]" and the jury did not consider their liability. (App.210-218).

Second, looking to Texas law, "[i]f the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements." Tex. Civ. Prac. & Rem. Code § 33.012(b). "When there is a settlement covering some or all of the damages awarded in the judgment, section 33.012 requires the trial court to

reduce the judgment accordingly." *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 926 (Tex. 1998).

"Under Texas' one satisfaction rule, a plaintiff is entitled to only one recovery for any damages suffered.' '[T]he rule is intended to prevent a plaintiff's double recovery based on a single injury' and applies whenever the 'plaintiff has suffered a single, indivisible injury.' " *Thomas v. Hughes*, 27 F.4th 995, 2022 U.S. App. LEXIS 5706, at *36 (5th Cir. 2022) (citations omitted). "[T]he plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settling defendant has already partially contributed. The plaintiff would otherwise be recovering an amount greater than the trier of fact has determined would fully compensate for the injury." *First Title Co. v. Garrett*, 860 S.W.2d 74, 78 (Tex. 1993). The one satisfaction rule applies when multiple defendants commit technically different acts that result in the same single injury. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991).

Respondents' settlements were for injuries, pain, and suffering "caused by the search and seizure of [each Respondent's] person" and "the associated seizure of bodily materials" and for Megan's settlement also being subject to the dog scent line up and her subsequent incarceration. (App.211-212, 220). The verdict awarded compensatory damages for Respondent's arrests. (App.375). For Respondents to obtain compensatory damages in a settlement and after from Deputy Johnson for the same injuries, regardless of the theory

of liability, violates Texas one satisfaction rule. (App.209-224, 375).

Third, "[t]he purpose of § 1983 is to deter state actors from using their badge of authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Setoff is not contrary to the purpose of § 1983, but requires analysis "whether and to what extent a reduction of the [$1,000,000.00] award might contravene § 1983 policy goals." *Burke, supra*, at 1047. Respondents were already compensated for the same claims and compensatory damages received from settling co-defendants. (App.208-224).

The trial court barred all references to the settlement at trial and refused to instruct or inquire of the consideration of Fort Bend County and Deputy Pikett's proportionate liability for the same claim and accusations. (App.285-298).

Noting the "Fifth Circuit needs to rule on it," the trial court below denied a setoff for the settlement from Fort Bend County and Deputy Pikett over the same injuries and claims at trial. (App.298). Holding there is no gap between state and federal law, the trial court opined "there is no need for federal courts to adopt state law on this issue." (App.297). *Sullivan* and *Burnett* instruct otherwise. *Sullivan*, 396 U.S. at 240; *Burnett*, 468 U.S. at 48-49.

The district court pushed the question to the Fifth Circuit, which it did not answer. The Fifth Circuit's

implicit decision mirrors the Second and Sixth Circuits, in contradiction to § 1983 damages treatment in the majority of circuits. Certiorari should be granted to finally resolve this important and recurring issue of federal civil rights law.

CONCLUSION

This petition for a writ of certiorari should be granted to decide the important federal issues the Fifth Circuit decided in a way that conflicts with relevant decisions of this Court and other circuit courts.

WILLIAM S. HELFAND, *Counsel of Record*
NORMAN RAY GILES
LEWIS BRISBOIS BISGAARD & SMITH, LLP
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
bill.helfand@lewisbrisbois.com
(713) 659-6767