ORIGINAL

FILED
OCT 30 2026
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 26-603

In The
Supreme Court of the United States

MARK D. DAVIS,

Petitioner,

v.

JAMES DISTEFANO, CHRISTINA KEETON, and DANNY WESSON,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Mark D. Davis, *pro se*
569 County Road 281
Florence, Alabama 35633
(256) 355-1504
davis.mark.legal@gmail.com

QUESTIONS PRESENTED

Petitioner was arrested in his home on a warrant for a misdemeanor. The warrant application was a form complaint whose only factual content was an incorporated printout from the sheriff's records system, which the district court found "did not appear sworn, signed, or notarized." In petitioner's action under 42 U.S.C. § 1983, the court of appeals sustained the warrant by reviewing the application together with "the broader pool of information known or available" to the officer, including deposition testimony given years later and photographs taken the day after the warrant issued. It also held that facts the officer knew and omitted from the application were immaterial because they related only to petitioner's "intent and justification."

The questions presented are:

1. Whether, in a Fourth Amendment action challenging an arrest made in the home under a warrant, a court may sustain the warrant on information the affiant possessed but did not present to the magistrate, or that did not exist when the warrant issued.

2. Whether facts known to a warrant affiant that bear on the mental-state element of the charged offense may be disregarded as "defenses" in the materiality inquiry required by *Franks v. Delaware*, 438 U.S. 154 (1978).

PARTIES TO THE PROCEEDING

Petitioner is Mark D. Davis. He was the plaintiff in the district court and the appellant in the court of appeals.

Respondents are James DiStefano, Christina Keeton, and Danny Wesson. They were the defendants in the district court and the appellees in the court of appeals. The court of appeals captioned the case with the complaint's misspelling of the first respondent's name, "DiStephano." The correct spelling is "DiStefano," Pet. App. 3a n.1, 18a n.1, which the district court used and which the cover and this petition use.

RELATED PROCEEDINGS

- *Davis v. DiStephano, et al.*, No. 25-11743, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Mar. 24, 2026. Rehearing denied Aug. 7, 2026.
- *Davis v. DiStefano, et al.*, No. 3:23-cv-00581-HNJ, U.S. District Court for the Northern District of Alabama. Judgment entered Feb. 20, 2025. Motion to alter or amend judgment denied Apr. 23, 2025.
- *Alabama v. Davis*, No. 41-DC-2020-001444.00, District Court of Lauderdale County, Alabama. Charge nolle prossed Feb. 11, 2022.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. The altercation and the on-scene investigation	4
B. The warrant application	5
C. The photographs and the arrest	7
D. Proceedings below	8
REASONS FOR GRANTING THE PETITION	11
I. The Eleventh Circuit Adopted a Rule for Reviewing Warrants That Conflicts With This Court's Decisions and With Other Circuits.	11
A. A warrant is judged by what the magistrate was given.	11
B. The court below measured the warrant against the officer's knowledge, and against evidence that did not yet exist.	12

C. The rule conflicts with the approach of other courts of appeals and with the Eleventh Circuit's own precedent. 15
D. The rule runs in only one direction. 17
II. The Circuits Are Divided Over Whether an Affiant May Withhold Known Facts Bearing on the Defendant's State of Mind. 19
A. The courts of appeals disagree. 19
B. The decision below treats facts bearing on intent as irrelevant. 21
C. The facts omitted here went to an element, not a defense. 23
III. The Questions Are Important and Recur. 26
IV. This Case Is an Ideal Vehicle. 27
V. In the Alternative, the Court Should Summarily Reverse. 31
CONCLUSION 32

TABLE OF APPENDICES **Page**

App. A Opinion of the United States Court of Appeals for the Eleventh Circuit (Mar. 24, 2026) 1a
App. B Judgment of the United States Court of Appeals for the Eleventh Circuit (Mar. 24, 2026) 15a
App. C Memorandum Opinion and Order of the United States District Court for the Northern District of Alabama (Feb. 20, 2025) 17a

App. D Order of the United States District Court for the Northern District of Alabama (Feb. 20, 2025) 90a
App. E Memorandum Opinion of the United States District Court for the Northern District of Alabama Denying Reconsideration (Apr. 23, 2025) 91a
App. F Order of the United States Court of Appeals for the Eleventh Circuit Denying Rehearing and Rehearing En Banc (Aug. 7, 2026) 105a
App. G Constitutional and Statutory Provisions Involved 107a
App. H Criminal Complaint, Warrant of Arrest, Certificate of Execution, and Attached Records Printout (Doc. 34-10) 116a
App. I Written Statement of Mark D. Davis, Oct. 5, 2020 (Doc. 34-4) 137a
App. J Handwritten Statement of Katie Davis, Oct. 5, 2020 (Doc. 34-6) 140a
App. K Excerpts, Deposition of Christina Keeton (Doc. 34-1) 143a
App. L Excerpts, Transcript of Body-Camera Footage, Oct. 4-5, 2020 (Doc. 34-13) . . 185a
App. M Excerpts, Transcript of One Place Interview of Katie Davis, Oct. 5, 2020 (Doc. 34-16) 227a

App. N Excerpts, Transcript of One Place Interview of Landon Beard, Oct. 5, 2020 (Doc. 34-18) 241a

App. O Excerpts, Deposition of Mark D. Davis (Doc. 34-3) 251a

App. P Appearance Bond and Additional Bond Conditions, *State v. Davis*, No. 41-DC-2020-001444.00 (Lauderdale Cnty. Dist. Ct. filed Oct. 13, 2020) . . . 277a

App. Q Declaration of Austin Burdick (Doc. 37-4) 281a

TABLE OF AUTHORITIES

Cases **Page(s)**

Aguilar v. Texas, 378 U.S. 108 (1964) 2, 3, 11, 18, 28

Butler v. Smith, 85 F.4th 1102 (11th Cir. 2023) 9, 10, 12, 16, 18, 23, 25, 28

City of Montgomery v. Zgouvas, 953 So. 2d 434 (Ala. Crim. App. 2006) 23

Commissioner v. McCoy, 484 U.S. 3 (1987) 27

Estate of Dietrich v. Burrows, 167 F.3d 1007 (6th Cir. 1999) 20

Florida v. Jardines, 569 U.S. 1 (2013) 29

Franks v. Delaware, 438 U.S. 154 (1978) ..... i, 3, 12, 15, 18, 22, 26

Gerstein v. Pugh, 420 U.S. 103 (1975) 30

Gervin v. Florence, 139 F.4th 1236 (11th Cir. 2025) 9

Giordenello v. United States, 357 U.S. 480 (1958) 19

Graves v. Mahoning County, 821 F.3d 772 (6th Cir. 2016) 16, 26

Groh v. Ramirez, 540 U.S. 551 (2004) 30

Harris v. Hixon, 102 F.4th 1120 (11th Cir. 2024) 17

Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004) 20

Holman v. City of York, 564 F.3d 225 (3d Cir. 2009) 21

Holmes v. Kucynda, 321 F.3d 1069 (11th Cir. 2003) 23, 25

Illinois v. Gates, 462 U.S. 213 (1983) 11, 28
Jocks v. Tavernier, 316 F.3d 128 (2d Cir. 2003) . . 20
Kendig v. Stolar, 173 F.4th 466
(3d Cir. 2026) 3, 15, 19, 20, 21, 22, 25, 30, 31
Kirk v. Louisiana, 536 U.S. 635 (2002) 31
Kuehl v. Burtis, 173 F.3d 646 (8th Cir. 1999) 21
Lange v. California, 594 U.S. 295 (2021) 29
Loftin v. City of Prentiss,
33 F.4th 774 (5th Cir. 2022) 21
Luke v. Gulley, 50 F.4th 90 (11th Cir. 2022) 16
Malley v. Briggs, 475 U.S. 335 (1986) 12
Manuel v. City of Joliet, 580 U.S. 357 (2017) . . 11, 27
Maryland v. Garrison,
480 U.S. 79 (1987) 11, 12, 14, 18, 22
Miller v. Prince George's County,
475 F.3d 621 (4th Cir. 2007) 12, 15
Nathanson v. United States,
290 U.S. 41 (1933) 19, 28
Paez v. Mulvey, 915 F.3d 1276
(11th Cir. 2019) 10, 21
Payton v. New York,
445 U.S. 573 (1980) 8, 10, 12, 16, 29
Silverman v. United States,
365 U.S. 505 (1961) 29
Thompson v. Clark, 596 U.S. 36 (2022) 11, 27
Thornton v. City of Macon,
132 F.3d 1395 (11th Cir. 1998) 23, 25
Tolan v. Cotton, 572 U.S. 650 (2014) 28
United States v. Williams, 504 U.S. 36 (1992) . . . 28

Welsh v. Wisconsin, 466 U.S. 740 (1984) 29
Whiteley v. Warden, 401 U.S. 560 (1971) 2, 3, 10, 11, 12, 13, 14, 16, 17, 18, 27, 28, 31
Williams v. Aguirre, 965 F.3d 1147 (11th Cir. 2020) 16, 17
Winfrey v. Rogers, 901 F.3d 483 (5th Cir. 2018) 12, 15, 18

Constitutional Provision **Page(s)**

U.S. Const. amend. IV 1

Statutes **Page(s)**

Federal

28 U.S.C. § 636(c) 1
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 . . . . . i, 1, 8

Alabama

Ala. Code § 13A-3-23 2
Ala. Code § 13A-3-24 2
Ala. Code § 13A-6-132 . . . . . 2, 6
Ala. Code § 13A-11-8 . . . . . 2, 6, 23
Ala. Code § 15-7-2 19
Ala. Code § 26-1-1 . . . . . 2, 4, 9

Rules **Page(s)**

Sup. Ct. R. 13.1, 13.3 1

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unpublished. Its order denying rehearing (Pet. App. 105a-106a) is unreported. The district court's memorandum opinion and order (Pet. App. 17a-89a), final order (Pet. App. 90a), and memorandum opinion denying the motion to alter or amend (Pet. App. 91a-104a) are unreported. A magistrate judge decided the case with the parties' consent. 28 U.S.C. § 636(c).

JURISDICTION

The court of appeals entered judgment on March 24, 2026. Pet. App. 15a-16a. It denied a timely petition for rehearing and rehearing en banc on August 7, 2026. Pet. App. 105a-106a. This petition is filed within 90 days of that order. Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment 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.

The appendix sets out the Fourth Amendment and 42 U.S.C. § 1983 (Pet. App. 107a-108a), and Alabama

Code §§ 13A-3-23, 13A-3-24(1), 13A-6-132, 13A-11-8, and 26-1-1(a), as in effect in October 2020 (Pet. App. 109a-115a).

INTRODUCTION

For more than half a century this Court has held that a warrant is judged by what the magistrate was provided. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964). An "otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971).

The Eleventh Circuit applied a different rule. It measured the warrant for petitioner's arrest against "the broader pool of information known or available" to the officer who sought it. Pet. App. 13a. Under that rule it sustained the warrant with evidence the magistrate never had: the officer's deposition testimony, given years later, that the complainant's voice "sounded hoarse" on body-camera video, and photographs of bruises taken the day after the warrant issued. Pet. App. 12a-13a. In the same opinion it held that the facts the officer knew and left out of the application did not matter, because they related to petitioner's "intent and justification." Pet. App. 12a. But intent is an element of the offense charged, not a defense, and facts negating it bear on whether there was probable cause at all. Facts outside the application

may save a warrant, under that rule, but may never impeach one.

The panel introduced those facts with "moreover," but they were not surplusage. The panel found the application sufficient on its own only after setting aside the facts Keeton omitted. Restore those facts, as *Franks* requires, and the application no longer stands alone. That the panel needed outside evidence to "confirm" the application shows it could not stand on its own. And the panel's stated test - whether the application, "even including the broader pool of information known or available to know," supplied a substantial basis, Pet. App. 13a - is not the *Whiteley* test under any reading.

The rule conflicts with *Whiteley* and *Aguilar*, with the approach other courts of appeals follow, and with the Eleventh Circuit's own published precedent. It was applied to an arrest made in the home, where even the circuit most willing to overlook warrant defects recognizes an exception. And the second holding deepens an acknowledged division among the circuits over whether an affiant may withhold known facts bearing on the defendant's state of mind. The Third Circuit held this year that such facts must go to the magistrate. *Kendig v. Stolar*, 173 F.4th 466, 477 (3d Cir. 2026). The decision below holds they may be set aside.

Both questions were pressed and passed on below. The judgment rests on probable cause alone. The district court held, and the court of appeals did not disturb, that the arrest could not have been made without a warrant. The case is a clean vehicle for resolving both questions.

STATEMENT OF THE CASE

A. The altercation and the on-scene investigation

In October 2020 petitioner Mark Davis lived in Lauderdale County, Alabama, with his daughter Katie. She was 18. Alabama sets the age of majority at 19. Ala. Code § 26-1-1(a); Pet. App. 12a n.4. Mr. Davis testified, without contradiction, that she was on probation for assaulting a peer. Pet. App. 12a; see Pet. App. 27a.

On the night of October 4, Katie came to the house to collect her belongings, and an argument became physical. Pet. App. 2a. The accounts differ. Mr. Davis wrote a statement for the deputies that night. He wrote that her pupils were dilated, he took her car keys, she hit him with her fists, and he restrained her. Pet. App. 137a-139a. He ended: "I do not want to press charges against Katie. I love her with all my heart." Pet. App. 139a. Katie wrote that her father swung a belt at her, that "I pushed him off," and that outside he held her against the wall by the throat. Pet. App. 140a-141a. Neither statement mentioned a threat.

Deputies Jason Brown and David Alfaro responded. Their report states that they "observed a mark on the father's arm and no marks or bruising on the daughter Katie's neck, arm or legs." Pet. App. 125a. Deputy Brown told Katie: "He's got marks on him, and you don't on you, and ... you know what that shows? That's primary aggressor, and I don't want to carry you in, okay?" Pet. App. 216a. He told the boyfriend's family that the evidence did not "meet

the state statute code for me being comfortable in arresting ... him on it." Pet. App. 202a. He asked Mr. Davis "at least twice, possibly three times," whether he wanted his daughter arrested. Mr. Davis said no; she "needed some kind of mental health counseling" and "didn't need to go to jail." Pet. App. 263a-264a. No one was arrested.

Respondent Danny Wesson, the boyfriend's grandfather, arrived while the deputies were there. He "threatened to harm" Mr. Davis, Pet. App. 2a, and told the deputies, "If he comes out here with a pistol, I got one too," Pet. App. 210a. He and his family objected to the deputies' decision not to arrest Mr. Davis. Pet. App. 34a. Wesson told the deputies that respondent James DiStefano, an investigator in the sheriff's Special Victims Unit, was a family relation who lived nearby and attended family gatherings. Pet. App. 34a-35a, 50a n.25. The next day the deputy's report was closed: "ADM. CLEARED (RECORDS ONLY)." Pet. App. 123a.

B. The warrant application

On October 5, DiStefano assigned the case to respondent Christina Keeton because of his family tie to the boyfriend. Pet. App. 3a. Before applying for a warrant, Keeton watched the body-camera video and read both written statements. Pet. App. 3a, 11a, 182a. She interviewed Katie and the boyfriend. Pet. App. 3a. She did not interview Mr. Davis or look at his injuries, and she did not recall speaking with the responding deputies. Pet. App. 157a, 175a. The only injury Katie reported was sore neck muscles. Pet. App. 231a. She also said that inside the house she "was screaming so

loud." Pet. App. 230a. The boyfriend, watching from his truck, said the hand was on Katie's throat "probably for like a couple of seconds." Pet. App. 245a.

On October 6, Keeton swore to a form criminal complaint charging third-degree domestic violence based on harassment. Ala. Code §§ 13A-6-132(a)(1), 13A-11-8(a)(1). In the space for facts it said only: "See attached officer's affidavit incorporated by reference." Pet. App. 117a. No affidavit was attached. The attachment was a printout from the sheriff's records system. The district court found that it "did not appear sworn, signed, or notarized." Pet. App. 36a. Keeton testified that "the affidavit was the report, which was what we did with every case then." Pet. App. 171a; see Pet. App. 173a (the report was "standing in as the affidavit that should be on that complaint").

The printout held Deputy Brown's narrative and a short narrative by Keeton recounting the interviews. Pet. App. 125a, 134a-136a. It told the magistrate that the case had been closed the day before, Katie had no marks, Mr. Davis had a mark on his arm, and Mr. Davis said Katie "became violent toward him hitting him." Pet. App. 123a, 125a, 133a. It reported that the belt "did not hit her." Pet. App. 135a. It noted that both parties had made written statements, but neither statement was included in the printout. Pet. App. 125a.

The printout did not say that the responding deputy found Katie to be the "primary aggressor," that he found no basis to arrest Mr. Davis, or that Mr. Davis repeatedly declined to have his daughter arrested and said so in writing. It did not say that Katie was a mi-

nor under Alabama law and on probation for assault, or why her father took her keys. It did not include the boyfriend's "couple of seconds." Keeton's narrative mentioned no hoarse voice and no bruises. Pet. App. 134a-136a.

The magistrate issued the warrant the same day. The form recites that "[p]robable cause has been found on a complaint filed." Pet. App. 119a-120a. No transcript, recording, or summary of any testimony exists. The district court found that the magistrate issued the warrant "[b]ased upon the information contained in the criminal complaint and the attached police report." Pet. App. 36a-37a.

C. The photographs and the arrest

On October 7, the day after the warrant issued, DiStefano photographed bruises on Katie's arms at the Wesson home, about an hour before the arrest, and Keeton received the photographs by email. Pet. App. 37a-38a. Keeton later explained that the deputies who declined to arrest "didn't have the evidence that I got later with the pictures." Pet. App. 159a.

That evening, DiStefano, Deputy Brown, and another investigator came to Mr. Davis's home and arrested him there. Pet. App. 38a. The certificate of execution records the arrest "at 569 CR 281," his home address. Pet. App. 120a. Mr. Davis was held in jail about 24 hours, until he was released on bond at 9:11 p.m. on October 8. Pet. App. 279a. The bond conditions barred him from leaving the state and from any contact with his daughter or her family. Pet. App. 5a, 278a-280a. In February 2022 the State nolle prossed the charge. Pet. App. 39a.

D. Proceedings below

Mr. Davis sued the three respondents under 42 U.S.C. § 1983 and Alabama law for false arrest, malicious prosecution, and conspiracy, alleging that he was seized on a warrant unsupported by probable cause. Pet. App. 5a. The parties cross-moved for summary judgment.

The district court. The district court treated the claims as challenges to a seizure pursuant to legal process. Pet. App. 5a. Under Eleventh Circuit law, such a plaintiff must show both that "the legal process justifying his seizure was constitutionally infirm" and that "his seizure would not otherwise be justified without legal process." Pet. App. 54a. The court held that Mr. Davis satisfied the second requirement: "Davis's arrest would not otherwise stand justified without legal process because home arrests require a warrant absent exigent circumstances," and "[t]he court finds no evidence of exigent circumstances." Pet. App. 54a (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)). For the same reason, it held that the Eleventh Circuit's exception permitting a court to consider "information known to the officers but not communicated to the [magistrate]" did not apply: the officers "effectuated the arrest within Davis's home," so the court's assessment "may only refer to the evidence definitively presented to the judicial officer." Pet. App. 63a-64a n.28.

The court then went beyond the application in two respects. It "presume[d] Investigator Keeton presented oral testimony" to the magistrate, though nothing records any, and held that the presumed testimony and the printout "[t]ogether" could support probable

cause. Pet. App. 61a. It treated the existence of the written statements, which the magistrate never saw, as "lending credence" to the printout. Pet. App. 70a n.31. And it held the omitted facts immaterial because the officers "did not need to assess possible defenses." Pet. App. 74a. It said the law was unclear whether an 18-year-old is a "minor" under the parental-discipline statute without addressing § 26-1-1, which Mr. Davis had cited. Pet. App. 74a n.32; D. Ct. Doc. 37 at 9. On reconsideration it reiterated that "only the warrant-issuing judicial officer's probable cause determination matters." Pet. App. 97a.

The court of appeals. The Eleventh Circuit affirmed in an unpublished per curiam opinion. It recited the four elements of a § 1983 claim for seizure pursuant to legal process, including that "the seizure would not otherwise be justified without legal process," and stated: "Only the second element is at issue here." Pet. App. 6a (quoting *Gervin v. Florence*, 139 F.4th 1236, 1248 (11th Cir. 2025)). It stated that "we consider only the information that was presented to the magistrate judge," and "can't justify a seizure by reference to information in an officer's investigative file or mind." Pet. App. 8a (quoting *Butler v. Smith*, 85 F.4th 1102, 1113 (11th Cir. 2023)).

The panel held that Katie's account, "if credited," established probable cause. Pet. App. 10a. It acknowledged that "there was no 'physical' supporting evidence at that time, in the form of bruises or red marks." Pet. App. 10a. It held that "the only alleged omissions appear to relate to Davis's intent and justification," and that officers are not expected "to weigh the viabil-

ity of most affirmative defenses." Pet. App. 12a (quoting *Paez v. Mulvey*, 915 F.3d 1276, 1286 (11th Cir. 2019)). It added that Katie's statements "could persuade a reasonable officer" that the conduct "fell outside the scope of any lawful use of force." Pet. App. 12a-13a. It then continued:

> Moreover, other facts not presented to the magistrate judge tended to confirm Katie's story. Keeton provided unrebutted testimony that Katie's voice sounded hoarse on the body-cam footage, which was consistent with her allegation of being choked, and DiStefano took pictures of bruising on Katie's arms before Davis's arrest.

Pet. App. 13a. It concluded that the application, "even including the broader pool of information known or available to know, provided a 'substantial basis for determining the existence of probable cause.' " Pet. App. 13a. The opinion does not mention the home arrest, *Payton*, or the district court's holding that the arrest required a warrant. The panel did not reach qualified immunity. It held that "[b]ecause probable cause supported his seizure," every claim failed under state and federal law. Pet. App. 14a.

Mr. Davis sought rehearing, arguing that the reliance on facts outside the application conflicted with *Whiteley* and *Butler*. 11th Cir. Doc. 22. Rehearing and rehearing en banc were denied. Pet. App. 105a-106a.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Adopted a Rule for Reviewing Warrants That Conflicts With This Court's Decisions and With Other Circuits.

A. A warrant is judged by what the magistrate was given.

The Fourth Amendment places a neutral magistrate between the citizen and the police. The police supply the facts, and the magistrate decides whether they show probable cause. The magistrate's action "cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). That structure works only if the magistrate's decision is reviewed on the facts the magistrate had. So "the reviewing court may consider only information brought to the magistrate's attention," *Aguilar*, 378 U.S. at 109 n.1, and an insufficient application "cannot be rehabilitated" with information the affiant held back, *Whiteley*, 401 U.S. at 565 n.8. And "[t]hose items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued." *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). Validity is assessed "on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate." *Ibid.*

The rule applies with full force in a § 1983 action. A claim that a warrant issued without probable cause challenges the legal process itself. See *Thompson v. Clark*, 596 U.S. 36, 42-43 (2022); *Manuel v. City of Joliet*, 580 U.S. 357, 367-69 (2017). An officer who obtains a warrant on an application she should have

known was insufficient is not shielded by the magistrate's signature. *Malley v. Briggs*, 475 U.S. 335, 345 (1986). Nor is an officer who knowingly or recklessly includes a false statement. *Franks*, 438 U.S. at 155-56. The courts of appeals apply the same rule to material omissions. *E.g.*, *Miller v. Prince George's County*, 475 F.3d 621, 627 (4th Cir. 2007); *Winfrey v. Rogers*, 901 F.3d 483, 494-95 (5th Cir. 2018). These rules run in one direction. A court may set aside a false statement, and it may count against the warrant a fact the officer left out. It may not add, in support of the warrant, a fact the magistrate was never given. *Whiteley*, 401 U.S. at 565 n.8. The reason is that the officer, not the citizen, decides what the magistrate sees. An officer who holds a fact back cannot later use it to defend the warrant. But the person arrested may point to what she held back to show that the magistrate was not given the whole picture. A warrant that was insufficient when it issued cannot be made sufficient afterward. *Garrison*, 480 U.S. at 85. The point has special force when the arrest is made in the home. Without a valid warrant, police may not enter a home to make an arrest unless there are exigent circumstances. *Payton*, 445 U.S. at 590. So a home arrest stands or falls with the warrant.

B. The court below measured the warrant against the officer's knowledge, and against evidence that did not yet exist.

The panel recited the correct rule. Citing *Butler*, which applies *Whiteley*, it said that "we consider only the information that was presented to the magistrate judge." Pet. App. 8a; see *Butler*, 85 F.4th at 1113 (quot-

ing *Whiteley*, 401 U.S. at 565 n.8). It did not follow that rule. Its error was not a slip in applying *Whiteley*; it stated and applied a different test. It asked whether Keeton's application, "even including the broader pool of information known or available to know," provided a substantial basis for probable cause. Pet. App. 13a. The word "even" does not narrow that test; it describes it. The panel measured the application against everything the officer knew or could have learned, and it sustained the application on that measure.

The outside facts were not a minor part of the panel's reasoning. The panel introduced them with "moreover" after stating that Katie's account, "if credited," established probable cause. Pet. App. 10a, 13a. But the panel reached that "if credited" conclusion only after it had set aside, as going to "intent and justification," every fact Keeton knew and left out. Pet. App. 12a. The two steps are linked. If the omitted facts must be restored to the application - the second question presented - then the application the magistrate should have had is not the one the panel credited, and the outside facts are the only thing left holding the warrant up. The panel's own structure confirms it: an application that stood on its own would not have needed outside evidence to "confirm" it. The outside facts did real work, and *Whiteley* forbids that work.

The panel used that rule three times. *First*, the hoarse voice. That fact came from Keeton's deposition, years after the arrest. Pet. App. 168a. Her narrative in the application does not mention it. Pet. App. 134a-136a. It is precisely "testimony concerning information possessed by the affiant when he sought the warrant

but not disclosed to the issuing magistrate." *Whiteley*, 401 U.S. at 565 n.8. Keeton's interview with Katie supplied a reason for a hoarse voice that had nothing to do with choking: Katie's own screaming. Pet. App. 230a. The panel took the hoarse voice from outside the application but not what Keeton heard that explains it.

Second, the photographs. They did not exist when the warrant issued. The magistrate signed on October 6; the photographs were taken on October 7. Pet. App. 37a, 120a. The panel said they were taken "before Davis's arrest." Pet. App. 13a. That is true, but what matters is the moment the warrant issued, not the moment of arrest. The question is what the magistrate had when she found probable cause, and a photograph taken the evening of the next day, about an hour before the arrest, could not have informed that finding. The panel itself acknowledged that "there was no 'physical' supporting evidence at that time." Pet. App. 10a. *Garrison* forecloses that use: "the discovery of contraband cannot validate a warrant invalid when issued." 480 U.S. at 85. Photographs taken after the warrant issued cannot validate it either.

Third, the element of physical contact. The panel found it satisfied because "Davis admitted grabbing, touching, and striking Katie with a belt." Pet. App. 10a. Those admissions came from the body-camera video and from Mr. Davis's deposition, taken years later. Pet. App. 4a n.2, 182a. The video was not part of the application, and the deposition did not yet exist. What the application did say was the opposite: the belt "did not hit her." Pet. App. 135a.

Keeton's own testimony confirms that the outside facts did the work. She testified that she sought the warrant "based off of her consistent statements and interviews and her injuries." Pet. App. 157a. Before the warrant, Katie reported only sore neck muscles, and the injuries appeared only in the photographs Keeton "got later." Pet. App. 159a, 231a.

C. The rule conflicts with the approach of other courts of appeals and with the Eleventh Circuit's own precedent.

1. Other courts of appeals test a warrant challenged in a § 1983 action by correcting the application, not by consulting the officer's file. The Fourth Circuit asks whether the officer made "false statements or omissions" and whether they were "material," that is, "necessary to the ... finding of probable cause." *Miller*, 475 F.3d at 627 (quoting *Franks*, 438 U.S. at 155-56). The Fifth Circuit reconstructs the affidavit with the false statements removed and the omissions restored. *Winfrey*, 901 F.3d at 494-95. The Third Circuit held this year that an officer who gathers information establishing self-defense "must provide that information to the magistrate so that the probable cause determination remains with the magistrate judge, not the officer." *Kendig*, 173 F.4th at 477. Under each of these approaches, the court tests the application the magistrate actually had, corrected for what the officer left out. None permits a court to sustain a warrant with evidence that did not exist when the warrant issued, or with the officer's later testimony about what she observed.

2. Even the Sixth Circuit, which does not treat a defective warrant as a violation when the officer had probable cause, recognizes that the home is different. It has held that "[e]ven [when] the arrest warrant is invalid," probable cause known to the officer is "sufficient to justify arrest." *Graves v. Mahoning County*, 821 F.3d 772, 776 (6th Cir. 2016) (Sutton, J.) (quotation omitted). But "there are exceptions - say for arrests in a home." *Ibid.* (citing *Payton*, 445 U.S. at 589-601). The same opinion recognized that warrants issued on complaints reciting only the elements of the charge "appear to have been issued without any independent probable cause determination." *Id.* at 775. A warrantless arrest in a public place requires only probable cause, so a defective warrant may be harmless. An arrest in the home requires a valid warrant, so the warrant must stand on its own. The decision below applied an officer-knowledge rule to an arrest made in the home. That rule cannot be squared with *Whiteley*, 401 U.S. at 565 n.8, and even *Graves* would not extend it to an arrest in the home, 821 F.3d at 776.

3. The decision below also conflicts with the Eleventh Circuit's published law. That court holds that "the lawfulness of seizures pursuant to legal process turns on the validity of the legal process itself." *Williams v. Aguirre*, 965 F.3d 1147, 1162 (11th Cir. 2020). Review "must be strictly confined to the information brought to the magistrate's attention." *Ibid.* (quotation omitted); accord *Butler*, 85 F.4th at 1113; *Luke v. Gulley*, 50 F.4th 90, 96 (11th Cir. 2022). The only exception it recognizes applies when the seizure "would be reasonable without a warrant," and then

only for a "brief period of detention." *Harris v. Hixon*, 102 F.4th 1120, 1134-35 (11th Cir. 2024) (quoting *Williams*, 965 F.3d at 1164). The district court held that exception unavailable because the arrest was made in the home without exigency. Pet. App. 54a, 63a-64a n.28. The panel agreed that the warrant-independent element was not at issue. Pet. App. 6a. Having put the exception aside, the panel had no basis in its own circuit's law to consult the officer's knowledge. It did so anyway, without explanation.

An intra-circuit conflict is ordinarily for the court of appeals to resolve. But the Eleventh Circuit declined to rehear the case en banc, and its unpublished decisions do not bind later panels. The conflict will therefore persist in the form it takes here: published opinions announce the *Whiteley* rule, and unpublished affirmances depart from it without saying so.

D. The rule runs in only one direction.

Keeton chose what the magistrate would see. She had watched the body-camera video and read both written statements. Pet. App. 3a, 11a, 182a. She left out what they showed in Mr. Davis's favor: the responding deputy found Katie to be the "primary aggressor" and found no basis to arrest her father, and Mr. Davis declined in writing to have his daughter charged. Pet. App. 139a, 202a, 216a. The rule applied below admits outside facts only when they help the officer. When Mr. Davis pointed to facts outside the application, the courts refused to consider them. The district court said that "only the warrant-issuing judicial officer's probable cause determination matters." Pet. App. 97a. The panel set aside the omitted facts

as going to "intent and justification." Pet. App. 12a. But when outside facts helped the officers, both courts used them. The panel relied on the hoarse voice, the photographs, and Mr. Davis's later admissions. Pet. App. 10a, 13a. The district court presumed testimony no record shows, Pet. App. 61a, and counted the existence of written statements the magistrate never saw, Pet. App. 70a n.31. Mr. Davis's statement said that Katie hit him with her fists and he did not want her charged. Pet. App. 137a-139a. The court counted its existence for the officers and never counted its words for Mr. Davis.

Whiteley and *Aguilar* protect the citizen by confining review to the record the magistrate had. 401 U.S. at 565 n.8; 378 U.S. at 109 n.1. And *Garrison* bars the use of evidence emerging after the warrant issues. 480 U.S. at 85. *Franks*, as the courts of appeals apply it, protects the citizen by restoring what the officer withheld. 438 U.S. at 155-56; *Winfrey*, 901 F.3d at 494-95. The rule below turns each of these protections around. An officer who omits the facts favoring the accused loses nothing, because those facts will be set aside, and anything helpful found later may be used to sustain the warrant.

The district court's presumption illustrates the problem. A court cannot confine review to what the magistrate was given unless it knows what the magistrate was given. The Eleventh Circuit requires "a record" that the officer "submitted the file to or explained his thought processes to the magistrate judge." Pet. App. 8a (quoting *Butler*, 85 F.4th at 1113). A presumption is the absence of a record. Alabama law

required the magistrate to examine the complainant "on oath" and "take their depositions in writing." Ala. Code § 15-7-2(a). No deposition exists here. The complaint here incorporated one thing, the "attached officer's affidavit," Pet. App. 117a, and Keeton testified that "the affidavit was the report," Pet. App. 171a. The district court found that the report "did not appear sworn, signed, or notarized." Pet. App. 36a. The Fourth Amendment requires that probable cause be "supported by Oath or affirmation," and Keeton swore only to her belief. Pet. App. 61a. "Mere affirmance of belief or suspicion is not enough." *Nathanson v. United States*, 290 U.S. 41, 47 (1933). And the deficiencies of a conclusory arrest-warrant complaint "could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer." *Giordenello v. United States*, 357 U.S. 480, 486 (1958). If courts may presume that an officer told the magistrate more than the papers show, every thin warrant can be saved by testimony no one can test.

II. The Circuits Are Divided Over Whether an Affiant May Withhold Known Facts Bearing on the Defendant's State of Mind.

A. The courts of appeals disagree.

The courts of appeals have openly divided over whether facts supporting a defense are relevant to probable cause, and the Third Circuit has now applied its answer to warrant applications. In *Kendig*, a trooper's affidavit omitted known facts showing that the accused acted in self-defense. 173 F.4th at 470-71,

478 n.51. The court held that when an officer "gathers information bearing on the validity of the affirmative defense of self-defense, which he conclusively knows negates the requisite mental state of the charged offense or excuses the offending conduct, he must provide that information to the magistrate." *Id.* at 477. In short, "the Fourth Amendment does not allow an officer to open the window to this exculpatory defense only to draw the blinds before the magistrate can look through." *Ibid.* The court was explicit that the question is open. It wrote that "our sister circuits remain divided on whether and when to require officers to consider affirmative defenses at the probable cause stage," *ibid.*, and that this division meant the rule was not "beyond debate," *id.* at 477. For that reason alone, and while noting that a reasonable jury could conclude the officer knew self-defense would negate the charges, *id.* at 477 n.50, the court held the officer entitled to qualified immunity: it could identify neither "controlling authority" nor "a robust consensus of cases of persuasive authority" settling the duty. *Id.* at 476. The Third Circuit thus recognized the right, found it violated on facts a jury could accept, and could not enforce it - because this Court has not spoken.

Kendig collected the decisions of other circuits. 173 F.4th at 475 n.41. The Second, Sixth, and Seventh Circuits hold that an officer may not disregard known facts establishing a defense. *Jocks v. Tavernier*, 316 F.3d 128, 135-36 (2d Cir. 2003) (officer may not "deliberately disregard facts known to him which establish justification"); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1011-12 (6th Cir. 1999); *Hodgkins ex rel.*

Hodgkins v. Peterson, 355 F.3d 1048, 1061 (7th Cir. 2004) (officer "may not ignore conclusively established evidence of the existence of an affirmative defense"). The Eighth Circuit denied qualified immunity to an officer who "ignored plainly exculpatory evidence that negated the intent required for simple assault." *Kuehl v. Burtis*, 173 F.3d 646, 650-51 (8th Cir. 1999) (officer "is not free to disregard plainly exculpatory evidence"). The Fifth Circuit has "repeatedly refused to opine" on the question. *Loftin v. City of Prentiss*, 33 F.4th 774, 780 & n.2 (5th Cir. 2022). And the Third Circuit had earlier held that the necessity defense to a trespass charge "need not have been considered in the assessment of probable cause," while declining to hold defenses categorically irrelevant. *Holman v. City of York*, 564 F.3d 225, 231 (3d Cir. 2009); see *Kendig*, 173 F.4th at 473 n.28.

B. The decision below treats facts bearing on intent as irrelevant.

The court below did not ask whether the omitted facts were known to the officer, whether they were conclusive, or whether they would have mattered to a magistrate. It held that because "the only alleged omissions appear to relate to Davis's intent and justification," they could not "defeat the existence of probable cause." Pet. App. 12a. It relied on the principle that officers need not "weigh the viability of most affirmative defenses." Pet. App. 12a (quoting *Paez*, 915 F.3d at 1286). The panel added that Katie's statements "could persuade a reasonable officer" that Mr. Davis's conduct "fell outside the scope of any lawful use of force." Pet. App. 12a-13a. But that sentence asks what an of-

ficer could conclude from what Katie told her. It does not ask what the magistrate would have decided had the omitted facts been in the application, and it treats the question as one of defenses, not of the intent the offense requires. The panel's rule is therefore categorical: facts going to intent and justification fall outside the materiality inquiry altogether.

That rule cannot be reconciled with this Court's cases. "[I]t is the magistrate who must determine independently whether there is probable cause," *Franks*, 438 U.S. at 165, and a warrant is judged by the information the officers "disclosed, or had a duty to discover and to disclose, to the issuing Magistrate," *Garrison*, 480 U.S. at 85. An affiant who decides for herself that facts bearing on intent do not matter is making the magistrate's decision for the magistrate. Nor can the rule be reconciled with *Kendig*, which requires known facts negating the mental state to go to the magistrate, or with the decisions of the Second, Sixth, Seventh, and Eighth Circuits, each of which treats known exculpatory facts as relevant. And the panel confused two different questions. The first is whether an officer must investigate a possible defense before making an arrest. The second is whether an officer who already knows facts cutting against the charge may leave them out of the warrant application. Circuit law generally answers the first question no. *Franks*, as the courts of appeals apply it to omissions, also answers the second question no: a warrant obtained by leaving out material facts is invalid. The panel answered only the first question, and then treated its answer as permission for Keeton to leave out facts she already knew. It did

so even though it had just recited *Butler*'s rule that a court must consider "any material information that she omitted." Pet. App. 8a (quoting *Butler*, 85 F.4th at 1113).

C. The facts omitted here went to an element, not a defense.

The error is starker because intent is an element of the charged offense. Harassment under Alabama law requires intent "to harass, annoy, or alarm." Ala. Code § 13A-11-8(a)(1); Pet. App. 9a. The Alabama decision the panel cited explains that "[t]he crux" of the statute "is whether the actor or speaker intends to harass or alarm another. Without this intent, his speech and actions are lawful." *City of Montgomery v. Zgouvas*, 953 So. 2d 434, 443 (Ala. Crim. App. 2006); see Pet. App. 10a. The State must prove intent. The accused need not disprove it. A defense excuses conduct even when every element is proved. Facts negating an element are different: without the element there is nothing to excuse. The Eleventh Circuit's own published law agrees, and has since well before 2020: an officer's "knowledge that an element isn't met - or is exceedingly unlikely to be met - will preclude a finding of probable cause." *Butler*, 85 F.4th at 1116 (citing *Holmes v. Kucynda*, 321 F.3d 1069, 1081 (11th Cir. 2003), and *Thornton v. City of Macon*, 132 F.3d 1395, 1399 (11th Cir. 1998)).

The facts Keeton knew and omitted went to that element. Deputy Brown found that the physical evidence made Katie the "primary aggressor" and he had no basis to arrest her father. Pet. App. 202a, 216a. The father himself called the sheriff's office; Katie and the

boyfriend left before deputies arrived. He declined repeatedly to have his daughter arrested, and wrote that he restrained her because she was hitting him. Pet. App. 137a-139a, 164a, 263a-264a. She was a minor under Alabama law, on probation for assaulting a peer, and her father had just taken her car keys because her pupils were dilated, which suggested drug or alcohol use. Pet. App. 12a & n.4, 27a, 137a. The only other witness, Katie's boyfriend, put the contact at "a couple of seconds." Pet. App. 245a. Asked whether she considered why Mr. Davis acted, Keeton testified: "regardless of what he was upset over or angry about, he still did the act of the crime." Pet. App. 183a. That is the view the panel adopted, and it removes the element of intent from the probable-cause inquiry. Whatever the right rule for true affirmative defenses, an affiant may not omit facts bearing on an element and then have them treated as a defense she was free to ignore.

The corrected application shows why the omissions were material. Put the omitted facts into the printout and the magistrate would have read this: Deputy Brown, who examined both parties that night, found Mr. Davis's arm marked and Katie's neck, arms, and legs unmarked, told Katie that "shows" she was the "primary aggressor," and concluded that the evidence did not "meet the state statute code" for arresting her father; the father had called the sheriff's office himself, declined at least twice to have his daughter arrested, and wrote that he restrained her because she was hitting him and that he did not want to press charges; the daughter was a minor under Alabama law and, as Mr. Davis testified, on probation for assault.

Pet. App. 12a, 125a, 137a-139a, 202a, 216a, 263a-264a. Against that, the application offered Katie's account that her father swung a belt that "did not hit her" and held her by the throat for what the boyfriend put at "a couple of seconds." Pet. App. 135a, 245a. This is not a case of two equally credible accounts. It is a record in which a neutral officer, Deputy Brown, found the complainant, Katie, to be the aggressor and the accused, Mr. Davis, to be the one injured. No magistrate could find from it a substantial chance that Mr. Davis acted with intent "to harass, annoy, or alarm," rather than to restrain a minor who was striking him. The facts were not cumulative of the printout's fragments; the printout said Katie was unmarked and that Mr. Davis said she hit him, but it did not tell the magistrate that Deputy Brown had drawn the conclusion those facts compelled, or that the father had refused in writing to have her charged. *Kendig*'s threshold - facts the officer "conclusively knows" negate the mental state, 173 F.4th at 477 - is met here if it is met anywhere, and so is the Eleventh Circuit's own long-standing standard: knowledge that the element is "exceedingly unlikely to be met." *Butler*, 85 F.4th at 1116 (citing *Holmes*, 321 F.3d at 1081, and *Thornton*, 132 F.3d at 1399). Keeton had read both statements and watched the video before she applied. Pet. App. 3a, 11a, 182a. The application did not include Deputy Brown's conclusion or the father's written refusal, and nothing in the record shows she told the magistrate either. Pet. App. 117a, 125a, 134a-136a.

III. The Questions Are Important and Recur.

Every § 1983 action challenging an arrest under a warrant begins with the same question: what facts may the court consider? If a court may supply facts the application lacked, using evidence gathered later, the magistrate's review becomes a formality. And the incentives run the wrong way. An officer who leaves out the facts favoring the accused risks nothing: those facts will be labeled "justification" and set aside, and anything helpful found afterward may be used to save the warrant. This Court has warned that the Warrant Clause "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Franks*, 438 U.S. at 168. A rule that lets an officer withhold known facts with the same confidence has the same effect.

The practice in this case was routine, not a one-time lapse. Keeton testified that the report was "standing in as the affidavit that should be on that complaint," Pet. App. 173a, and that this was "what we did with every case then," Pet. App. 171a. Mr. Davis's criminal defense counsel declared under penalty of perjury that the prosecutor told him this "is how Lauderdale County has prepared warrants for years." Pet. App. 285a ¶ 16. And the problem is not confined to one county. The Sixth Circuit confronted a complaint alleging that a single Ohio county issued thousands of arrest warrants a year on complaints stating only conclusions. *Graves*, 821 F.3d at 775.

That the decision below is unpublished is a reason for review, not against it. This Court has said that the unpublished status of a decision "carries no weight in our decision to review the case." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam). It has twice reviewed and reversed unpublished decisions on the Fourth Amendment's application to seizures under legal process. *Thompson*, 596 U.S. 36, *rev'g* 794 F. App'x 140 (2d Cir. 2020); *Manuel*, 580 U.S. 357, *rev'g* 590 F. App'x 641 (7th Cir. 2015). The rule the panel applied operates through routine, nonprecedential affirmances that never draw en banc attention and that no later panel is bound to correct. A published opinion stating that courts may consult "the broader pool of information known or available" to the officer would invite review. An unpublished opinion that does the same thing, while reciting the *Whiteley* rule, escapes review. The Eleventh Circuit denied rehearing en banc. Pet. App. 105a-106a. Only this Court can restore a single rule.

IV. This Case Is an Ideal Vehicle.

The questions were pressed and passed on. The second question was pressed at every stage. Mr. Davis's opening brief devoted a section to the "Facts Keeton Omitted, Ignored or Should Have Known," Appellant's Br. 12-16, 25-28 (11th Cir. Doc. 9), and his rehearing petition argued that the corrected application "would not have established even arguable probable cause." 11th Cir. Doc. 22, at 24-25. The panel decided it. Pet. App. 12a. The first question arose from the panel's own opinion. The opening brief argued that the warrant had to be judged on the papers the magistrate had, and

that the district court could not presume unrecorded oral testimony to supply what the application lacked. Appellant's Br. 28-30 (citing *Nathanson*, *Aguilar*, and *Gates*). The panel then went further than the district court had, sustaining the warrant on the hoarse voice and the photographs. Pet. App. 13a. On rehearing Mr. Davis invoked *Whiteley*'s rule that an application "cannot be rehabilitated" with information known to the officer but not disclosed to the magistrate, and argued that the panel had misapplied the *Butler* standard it recited. 11th Cir. Doc. 22, at 4, 13. Rehearing was denied. Pet. App. 105a-106a. The panel's reliance on outside facts is in any event the holding under review, and this Court's rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992).

The judgment rests on probable cause alone. The panel did not reach qualified immunity, and the district court's immunity rulings rested entirely on its probable-cause finding. Pet. App. 14a, 82a, 85a-87a. The panel held that "[b]ecause probable cause supported his seizure," every claim against every respondent failed. Pet. App. 14a. A ruling for petitioner on either question would change the result as to all three.

The dispositive facts are undisputed. The warrant issued October 6. The photographs were taken October 7. The hoarse voice appears in no document given to the magistrate. The arrest was made at Mr. Davis's home. Pet. App. 37a-38a, 119a-120a, 134a-136a, 168a. Because the case was decided on summary judgment, the record is viewed in Mr. Davis's favor, *Tolan v. Cot-*

ton, 572 U.S. 650, 651 (2014) (per curiam), and the omitted facts are therefore taken as true.

No alternative ground supports the judgment. Respondents may offer two. Neither works.

First, respondents may argue that the warrant does not matter because the arrest would have been lawful without one. That argument is foreclosed by the decisions below. The district court held that the arrest "would not otherwise stand justified without legal process because home arrests require a warrant absent exigent circumstances," and found "no evidence of exigent circumstances." Pet. App. 54a; see Pet. App. 63a-64a n.28. The court of appeals left that holding undisturbed and treated the warrant-independent element as not at issue. Pet. App. 6a. That holding follows from this Court's cases. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The charge was a three-day-old misdemeanor, and the deputies had left the scene without arresting anyone. See *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984); *Lange v. California*, 594 U.S. 295, 313 (2021). Nor does release on bond cure the defect. "[E]ven pretrial release may be accompanied by burdensome conditions that effect a significant

restraint of liberty." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Mr. Davis could not leave the state or contact his daughter. Pet. App. 278a-280a. The warrant was the only lawful basis for the arrest, so it had to stand or fall on what the magistrate was given. When a warrant is "so obviously deficient," this Court "regard[s] the search as 'warrantless,'" and a warrantless entry into a home is "presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 558-59 (2004).

Second, respondents may argue that the outside facts were surplusage because the panel first found probable cause on Katie's account "if credited." Pet. App. 10a. As shown above (Part I.B), that finding depends on the panel's disposal of the omitted facts; the two questions presented are not independent grounds, and the judgment stands only if the panel was right on both.

Qualified immunity does not stand in the way. Respondents may say that review is pointless because *Kendig* granted qualified immunity to an officer who omitted self-defense facts in 2020, and Keeton applied for this warrant in October 2020. That argument fails for four reasons. First, immunity below rose and fell with probable cause. The district court granted qualified immunity and Alabama state-agent immunity to DiStefano and Keeton solely because it found probable cause and no material omission, Pet. App. 82a, 85a-87a; it made no finding that the right was unsettled. The panel did not reach immunity at all. Pet. App. 14a. The questions presented are therefore the only grounds of decision, and this Court routinely decides the constitutional question and leaves immunity

to the courts below on remand. Second, the first question presented does not depend on *Kendig* at all. The rule that a warrant is judged by what the magistrate was given has been clearly established since *Whiteley* in 1971, and a ruling for petitioner on that question alone changes the result for every respondent. Third, respondent Wesson is a private citizen with no claim to qualified immunity, and the state-law claims against all three respondents turn on Alabama immunity doctrines, not on the federal "clearly established" inquiry. Fourth, the unsettled state of the law is a reason to grant review, not to deny it. *Kendig* could recognize the right and still not enforce it only because this Court has not addressed it. Until the Court does, affiants in the Eleventh Circuit will continue to leave these facts out, and the courts of that circuit will continue to call the omissions "defenses" and move on.

Finally, a ruling for petitioner would decide the questions, not the case. On remand the lower courts would apply the correct rule to the application as corrected, and respondents could press any other defense. That is the ordinary course when this Court resolves a question of law the court of appeals decided incorrectly.

V. In the Alternative, the Court Should Summarily Reverse.

The dispositive dates and documents are undisputed, and the panel's departure from *Whiteley* appears on the face of its opinion. Pet. App. 13a. This Court has summarily reversed a decision that disregarded the warrant requirement for a home arrest. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per cu-

riam). If the Court does not grant plenary review, it should summarily reverse and remand for application of the correct rule to the application as corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: Oct. 30, 2026

Respectfully submitted,

MARK D. DAVIS
Pro Se
569 County Road 281
Florence, Alabama 35633
(256) 355-1504
davis.mark.legal@gmail.com

Petitioner