No. 26-6176

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

FILED
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SUPREME COURT, U.S.

AAKASH DALAL,

Petitioner,

Vs.

JOHN L. MOLINELLI, LILIANA S. DEAVILA-SILEBI, JOHN L. HIGGINS, MARTIN DELANEY, ROBERT ANZILOTTI, JAMES COSTELLO, MICHAEL SAUDINO, COUNTY OF BERGEN, LAWRENCE JUDSON WELLE, COREY S. COLEMAN, JAMES SPENCE, TARA JERUSSI, AJIT DAVID, and JOHN DOES 1-2,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Aakash Dalal
SBI #792652E
215 Burlington Road South
Bridgeton, NJ 08302
Petitioner, *pro se*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the sham affidavit doctrine violates the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution by permitting judges to make credibility determinations, and if not, what is the appropriate standard for the application of the doctrine?

2. Whether courts can apply the sham affidavit doctrine to encompass summary judgment affidavits that contain supplemental or clarifying facts, rather than contradictory facts?

3. Whether a lower court's application of the sham affidavit doctrine is an issue of law, subject to de novo appellate review, or an evidentiary issue, subject to review under the abuse of discretion standard?

4. Whether the Third Circuit's weighing of evidence and credibility determinations, including its expansion of the sham affidavit doctrine, at the summary judgment stage deprived Petitioner of his Seventh Amendment guaranteed right to a jury trial?

LIST OF PARTIES IN THE COURT BELOW WHOSE JUDGMENT IS SOUGHT TO BE REVIEW

Pursuant to Rule 14.1(b), Petitioner Aakash Dalal certifies that the following is a list of the parties in the court below whose judgment is sought to be reviewed:

1. AAKASH DALAL, Plaintiff
2. COUNTY OF BERGEN, Defendant
3. MICHAEL SAUDINO, Defendant
4. JOHN L. MOLINELLI, Defendant
5. LILIANA S. DEAVILA-SILEBI, Defendant
6. JOHN L. HIGGINS, Defendant
7. MARTIN DELANEY, Defendant
8. ROBERT ANZILOTTI, Defendant
9. JAMES COSTELLO, Defendant
10. LAWRENCE JUDSON WELLE, Defendant
11. COREY S. COLEMAN, Defendant
12. JAMES SPENCE, Defendant
13. TARA JERUSSI, Defendant
14. AJIT DAVID, Defendant
15. THE UNITED STATES OF AMERICA, Defendant

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Brunet, Summary Judgment Materials, 147 F.R.D. 647, 664-65, 667 (1993) ("Rule 56 fails to speak directly to the matter of inconsistent evidence proffered by a party.") 12

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Jeffrey Q. Smith & Grant R. MacQueen, Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?, 101 Judicature, no. 4, 2017 30

K. Klein, The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial, 53 Ohio St. L. J. 1005, 1010 (1992) 25

Michael Holley, Making Credibility Determinations at Summary Judgment: How Judges Broaden Their Discretion While "Playing by the Rules," 20 Whittier L. Rev. 865, 898 (1999) 19, 28

R. Warden, Northwestern University School of Law, Center on Wrongful Convictions, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row (2004) 33

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The March 2, 2026 opinion and judgment of the United States Court of Appeal for the Third Circuit sought to be reviewed (Docket No. 24-2649) is appended as Appendix 1.

The July 31, 2024 decision of the trial court, the United States District Court for the District of New Jersey (Docket No. 20-1434) is appended as Appendix 2.

The June 9, 2026 decision of the Third Circuit denying rehearing en banc is appended as Appendix 3.

JURISDICTION OF THE SUPREME COURT

On March 2, 2026, the United States Court of Appeals for the Third Circuit entered a judgment in this matter. A timely petition for en banc review was denied on June 9, 2026. Copies of the judgments and orders appear at Appendix 1 and 3.

The jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution, Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner Aakash Dalal ("Petitioner") brought claims of fabrication of evidence, malicious prosecution, and conspiracy to violate civil rights under 42 U.S.C. § 1983 and state law against several state and federal law enforcement officials ("Respondents"). App. 2, Opinion at 1. These claims were based on Respondents FBI Special Agents' and county prosecutors' joint use of notorious jailhouse informant Whendel Stewart's alleged statements to charge Plaintiff in state court with conspiracy to commit murder and terroristic threats. Id. The criminal charges were ultimately dismissed. Id. at 35.

The Respondents moved for summary judgment and Petitioner opposed, arguing there were genuine disputes of material fact such that a jury trial was warranted. Id. at 36. The District Court granted Respondents summary judgment. App. 2, Order. Before the Third Circuit, Petitioner argued that the District Court violated the Seventh Amendment by conducting a summary trial on paper rather than adhering to the established legal standards for summary judgment under Fed. R. Civ. P. 56: It improperly twisted and skewed the facts in the Respondents' favor, weighed evidence in their favor, made credibility determinations in their favor, mischaracterized Petitioner's claims and arguments, and ignored material facts unfavorable to the Respondents. C.A. 20 at 18-55[1].

For its part, the Third Circuit deprived Petitioner of his Seventh Amendment guaranteed right to a trial in a different way: by expanding the sham affidavit doctrine to cover supplemental, rather than contradictory, statements to strike Petitioner's summary judgment affidavit. In doing so, the Third Circuit created a circuit split, as the Second, Fifth, Sixth, Seventh, and Eighth Circuits have flatly rejected such an expansion of the

[1] C.A. refers to the Court of Appeal docket.

doctrine. As explained below, the sham affidavit doctrine is another weapon in the arsenal of artifices invented by judges to deprive citizens of their Seventh Amendment guaranteed right to a jury trial. The Third Circuit stretched this doctrine beyond its questionable moorings to effectively permit judges to make credibility determinations and disregard litigants' competent evidence. To safeguard the ever evaporating Seventh Amendment right to a trial and resolve the circuit splits set forth below, the Supreme Court must say enough is enough and grant certiorari.

I. Plaintiff's Claims

In the courts below, Petitioner made it clear his fabrication of evidence and malicious prosecution claims were focused on the sole evidence used by Respondents to charge him: (1) FBI Special Agent Corey S. Coleman's ("Coleman") assertion that jailhouse informant Whendel Stewart ("Stewart") told him Plaintiff said he wanted to kill assistant prosecutor Martin Delaney ("Delaney"); and (2) a piece of paper with Delaney name on it purportedly turned over by Stewart. ECF #240 at 100-104[2]; C.A. 20 at 21-32; App. 4 at ¶ 114; App. 2 at 10; 45. Petitioner argued there was a genuine dispute of material fact as to whether this evidence was intentionally fabricated or submitted with a reckless disregard for the truth based on the following evidence:

- There was no evidence other than Coleman's say so that Stewart even made these allegations, as Stewart's purported statements to the FBI were never recorded, App. 2 at 6, and Defendants never produced any affidavits, testimony, or anything else from Stewart himself. C.A. No. 20 at 22-23. Stewart was deported to Guyana, App. 10 at 24-25; App. 7 at 3-4, 38-39, and the FBI could not identify his location. App. 8 at 9.

- Throughout his deposition, amended complaint, and other documents, Petitioner unequivocally denied that he told Stewart he would kill Delaney, denied agreeing with Stewart to murder Delaney, and denied that he agreed to purchase a firearm

[2] ECF refers to the Electronic Case File in the District Court.

from Stewart for the purpose of killing Delaney. App. 2 at 45. He also denied providing pieces of paper to Stewart with his and Delaney's name. App. 2 at 10

- Stewart lacked credibility because Coleman[3] knew him (1) to be "a Bloods gang member with an extensive criminal history", App. 7 at 7; (2) to have a history of lying to law enforcement to avoid deportation, App. 7 at 8; and (3) to have "had no history or track record as an informant", App. 7 at 5-7.

- An attempt to corroborate Stewart's allegation by wiring him with a recording device failed as he (1) failed to elicit any statements from Petitioner threatening Delaney or anyone else; (2) elicited remarks from Plaintiff rejecting the need for violence; (3) failed to entrap Petitioner into hiring Stewart as a hitman; (4) instead eliciting a remark that violence was not the right way to go about things; and (5) failed to get Petitioner to agree to purchase a firearm. App. 1 at 7; App. 2 at 13-20.

- The same day Coleman manufactured these allegations, United States Marshal's Service Senior Investigator Paul Safier concluded, after speaking to Coleman, that "there is no credible intelligence to suggest Dalal is actively planning with supporters to attack any building, federal asset, or government official at this time." App. 2 at 31.

- The joint conclusion of Safier, AUSA Andrew Kogan, and Coleman, based on Stewart's failure to elicit any recorded threats, that Stewart's allegations were "false/specious" due to "negative corroboration". App. 2 at 32.

- Coleman repeatedly made false statements in his reports concerning Stewart. This included falsely claiming in the same report in which Stewart's allegations regarding Delaney appeared that "Stewart is not expecting to receive anything for assisting the FBI." App. 9 at 2. The record, however, shows Stewart "acknowledged seeking a benefit for his cooperation, including consideration with his immigration matter." App. 2 at 30. Coleman also lied about Stewart's credibility and the reasons for his ultimate deportation. C.A. No. 20 at 29-30.

- Coleman's similar misuse of jailhouse informant Stewart in a federal death penalty case in Buffalo, New York where Stewart again failed to elicit recorded threats from an inmate, and where such misconduct drew a district court's condemnation and the suppression of evidence. App. 2 at 32-33; App. 1 at 9 n.5; United States v. Stewart, 2015 U.S. Dist. LEXIS 139920 (W.D.N.Y. Oct. 14, 2015).

[3] Coleman himself had a checkered background, having been fired from his previous job and unemployed for some time before joining the FBI. App. 7 at 3; App. 8 at 4.

- Coleman's statement that he wanted to prevent Petitioner's release on bail and the fact that the charges were brought the same day Petitioner was set to be released on bail. App. 11 at 29.

- When Coleman was asked in an interrogatory to "[i]dentify any agreement between Plaintiff Aakash Dalal and FBI informant Whendel Stewart to (1) murder former Bergen County Assistant Prosecutor Delaney or (2) purchase an AR-15 rifle," he could not do so, stating, "this interrogatory seeks information and facts of which he was never informed by either Dalal or Stewart." App. 8 at 29 (Int. 22).

- Respondents-Detectives Robert Anzilotti and James Costello admitted they knew Petitioner did not threaten Delaney. App. 2 at 24-25.

II. The Third Circuit's Decision

Given the district court's decision granting Respondents summary judgment never addressed the particular evidence that was used to charge Petitioner, App. 2 at 42-49, the Third Circuit affirmed on very different grounds. Specifically, it employed the sham affidavit doctrine and applied it as a wrecking ball to Petitioner's case. First, the Third Circuit honed in on Petitioner's deposition testimony: "Dalal's own deposition, though perhaps less edifying than the other examination, would prove to be the most significant." (App. 1, Opinion at 11). The Third Circuit described Petitioner's responses as vague, id., and then focused on Petitioner's certification in opposition to Respondents' motion for summary judgment in which "he specifically identified, for the first time, the documents he claims were fabricated after his arrest." Id. at 12 (emphasis added). The Third Circuit also stated Petitioner "also asserted a new fact, to wit, that Costello and another BCPO detective threatened to hurt him if he did not confess during a post-arrest interrogation and that they both admitted they knew Dalal did not threaten Delaney." Id.

Citing no more than a footnote in the district court's opinion, the Third Circuit falsely claimed Petitioner "also heavily relied upon the conclusory allegations in his

certification that the Defendants had falsified documents, which the Court remarked 'border[s] on a sham affidavit'[4] because he did not raise them in his pleadings or disclose them through discovery or in his deposition." Id. at 13.

The panel then found that "Dalal's eleventh-hour assertions that certain documents seized from his cell were fabricated and that two BCPO detectives admitted he did not threaten Delaney should be disregarded because the 'certification' in which he first raised them is a sham." App. 1 at 15. Critically, the Third Circuit never identified any actual contradictions between these statements and Plaintiff's deposition, but instead chided Plaintiff for "sandbagging the defense" by not disclosing this information in discovery. Id. at 16. It then stated, Plaintiff "blames the Appellees for failing to question him about [the Defendants' admission], but the onus was on him to put the Appellees on notice of the allegation by including it in his pleadings." Id. The panel concluded that "Dalal has not proffered a satisfactory explanation for his failure to challenge these documents or to invoke the revelatory interrogation sooner, and the record does not independently support the contested portions of his affidavit, so we will disregard his belated allegations." Id. at 17. Thus, the panel stretched the sham affidavit doctrine to now cover what it determined to be late, rather than contradictory, statements.

The panel then acknowledged, but minimized, the reality that the purported jail cell documents had not been used to charge Petitioner. Id. Having disregarded Petitioner's

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[4] The district court's stray remark that one statement in Plaintiff's certification "border[ed] on a sham affidavit" concerned an allegation that Defendant Tara Jerussi had lied a post-arrest interview report. App. 2 at 47-48. It is important to note that the federal government Respondents blatantly misled the Third Circuit when they claimed in their appellate brief that "[t]he District Court correctly concluded that Dalal's Affidavit is a sham affidavit and is entitled to no consideration.". C.A. 37 at 27. The district court reached no such conclusion.

affidavit, the panel found "as the documents' authenticity is not genuinely in dispute, we may consider them among the totality of evidence when assessing whether his fabrication claim has legs." Id. The panel then made these documents the centerpiece of its legal analysis, conducted its own handwriting analysis, and concluded the documents corroborated Stewart's allegations. Id. at 17-18.

Contrary to the panel's claim that Petitioner "heavily relied" upon the fabrication of the purported jail cell documents, the record shows that because these documents had been purportedly acquired or fabricated after[5] Plaintiff's arrest and played zero role in the charges that were brought, Petitioner did not rely on them at all. ECF #240. Petitioner's 136-page brief in the district court only once mentions these purported jail cell documents and notes they were irrelevant because evidence purportedly discovered after an arrest cannot be considered in the probable cause analysis. ECF#240 at 48. The panel therefore placed at the centerpiece of its analysis marginally relevant evidence—the value of which it grossly mischaracterized.

Additionally, this purported evidence was little more than an afterthought for the Respondents and the district court. The State and Federal Defendants consigned the purported jail cell documents to one footnote in their motions for summary judgment on Plaintiff's fabrication of evidence claims. ECF#220 at 23 n.3 (conceding "[t]hese facts are only provided for additional context..."); ECF #222-2 at 32 n.7. Third, the Defendants themselves believed Plaintiff had disputed the authenticity of these documents at his deposition stating, "State Defendants recognize that Dalal undoubtedly will--as he did on

[5] Dempsey v. Bucknell University, 834 F.3d at 457, 481 (3d Cir. 2016) (prohibiting consideration of "after-acquired evidence")

his deposition--implausibly contend that he did not write these items..." ECF#220 at 23 n.3.

The district court relegated these documents to a footnote and in addressing Plaintiff's affidavit disavowing writing these documents, the district court recognized that Plaintiff had actually contested these documents in his deposition: "The State Defendants indicate that Plaintiff also testified in his deposition that these documents are 'forgeries'. ECF No. 240, State Def. Brief at 23 n.3." App. 2 at 23 n. 14. The district court later concluded:

> "In his Certification submitted with his opposition papers, Plaintiff states that 'to the best of his recollection' he did not write the hand written documents recovered from his cell and that they are 'crude' fabrications created by Defendants. Similarly, in his deposition, he claimed that the documents are 'forgeries.'".
>
> App. 2 at 47[6].

REASONS FOR GRANTING THE WRIT

As explained in Section I, the Third Circuit expanded the sham affidavit doctrine[7] in a way that is in direct conflict with United States Courts of Appeals for the Second, Fifth, Sixth, Seventh, and Eighth Circuits. Specifically, the Third Circuit concluded the doctrine permitted it to exclude supplemental or responsive statements in a summary judgment affidavit even where they do not contradict prior deposition testimony. This

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[6] Most importantly, there was no admissible evidence in the record that these documents were discovered in Plaintiff's jail cell or anywhere else for that matter. There exists no affidavit or report from whoever purportedly seized these documents. Plaintiff objected below that these documents were inadmissible. App. 6 at ¶ 41 ("The Defendants' cannot authenticate these documents, as they have failed to provide any affidavits by the purported person who discovered them. Fed. R. Evid. 901(a)"). Defendants merely provide the certification of their counsel, who had no personal knowledge and who simply said the documents were seized from Plaintiff's jail cell. App. 11 at ¶ 13.

[7] The sham affidavit doctrine is rooted in a Second Circuit decision from 1969. Perma Rsch. & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969).

section further explains that the federal circuits are also in conflict as to the standards they use to evaluate the doctrine's application and even the standard of appellate review they employ to consider a district court's decision. In Section II, Petitioner argues that the judicially invented sham affidavit doctrine is in direct conflict with the Supreme Court's precedents and violates the Seventh Amendment guaranteed right to a jury trial. That is because it impermissibly allows judges to enter into the province of the jury by making forbidden credibility determinations. If the Court finds the doctrine to be constitutional, the Court should resolve the confusion among the circuits by adopting a uniform, stringent, and objective analytical framework for application of the doctrine. Finally, in Section III, Petitioner argues that the application of the appropriate standard compels a finding that there are genuine disputes of material fact requiring reversal of the Third Circuit's decision and remand for a trial.

I. THE FEDERAL CIRCUITS ARE IN CONFLICT AND SPLIT ON THE IMPORTANT QUESTIONS OF FEDERAL LAW PRESENTED

As explained in Section A, the Third Circuit's expansion of the sham affidavit doctrine to exclude supplemental, rather than contradictory, statements in an affidavit is in direct conflict with the decisions of the Second, Fifth, Sixth, Seventh, and Eighth Circuits. Accordingly, certiorari should be granted to resolve this circuit split. Rule 10(a). While every federal court of appeals has long adopted some form of the sham affidavit doctrine[8], scholars and federal and state courts have recognized that the federal circuits

[8]Sinskey v. Pharmacia Ophthalmics, Inc., 982 F.2d 494, 498 (Fed. Cir. 1992); Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994); Perma, 410 F.2d at 577-78; Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 706 (3d Cir. 1988); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984); Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986); Babrocky v. Jewel Food Co., 773 F.2d 857, 861 (7th Cir. 1985); Camfield Tires,

are in conflict as to the standards for the application of the sham affidavit doctrine. See, e.g., Collin J. Cox, Reconsidering the Sham Affidavit Doctrine, 50 Duke L.J. 261, 263 (2000) ("In recent years, splits of authority regarding the sham affidavit doctrine have emerged, both between federal courts of appeals and between state courts."); Arce v. Chicago Transit Authority, 311 F.R.D. 504, 510 n. 7 (N.D. Ill. 2015) ("The circuits are inconsistent in how they apply the sham affidavit rule."); Shelcusky v. Garjulio, 797 A.2d 138, 147 (N.J. 2002) ("Uniform standards on the application of the sham affidavit doctrine cannot be found in the case law.").

Importantly, the Supreme Court has yet to consider the validity of the sham affidavit doctrine, define its standards, apply it, or even mention it by name. Cox, 50 Duke L.J. at 263 ("The United States Supreme Court has not directly addressed the propriety of the sham affidavit doctrine."). While noting that every federal circuit has adopted some form of the sham affidavit doctrine, Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999), this Court has never actually embraced the sham affidavit doctrine stating, "we do not necessarily endorse these cases, but leave the law as we found it". Id. at 806. Accordingly, certiorari should be granted because the Third Circuit decided these important questions of federal law that have not been, but should be settled by the Supreme Court. Rule 10(c). The Federalist No. 78, Bantam Classic Ed. at 399 (A. Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they

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Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364-65 (8th Cir. 1983); Radobenko v. Automated Equip. Corp., 520 F.2d 540, 544 (9th Cir. 1975); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986); Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657-59 (11th Cir. 1984); Galvin v. Eli Lilly & Co., 488 F.3d 1026 (D.C. Cir. 2007)

should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.").

It is also significant that Fed. R. Civ. P. 56 does not address how district courts should treat affidavits submitted in response to motions for summary judgment that contradict prior deposition testimony; Cox, 50 Duke L.J. at 262 ("The rules of civil procedure in the federal and state systems do not specify how courts should treat such affidavits."); Brunet, Summary Judgment Materials, 147 F.R.D. 647, 664-65, 667 (1993) ("Rule 56 fails to speak directly to the matter of inconsistent evidence proffered by a party."). Scholars have thus concluded that the shame affidavit doctrine violates the rule. J.J. Duane, The Four Greatest Myths About Summary Judgment, 52 Wash. & Lee L. Rev. 1523, 1601 (1995) (disregarding a contradictory affidavit violates Fed. R. Civ. P. 56(e) because that rules sets forth detailed requirements for an affidavit, e.g, that it be made on "personal knowledge," but does not include a requirement of consistency)

As explained in section B, by effectively conducting *de novo* review of the District Court's decision not to the apply the sham affidavit doctrine, the Third Circuit also deepened the circuit split over the appellate standard of review of the sham affidavit doctrine. Section C shows that every circuit applies a different test that is in conflict with other circuits. Section D further demonstrates that these circuit conflicts have resulted in yet another circuit split over the legal standard governing Fed. R. Civ. P. 30(e).

A. The Third Circuit's decision is in conflict with the decisions of the Second, Fifth, Sixth, Seventh, and Eighth Circuits.

The Third Circuit's ruling expanding the sham affidavit doctrine and implicating these important federal questions is in direct conflict with the explicit holdings of the Second, Fifth, Sixth, Seventh, and Eighth Circuits. These circuits have clearly rejected

the very same expansive interpretation of the sham affidavit doctrine employed by the Third Circuit. Rule 10(a) of the Supreme Court's Rules has therefore been satisfied. These conflicts require the Supreme Court's intervention and clarification to ensure the uniform interpretation of federal law throughout the United States. There is an immense risk of allowing the panel decision to stand uncorrected given the frequency and recurring nature of this issue[9].

In response to Respondents' voluminous motions for summary judgment, Petitioner submitted an affidavit containing several supplement and responsive statements. It is undisputed that none of these statements contradicted Petitioner's deposition testimony. App. 1 at 11. The Third Circuit expanded the sham affidavit doctrine to exclude statements in a summary judgment affidavit that do not actually contradict prior deposition testimony. According to the Third Circuit, as long as the statements were not made soon enough, and even where the party was never specifically questioned about the topic, courts may disregard these statements as a sham. App. 1 at 16-17. The panel transformed an objective inquiry—whether there is a clear and direct contradiction between the affidavit and deposition testimony—into a subjective one that threatens to deprive litigants of their Seventh Amendment right to a jury trial.

The Fifth Circuit rejected a district court's application of the sham affidavit doctrine to an affidavit that "significantly supplement[ed]", rather than contradicted, the plaintiff's earlier statement and reversed the grant of qualified immunity to the police defendants. Winzer v. Kaufman County, 916 F.3d 464, 473 (5th Cir. 2019). There, the

[9] A LexisNexis search for the phrases "sham affidavit doctrine" and "sham affidavit rule" reveals that the issue was considered in over 1,000 district court decisions on motions for summary judgment in the past five years. As shown below, the doctrine is especially pervasive in complex commercial and civil rights cases, as well as contractual disputes.

plaintiff submitted a "summary judgment affidavit" that provided substantial additional information that had not been previously disclosed. Id. at 472-473. The district court disregarded the affidavit under the sham affidavit doctrine. Id. at 472.

The Fifth Circuit "found the district court abused its discretion in applying the sham affidavit doctrine to exclude [the plaintiff]'s competent summary judgment evidence" because:

> "[W]hile the affidavit significantly supplements the complaint factually, it contradicts nothing. We have held that the sham affidavit doctrine is inappropriate where an 'affidavit supplements, rather than contradicts' an earlier statement."
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> Id. at 473 (quoting Clark v. Resistoflex Co., 854 F.2d 762, 766 (5th Cir. 1988)).

The Fifth Circuit has also noted "[c]ommonly accepted practice allows post-discovery disclosure of evidence created for summary judgment purposes." Frosch v. Alsobrook, 2025 U.S. App. LEXIS 13547 *5 (5th Cir. June 3, 2025). "This practice makes sense-a party does not know exactly what arguments the other party will raise in its motion until its brief is filed." Id. "An affidavit that supplements rather than contradicts prior deposition testimony falls outside the doctrine's ambit." Seigler v. Wal-Mart Stores Texas, 30 F.4th 472, 2022 U.S. App. LEXIS 9146 * 7 (5th Cir. 2022)

The Sixth Circuit's decision in Aerel involved a contractual dispute between two companies centered on an omitted commissions clause. Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 899-901 (6th Cir. 2006). At his deposition, Aerel's principal admitted he knew of the omission and was not pleased with it. Id. at 901. In a summary judgment affidavit, the principal provided reasons for the omitted clause and stated the omission "did not alter his oral understanding" with the other company's director that Aerel would continue to receive commissions. Id. at 902.

The district court excluded this summary judgment affidavit under the sham affidavit doctrine relying on several unpublished Sixth Circuit panel decisions expanding the sham affidavit doctrine to (1) later-filed affidavits revealing an omission in the party's deposition testimony and (2) new evidence introduced in a summary judgment affidavit where the party had an opportunity to disclose it during discovery. Id. at 906-907.

The Sixth Circuit, however, concluded this "expansive view" of the sham affidavit doctrine "is unwarranted." Id. at 907. The court noted the sham affidavit doctrine "barred the nonmoving party from avoiding summary judgment by simply filing an affidavit that directly contradicts the party's previous testimony." Id. It then explained why the expansion of the doctrine by the panels to cover affidavits that are not contradictory was clearly erroneous:

> "This is a far cry, however, from preventing a party who was not directly questioned about an issue from supplementing incomplete deposition testimony with a sworn affidavit. Such an affidavit fills a gap left open by the moving party and thus provides the district court with more information, rather than less, at the crucial summary judgment stage."
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> Id. at 907.

Given the risks posed by such an expansion of the sham affidavit doctrine, the Sixth Circuit found it necessary to explicitly overrule these unpublished decisions in a published decision (even as it affirmed):

> "The district court's ruling, though consistent with the unpublished decisions of this court discussed above, therefore strikes us as a potentially significant extension of the [sham affidavit doctrine]--one that threatens to transform the straightforward, objective inquiry needed to decide whether an affidavit contradicts deposition testimony into a more subjective evaluation of a party's prior 'opportunit[ies] during discovery to present evidence' and whether that party could have or should have been more forthcoming in her deposition."
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> Id. at 909.

In Bass, the question of when a claim for arbitration accrued for statute of limitations purposes was at issue on summary judgment. Bass v. City of Sioux Falls, 232 F.3d 615, 616-617 (8th Cir. 1999). At his deposition, a corporation's representative, Abel, could not identify a specific date or time when he declined Bass's arbitration request. Id. at 617. In his summary judgment affidavit, however, Abel explained he had advised Bass's union representative that the corporation had declined to participate in arbitration on several occasions in March 1996. Id. The district court excluded this affidavit under the sham affidavit doctrine. Id.

The Eighth Circuit reversed, concluding that (1) the failure to provide specific information did not render the subsequent affidavit contradictory and (2) the deponent had no duty to volunteer that information:

> "The fact that Abel's deposition testimony does not identify a specific time or date on which he informed Thompson or the Union of SuTran's position concerning the grievance does not render his subsequent affidavit testimony inconsistent or revised. He had no duty to volunteer such information during the deposition absent a question from plaintiffs' counsel seeking that information. Accordingly, the district court erred in disregarding Abel's affidavit."
>
> Id. at 618.

The Seventh Circuit has similarly held that "[t]he sham-affidavit rule is simply inapplicable where the affidavit amplifies, rather than contradicts, evidence already in the record." Clemons v. Wexford Health Sources, 106 F.4th 628, 635 (7th Cir. 2024). The Second Circuit also rejected this expansion of the sham affidavit doctrine in a different context. Palazzo v. Corio, 232 F.3d 38, 43 (2d Cir. 2000) (explaining that sham affidavit principle does not apply if the deposition and the later sworn statement are not actually contradictory, such as if the later sworn assertion "addresses an issue that was not, or was not thoroughly or clearly, explored in the deposition"). "[T]he district court should not

disregard the [post-deposition] testimony because of an earlier account that was ambiguous, confusing, or simply incomplete." Id.

Importantly, these circuits clearly considered the Federal Rules of Civil Procedure in making their decisions, while the Third Circuit inexplicably ignored them. In disregarding detectives' admission that they knew Petitioner had not threatened to kill Delaney, the Third Circuit concluded, Petitioner "blames Appellees for failing to question him about it a decade later, but the onus was on him to put Appellees on notice of the allegation by including it in his pleadings." App. 1 at 16. Fed. R. Civ. P. 8(a)(2), however, simply requires "a short and plain statement of the claim showing that the pleader is entitled to relief" not the explication of every single factual detail that could support a claim. Similarly, the Third Circuit faulted Petitioner for not disclosing an affidavit sooner, App. 1 at 16-17, but Fed. R. Civ. P. 56(c)(4) clearly permits the submission of an affidavit in opposition to a motion for summary judgment.

The practical implications of the Third Circuit's decision are clear. Without question, the Third Circuit's decision will be used as a sword by parties to strike at the other side's Seventh Amendment right to a jury trial. This new rule also makes little sense, as facts and evidence perceived to be tangential by one party may be critical to the other's summary judgment strategy. In the present case, the purported jail cell notes were considered marginal by all parties and the district court, but were considered pivotal evidence by the Third Circuit. The more complex the case, the more likely it is that such an issue will arise. The decision will disrupt and increase the cost of discovery, as the panel has effectively invented a duty for counsel to (1) divine all possible summary judgment arguments opposing counsel may raise and (2) volunteer any and all

information concerning such hypothetical arguments or be barred from opposing those arguments later on.

B. The Courts of Appeals are divided as to the standard of appellate review to be applied to the sham affidavit doctrine.

The Courts of Appeals are also in conflict as to whether the application of the sham affidavit doctrine is an issue of law or an evidentiary issue. Accordingly, there is a circuit split as to the standard of appellate review to be applied to a District Court's application of the sham affidavit doctrine. The D.C. and Second Circuits consider the application of the doctrine an issue of law and accordingly conduct de novo review. Galvin v. Eli Lilly & Co., 488 F.3d 1026, 1030 n. * (D.C. Cir. 2007); Butler v. Raytel Med. Corp., 150 Fed. Appx. 44, 46 n. 2 (2d Cir. 2005). The First, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, however, treat it as an evidentiary issue subject to review for abuse of discretion. Escribano-Reyes v. Prof'l HEPA Certificate Corp., 817 F.3d 380, 386 (1st Cir. 2016); Daubert v. NRA Group, LLC, 861 F.3d 382, 389 (3d Cir. 2017); Seigler v. Wal-Mart Stores Tex., L.L.C., 30 F.4th 472, 476 (5th Cir. 2022); France v. Lucas, 836 F.3d 612, 622 (6th Cir. 2016); Cole v. Homier Distrib. Co., 599 F.3d 856, 867 (8th Cir. 2010); Yeager v. Bowlin, 693 F.3d 1076, 1079 (9th Cir. 2012); Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1016 (10th Cir. 2002); Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1342-43 (11th Cir. 2000). The Seventh Circuit reviews the sham affidavit doctrine under both de novo and abuse of discretion standards. Craig v. Wrought Washer Mfg., 108 F.4th 537, 543 (7th Cir. 2024).

C. Every federal circuit applies a different sham affidavit standard that is in conflict with the other circuits.

As shown below, given the void in direction from the Supreme Court and the Federal Rules of Civil Procedure[10], every federal circuit has employed a sham affidavit doctrine or rule that is in conflict with every other federal circuit. Some circuits require district courts to exclude contradictory affidavits entirely, other circuits prohibit the exclusion of contradictory affidavits where a satisfactory or plausible explanation has been provided for the contradiction, and others even permit the exclusion of affidavits that contain no contradictions. A few circuits have gone further and expanded the doctrine to permit the exclusion of experts' and witness's affidavits and interrogatory responses.

"[I]n creating the sham doctrine, judges have cobbled together rules so that they can exercise discretion by choosing between different rules[.]" Michael Holley, Making Credibility Determinations at Summary Judgment: How Judges Broaden Their Discretion While "Playing by the Rules," 20 Whittier L. Rev. 865, 898 (1999). Significantly, the doctrine "has deteriorated to the extent that the courts have unlimited discretion to exclude various types of evidence at summary judgment." Id. at 887. Without clear and uniform standards governing how summary judgment affidavits should be evaluated, courts will produce erratic and inconsistent results. The Supreme Court has an obligation to provide clear standards and must act when there is confusion among the lower courts. Certiorari should therefore be granted to settle the federal questions presented.

The First Circuit employs a hybrid objective and subjective inquiry, stating "where a party has given clear answers to unambiguous questions in discovery, that party

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[10] Cox, 50 Duke L.J. at 265-66 ("The chief reason for the indecision among federal courts regarding some aspects of the sham affidavit doctrine is that the Federal Rules of Civil Procedure do not address situations involving offsetting affidavits.")

cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, unless there is a satisfactory explanation of why the testimony has changed." Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 54 (1st Cir. 2000). In the Second Circuit, a sham issue of fact exists when the contradictions in a party's affidavit, compared to the party's prior testimony, are "inescapable and unequivocal in nature." In re Fosamax Prods. Liab. Litig., 707 F.3d 189, 194 (2d Cir. 2013). "[I]f there is a plausible explanation for discrepancies in a party's testimony," however, "the court considering a summary judgment motion should not disregard the later testimony because an earlier account was ambiguous, confusing, or simply incomplete." Rojas v. Roman Cath. Diocese of Rochester, 660 F.3d 98, 106 (2d Cir. 2011).

The Third Circuit has adopted a "flexible approach" to the sham affidavit rule. Jiminez v. All American Rathskeller, Inc., 503 F.3d 247, 254 (3d Cir. 2007). Accordingly, "not all contradictory affidavits are necessarily shams", id., and "the sham affidavit rule does not reject later statements solely because they conflict with prior deposition testimony." SodexoMAGIC, LLC v. Drexel University, 24 F.4th 183 (3d Cir. 2022). Under this "flexible approach", in this case, the Third Circuit expanded the doctrine to cover non-contradictory statements.

The Fourth Circuit has stated "for the [sham-affidavit] rule . . . to apply, there must be a bona fide inconsistency" between an affiant's statements and his deposition testimony and the Fourth Circuit does not consider any explanations for the contradiction. Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 n.7 (4th Cir. 2001). Expert affidavits

and reports that contradict their deposition testimony are also subject to exclusion under the rule. Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970 (4th Cir. 1990).

In the Fifth Circuit, "a district court must consider all the evidence before it and cannot disregard a party's affidavit merely because it conflicts to some degree with an earlier deposition." Seigler, 30 F.4th at 477 (quoting Kennett-Murray Corp. v. Bone, 622 F.2d 887, 893 (5th Cir. 1980)). "An affidavit that supplements rather than contradicts prior deposition testimony falls outside the doctrine's ambit." Id. Only "inherently inconsistent" testimony is subject to the high bar of the sham affidavit doctrine. Id.

The Sixth Circuit employs a "straightforward, objective inquiry" that requires a determination of whether the affidavit directly contradicts the deposition. Aerel, 448 F.3d at 909. As explained in section A, the Sixth Circuit prohibits district courts from engaging in a "subjective evaluation of a party's prior 'opportunit[ies] during discovery to present evidence' and whether that party could have or should have been more forthcoming in her deposition." Id. The Sixth Circuit further holds that courts should not apply the sham affidavit rule when "the alleged inconsistency created by the affidavit existed within the deposition itself" O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 593 (6th Cir. 2009). Importantly, the Sixth Circuit holds that a plaintiff is "not under any obligation to volunteer" information at a deposition and where they are "not expressly asked" about the issue, the affidavit should not be excluded. Briggs v. Potter, 463 F.3d 507, 513 (6th Cir. 2006)

The Seventh Circuit has broadened its sham affidavit rule to hold that "even affidavits that are not directly contradictory may be excluded under th[e] rule," Hickey v. Protective Life Corp., 988 F.3d 380, 389 (7th Cir. 2021). Where a party adds new factual

details that were not previously disclosed, their affidavit may be excluded in the Seventh Circuit. Buckner v. Sam's Club, Inc., 75 F.3d 290, 293 (7th Cir. 1996) (affirming application of sham-affidavit rule where the plaintiff, who fell after tripping over an object, described the object vaguely in her initial deposition, but then provided more detail in a subsequent affidavit that tied the object directly to the defendant's store). The Seventh Circuit also applies the rule to interrogatory answers that are in conflict with deposition testimony. Bank of Ill. v. Allied Signal Safety Restrain Sys., 75 F.3d 1162, 1166 (7th Cir. 1996). An expert's affidavit or report that contradicts the plaintiff's testimony is also subject to exclusion under the Seventh Circuit's sham affidavit rule. Adelman-Tremblay v. Jewel Cos., 859 F.2d 517, 521 (7th Cir. 1988).

The Eighth Circuit directs district courts to "examine alleged inconsistencies between an affidavit and previous deposition testimony 'with extreme care'", and holds the district court's "authority to disregard an affidavit and grant summary judgment on the remaining record" is "limited to situations 'where the conflicts between the deposition and affidavit raise only sham issues.'" Baker v. Silver Oak Senior Living Mgmt. Co., L.C., 581 F.3d 684, 690 (8th Cir. 2009) (quoting Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1366 (8th Cir. 1983)). Notably, the Eighth Circuit held that a plaintiff has "no obligation in her deposition to volunteer information that was not requested." Id. at 691.

The Eighth Circuit uniquely holds that third party witnesses' affidavits or testimony that contradicts a plaintiff's testimony constitutes an inadmissible sham affidavit. Prosser v. Ross, 70 F.3d 1005, 1008 (8th Cir. 1995). The Ninth Circuit has considered and rejected the Eighth Circuit's expansion of the doctrine to cover witness

affidavits. Nelson v. City of Davis, 571 F.3d 924, 929 (9th Cir. 2009). The Ninth Circuit holds that "[i]n order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the 'inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit.'" Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012) (internal citations omitted).

The Tenth Circuit employs a stringent test, holding that a district court may not disregard an affidavit solely because it conflicts with prior sworn statements. Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). After finding a clear contradiction, lower courts must consider (1) whether the affiant was cross-examined during his earlier testimony, (2) whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and (3) whether the earlier testimony reflects confusion which the affidavit attempts to explain. Id.

The Eleventh Circuit has cautioned that the sham affidavit rule is to be applied "sparingly" and exclusion is only appropriate when there is an "inherent inconsistency between an affidavit and a deposition." Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1237 (11th Cir. 2010). "A definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986). Accordingly, "[a]n opposing party's affidavit should be considered although it differs from or varies [from] his evidence as given by deposition or another affidavit and the two in conjunction may disclose as issue of credibility." Id. at 953. Furthermore, "[t]o

allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words . . . the affiant . . . was stating the truth." Id. at 953-54. The Eleventh Circuit has rejected the Fourth and Seventh Circuit rules barring contradictory expert testimony. Lane v. Celotex Corp., 782 F.2d 1526, 1530-31 (11th Cir. 1986).

D. The sham affidavit doctrine circuit split has precipitated in another circuit split.

The Court's adjudication of the questions presented would also resolve a second order circuit split—further bolstering the need to grant certiorari. Specifically, the circuit split with regard to sham affidavit doctrine has precipitated in a circuit split with regard to Fed. R. Civ. P. 30(e), as circuit courts have relied on their particular interpretation of the sham affidavit doctrine to either limit or expand the changes that can been made to deposition testimony under the rule. "Circuit courts have split on the question of whether Rule 30(e) allows deponents to make significant substantive changes to their testimony." Hillman v. Gree USA, Inc., 2026 U.S. Dist. LEXIS 67478 *2 (E.D.Mo. Mar. 30, 2026) (citing cases). At least four circuits construe Rule 30(e) consistently with the sham affidavit rule as applied in those circuits. A.C. v. Shelby County Bd. of Educ., 711 F.3d 687, 702-03 (6th Cir. 2013); Hambleton Bros. Lumber v. Balkin Enters., Inc., 397 F.3d 1217, 1225 (9th Cir. 2005); Burns v. Bd. of Cnty. Comm'rs of Jackson Cnty., 330 F.3d 1275, 1282 (10th Cir. 2003); Thorn v. Sundstrand Aero. Corp., 207 F.3d 383, 389 (7th Cir. 2000).

II. THE SHAM AFFIDAVIT DOCTRINE VIOLATES THE SEVENTH AMENDMENT GUARANTEED RIGHT TO A CIVIL JURY TRIAL; ALTERNATIVELY, THE COURT SHOULD ADOPT A STRINGENT STANDARD FOR THE APPLICATION OF THE DOCTRINE

The judicially invented sham affidavit doctrine plainly violates the Seventh Amendment, as it allows judges to make credibility determinations, which historically and according to this Court's longstanding precedent, have been reserved solely for juries. Even worse, the doctrine permits judges use these credibility findings to deprive litigants of their very right to a jury trial. Accordingly, the Third Circuit (and the other courts that have adopted the sham affidavit doctrine) have decided federal questions in a way that conflicts with relevant decisions of the Supreme Court, providing yet another compelling reason to grant certiorari. Rule 10(c).

A. The Seventh Amendment prohibits judges from invading the province of the jury by making credibility assessments.

The Seventh Amendment to the United States Constitution provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." U.S. Const. AMEND. VII[11]. Given that "[m]aintenance

[11] "It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting). "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." Id. at 343. Thomas Jefferson famously stated, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." Id. at 343 n. 10. "If the Federalists and Anti-Federalists disagreed about anything when it came to the civil jury trial right, it may have only been about whether the right was 'the most important of all individual rights, or simply one of the most important rights.'" Thomas v. Humboldt County, 146 S.Ct. 27, 28 (2025) (Gorsuch, J., statement respecting denial of cert.) (quoting K. Klein, The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial, 53 Ohio St. L. J. 1005, 1010 (1992))

of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935). "[E]very encroachment upon [the jury trial right] has been watched with great jealousy." Securities and Exchange Commission v. Jarkesy, 603 U.S. 109, 122 (2024) (quoting Parsons v. Bedford, 3 Pet. 433, 446 (1830)).

It has been well-established that under the Seventh Amendment, only jurors are permitted to make credibility calls. "Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 625 (1991). "Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." United States v. Scheffer, 523 U.S. 303, 313 (1998) (quoting Aetna Life Ins. Co., v. Ward, 140 U.S. 76, 88 (1891)).

The Supreme Court has "by no means authorize[d] trial on affidavits." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). It has emphasized that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, where he is ruling on a motion for summary judgment or for a directed verdict." Id. "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which

so long has been the hallmark of 'even handed justice.'" Poller v Columbia Broadcasting, 368 US 464, 473 (1962).

B. The sham affidavit doctrine violates the Seventh Amendment by permitting judges to make credibility determinations.

Several courts and scholars have noted the obvious constitutional problem underlying the sham affidavit doctrine. In order to apply the doctrine, a judge must both make a credibility assessment and weigh the evidence. To hold that a plaintiff's later affidavit should be excluded because it contradicts his earlier deposition testimony necessarily requires a judge to make a credibility assessment of the plaintiff and his testimony and requires the judge to weigh the plaintiff's deposition testimony against his affidavit. The judge must determine that the earlier deposition testimony was credible, while the later affidavit was not. In the case of supplemental facts set forth in an affidavit, the credibility assessment is even more pronounced and apparent. A judge must make a finding that the plaintiff's averments in his affidavits are incredible because he either could have or would have disclosed them earlier if they were true. Furthermore, there is no support or basis for such judicial discretion in the text of Fed. R. Civ. P. 56. As explained above, the Seventh Amendment plainly prohibits such judicial incursions into the realm of the jury.

The Supreme Court of Maryland held that "in application, the sham affidavit rule requires a credibility judgment by the trial court." Pittman v. Atlantic Realty, 754 A.2d 1030, 1041 (Md. 2000). This is yet another reason certiorari should be granted. Rule 10(b). The Fifth Circuit also previously recognized the reality that application of the sham affidavit rule would constitute an improper credibility determination, stating, "[i]n light of the jury's role in resolving questions of credibility, a district court should not

reject the content of an affidavit even if it is at odds with statements made in an earlier deposition." Kennett-Murray Corp., 622 F.2d at 894; Michael Holley, Making Credibility Determinations at Summary Judgment: How Judges Broaden Their Discretion While "Playing by the Rules," 20 Whittier L. Rev. 865, 887-904 (1999) (persuasively contending that the sham affidavit doctrine allows judges to make credibility decisions and exercise "forbidden discretion")

In Pittman, the Maryland Supreme Court rejected the sham affidavit rule stating "adopting the sham affidavit rule would shift the credibility determination from the trier of fact at trial, where the trier of fact would have the benefit of observing the witness's demeanor on cross-examination, to the trial court on summary judgment, where the trial court would be limited to a paper record." 754 A.2d at 1045. The court further considered and rejected a sham affidavit rule that would require striking a contradictory affidavit unless the affiant provided reasons for the change in testimony:

> "Such a rule, however, merely inserts another layer into the analysis, but it does not remove the underlying credibility issue. If this version of a sham affidavit rule required the court to weigh the validity of the explanation, then the credibility determination simply would be moved to another level. If the rule required the court to accept the explanation, those who are disposed to submit a sham affidavit would simply add a sham reason in order to defeat summary judgment, and the result would not differ from having no sham affidavit rule at all. The trier of fact at trial would still determine the truth of the factual matter that had been set forth in the affidavit."
>
> Id.

The court also presciently highlighted the risks of adopting such a doctrine, stating:

> "If we were to adopt the sham affidavit rule in order to address what may be a relatively small number of cases in which sham affidavits are presented, the downside possibly would be an increase in the filings of summary judgment motions that are based on an attempt to convince the trial court that some

> variation in the nonmovant's affidavit was completely and inexplicably contradictory, and that the variation was not simply a clarification or elaboration."
>
> Id.

The Third Circuit's disturbing expansion of the sham affidavit doctrine in this case to cover an affidavit that supplemented Petitioner's deposition testimony in response to Respondents' summary judgment arguments constitutes an even more disturbing and blatant credibility determination. In effect, the Third Circuit faulted Petitioner for failing to make the statements at issue sooner even when he was never questioned about these specific facts. The court subsequently deemed these statement not sufficiently credible because they were not made soon enough. "The sham affidavit doctrine is faulty precisely because it enables a judge to exercise significant discretion in choosing the outcome of a case, while also letting the judge make the outcome appear to be the result of a mechanical application of a rule-like doctrine." Holley, 20 Whittier L. Rev. at 898.

The deprivation of a jury trial through such an artifice like the sham affidavit doctrine reflects a backslide into the revival of British-imposed and British-style vice-admiralty courts. Nearly one hundred years ago, Justice Black made note of the "gradual process of erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting). A deliberate degradation of the right to a jury trial in fact preceded the Revolution, as "in the decade before the Revolution, the drip, drip, drip of expanding power became a torrent, as Parliament allowed more and more actions to be brought in colonial vice-admiralty courts." Jarkesy, 603 U.S. at 146 (Gorsuch, J., concurring).

Of course, "the Seventh Amendment seeks to ensure there will be no juryless vice-admiralty courts in the United States." Jarkesy, 603 U.S. at 149 (Gorsuch, J., concurring). This all important right exists only in the United States, as nearly every civil jury trial on the planet takes place here. United States v. Luisi, 568 F. Supp. 2d 106, 110 (D. Mass. 2008) (quoting Hon. William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U.L. Rev. 67, 68 (2006) ("Nearly all civil jury trials and ninety percent of criminal jury trials on the planet take place in the United States.").

With the development of pretenses like the sham affidavit doctrine, however, the right to a civil jury trial has become elusive. Jeffrey Q. Smith & Grant R. MacQueen, Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?, 101 Judicature, no. 4, 2017, at 26, 28 ("[A]pproximately 1 percent of all civil cases filed in federal court are resolved by trial."). Certiorari is warranted in this case not only to resolve several circuit splits and ensure uniform standards, but to reverse the damage that has been done to the Seventh Amendment by the lower courts.

A commentator summed up the damage the sham affidavit doctrine has done:

> "[J]udges created the sham doctrine. The sham doctrine gradually turned the tables on plaintiffs, allowing the judge in many circumstances to put the burden on them to prove their testimony credible before it would be considered as competent summary judgment evidence. So, defendants got a windfall. And, so did judges, in that their discretion expanded with minimal cost to their security in their roles. ... The big loser under the sham doctrine are the plaintiffs, especially the less sophisticated ones, or those who hire poor attorneys. As an empirical matter, these plaintiffs include aggrieved employees, independent contractors, and sole proprietorships."
>
> Holley, 20 Whittier L. Rev. at 905.

C. Alternatively, the Court should adopt a stringent standard for the application of the sham affidavit doctrine.

While Petitioner maintains the sham affidavit should be discarded entirely, to the extent the Court concludes the sham affidavit doctrine can be employed consistently with the Seventh Amendment, it should direct lower courts to use a stringent standard when applying the doctrine. Considering the assortment of conflicting rules applied by the federal circuits, section I(C), Petitioner proposes the following standard.

First, the sham affidavit doctrine is to be applied with extreme caution and only sparingly. Second, it applies only to specific statements in a responsive summary judgment affidavit that directly contradict the affiant's deposition testimony. Third, the doctrine does not apply to supplemental or clarifying statements. Fourth, even when direct contradictions exist, the affiant should be permitted to plausibly explain the reason for the contradiction. Fifth, the court must consider whether the affiant was carefully examined regarding the particular fact at issue at his deposition and had available all relevant evidence underlying the factual issue. Sixth, and finally, courts should consider the complexity of the case and discovery.

III. APPLICATION OF THE APPROPRIATE LEGAL STANDARDS REQUIRES THAT THE THIRD CIRCUIT'S DECISION BE REVERSED AND THAT THE CASE BE REMANDED FOR A TRIAL

Absent the Third Circuit's misguided application of the sham affidavit doctrine, there are genuine issues of material fact for a jury to resolve. Accordingly, the matter should be remanded for trial. Whether the Court discards the doctrine as unconstitutional or adopts a constitutionally consistent standard, it is inapplicable to Petitioner's case. There are no direct contradictions between Petitioner's affidavit and his deposition

testimony and the district court did not abuse its discretion in declining to apply the doctrine. The Third Circuit's decision collapses without its sham analysis. That is because (1) the Third Circuit's misuse of the sham affidavit doctrine is at the core of its affirmance of summary judgment on Petitioner's fabrication of evidence claim, App. 1 at 14-21, and (2) the Third Circuit stated that the fabrication of evidence claim "undergirds" Petitioner's other claims, including his malicious prosecution and conspiracy claims. App. 1 at 14.

Furthermore, the Third Circuit was not coy in its decision to trample upon the Seventh Amendment. In this case, the very language employed by the Third Circuit demonstrates that it crossed the line separating judges from juries by making blatant credibility determinations. Its sham affidavit doctrine holding was adorned with findings that Petitioner's decision not to proactively offer information at his deposition "strains credulity", App. 1 at 17, and accusations of "sandbagging" the defense at his deposition. App. 1 at 16. Critically missing from the Third Circuit's decision, however, is the word "contradiction". Whether testimony "strains credulity", or in other words, is not credible is a determination reserved for the jury. Similarly, asking a witness why they did not disclose certain information earlier and asking a jury to make a credibility determination based on their response or inability to respond is a classic cross-examination technique. That, however, is a matter for trial, not for summary judgment.

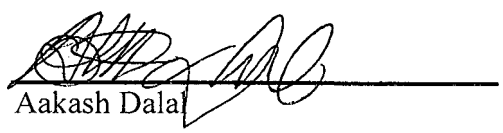
The remainder of the Third Circuit's decision demonstrates the court's clear failure to comprehend its role at the summary judgment stage. Even as the United States Marshals Service Investigator Paul Safier, Assistant United States Attorney Andrew Kogan, along with FBI Special Agent Coleman himself jointly concluded and wrote in a

report that Stewart's allegations against Petitioner were "false/specious" due to "negative corroboration", App. 2 at 32 (emphasis added)[12], the Third Circuit inexplicably held, "Notwithstanding Stewart's liabilities, we have already determined that Appellees had good cause to vouch for his credibility because the recordings corroborate significant aspects of his letter and prior statements." App. 1 at 23 (emphasis added). Similarly, the Third Circuit's conclusion that Petitioner "proffered no evidence" that the state prosecutor Respondents "were aware" of Stewart's credibility issues, App. 1 at 13, the evidence clearly shows that they were aware of this information. App. 8 at 28-29 ("At some point Higgins and Anzilotti were informed of who [Stewart] was and his criminal history ... [a]t some point they would have been aware of Whendel Stewart's immigration situation and his request.").

CONCLUSION

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

Respectfully submitted:



Aakash Dalal

Dated: September 4, 2026

[12] It is of course no surprise that a jailhouse informant's statement would turn out to be false. "The likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored." Kansas v. Ventris, 556 U.S. 586, 597 n. 2 (2009) (Stevens, J., dissenting). R. Warden, Northwestern University School of Law, Center on Wrongful Convictions, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row (2004) (testimony by jailhouse informants is leading cause of wrongful convictions in United States capital cases)

APPENDIX 1