No.

In the Supreme Court of the United States

PRADEEP SRIVASTAVA, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether all of the evidence seized pursuant to search warrants should be suppressed under the exclusionary rule, where the executing officers believed that the warrants imposed no meaningful limits on the items that could be seized and, consistent with that belief, seized a substantial volume of items not covered by the warrants.

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Pradeep Srivastava respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is unreported. The earlier opinion of the court of appeals (App., *infra*, 29a-59a) is reported at 540 F.3d 277. The opinion of the district court granting petitioner's motion to suppress (App., *infra*, 61a-111a) is reported at 444 F. Supp. 2d 385. The opinion of the district court denying respondent's motion for reconsideration (App., *infra*, 112a-122a) is reported at 476 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution 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.

STATEMENT

This case involves arguably the most important aspect of the exclusionary rule that the Court has yet to address: namely, whether, and if so in what circumstances, evidence that would otherwise fall within the scope of a search warrant should be suppressed on the ground that the executing officers acted with "flagrant disregard" for the warrant's terms. Most, but not all, of the federal courts of appeals have recognized the "flagrant disregard" doctrine and held that evidence may be suppressed on that basis. In the decision under review, however, the Fourth Circuit adopted a crabbed interpretation of that doctrine. It held, first, that the officers' beliefs concerning the scope of the warrants at issue were irrelevant for purposes of determining whether the officers acted with "flagrant disregard" for the warrants' terms, and second, that the "flagrant disregard" doctrine was inapplicable despite the district court's finding that

the officers seized a substantial volume of items not covered by the warrants.

The Fourth Circuit's decision deepens a conflict among the federal courts of appeals and state courts of last resort concerning the validity and scope of the "flagrant disregard" doctrine. And now that petitioner's conviction is final, there is no impediment in this case to the Court's review. Both because the Fourth Circuit's decision conflicts with the decisions of several other lower courts and because its reasoning was seriously flawed, the petition for certiorari should be granted.

1. Petitioner operated a cardiology practice in Prince George's County, Maryland. In 2003, the federal government, through the Department of Health and Human Services (HHS) and other agencies, began investigating whether petitioner had submitted fraudulent claims to health-care benefit programs, in violation of 18 U.S.C. 1347. As part of that investigation, Jason Marrero, an HHS special agent, applied for warrants to search petitioner's home and two offices. On March 20, 2003, a magistrate judge issued the warrants. The warrants authorized agents to search for "[t]he following records including, but not limited to, financial, business, patient, insurance and other records related to the business of [petitioner] * * *, for the period January 1, 1998, to Present, which may constitute evidence of violations of [18 U.S.C. 1347]." The warrants proceeded to authorize the seizure of various specific categories of records, including, as is relevant here, "[f]inancial records, including but not limited to accounting records, tax records, accounts receivable logs and ledgers, banking records, and other records reflecting income and expenditures of the business." App., *infra*, 30a-34a, 63a-65a.

The following day, federal agents, led by Agent Marrero, simultaneously executed the warrants. The agents

seized substantial volumes of documents from each location. The agents seized, *inter alia*, the following items from petitioner's home: copies of the personal tax returns for petitioner and his wife; their personal bank and brokerage records; papers concerning petitioner's homes; unopened personal mail; an invitation to a cultural event; petitioner's wallet; his credit cards and credit-card statements; a CVS Pharmacy loyalty card; an American Automobile Association card; and some foreign currency. During the search of one of petitioner's offices, agents also seized copies of records indicating that petitioner had transferred large sums of money to a bank in India. App., *infra*, 35a-36a, 65a-66a; Pet. D. Ct. Mot. to Suppress, Ex. 4.

Agent Marrero later testified that he viewed the limiting language in the warrants as "just an expression" and a "go by" and that he did not believe that it restricted his actions in any way. He further testified that he did not consider himself to be limited to seizing only business records and that he intended to seize personal financial records as well. In an apparent recognition of the overbreadth of the searches, after petitioner's counsel complained that the executing officers had seized items outside the warrants' scope, the government returned about 80% of the materials that had been seized from petitioner's home; the returned materials filled twelve large boxes. App., *infra*, 78a-84a, 118a.

In the wake of the searches, the government did not pursue any criminal charges against petitioner for health-care fraud.[1] Agent Marrero, however, shared the

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[1] Without conceding any wrongdoing, petitioner did enter into a civil settlement with the government on similar charges. See App., *infra*, 62a n.2; Gov't C.A. Reply Br. 4-5 & n.1.

seized Indian bank records with the U.S. Attorney's Office. In conjunction with the Internal Revenue Service, the U.S. Attorney's Office then began an investigation into whether petitioner had committed *tax* fraud. Although the genesis for that investigation was that petitioner had failed to disclose the Indian bank account, the IRS eventually concluded that petitioner had underreported capital gains for tax years 1998 and 1999. App., *infra*, 36a-37a, 66a-67a.

2. On October 12, 2005, a grand jury in the District of Maryland indicted petitioner on two counts of attempting to evade taxes, in violation of 26 U.S.C. 7201, and one count of making false statements on a tax return, in violation of 26 U.S.C. 7206(1). Petitioner moved to suppress all of the documents seized during the searches, including tax returns and other tax-related documents seized from his home, as well as the Indian bank records seized from one of his offices. See App., *infra*, 38a-40a (listing key documents).

After conducting an evidentiary hearing at which Agent Marrero testified, the district court granted petitioner's motion to suppress. App., *infra*, 61a-111a. With regard to the documents the government was planning to introduce at trial, the district court first held that those documents fell outside the scope of the warrant. *Id.* at 69a-77a. The court reasoned that the documents at issue "neither tended to show violations of the health care fraud statute[] nor related to the business of [petitioner]." *Id.* at 74a. The court observed that "[t]he fact that officers executing the search warrants in this case were faced with many personal records does not excuse them from complying with the restrictions and qualifications listed in the warrant." *Id.* at 73a.

As is relevant here, the district court then held that, "[e]ven if * * * some of the documents at issue here

were within the scope of the warrant, these documents would be excluded as well because the conduct of the agents who executed this warrant was so inappropriate as to warrant the exclusion of *all* evidence seized." App., *infra*, 77a. The court reasoned that, while the exclusionary rule ordinarily requires only that improperly seized evidence be suppressed, the blanket suppression of all seized evidence is merited where "the officers executing the warrant exhibit a flagrant disregard for its terms." *Id.* at 78a (internal quotation marks and citation omitted).

Applying that principle, the district court first found that, although the warrant contained limitations concerning the subject matter of the records that could have been seized, Agent Marrero had "approached * * * the search[es] in a way that authorized the seizure of virtually any document of [petitioner]," App., *infra*, 82a, and thereby "flagrantly exceeded the specific limitations of the warrants," *id.* at 85a. "It is clear," the court explained, "that [Agent] Marrero was unequivocal in his belief that the limiting words of the warrant were meaningless to him." *Id.* at 81a. The court characterized Agent Marrero's testimony as "astonishing," *id.* at 78a; "at best[] troublesome," *id.* at 82a; and "alarming," *id.* at 83a. The court further found that "[Agent] Marrero's expansive view of the warrants * * * created a situation where executing agents grossly exceeded the scope of the search warrants." *Id.* at 82a-83a.

The district court was "mindful that it is a rare situation indeed where agents are found to be so excessive in their execution of a search warrant that blanket suppression is warranted." App., *infra*, 83a. Nevertheless, based on its findings concerning Agent Marrero's interpretation of the warrants and the overbreadth of the searches, the court concluded, "[w]ith great disappoint-

ment," that "this rare remedy is appropriate in this case." *Id.* at 83a-84a, 109a.[2]

3. After the government filed an interlocutory appeal, the court of appeals vacated and remanded. App., *infra*, 29a-59a. With regard to the documents the government was planning to introduce at trial, the court of appeals first held, in disagreement with the district court, that those documents fell within the scope of the warrant. *Id.* at 47a-55a.

As is relevant here, the court of appeals then held that blanket suppression of the items seized during the searches was improper. App., *infra*, 56a-58a. At the outset, the court asserted that "only extraordinary circumstances * * * will justify the suppression of lawfully seized evidence." *Id.* at 56a (citation omitted). The court then summarily concluded that it was "unable to identify any extraordinary circumstances that might support [the district court's] ruling." *Id.* at 57a.

The court of appeals added that, "[e]ven assuming—as the district court found—that Agent Marrero believed that the terms of the search warrants were 'meaningless,' and did not limit his conduct in any way, such an assumption does not support the blanket suppression ruling." App., *infra*, 57a. The court of appeals explained that "a constitutional violation does not arise when the actions of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer." *Ibid.* "As a result," the court continued, "the

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[2] The district court subsequently denied the government's motion for reconsideration. App., *infra*, 112a-122a. In so doing, the court emphasized that, in ordering blanket suppression, it had relied on "the quantity of the materials seized" and "[Agent] Marrero's testimony," and "not simply [on] the interpretation of the text of the warrants and accompanying affidavit." *Id.* at 117a-118a.

subjective views of Agent Marrero were not relevant—the proper test is an objective one." *Ibid.* (citing *Maryland* v. *Macon*, 472 U.S. 463 (1985), and *Martin* v. *Gentile*, 849 F.2d 863 (4th Cir. 1988)). Although the court of appeals expressed "sympath[y] with the [district] court's view that [Agent] Marrero's testimony was disconcerting," it concluded that "his personal opinions were an improper basis for the blanket suppression ruling." *Id.* at 58a.[3]

The court of appeals subsequently denied rehearing without recorded dissent. App., *infra*, 60a.

4. Petitioner filed a petition for a writ of certiorari; the government opposed the petition, primarily on the ground that the petition was interlocutory. This Court denied certiorari. See 129 S. Ct. 2826 (2009) (No. 08-1152).

5. The case proceeded to trial. There, three members of the search team corroborated Agent Marrero's testimony that the executing officers did not consider themselves to be limited to seizing only business records and that they intended to seize any "financial documents" they found (whether related to petitioner's medical practice or not). See 9/30/09 Tr. 18 (Agent Kochanski); *id.* at 39-40 (Agent Zimmerman); *id.* at 94-95 (Agent Quarles). Based largely on the tax-related documents

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[3] In a footnote, the court of appeals concluded that the district court had erred by citing the government's subsequent return of large quantities of materials seized from petitioner's home as evidence of the overbreadth of the searches. App., *infra*, 58a n.20. The court of appeals reasoned that "the voluntary return of property seized under a valid warrant does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional." *Ibid.*

seized from his home, petitioner was found guilty on all three counts. App., *infra*, 5a, 43a.

6. In his post-conviction appeal, petitioner challenged the district court's denial of his request for an evidentiary hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), on the ground that Agent Marrero's affidavit in support of the warrant application had contained material omissions, see Pet. C.A. Br. 28-44, and also challenged the district court's exclusion of certain testimony at trial, see *id.* at 49-58. In order to ensure that it was preserved for this Court's review, petitioner also renewed his contention that the tax-related documents should have been suppressed under the "flagrant disregard" doctrine. See *id.* at 45-49.

The court of appeals affirmed. App., *infra*, 1a-28a. With regard to the "flagrant disregard" doctrine, the court reasoned that it was bound by its earlier decision holding the doctrine inapplicable. *Id.* at 24a-25a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit concluded in this case that the blanket suppression of evidence seized pursuant to search warrants was improper, notwithstanding the district court's findings that the supervising officer believed that the warrants imposed no meaningful limits on the items that could be seized and that the executing officers seized a substantial volume of items not covered by the warrants. In so concluding, the Fourth Circuit held that the beliefs of the officers were irrelevant for purposes of determining whether the officers had acted with "flagrant disregard" for the terms of the warrants (and thus whether blanket suppression was required under the exclusionary rule). The court of appeals' decision deepens a conflict among the federal courts of appeals and state courts of last resort concerning the validity and scope of

the "flagrant disregard" doctrine, and it cannot be squared with this Court's decisions concerning the scope of the exclusionary rule more generally. This case, moreover, now constitutes an ideal vehicle for the Court to clarify the standards for the invocation of the "flagrant disregard" doctrine. Further review is therefore warranted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort Concerning The Validity And Scope Of The "Flagrant Disregard" Doctrine

In the operative opinion under review, the Fourth Circuit held that the beliefs of the officers concerning the scope of the warrants were irrelevant for purposes of the application of the "flagrant disregard" doctrine. See App., *infra*, 57a-58a. The lower courts are in substantial disagreement as to the relevance of officers' subjective views to the analysis, with some courts holding that they are relevant, others holding that they are not, still others taking an agnostic or ambiguous position, and still others refusing to recognize the "flagrant disregard" doctrine at all. All of the federal courts of appeals with jurisdiction over criminal matters, moreover, have now spoken to the issue in some manner. The resulting disarray merits the Court's review.

1. Three circuits—the District of Columbia, Ninth, and Tenth—have explicitly considered officers' state of mind in determining the applicability of the "flagrant disregard" doctrine. See *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981) (per curiam), cert. denied, 456 U.S. 926 (1982); *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (Kennedy, J.); *United States* v. *Foster*, 100 F.3d 846, 850 (10th Cir. 1996). In *Rettig* and *Heldt*—the two seminal cases for the proposition that there are circumstances under which "the en-

tire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed," *Waller* v. *Georgia*, 467 U.S. 39, 43 n.3 (1984)—the courts framed the standard for blanket suppression in terms of the officers' state of mind. In *Rettig*, the Ninth Circuit heavily relied on the fact that, while the warrant in question allowed the officers to search for evidence of marijuana dealing, the officers had obtained the warrant only as a pretext to search for evidence of *cocaine* smuggling. See 589 F.2d at 421-422. After noting "the breadth of the search that took place," *id.* at 421, and "[the officers'] intent to conduct a search the purposes and dimensions of which are beyond that set forth in the [warrant application]," *id.* at 423, the court concluded that the warrant, "[a]s interpreted and executed by the agents, * * * became an instrument for conducting a general search." *Ibid.* And in *Heldt*—which first referred to the "flagrant disregard" doctrine, 668 F.2d at 1259—the District of Columbia Circuit explained that, while the relevant inquiry focuses on "the reasonableness of [the] search," *id.* at 1260, "the reasonableness of the execution of a search can be determined from the *subjective and objective* behavior of the participants during the search." *Id.* at 1268 (emphasis added). The court concluded that, in that case, there was "no persuasive evidence that the search was merely a subterfuge to examine or seize other evidence not specified in the warrant," *ibid.*, and thus held that blanket suppression was inappropriate, *id.* at 1269.

In its subsequent decision in *Foster*, the Tenth Circuit tied the standard for blanket suppression even more explicitly to a finding concerning the officers' state of mind. In that case, the court determined, based on testimony from the executing officers, that the officers "viewed the warrant [at issue] as a general warrant and

executed the warrant in accord with those views." 100 F.3d at 850. The court upheld the suppression of the evidence at issue, on the ground that "the officers' disregard for the terms of the warrant was a deliberate and flagrant action taken in an effort to uncover evidence of additional wrongdoing." *Id.* at 851. Notably, the court made clear that the "flagrant disregard" doctrine was applicable not only when officers *obtained* a warrant in bad faith, but also when they acted in bad faith in *executing* it. See *ibid.*

At least one state court of last resort has likewise considered officers' state of mind in applying the "flagrant disregard" doctrine. In *State* v. *Valenzuela*, 536 A.2d 1252 (1987) (Souter, J.), cert. denied, 485 U.S. 1008 (1988), the New Hampshire Supreme Court noted that the executing officers had "improperly seized and removed voluminous papers for later examination into possible evidentiary value." *Id.* at 1267. The court nevertheless held that the "flagrant disregard" doctrine was inapplicable, based on the trial court's findings that "the dominant concern of the officers was to find the evidence they were authorized to seize" and that "execution of the warrant was no mere subterfuge for a general search." *Ibid.*

2. By contrast, like the Fourth Circuit in this case, three other circuits—the Third, Sixth, and Eighth—have looked only to objective factors, without reference to officers' actual state of mind, in determining the applicability of the "flagrant disregard" doctrine. In *United States* v. *American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (1989), cert. denied, 493 U.S. 955 (1989) and 493 U.S. 1021 (1990), the Third Circuit stated that an "objective standard govern[ed] the evaluation of the officers' conduct in executing the warrant," *id.* at 1107, and it "rel[ied] on [the] conclusion that the agents acted in

objective good faith" in holding that the "flagrant disregard" doctrine was inapplicable, *ibid.* Similarly, in *United States* v. *Garcia*, 496 F.3d 495 (6th Cir. 2007), and *United States* v. *Decker*, 956 F.2d 773 (8th Cir. 1992), the courts focused only on objective considerations—and, indeed, seemingly took the position that the "flagrant disregard" doctrine applies only where officers searched *places* not authorized by the warrant (and not where, as here, officers seized unauthorized *items*). See *Garcia*, 496 F.3d at 507; *Decker*, 956 F.2d at 779.[4]

Some state courts of last resort also have looked only to objective factors in applying the "flagrant disregard" doctrine. For example, in *State* v. *Jacobs*, 10 P.3d 127 (2000), the New Mexico Supreme Court held that officers did not "grossly exceed the scope of the warrant" by seizing two items not specified in the warrant (at least one of which, according to the court, officers "reasonabl[y]" could have believed "was related to the crime being investigated"). *Id.* at 141. And in *State* v. *Petrone*, 468 N.W.2d 676, cert. denied, 502 U.S. 925 (1991), the Wisconsin Supreme Court upheld the admission of evidence on the ground that the executing officers "did not seize items that were not arguably connected in some

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[4] In *Foster*, *supra*, the government unsuccessfully argued in a petition for rehearing that the "flagrant disregard" doctrine applies only where officers searched places not authorized by the warrant. See 104 F.3d 1228, 1229 (10th Cir. 1997). In other briefs, however, the government has conceded that the doctrine also applies where officers seized unauthorized items. See, *e.g.*, Gov't Br. at 27-28, *United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007) (Nos. 05-11689-BB & 05-15014-BB). And the government recently conceded that the courts of appeals appear to take conflicting approaches in this regard. See Gov't Br. at 14 n.4, *United States* v. *Allen*, No. 10-6170, 2011 WL 989854 (10th Cir. Mar. 22, 2011).

way with the illegal activity described in the warrant." *Id.* at 683.

3. Three other circuits—the First, Second, and Eleventh—either have expressly left open the relevance of officers' state of mind in determining the applicability of the "flagrant disregard" doctrine, or have taken ambiguous positions on the issue. For its part, the Second Circuit has announced a two-part test for the applicability of the "flagrant disregard" doctrine, under which blanket suppression is appropriate when (1) officers "effect a widespread seizure of items that were not within the scope of the warrant" and (2) officers "do not act in good faith." *United States* v. *Liu*, 239 F.3d 138, 140 (2000) (internal quotation marks and citation omitted), cert. denied, 534 U.S. 816 (2001). Because the Second Circuit determined in *Liu* that the search at issue was not overbroad for purposes of the first prong of its test, it explicitly left open "the question of whether the proper approach to 'good faith' in this context is objective or subjective." *Id.* at 142.

The law in the First and Eleventh Circuits is less clear. In *United States* v. *Young*, 877 F.2d 1099 (1989) (Breyer, J.), the First Circuit explained that blanket suppression would be warranted where "the lawful part [of a search] seems to have been a kind of pretext for the unlawful part." *Id.* at 1105-1106 (citing, *inter alia*, *Rettig*, 589 F.2d at 423). In its subsequent decision in *United States* v. *Hamie*, 165 F.3d 80 (1999), however, the First Circuit focused more on the extent of overbreadth of the search in determining that the "flagrant disregard" doctrine was not applicable. See *id.* at 84 (concluding that the seized evidence that fell outside the scope of the warrant "was a very small tail on a very large dog"). Similarly, in *United States* v. *Wuagneux*, 683 F.2d 1343 (1982), cert. denied, 464 U.S. 814 (1983), the Eleventh

Circuit stated that blanket suppression would be appropriate under the "flagrant disregard" doctrine only where "the executing officer's conduct exceeds any reasonable interpretation of the warrant's provisions." *Id.* at 1354. More recently, however, in *United States* v. *Khanani*, 502 F.3d 1281 (2007), the Eleventh Circuit seemingly relied on the state of mind of the executing officers, citing the district court's finding that the officers had "made efforts" not to seize items outside the warrant's scope. *Id.* at 1290.

4. Finally, two other circuits—the Fifth and Seventh—have refused to recognize the "flagrant disregard" doctrine at all. In *United States* v. *Willey*, 57 F.3d 1374, cert. denied, 516 U.S. 1029 (1995), the Fifth Circuit declared that it had "not adopted the flagrant disregard exception" to the general principle that items properly seized pursuant to a valid warrant are admissible. *Id.* at 1390 n.31; accord *United States* v. *Setser*, 568 F.3d 482, 489 (5th Cir.), cert. denied, 130 S. Ct. 437 (2009). And in *United States* v. *Buckley*, 4 F.3d 552 (1993), cert. denied, 510 U.S. 1124 (1994), the Seventh Circuit, despite citing the Ninth Circuit's decision in *Rettig*, ultimately rejected the "flagrant disregard" doctrine. See *id.* at 557-558. The court stated that, "[i]f the defendants in this case wish for suppression of all of the evidence, they must assert that *all* of the evidence was beyond the scope of the warrant." *Id.* at 558 (emphasis added). At least one state court of last resort, moreover, has declined to recognize the "flagrant disregard" doctrine, on the ground that this Court has not yet done so. See *Klingenstein* v. *State*, 624 A.2d 532, 537 (Md.), cert. denied, 510 U.S. 918 (1993).

There is therefore a substantial conflict not only as to the relevance of officers' subjective views to the application of the "flagrant disregard" doctrine, but also as to

the validity of the "flagrant disregard" doctrine as a basis for suppression in the first place. The resulting disuniformity, on a fundamental aspect of the exclusionary rule, merits this Court's review.

B. The Decision Below Is Inconsistent With This Court's Decisions Concerning The Exclusionary Rule

In addition to deepening a circuit conflict concerning the validity and scope of the "flagrant disregard" doctrine, the decision below cannot be reconciled with this Court's decisions concerning the exclusionary rule more generally. Further review is warranted on that basis as well.

1. As a matter of first principles, the "flagrant disregard" doctrine constitutes a valid application of the exclusionary rule. The premise of the "flagrant disregard" doctrine is that it is sometimes necessary to suppress even properly seized items where the seizure of other items was improper. See, *e.g.*, *Heldt*, 668 F.2d at 1259-1260.

As lower courts recognizing that doctrine have noted, "[t]he cornerstone of the * * * doctrine is the enduring aversion of Anglo-American law to so-called general searches," and "[t]he rationale for blanket suppression is that a search that greatly exceeds the bounds of a warrant and is not conducted in good faith is essentially indistinguishable from a general search." *Liu*, 239 F.3d at 140-141; see, *e.g.*, *Heldt*, 668 F.2d at 1257 (noting that, "[w]hen investigators fail to limit themselves to the particulars in the warrant, both the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity"). To put the point another way, when an officer seizes items (or searches places) with "flagrant disregard" for the war-

rant's relevant limitations as to the items to be seized (or places to be searched), it is as if those limitations never existed in the first place. Although items properly seized pursuant to a valid warrant are ordinarily admissible, the blanket suppression of evidence in cases involving the "flagrant disregard" of a warrant's terms properly serves the "primary justification" for the exclusionary rule: *viz.*, to "deter[] * * * police conduct that violates Fourth Amendment rights." *Stone* v. *Powell*, 428 U.S. 465, 486 (1976).

This Court has considered the "flagrant disregard" doctrine on only one occasion, but has not squarely addressed any question concerning the validity or scope of that doctrine. In *Waller* (which primarily concerned the question whether the Sixth Amendment right to a public trial extended to a suppression hearing, see 467 U.S. at 44-47), the Court addressed in a footnote the petitioners' contention that officers had "so 'flagrant[ly] disregard[ed]' the scope of the warrants in conducting the seizures at issue * * * that they turned the warrants into impermissible general warrants." *Id.* at 43 n.3 (alteration in original; citation omitted). The Court recognized that the decisions in *Rettig* and *Heldt* stood for the proposition that "in such circumstances the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed." *Ibid.* But the Court ultimately (and "summarily") concluded that, because the petitioners had alleged only that the officers "unlawfully seized and took away items unconnected to the prosecution," there was "no requirement that lawfully seized evidence be suppressed as well." *Ibid.* In *Waller*, therefore, the Court held only that the "flagrant disregard" doctrine was inapplicable

on the facts of that case, without opining more broadly on the validity or scope of that doctrine.[5]

2. Although the court of appeals correctly recognized the existence of the "flagrant disregard" doctrine, it erred in two critical respects by holding that the doctrine was inapplicable here.

a. The court of appeals primarily erred by holding that "the subjective views of [the supervising officer] were not relevant" in determining the applicability of the "flagrant disregard" doctrine. App., *infra*, 57a. In so holding, the court erroneously conflated the question whether a Fourth Amendment violation had occurred with the question whether the suppression of evidence was warranted under the exclusionary rule.[6] As to the former question, it is settled law, as the court of appeals noted, that "a constitutional violation does not arise when the actions of the executing officers are objectively reasonable." *Id.* at 57a (citing *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985)); see, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (noting that "[s]ubjective intentions

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[5] Two courts of appeals have read *Waller* to support the proposition that the "flagrant disregard" doctrine applies only where officers search *places* not authorized in the warrant (and not where officers seize unauthorized *items*). See *Garcia*, 496 F.3d at 507; *Decker*, 956 F.2d at 779; but see *United States* v. *Medlin*, 842 F.2d 1194, 1198-1199 (10th Cir. 1988) (rejecting that interpretation). Those courts' reading of *Waller* cannot be reconciled with the text of the Fourth Amendment, which prohibits searches of unauthorized places and seizures of unauthorized items alike. Nor can it be reconciled with *Waller* itself, which approvingly cites *Rettig* and *Heldt*—decisions that involved the seizure of unauthorized items. See *Heldt*, 668 F.2d at 1266-1269; *Rettig*, 589 F.2d at 423.

[6] The court of appeals' error was hardly surprising, because the government had made the same error in its brief to that court. See 07-4386 Gov't C.A. Br. 31, 36-37.

play no role in ordinary, probable-cause Fourth Amendment analysis").

As to the latter question, however, this Court has consistently emphasized that "the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." *Scott* v. *United States*, 436 U.S. 128, 139 n.13 (1978); see, *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 911 (1984) (noting that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" in determining whether to apply the exclusionary rule). Just two years ago, the Court reiterated that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009).

The significance of an officer's intent to the application of the exclusionary rule is entirely understandable. Whereas the touchstone of the Fourth Amendment is reasonableness, the touchstone of the exclusionary rule is deterrence. See, *e.g.*, *Herring*, 129 S. Ct. at 700; p. 17, *supra*.[7] Because meaningful deterrence is not possible where "the official action was pursued in complete good faith," *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974), the Court has consistently declined to apply the exclusionary rule where the Fourth Amendment violation at issue resulted from non-culpable police conduct. See, *e.g.*, *Her-*

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[7] The government has affirmatively argued as much. See, *e.g.*, Oral Arg. Tr. at 31, *Davis* v. *United States*, No. 09-11328 (Mar. 21, 2011) (statement of Deputy Solicitor General Dreeben describing as "very straightforward" the principle that "the exclusionary rule applies only when it can deter police misconduct").

ring, 129 S. Ct. at 702; *Illinois* v. *Krull*, 480 U.S. 340, 349-350 (1987); *Leon*, 468 U.S. at 922. Conversely, because the exclusionary rule is "most likely" to be an effective deterrent when "official conduct was flagrantly abusive of Fourth Amendment rights," *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part), the Court has consistently applied the exclusionary rule when it has found that the officers engaged in a flagrant or deliberate violation of rights. See, *e.g.*, *Franks* v. *Delaware*, 438 U.S. 154 (1978); *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

This Court's decisions in *Franks* and *Herring* highlight the relevance of an officer's intent to the exclusionary-rule inquiry. In *Franks*, the Court held that the exclusionary rule requires the suppression of evidence seized pursuant to a warrant that was issued based on an affidavit containing either "deliberate[ly] fals[e]" statements or statements made in "reckless disregard for the truth." 438 U.S. at 171. In so holding, the Court noted that it "ha[d] not questioned * * * the continued application of the [exclusionary] rule to suppress evidence * * * where a Fourth Amendment violation has been substantial and deliberate." *Ibid.* And the Court explained that it would be an "unthinkable imposition upon [a magistrate's] authority" if an officer could intentionally or recklessly falsify statements in an affidavit and obtain a search warrant based on those statements, yet retain the ability to use evidence obtained from the ensuing search (and, "having misled the magistrate," thereby "remain confident that the ploy was worthwhile"). *Id.* at 165, 168. So too here, where an officer acts with disregard for the limitations in a search warrant (and in fact seizes a substantial amount of evidence outside the scope of the warrant), the suppression of all of the seized evidence is justified.

In *Herring*, by contrast, the Court held that the exclusionary rule did not require the suppression of evidence where the underlying Fourth Amendment violation was "the result of negligence * * * rather than systemic error or reckless disregard of constitutional requirements." 129 S. Ct. at 704. In so holding, however, the Court reiterated that suppression of evidence under the exclusionary rule "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* at 698. Because *Herring* was not a case that "featured intentional conduct that was patently unconstitutional"—*i.e.*, because the conduct at issue was not "sufficiently deliberate that exclusion [could] meaningfully deter it"—the Court determined that exclusion was unwarranted. *Id.* at 700, 702. By contrast, where, as here, the unlawful seizure resulted from an officer's conscious refusal to adhere to limitations in a search warrant he was executing, the deterrent effect of suppressing all of the evidence seized by the officer is obvious.

To be sure, this Court has "perhaps confusingly" stated that, although an officer's "good faith" (or lack thereof) is relevant to the exclusionary-rule inquiry, good faith is to be measured by an objective, rather than subjective, standard. *Herring*, 129 S. Ct. at 701, 703; see *id.* at 710 n.7 (Ginsburg, J., dissenting) (noting that "[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police"). Thus, in *Leon*, the Court held that the exclusionary rule does not apply where officers acted in "objectively reasonable reliance" on a defective warrant. See 468 U.S. at 922.

Even assuming, however, that the relevant inquiry for purposes of the "flagrant disregard" doctrine is whether the officer acted with objective, rather than sub-

jective, bad faith, it is clear that the necessary showing has been made here. The district court found that the supervising officer acted according to his belief that "the express limitations of the search warrant[s] were meaningless[] and certainly not restrictions that would limit his conduct in any way." App., *infra*, 118a; see *id.* at 81a-82a (same). Trial testimony confirmed that, based on instructions from the supervising officer, other executing officers acted pursuant to the same understanding. See p. 8, *supra*. Whatever the precise contours of the warrant's limitations,[8] it was patently unreasonable for the supervising officer to view the limiting language in the warrants as "just an expression," and, on that basis, to instruct the executing officers that they had "limitless power to seize virtually anything from [petitioner's] home and business." App., *infra*, 81a-82a. By any standard, therefore, the supervising officer in this case acted in bad faith—and the court of appeals should have taken that bad faith into account in determining whether blanket suppression was appropriate under the "flagrant disregard" doctrine.

b. The court of appeals compounded its error with regard to the relevance of intent by failing to engage in any inquiry concerning the overbreadth of the searches—*i.e.*, whether the executing officers seized a substantial volume of items not covered by the warrants—in determining the applicability of the "flagrant disregard" doctrine. For its part, the district court found that "the executing agents grossly exceeded the scope of the search warrants," App., *infra*, 83a, and sup-

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[8] Compare App., *infra*, 47a-55a (court of appeals holding that particular documents fell within the scope of the warrant), with *id.* at 69a-77a (district court holding to the contrary).

ported that finding by listing numerous seized items that unquestionably were outside the warrants' scope, see *id.* at 82a n.15. The court of appeals, however, did not independently assess the actual overbreadth of the searches; instead, it merely stated, without elaboration, that its holding that the documents the government was planning to introduce at trial fell within the scope of the warrant "substantially undercut[] the [district court's] blanket suppression ruling." *Id.* at 57a.[9]

Because the court of appeals ultimately did not disturb the district court's finding that the executing officers seized a substantial volume of items not covered by the warrants, it is unclear what, if any, "extraordinary circumstances" would justify blanket suppression under the court of appeals' view of the "flagrant disregard" doctrine. See App., *infra*, 56a. The Fourth Circuit's cramped interpretation of that doctrine is erroneous and warrants this Court's review.

C. The Question Presented Is An Important One That Merits The Court's Review In This Case

1. The question presented in this case—*i.e.*, whether blanket suppression is appropriate where officers believed that limitations in a search warrant were meaningless and seized a substantial volume of items not covered

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[9] Although the court of appeals faulted the district court in passing for citing the government's subsequent return of large quantities of materials seized from petitioner's home, see App., *infra*, 58a n.20, the district court relied on the return of those materials—which occurred in response to a complaint by petitioner's counsel that the executing officers had improperly seized numerous items—merely to "further bear[] out" its conclusion that the executing officers "grossly exceeded" the warrants' scope. *Id.* at 83a n.16. The volume of returned items alone creates a strong inference that the overbreadth of the searches was substantial.

by the warrant—is a recurring one of exceptional importance. Since then-Judge Kennedy wrote the Ninth Circuit's pathmarking opinion in *Rettig* more than 30 years ago, there have been scores of cases in the lower federal and state courts concerning the validity and scope of the "flagrant disregard" doctrine. See pp. 10-16, *supra*; 2 Wayne R. LaFave, *Search and Seizure* § 4.10(d), at 769-771 nn.189-190 (4th ed. 2004) (citing additional cases). Apart from its passing reference to the "flagrant disregard" doctrine in *Waller*, however, this Court has never directly addressed any question concerning that important aspect of the exclusionary rule. The question presented here, moreover, is as least as important as the questions presented in this Court's most recent cases involving application of the exclusionary rule in the context of Fourth Amendment violations. See *Davis* v. *United States*, No. 09-11328 (cert. granted Nov. 1, 2010) (whether evidence lawfully seized under then-existing precedent should be suppressed if that precedent is subsequently overturned); *Herring*, 129 S. Ct. at 698 (whether evidence found pursuant to a search incident to arrest should be suppressed because the arrest was due to a bookkeeping error); *Hudson* v. *Michigan*, 547 U.S. 586, 588 (2006) (whether evidence found pursuant to a warranted search should be suppressed because the knock-and-announce rule was violated).

The question presented in this case is of ever more pressing importance in light of the proliferation of prosecutions for "white-collar" offenses, in which the government typically relies on documentary, rather than physical, evidence. As this Court has long recognized, "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easi-

ly ascertainable." *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). That is because, "[i]n searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Ibid.* As a result, one of the only ways in which a court can limit the scope of a search for documents is to authorize officers to seize only those documents that specifically relate to the offense as to which there is probable cause—as the warrant did here. See App., *infra*, 72a-73a. If officers are allowed to ignore such limitations without facing the consequence of exclusion for doing so, they will have every incentive to pursue a seize-first, ask-questions-later strategy, as the officers did here. Application of the "flagrant disregard" doctrine is therefore particularly vital in the context of document searches, in order to deter officers from transforming the execution of a carefully tailored search warrant into "a fishing expedition for the discovery of incriminating evidence." *Foster*, 100 F.3d at 847 (internal quotation marks omitted).

2. This case constitutes an optimal vehicle for the Court to clarify the standards for invocation of the "flagrant disregard" doctrine, in light of the district court's findings that the supervising officer believed that the warrants imposed no meaningful limits on the items that could be seized and that the executing officers seized a substantial volume of items not covered by the warrants. The conflict among the lower courts concerning the validity and scope of the "flagrant disregard" doctrine has long since matured. And now that petitioner's conviction is final, this case comes to the Court in an ideal procedural posture, with a complete evidentiary record that includes testimony from the officer who sought the search warrants and supervised the searches; testimony

from other officers who executed the searches; and an inventory of the seized items. See pp. 3-9, *supra*. The Court will have no better opportunity to consider the question presented in this case—a recurring question of great importance in the administration of the exclusionary rule. The Court should take that opportunity and grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2011