No. 11-987

In The
Supreme Court of the United States

RACHEL E. GARDNER, Individually,
and JOHN SAGER, Individually,

Petitioners,

v.

TODD M. CHISM and NICOLE C. CHISM,
Individually and as Husband and Wife,

Respondents.

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

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Pursuant to 42 U.S.C. § 1983 and the requisite qualified immunity analysis, the pertinent questions are:

1. Whether judicial deception is ever objectively reasonable to justify law enforcement officers to intentionally or with reckless disregard for the truth submit falsehoods and omit material facts in an affidavit to misrepresent probable cause where it otherwise would not exist.

2. Whether it is ever unlawful for reasonable law enforcement officers to intentionally or with reckless disregard for the truth (by false statements and omission of material facts) manufacture probable cause where it otherwise would not exist in order to arrest an individual and search his house and business.

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STATEMENT OF THE CASE

A. Unreasonable And Unlawful Conduct Of Petitioners.

Petitioner Rachel E. Gardner is a Washington State Patrol ("WSP") officer assigned to the WSP's Missing & Exploited Children Task Force ("MECTF"). Pet. App. 94a. Petitioner John Sager, Gardner's WSP supervisor, was responsible for the MECTF investigations during the time at issue. Pet. App. 45a.

Todd and Nicole Chism, and their two minor children, all reside at [Home Address Omitted], Nine Mile Falls, Stevens County, Washington. App. 2. Todd Chism is a firefighter holding the rank of Lieutenant for the Spokane, Washington Fire Department. App. 2.

In 2007, the Chisms were victims of credit card theft by unknown third parties fraudulently using their Bank of America ("BOA") credit cards. Significantly, credit card No. 6907 at one time was even reported lost by the Chisms to BOA. *Id*. Additionally, on August 17, 2007, Mr. Chism called BOA to dispute four unknown charges to their joint BOA credit card No. 6907 – three of the charges were to a Texas company called NC Soft, and one charge was to an entity called Click-n-Buy, a London, England company. App. 11-12. On August 19, 2007, BOA sent a confirming letter to the Chisms notifying them that BOA had been alerted to the possibility of fraudulent usage on two of their then current cards – those ending in 0626 and 6907. App. 8-9. As a result of their

card theft, the Chisms changed card numbers for three of their cards. These accounts ended in the following numbers 9625, 2191, and 6907.

In July 2007, MECTF received two cybertips from the National Center for Missing and Exploited Children. Pet. App. 6a-7a. Both of the cybertips advised that the webhosting company Yahoo! had archived images of child pornography discovered on two separate websites. Pet. App. 6a-7a. However, neither cybertip was able to provide MECTF with the time or date that the child pornographic images were uploaded, nor the IP addresses from which the child pornographic images were uploaded. Pet. App. 6a-7a. This civil rights action under 42 U.S.C. § 1983 arose from the investigation Petitioners conducted after receiving these tips. Pet. App. 3a. Based upon Petitioners' investigation, they erroneously focused upon Todd Chism. Pet. App. 4a.

In January 2008, Petitioner Officer Gardner submitted a search warrant application and affidavit to a magistrate judge and obtained a warrant to search the home of Todd and Nicole Chism in Nine Mile Falls, Washington, and Todd Chism's workplace in Spokane, Washington. Pet. App. 10a. On the same day, and based upon Petitioner Officer Gardner's affidavit, a Deputy Prosecuting Attorney obtained a warrant to arrest Todd Chism. Pet. App. 10a. Petitioner Officer Sager "*reviewed* [Gardner's] *affidavit and agreed that probable cause existed*." Pet. App. 10a. However, the affidavit contained unfounded and deceptive assertions that Todd Chism had purchased

and downloaded images of child pornography from two separate websites and utilized his BOA credit card (6907) to do so.

The Ninth Circuit concluded that when *"Gardner drafted the affidavit, she possessed no information that Todd Chism had ever accessed any child pornographic images, let alone the particular images that were uploaded to the . . . websites*." Pet. App. 13a. "*Nor did Gardner have any evidence that the images were ever downloaded by anyone.*" Pet. App. 13a. "*Thus, Gardner's assertion that Todd downloaded images of child pornography was not a truthful representation of the evidence she had gathered*." Pet. App. 13a. Furthermore, "*Gardner's statement that the Chisms'* (bank) *card purchased child pornographic images was . . . patently false*." Pet. App. 13a.

Based on the above, the Ninth Circuit concluded "*Gardner's affidavit contained several false statements and omissions.*" and that these "*omissions and false statements . . . were all facts that were within Gardner's personal knowledge. . . . statement[s] that Gardner knew to be false when she drafted her affidavit*." Pet. App. 12a-15a. "*Gardner's affidavit also contained [the following] serious omissions*":

- "*First, Gardner omitted her discovery that the IP addresses that were used to open the offending Yahoo! user accounts and websites were traced to people other than the Chisms*." Pet. App. 13a.

- "*Second, Gardner omitted the fact that a third IP address . . . was used to log in to both the first and second user accounts . . . and that this IP address was never traced*." Pet. App. 13a-14a.
- "*Third, Gardner omitted the fact that Nicole shared the 6907 credit card account with Todd, even though Nicole's name – not Todd's – was associated with the two user accounts*." Pet. App. 14a.
- "*Fourth, Gardner did not report that the user accounts contained nonsensical identifying information*." Pet. App. 14a.

"*[T]he false statements and omissions contained in the affidavit all bolster the case for probable cause, which suggests that the mistakes were not the product of mere negligence.*" Pet. App. 16a. "*[C]umulatively, the omissions purged the affidavit of any reference to the possibility that someone other than Todd Chism was responsible. . . .*" Pet. App. 16a. Additionally, "*[t]he declaration Gardner filed in the district court similarly demonstrates she knew that the IP addresses used to register the user accounts and websites were traced to other people, and that she knew that the identifying information for the Yahoo! accounts was nonsensical.*" Pet. App. 15a.

Furthermore, Petitioners misstate that a credit card belonging to Todd Chism was used to perpetrate the crimes at issue. Pet. p.3. p.4, and p.5. In fact, Mr. and Mrs. Chism were joint signatories on their BOA accounts and both jointly held Alaska Airlines BOA

credit cards. Additionally, the Ninth Circuit found it was "*Nicole Chism's credit card information . . . used to pay the hosting fees . . .* " – not Todd's. Pet. App. 16a.

As a result of the above misstatements and omissions, on January 29, 2008, the WSP orchestrated the arrest of Todd Chism claiming crimes in violation of Washington State's laws against child pornography. Pet. App. 10a. The arrest of Todd Chism occurred despite the fact the Petitioners:

- were unable to verify who provided the online authorization for use of Mr. and Mrs. Chism's credit card for the *service* fees associated with the Yahoo! accounts; Pet. App. 13a.
- were unable to find a physical nexus between the online anonymous upload of child porn and the Chisms' physical home or to either of Mr. Chism's physical work addresses; Pet. App. 21a.

Petitioner Officer Gardner's justification for the arrest of Todd Chism was based solely upon an anonymous online authorization to charge the Chisms' *joint* BOA credit card for *service fees* associated with the Yahoo! accounts, and the fact that he was male. Pet. App. 19a, 91a.

Yet, it is undisputed that before Petitioner Officer Gardner submitted her affidavit, she conducted no standard investigation, such as seeking a court order to install a Pen Register on the Chisms' telephone lines; making a pretext call to the Chisms; inquiring

about the Chisms' Internet usage after identifying the Yahoo! e-mail accounts and credit card at issue; verifying from where either account, "qek" or "qaag," had signed onto the Internet; verifying that either of the Chisms actually uploaded child pornography; much less establishing a physical nexus from any physical address to the uploaded child pornography. Pet. App. 92a-108a. Instead, Petitioners relied solely upon two fictitious Yahoo! accounts linked to Yahoo! websites that had anonymously billed the Chisms' joint credit card for associated service fees. Pet. App. 22a-23a.

In seeking review, Petitioners misstate the assertions Officer Gardner made in her affidavit by now claiming her thirteenth and sixteenth paragraphs simply "*described the 'purchases' paid for by the 6907 card as 'images downloaded.'*" Pet. p.9. What Petitioner Officer Gardner actually misstated in her warrant affidavit was "*This is the card the suspect used to purchase the images of child pornography from the website . . .* ," a statement the Ninth Circuit held to be "*patently false*" as the "*Chisms' card was used to pay hosting fees. . . .*" Pet. App. 13a. Additionally, Petitioners' statement of the case ignores the BOA letter of August 19, 2007, which clearly alerts that the Chisms' card is subject to "*the possibility of fraudulent usage on the above referenced account(s) – 9626 and 6907*." App. 8-9. Further, Petitioners misstate that "*Gardner learned the Chisms had not contested the Yahoo! domain service fees for the "foel" and "qem" websites on their May and June*

2007 statements. . . ." Pet. p.7-8. The fact is, Petitioners never made this assertion of alleged fact before, instead Petitioner Officer Gardner testified she believed "*there had been no fraud reported on the account.*" Pet. App. 88a. There is nothing in the record to support this new assertion.

Finally, Petitioners misstate to this Court that the Chisms' BOA credit card "*statements for card 6907 confirmed and showed that eight charges for Yahoo! domain services, totaling $309.61, were paid with the 6907 card . . . five for other websites with similar names*." Pet. p.7. There was no investigation, testimony, or facts to even remotely prove that any additional charges contained within the Chisms' BOA credit card billing statements showed that eight charges for Yahoo! domain service existed. The total amount billed for service fees at issue in this case was $119.85, *not* $309.61 and there is no record to the contrary.

Petitioners knew at all times that there were no purchases of pornography ever made by means of the Chisms' bank card. Pet. App. 13a-15a.

B. Fraudulent Credit Card Activity On Chism Accounts.

On January 29, 2008, after stopping Todd Chism on the side of the road, the WSP arrested and handcuffed him. Pet. App. 10a; App. 2-3. Once arrested, Todd was taken to a public building where he was interrogated by the WSP in a staging area visible to

his friends and neighbors. App. 3. During interrogation, Todd told the arresting WSP officers about the reported past stolen and fraudulent card activity on his BOA cards. App. 3-4. Despite this knowledge, the WSP nonetheless thereafter invaded and scoured the Chism home in violation of the Chisms' right to privacy. Pet. App. 10a. The WSP search of the Chisms' home, including the Chism computers, discovered no evidence whatsoever to connect either Todd or Nicole Chism to any of the alleged criminal behavior. Pet. App. 10a. ("*WSP officers arrested, detained, and interrogated Todd; they scoured the Chisms' home; and they seized the Chisms' computers. No child pornography was found, and criminal charges were never filed against Todd*.")

Hours after being arrested, Todd was then taken to and processed into the Spokane, Washington, County Jail. App. 4. In total, Todd Chism was detained for 36 hours, the first four of which he was held in isolation, for crimes he did not commit. App. 4. On January 30, 2008, Todd Chism, after having been interrogated, booked into jail, and having spent the night there, was released from arrest and jail without conditions, by a District Court Judge who determined that the probable cause to hold him was "*too slim.*" App. 4-5. However, as a result of his unlawful arrest, Todd Chism was put on administrative leave from his fire fighter position and banned from all fire department property for nearly four months. App. 5.

Despite the lack of evidence, Petitioners orchestrated the issuance of a statewide press release

announcing Todd Chism had been arrested for possession and distribution of child pornography. App. 5. Petitioners' press release did not say Todd Chism was being "investigated" or that he was arrested for "alleged" criminal conduct. App. 5. Rather the press release stated Todd Chism was arrested for possession and distribution of child pornography. App. 5.

Ultimately, on April 29, 2008, the County Prosecutor announced that Todd Chism would face no charges because no evidence existed to base any charges against him. Pet. App. 10a; App. 6.

C. The Eastern District Of Washington District Court Ruling.

Respondents Chism filed a Complaint in state court alleging 42 U.S.C. § 1983 civil rights and various common law state claims against Petitioners Gardner and Sager and against the WSP. Petitioners removed the case to federal court where the parties filed cross motions for summary judgment.

Thereafter, the Eastern District of Washington District Court granted summary judgment for Petitioners based upon finding qualified immunity as to the 42 U.S.C. § 1983 civil rights claims. The District Court concluded "*that the officers' conduct did not violate a clearly established constitutional right of which a reasonable officer would have known*." Pet. App. 5a.

D. The Ninth Circuit Ruling.

The Ninth Circuit reversed the District Court, holding that "*the Chisms have made a substantial showing of the officers' deliberate falsehood or reckless disregard for the truth and have established that, but for the dishonesty, the searches and arrest would not have occurred*." Pet. App. 5a. The Ninth Circuit further concluded Petitioners were not "*entitled to qualified immunity because the Chisms' right to not be searched and arrested as a result of judicial deception was clearly established at the time Gardner prepared and submitted her affidavit.*" Pet. App. 5a-6a.

Petitioners' reliance on the Ninth Circuit's statement that "*Gardner's 'allusion' to 'images downloaded by Todd M. Chism' and 'her assertion that the Chisms' credit card was used to purchase images of child pornography from the website' were inaccurate*," completely ignores the Ninth Circuit's conclusion that Petitioner Gardner's assertions were reckless or intentional falsehoods and that these falsehoods could not be seen as the result of mere negligence. Pet. p.14. The Ninth Circuit specifically held that ("*We first observe that Gardner's affidavit contained several false statements and omissions.*"); ("*Gardner's statement that the Chisms' card purchased child pornographic images was . . . patently false.*"); ("*we conclude that the Chisms have made a substantial showing that the officers' deception was intentional or reckless. . . . the omissions and false statements contained in the affidavit were all facts that were within Gardner's personal knowledge*."); ("*A reasonable*

factfinder could also find that the officers acted recklessly or intentionally because the false statements and omissions contained in the affidavit all bolster the case for probable cause, which suggests that the mistakes were not the product of mere negligence."); ("*It is conspicuous that, cumulatively, the omissions purged the affidavit of any reference to the possibility that someone other than Todd Chism was responsible for the offending websites*."). Pet. App. 12a-13a, 15a-16a.

Additionally, Petitioners distort the Ninth Circuit's conclusion that "*Nicole Chism's credit card information was used to pay the hosting fees, yet the fact that Nicole was an authorized user of the credit card was omitted from the affidavit*," into a benign assertion that "*Nicole shared the 6907 account with Todd so her name was linked to both websites.*" Pet. App. 16a; Pet. p.14. The fact is that Nicole's name was used solely when the website accounts were created by the unknown perpetrator with no mention of Todd's name whatsoever. Pet. App. 13a.

Further, Petitioners' assertion that the Ninth Circuit found "*the subscriber account applications included some nonsensical information*" is likewise distorted. Pet. p.14. Here, the Ninth Circuit specifically concluded that "*[a]ll of the information in each Yahoo! profile was nonsensical, yet this information was omitted from the affidavit. In short, the net effect of Gardner's omissions was to obscure the prospect that someone other than Todd Chism might have*

registered the websites and uploaded images of child pornography." Pet. App. 16a.

The Ninth Circuit engaged in a detailed analysis of materiality and concluded that while "*mindful that 'a letter-perfect affidavit is not essential.' . . . we do not believe that a reasonable magistrate judge would have issued the search warrant if she had been apprised of an accurate version of the evidence*." Pet. App. 23a. The Ninth Circuit further concluded "*[t]hese false statements and omissions were* [also] *material as to Todd Chism's arrest. . . .*" Pet. App. 24a.

Finally, when employing the requisite objectively reasonable standard inherent in a qualified immunity analysis, Ninth Circuit Judge Paez relied upon previous Ninth and Seventh Circuit reasoning when reasserting that an officer who submits an affidavit containing "*statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements . . . cannot be said to have acted in a reasonable manner. . . .*" Pet. App. 26a. Based upon the qualified immunity analysis, the Ninth Circuit correctly reversed the trial court and denied Petitioners qualified immunity concluding "*every reasonable official would have understood that the Chisms had a constitutional right to not be searched and arrested as a result of judicial deception.*" Pet. App. 26a-27a.

Petitioners sought review of the panel decision en banc which ultimately was denied.

REASONS THE WRIT SHOULD BE DENIED

Petitioners fail to demonstrate that the Ninth Circuit's November 7, 2011 Opinion ("Opinion") is in conflict with any decision of this Court or another Court of Appeals, or that the Ninth Circuit decided an important federal question that has not already been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

The Ninth Circuit concluded a reasonable fact finder could find Petitioner Gardner recklessly or intentionally engaged in conduct when investigating the child pornography charges at issue in order to ensure her affidavit would *bolster* a finding of probable cause specifically against Todd Chism. Further, the Ninth Circuit held the Chisms made a substantial showing of the officers' reckless or intentional disregard for the truth. Pet. App. 16a. The Ninth Circuit's fact specific decision is founded on well-settled Constitutional law and does not warrant review as it is not in conflict with any other Circuit.

No federal circuit court has ever held that it is objectively reasonable for an officer to obtain probable cause for a warrant by misleading a magistrate through false statements and/or omissions of material fact where probable cause would not otherwise exist given the totality of the circumstances. It has long

been established that government employees are not entitled to violate citizens' rights through judicial deception. *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985), *citing Franks v. Delaware*, 438 U.S. 154, 164 (1973) ("*It is clearly established that the fourth amendment requires a truthful factual showing sufficient to constitute probable cause.*") Officers who mislead magistrates through falsehoods and material omissions cannot be said to have acted in a reasonable manner. "*If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, not only is his conduct the active cause of the illegal arrest, but he cannot be said to have acted in an objectively reasonable manner.*" *Id*. Because qualified immunity only shields those officers who engage in reasonable mistakes, the shield is lost for those that are "*plainly incompetent or those who knowingly violate the law.*" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

The Petition should be denied because (a) the decisions relied upon by Petitioners are not conflicting, are factually distinguishable, and are legally in accord with the Ninth Circuit's Opinion; (b) the Ninth Circuit's Opinion fully comports with *Franks v. Delaware*, 438 U.S. 154 (1973), and its progeny; (c) the Ninth Circuit's Opinion gave full consideration to the issues and decided them correctly; and (d) this case

does not have a significant public policy implication for law enforcement.

A. There Is No Circuit Split On The Questions Presented.

The cases relied upon by Petitioners to "establish" a purported conflict actually support the Ninth Circuit's Opinion in this matter. Petitioners in fact can point to no actual split of authority regarding how a qualified immunity analysis is employed when there is judicial deception involved.

Here, the Ninth Circuit utilized a two-part test in determining that the Petitioners' judicial deception precluded qualified immunity. First, the Ninth Circuit established "*the Chisms made a substantial showing of the officers' reckless or intentional disregard for the truth.*" Pet. App. 16a. Second, the Ninth Circuit concluded "*that a corrected version of Gardner's affidavit would not have provided the magistrate with a substantial basis for finding probable cause.*" Pet. App. 17a. Once the Ninth Circuit was satisfied that the Chisms had met both prongs of the two-part test, it embraced the holding in *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985), in concluding that clearly established law dictates no reasonable officer could believe that providing false statements and omitting material facts in order to secure a warrant was legal. Pet. App. 26a-27a. Thus, contrary to the Petitioners' assertions here, the Ninth Circuit's Opinion does not constitute a refusal to inquire into

the reasonableness of the Petitioners' actions under the law.

The cases on which Petitioners rely do not conflict with the decision below. In *Vakilian v. Shaw*, 335 F.3d 509 (6th Cir. 2003), the Sixth Circuit had employed the same two-part test utilized by the Ninth Circuit, ultimately concluding that while substantial evidence existed regarding the existence of false statements, the false statements were not material to the finding of probable cause. *Id.* at 517, *citing Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989) (applying the test set forth in *Franks v. Delaware*, 438 U.S. 154 (1973), to evaluate a § 1983 claim). As the false statements were deemed not material to a finding of probable cause the *Vakilian* court determined qualified immunity was appropriate. "*Because Shaw's remaining testimony was sufficient to establish probable cause, the judge would have issued the warrant whether or not there had been false testimony.*" *Vakilian* at 518. That is unlike the facts here.

The other cases on which petitioners rely, *Whitlock v. Brown*, 596 F.3d 406 (7th Cir. 2010); *Freeman v. County of Bexar*, 210 F.3d 550 (5th Cir. 2000); *Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007); and *Bagby v. Brondhaver*, 98 F.3d 1096 (8th Cir. 1996), likewise employed the same two-part test utilized by the Ninth Circuit. Each of these cases came to their determination as to whether qualified immunity was appropriate based upon the materiality of the specific facts involved.

In *Whitlock*, the Seventh Circuit concluded the plaintiff there failed to prove the alleged omission was material to the finding of probable cause. *Whitlock*, 596 F.3d at 413-14. Whereas here, the Ninth Circuit engaged in a thorough analysis of materiality and concluded "*we do not believe that a reasonable magistrate judge would have issued the search warrant if she had been apprised of an accurate version of the evidence. We therefore hold that the affidavit's false statements and omissions were material to the probable cause determination for the search warrant.*" Pet. App. 23a. The same conclusion regarding materiality was reached regarding the arrest warrant as well. Pet. App. 23a-24a.

In *Freeman v. County of Bexar*, 210 F.3d 550 (5th Cir. 2000), the court held the plaintiff failed to demonstrate an issue of material fact as to the truthfulness of information the officers relied upon nor was there any evidence that the allegedly omitted information would have purged the affidavit of probable cause. *Freeman*, at 555-556 ("*This evidence demonstrates little more than that reasonable officers disagreed. It does nothing to show that Saidler acted unreasonably . . . there is no evidence to suggest that either of these allegations calls into question the reasonableness of Saidler's actions*." and "*Freeman demonstrates no issue of material fact as to the truthfulness of any of the information relied upon by Jennings. . . .*").

In *Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007), when analyzing allegedly unlawful search and arrest

claims, the court held "*no alleged omissions were material to the issuance of these warrants*" and thus granted the officers qualified immunity as to Mr. Walczyk. *Walczyk* at 161. In regard to Mrs. Walczyk's unlawful search claim, the court found that a certain omission "*was fatal to a demonstration of probable cause*." *Walczyk*, at 162. Thereafter, the court held before qualified immunity could be granted or denied, further review of the factual record was necessary to determine the totality of the facts known to the officers at the time the affidavit for probable cause was issued. *Id.* at 162-164. Here, the Ninth Circuit denied the Petitioners qualified immunity after determining that the factual record made it clear that the false statements and material omissions were known to Petitioner Officer Gardner at the time she swore out her affidavit. "*For example, Gardner's false reference to 'images downloaded by Todd Chism' was a statement that Gardner knew to be false when she drafted her affidavit.*" Pet. App. 15a.

In *Bagby v. Brondhaver*, 98 F.3d 1096 (8th Cir. 1996), the court reiterated undisputed law. "*A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' violates the Fourth Amendment. An official who causes such a deprivation is subject to § 1983 liability.*" *Id.* at 1098, *citing Franks*, 438 U.S. at 171 and *Burke v. Beene*, 948 F.2d 489, 494 (8th Cir. 1991). Ultimately, the *Bagby* court concluded the officer was entitled to qualified immunity in so far as a corrected affidavit

would have provided probable cause. *Bagby*, too, is factually inapposite from this case.

B. The Ninth Circuit's Opinion Fully Comports With This Court's Decisions.

When viewed against this Court's decision in *Franks*, 438 U.S. at 164, and progeny analyzing judicial deception, the Ninth Circuit's Opinion presents no conflict warranting a grant of review. Furthermore, the Ninth Circuit's Opinion does not conflict with *Anderson v. Creighton*, 483 U.S. 635 (1987) or *Saucier v. Katz*, 533 U.S. 194 (2001). The Ninth Circuit applied an established standard based on the particular facts of this case. A fact-bound application of an established standard does not warrant the Supreme Court's review. *See* Sup. Ct. R. 10.

In *Anderson*, this Court held in reviewing a constitutional warrantless search claim, that an appellate court errs "*by refusing to consider the argument that it was not clearly established that the circumstances with which petitioner was confronted did not constitute probable cause and exigent circumstances.*" *Id.* at 635. The *Anderson* court held the "*relevant question* [was] *the objective question whether a reasonable officer could have believed petitioner's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.*" *Id.* at 636.

In *Saucier,* this Court held in reviewing a constitutional excessive force claim, that an appellate court

cannot merge the issues of qualified immunity and clearly established law. *Id*. at 201. Each issue must be considered separately. When considering excessive force the lower courts must review the excessive force issue considering the particular factors the officer was experiencing when she determined force was necessary, e.g., the severity of the crime, whether the suspect poses a threat to the officer or others, and whether the suspect is actively resisting. "*If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Id.* at 195.

The qualified immunity issue is separate from the excessive force issue because the

> "*qualified immunity inquiry's concern . . . is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. An officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances*."

Id. Here, the Ninth Circuit's Opinion does not conflict with this Court's holdings in either *Anderson* or *Saucier,* therefore the Petition should be denied.

1. The Ninth Circuit's Opinion in *Chism* is Legally and Factually Distinguishable from *Anderson v. Creighton*.

Unlike the Court of Appeals in *Anderson* at 635, here, the Ninth Circuit did consider the relevant question: *Whether a reasonable officer could believe that deceiving a magistrate in order to obtain probable cause that otherwise would not exist, is lawful in light of clearly established law and the information the officer possesses*. Here, the Ninth Circuit, after reviewing all facts and information known to Petitioner Officer Gardner at the time she executed her affidavit seeking probable cause, determined substantial evidence existed establishing Petitioner Officer Gardner recklessly or intentionally set forth false statements *and* omitted material facts:

- "*Gardner's assertion that Todd downloaded images of child pornography was not a truthful representation of the evidence she had gathered*."
- "*Gardner's statement that the Chisms' card purchased child pornographic images was . . . patently false*."
- "*Gardner omitted her discovery that the IP addresses that were used to open the offending Yahoo! user accounts . . . were traced to people other than the Chisms*."
- Gardner omitted the fact "*that a third IP address . . . was used to log in to both . . . user accounts . . . and that this IP address was never traced*."

- Gardner omitted the fact "*that Nicole shared the 6907 credit card account with Todd, even though Nicole's name – not Todd's – was associated with the two user accounts.*"
- Gardner omitted the fact "*that the user accounts contained nonsensical identifying information.*"

Pet. App. 13a-14a. The Ninth Circuit stated "*[a] reasonable factfinder could also find that the officers acted recklessly or intentionally because the false statements and omissions . . . all bolster the case for probable cause, which suggests that the mistakes were not the product of mere negligence*." Pet. App. 16a. Thereafter, the Ninth Circuit concluded "*the Chisms made a substantial showing of the officers' reckless or intentional disregard for the truth*." Pet. App. 16a.

The Ninth Circuit then held Petitioner Gardner's false statements and omissions were material to a finding of probable cause for both the arrest and search warrants at issue. "*We conclude that a corrected version of Gardner's affidavit would not have provided the magistrate with a substantial basis for finding probable cause.*" Pet. App. 17a. In support of this conclusion, the Ninth Circuit held that "*[i]n considering all of the information available to the officers, we do not think it sufficient to establish a fair probability that evidence of a crime would be found at the Chisms' home or Todd Chism's office.*" Pet. App. 20a. Of course no such evidence was found because none ever existed. Pet. App. 10a.

Next, the Ninth Circuit determined at the time Petitioner Gardner submitted her affidavit it was

clearly established law that an officer cannot set forth false statements or omit material facts in order to establish probable cause where it otherwise would not exist. "*In light of* Branch*,* Liston*, and* Hervey*, we conclude that every reasonable official would have understood that the Chisms had a constitutional right to not be searched and arrested as a result of judicial deception*." Pet. App. 26a-27a.

Ultimately, the Ninth Circuit held Petitioners were not entitled to qualified immunity. Pet. App. 27a. Here, the Ninth Circuit's Opinion fully comports with this Court's guidance set forth in *Anderson*. Unlike the lower court in *Anderson*, the Ninth Circuit considered the relevant question by thoroughly analyzing the facts known to Petitioner Gardner, as well as clearly established law at the time she submitted her affidavit. Accordingly, there exists no conflict between the Ninth Circuit's Opinion here and this Court's holding in *Anderson*.

2. The Ninth Circuit's Opinion in *Chism* is Legally and Factually Distinguishable from *Saucier v. Katz*.

Contrary to Petitioner's assertions, *Saucier*, does not stand for the proposition that regardless of the basis for the constitutional violation the relevant legal doctrine can never be merged with the qualified immunity issue. In fact, the *Saucier* court specifically stated it was not mandating a blanket rule requiring courts to always keep the relevant legal doctrine analysis separate and distinct from the qualified immunity analysis. "*This is not to say that the formulation of a*

general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard." *Id.* at 203.

What the *Saucier* court noted is that because "*[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. . . . If the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense.*" *Saucier* at 205. Accordingly, *Saucier* established that in the excessive force context, qualified immunity "*operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force.'*" *Id.* at 206. The same is true in the warrantless search context of *Anderson*, where officers perform their duties "*with considerable uncertainty as to 'whether particular searches or seizures comport with the Fourth Amendment.'*" *Saucier* at 203.

The Ninth Circuit's Opinion here is vastly distinguishable from *Saucier*, because the relevant legal doctrine is "judicial deception." Once a court has determined judicial deception exists by concluding substantial evidence illustrates (1) false statements or omissions of fact have been made, and (2) the false statements and omissions were material to obtaining a warrant, the doctrine does not waiver. There is no factual scenario in any Circuit that ever permits an officer to obtain a warrant through false statements and material omissions when the information available to the officer makes it clear probable cause would not exist absent the falsehoods and omissions. After all, it is clearly established law that an officer swearing out an affidavit be truthful, abstain from setting

forth falsehoods, falsifying evidence, omitting material facts, or engaging in any other manipulative acts intended to secure a warrant where probable cause does not otherwise exist. "*It is clearly established that the fourth amendment requires a truthful factual showing sufficient to constitute probable cause.*" *Franks* at 164.

While officers "*can have reasonable, but mistaken beliefs as to the facts establishing the existence of probable cause*," no officer, but the plainly incompetent or one who knowingly violates the law, can have a reasonable but mistaken belief as to what the law requires when swearing out an affidavit for probable cause. *Saucier* at 206. "*That a facially valid warrant will immunize only the officer who acted in an objectively reasonable manner in securing it is a principle that has been embraced by a number of courts in section 1983 actions*." *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985), *citing Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984), cert. granted, 471 U.S. 1124 (1985); and *Baskin v. Parker*, 602 F.2d 1205, 1208 (5th Cir. 1979) (remaining citations omitted).

In *Franks,* the U.S. Supreme Court held the Fourth Amendment is violated when a search warrant is issued upon an affidavit containing a falsehood, if the following three things are established: (1) a statement included in the affidavit for the warrant was in fact false; (2) the statement was either made deliberately with knowledge of its falsehood or with reckless disregard of the truth; and (3) the false statement was material to the finding of

probable cause. *Franks*, 438 U.S. at 171-172 (1973). In fact, "*[T]he Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts.*" *Miller v. Prince George's County, MD*, 475 F.3d 621, 631 (4th Cir. 2007), *citing Franks v. Delaware,* 438 U.S. 154, 155 and 164-65 (1973); and *United States v. Leon*, 468 U.S. 897, 922-23 and fn.23 (1984).

> "[The] *law* [is] *unquestionably clearly established . . . that the Constitution* [does] *not permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be without probable cause. No reasonable police officer . . . could believe that the Fourth Amendment permitted such conduct.*"

Miller v. Prince George's County, MD, 475 F.3d 621, 632 (4th Cir. 2007) (emphasis added); *citing Burke v. Town of Walpole,* 405 F.3d 66, 88 (1st Cir. 2005) (noting that the "*prohibition on material omissions*" in warrant applications is "*clearly established*"); *Holmes v. Kucynda,* 321 F.3d 1068, 1084 (11th Cir. 2003) (holding, as of 1998, that it was clearly established law that "*the Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest*."); *Mendocino Envtl. Ctr. v. Mendocino County,* 192 F.3d 1283, 1295 (9th Cir. 1999) ("*We begin with the*

precept that a police officer who recklessly or knowingly includes false material information in, or omits material information from, a search warrant affidavit cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost.") (internal quotation marks omitted); and *Moody v. St. Charles County,* 23 F.3d 1410, 1412 (8th Cir. 1994) ("*It is clearly established that the Fourth Amendment requires a truthful factual showing sufficient to constitute probable cause before an arrest warrant can issue.*"). *See also Manganiello v. City of New York*, 612 F.3d 149, 162 (2d Cir. 2010) ("*Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.*"). *See also Hale v. Fish*, 899 F.2d 390, 402 (5th Cir. 1990) wherein the court denied qualified immunity as the act of submitting an affidavit replete with falsehoods and omissions of material fact violate a clearly established right "*Major Jones submitted an affidavit found by the district court to contain material misstatements and omissions of such character that no reasonable official would have submitted it to a magistrate. As this finding is supported by the record, the court did not err in denying qualified immunity to Major Jones*." *Id.* at 402.

Once a court determines the false statements and/or omissions were recklessly or intentionally made and but for the falsity probable cause would not

exist, the shield of qualified immunity is lost. "*An officer's conduct in preparing a warrant affidavit that contains only inaccurate statements that are untruthful as that term is defined in* Franks *violates the arrestee's fourth amendment rights. In such a case, a reasonably well-trained police officer would have known that the arrest was illegal.*" *Olson v. Tyler,* 771 F.2d 277, 281 (7th Cir. 1985). After all, qualified immunity is not intended to protect either "*the plainly incompetent or those who knowingly violate the law*." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) *citing Malley v. Briggs*, 475 U.S. 335, 343 (1986).

Petitioners' assert that the Ninth Circuit refused to consider whether in the circumstances confronted by Petitioners, an officer could reasonably conclude that the affidavit contained adequate accurate information to demonstrate probable cause. Pet. p.22. Petitioners also claim that the Ninth Circuit "*bypass[ed] . . . established qualified immunity questions.*" Pet. p.25. These assertions are patently false. The Ninth Circuit fully analyzed the facts as they existed at the time Petitioner Gardner swore out her affidavit, fully analyzed the issue of qualified immunity, and ultimately determined that qualified immunity was not available. Pet. App. 19a-27a.

Furthermore, the Ninth Circuit was correct in holding that a reasonable officer equipped with the training and knowledge Petitioners had at the time the affidavit was executed, would have known that submitting false statements and omissions in order to obtain probable cause that otherwise did not exist,

exceeded legal bounds. "*[N]o reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant.*" Pet. App. 26a, fn.15. The Ninth Circuit noted that at the time Petitioner Gardner swore out her affidavit she was on actual notice, pursuant to Washington State Patrol training materials, that

> "*Much, if not all, of the cyber-evidence . . . will lead you to an innocent person. That's why simply identifying which account was used to commit a crime does not provide you with probable cause to get a search or arrest warrant for the name and address on that account. You'll need to do more investigating to determine if there is a link between the account holder (or other members of the household) with the criminal activity that was committed with that account.*"

Pet. App. 22a-23a. This training created the situation where Petitioners knew probable cause did not exist absent Petitioner Gardner's false statements and omissions of material fact.

The Ninth Circuit's fact-specific Opinion comports in all respects with this Court's prior decisions. Because no split in the Circuits was created by the Ninth Circuit's Opinion, and no conflict exists with prior decisions of this Court, the Petition should be denied.

C. The Ninth Circuit Found That Substantial Evidence Exists Showing Petitioners' Judicial Deception.

Contrary to Petitioners' assertion, the Ninth Circuit did not ignore uncontested evidence of probable cause. Pet. p.33. The Ninth Circuit thoroughly analyzed the facts known to Petitioners at the time Petitioner Officer Gardner swore out her affidavit seeking probable cause, including Petitioners' training materials. In doing so, the Ninth Circuit ultimately determined no evidence of probable cause existed. Pet. App. 17a.

Here, Petitioners attempt to argue that a reasonable officer faced with a similar scenario could reasonably conclude probable cause existed to arrest Todd Chism specifically and to search the Chisms' home. This argument is based on the attenuated theory that arguable probable cause existed to believe Todd Chism specifically, as opposed to someone else in his household had engaged in a criminal endeavor solely because Nicole Chism's credit card information was anonymously entered into an on-line form for the purpose of paying monthly hosting fees. This argument has several fatal flaws.

First, the Ninth Circuit found substantial evidence existed showing Petitioner Gardner made false statements and omitted numerous material facts in order to acquire probable cause that otherwise would not have existed. The Ninth Circuit found the net

effect of Petitioner Gardner's omissions alone "*was to obscure the prospect that someone other than Todd Chism might have registered the websites and uploaded images of child pornography*." Pet. App. 16a. Second, the Ninth Circuit then found Petitioner Gardner's dishonesty "*reflected an affiant 'reporting less than the total story . . . to manipulate the inferences a magistrate will draw.*" Pet. App. 16a. Thereafter, the Ninth Circuit concluded a corrected affidavit would fall far below establishing the requisite fair probability that Todd Chism violated the law absent numerous inferences, each one "*less and less likely to be true.*" Pet. App. 21a-22a.

> "*First, one would have to infer that Todd had used his wife's name rather than his own to pay the hosting fees for the sites. One would also have to infer that Todd devised a way to access the . . . websites with a forged IP address. Finally, one would have to infer from the previous two inferences that Todd was the person who uploaded the child pornographic images from his computer to the websites at an unknown time, date, and location.*"

Pet. App. 21a-22a. Contrary to Petitioners' assertions, the Ninth Circuit did not ignore any evidence. Instead, the Ninth Circuit considered the factual situation faced by Petitioner Officer Gardner and determined she had intentionally or with a reckless disregard for the truth manipulated, misstated, and omitted facts in order to obtain probable cause that otherwise would not have existed. Based upon this

deceptive conduct, which any reasonable officer would have known exceeded legal bounds, the Ninth Circuit properly declined to shield Petitioners from liability. Pet. App. 25a-27a.

Finally, Petitioners' argument that, pursuant to Wash. Rev. Code § 9.68A.050, the anonymous online use of Nicole Chism's credit card information to pay website hosting fees established probable cause to search Todd Chism's home and office, is nonsensical. Wash. Rev. Code § 9.68A.050 specifically states a crime has been committed when a person "*knowingly . . . finances, attempts to finance . . . printed matter that depicts*" child pornography. Pet. App. 111a. At the time Petitioner Gardner swore out her affidavit she had absolutely no evidence indicating there was a fair probability that Todd Chism "knowingly" financed or attempted to finance printed matter depicting child pornography. Petitioner Gardner had no evidence indicating Todd Chism knowingly engaged in any acts connected with Washington State's criminal code. In fact, the Ninth Circuit reviewed the facts known to Petitioner Gardner and concluded "*we do not think it sufficient to establish a fair probability that evidence of a crime would be found at the Chisms' home or Todd Chism's office.*" Pet. App. 20a. And of course, none was. Pet. App. 10a.

Instead, the facts that were known to Petitioner Gardner at the time she swore out her affidavit illustrate that (1) it was Nicole Chism's credit card that was utilized to pay hosting fees at the time the

websites at issue were created; (2) the IP addresses used, when the credit card information was provided, were to addresses in Walla Walla and Federal Way, Washington; (3) both of these cities are hundreds of miles away from the Chism's home; (4) at the time Nicole Chism's credit card was used, no illegal images had been uploaded to either website; and (5) when the credit card information was provided, at the precise time the websites were created, authorization was given for the card to continue to be billed monthly for all hosting fees. Pet. App. 6a-8a, 16a, and 20a. There is nothing within these facts even remotely implicating Todd Chism to having knowingly financing printed matter depicting child pornography.

Ultimately, Petitioners are really seeking to have this Court impermissibly weigh the evidence, to ignore Petitioners' judicial deception, and to embrace that which our Constitution deplores: unlawful searches and seizures. The Petition must be denied.

D. This Case Has No Significant Public Policy Implications For Law Enforcement And Crime Prevention.

This case stands for a very simple, long-held proposition of law requiring law enforcement officers to refrain from deceiving and/or omitting material facts from a judge in order to manufacture probable cause where it otherwise would not exist. The Ninth

Circuit in upholding this judicial deception prohibition and refusing to shield Petitioners from liability clearly recognize the doctrine of qualified immunity is only intended to accommodate "*reasonable error*." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). In fact, the Ninth Circuit's *Chism* Opinion fully comports with the doctrine of qualified immunity by refusing to accommodate Petitioners' clearly deceptive, inept, and/or illegal actions. Indeed, in keeping with the Ninth Circuit's *Chism* Opinion, officers remain required to act reasonably, and to refrain from engaging in judicial deception. The only public policy implication of this case is the long established one of not omitting material facts and not misleading or deceiving magistrates into finding probable cause where it otherwise does not exist.

CONCLUSION

The Ninth Circuit found substantial evidence that judicial deception existed showing Petitioners intentionally or with a reckless disregard for the truth, provided false statements and omitted material facts in order to obtain probable cause, that otherwise

would not have existed. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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