No. ____

IN THE

Supreme Court of the United States

CHENEQUA AUSTIN,
ERIC JERMAINE SPIVEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court held that consent must be voluntary for it to validate an otherwise unreasonable warrantless search. The test for voluntariness is whether the consent is "the product of an essentially free and unconstrained choice," or instead whether the individual's "will has been overborne and his capacity for self-determination critically impaired." *Id.* at 225 (citation omitted). The inquiry is a subjective one based on "all the circumstances." *Id.* at 227, 229–30, 249.

In this case, two law-enforcement officers employed a ruse in order to induce a homeowner to consent to a search of her master bedroom. The officers misrepresented their investigatory purpose: they told the homeowner that they sought to assist her as the victim of burglaries that she had reported, when in reality they sought to search her home for contraband. A divided panel of the Eleventh Circuit held that her consent was voluntary, reasoning that the officers' subjective investigatory purpose was categorically irrelevant to the legal analysis.

The question presented is:

When the police misrepresent the purpose of their investigation, may courts consider that deception as one circumstance in assessing the voluntariness of the resulting consent, or is the officers' subjective purpose irrelevant as a matter of law?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's divided opinion is published at 861 F.3d 1207 and is reproduced as Appendix A. App. 1a. The district court's order denying the motion to suppress is unreported but reproduced as Appendix C. App. 38a.

JURISDICTION

The court of appeals denied a petition for rehearing en banc on September 13, 2017. The order denying rehearing is reproduced as Appendix B. App. 36a. This Court has jurisdiction 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."

INTRODUCTION

Two law-enforcement officers knocked on Petitioners' front door and asked for consent to search the home. The officers' stated purpose was to follow up on burglaries that Petitioners had recently reported. Petitioners breathed easy: the police were there to help them as victims of a crime. Naturally, they consented. But there was a twist: unbeknownst to Petitioners, the officers' stated purpose was actually a pretext. Their real purpose was to look for contraband in the bedroom. They were not there to help Petitioners; they were there to bust them. But unaware of the officers' true investigatory purpose, Petitioners unwittingly consented.

In a divided opinion, the Eleventh Circuit concluded that this undisputed police deception did not vitiate the voluntariness of the consent that it deliberately induced. To reach that conclusion, the court of appeals remarkably proclaimed that "[t]he officers' subjective purpose in undertaking their investigation does not affect the voluntariness" of consent. App. 13a. That's right: "[w]hether officers deliberately lie[ ] does not matter." App. 12a (citation omitted). Because the ruse employed was wholly "irrelevant" to the voluntariness inquiry, *id.*, it was as if the police deception never happened at all.

That legal rule is unprecedented. No other appellate court, state or federal, has reasoned that police deception of their investigatory purpose is irrelevant to the voluntariness inquiry under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Quite the contrary, courts have uniformly considered such deception to be a relevant circumstance, often finding it (or its absence) to be dispositive. The anomalous

decision below shatters that agreement and defies the totality-of-the-circumstances analysis mandated by *Schneckloth*. Federal courts in Florida, Georgia, and Alabama are now categorically prohibited from even considering such deception as a relevant factor in the analysis. Meanwhile, every other court will continue to deem it salient, if not dispositive. And for good reason: deciding whether to invite officers into one's home will almost always depend on their stated purpose for entering.

This lack of uniformity is untenable. The voluntariness of consent cannot hinge on the jurisdiction in which it is given, or on whether the search results in a federal as opposed to a state prosecution. The decision below not only creates such disparity—including within both Florida and Georgia, the third and eighth most populous states—but it has dangerous implications for police behavior and society. By declaring deception of purpose irrelevant to voluntariness, it encourages the police to affirmatively lie about their investigations in order to circumvent the warrant requirement—even where, as here, they seek to rummage through a bedroom. "In effect, it teaches police they don't need to get a warrant so long as they can pre-plan a convincing enough ruse." App. 35a (Martin, J., dissenting).

When the police knock on the front door and represent that they are there to fulfill their sworn duty to protect and serve, society trains the homeowner to trust that assurance. Officers in the Eleventh Circuit can now betray that trust at will, even when the homeowner is innocent of wrongdoing and simply reports a burglary. Constrained only by their imagination, they can beguile their way into the home with Fourth Amendment impunity. The Court's review is urgently needed.

STATEMENT OF THE CASE

Following the denial of a motion to suppress evidence and statements, Petitioners Chenequa Austin and Eric Jermaine Spivey pled guilty to conspiracy to commit access-device fraud and aggravated identity theft. Petitioner Spivey also pled guilty to being a felon in possession of a firearm. Their guilty pleas were expressly conditioned on the right to appeal the denial of their suppression motion. App. 2a–3a, 6a. The parties agreed that this issue was case dispositive.

A. THE UNDISPUTED FACTS: OFFICERS CONCOCT A RUSE INDUCING AUSTIN TO CONSENT TO A SEARCH OF HER MASTER BEDROOM

At the suppression hearing, the government called the two law-enforcement officers as witnesses. Their testimony was remarkably consistent and candid. The defense neither challenged the accuracy of their testimony nor called any witnesses of its own. The relevant facts, set out below, were thus wholly undisputed.

A Burglar Turns Informant

On November 6, 2014, and again on November 23, 2014, a man burglarized Austin's home in Lauderhill, Florida. On each occasion, an officer from the Lauderhill Police Department was dispatched and prepared a report. In between the two burglaries, Austin and Spivey, her live-in boyfriend, installed video surveillance. On December 9, 2014, a detective from the neighboring Sunrise Police Department arrested the burglar. The burglar confessed and cooperated, during which time he informed the detective that there was a credit-card manufacturing plant inside the master bedroom of Austin's home.

A Federal Fraud Investigation is Born

That Sunrise Police detective relayed that information to Detective Alex Iwaskewycz. Although employed by the Lauderhill Police Department, Iwaskewycz had been assigned to the Secret Service's Organized Fraud Task Force for almost five years. That federal Task Force exclusively investigated financial crimes, including credit-card fraud. App. 53a–54a, 85a, 210a, 213a–14a. Iwaskewycz relayed the information to U.S. Secret Service Agent Jason Lanfersiek, a fellow Task Force member. Iwaskewycz relayed the information to Lanfersiek for the exclusive purpose of investigating the credit-card fraud, not for the purpose of investigating the burglaries. Indeed, the Secret Service and the federal Task Force lack jurisdiction over burglary offenses. App. 212a–18a, 230a.

The Officers Concoct a Ruse

To investigate the potential credit-card fraud, the two officers concocted a ruse, which they unveiled at a "planning strategy" session shortly before it was implemented on December 17, 2014. Present at that meeting were three police officers and three to four Secret Service agents, including supervisors, all of whom were working under the auspices of the Task Force. App. 55a, 95a–97a, 173a–74a.

Rather than seek a search warrant, the two officers planned to request consent to enter the house by informing the residents that they were there to follow up on the burglaries. In truth, however, Lanfersiek's exclusive purpose was to investigate the credit-card fraud. App. 56a, 62a, 112a, 118a. And, while Iwaskewycz claimed to be following up on the burglaries in part, he admitted that

his "primary function" and "primary assignment" was to investigate the credit-card fraud. App. 188a, 195a, 239a, 255a. Although the Lauderhill Police Department's burglary case was technically still open, the detective from the neighboring department had already arrested the burglar, obtained his written and oral confession, and closed the case. App. 88a, 218a–19a.

In order to further conceal their true investigatory purpose, the officers also planned to misrepresent Lanfersiek's identity. Iwaskewycz would correctly identify himself as a member of the Lauderhill Police Department (though make no mention of his assignment to the Task Force). However, he would falsely identify Lanfersiek as a forensic crime-scene technician who was there to dust for fingerprints that the burglar may have left. In reality, Lanfersiek was a Secret Service Agent who had no training or experience with fingerprints whatsoever. App. 97a–100a, 234a.

Moreover, in order to gain access to the master bedroom—where the burglar had informed them that the credit-card plant was located—they planned to ask the residents to re-trace the route that the burglar took, knowing that it would lead them to the bedroom. If they observed contraband in plain view, they would then ask for consent to search the residence. If that request failed, then they would clear the residence and apply for a warrant based on what they had seen in plain view. The ruse worked like a charm; they never sought a warrant.

Phase I: Austin Invites the Officers in to Investigate the Burglaries

After receiving the green light from their supervisors, the two officers drove to Austin's residence. Iwaskewycz had his badge and weapon exposed; and, because

Lanfersiek was posing as a crime-scene technician, he was disguised in a police jacket and carrying a bag of forensic tools. Upon seeing them arrive, Austin told Spivey that the police were there, and she hid a credit-card reader in the oven.

Identifying themselves as Lauderhill Police, the officers knocked on the door and Austin opened it. As planned, Iwaskewycz identified himself as a Lauderhill Police Detective, but misidentified Lanfersiek as a Lauderhill Police crime-scene technician and fingerprint analyst. He explained that they were there to follow up on the burglaries. Upon hearing the stated purpose for their visit, Austin became "relieved," "happy," and "genuinely excited;" she invited them in the house; and she offered to discuss the burglaries and show them video surveillance of the second burglary. The conversation at the door lasted thirty seconds to a minute. App. 58a–59a, 100a–102a, 175a–77a, 232a, 240a–41a.

Phase II: Lanfersiek "Dusts" His Way Into the Master Bedroom

Once inside, the officers re-introduced themselves to Spivey and repeated that their purpose was to follow up on the burglaries. App. 142a, 183a, 257a. Austin informed them that Spivey could help retrieve video surveillance. Spivey and Iwaskewycz spent the next thirty to forty-five minutes attempting to do so.

Meanwhile, and according to plan, Lanfersiek asked Austin to re-trace the route that the burglar took so that he could dust for fingerprints, beginning with where the burglar entered the house. Austin led him to a back door adjacent to the master bedroom, and Lanfersiek pulled out gloves and a brush and began dusting for fingerprints. In reality, he was "faking" and "pretending" to dust. App. 97a–

98a, 104a–05a, 234a. Lanfersiek asked Austin where the burglar went next, and she informed him what he already knew: the burglar went into the master bedroom. That was exactly where Lanfersiek had "wanted to go" all along. App. 106a.

Inside the bedroom, Lanfersiek observed stacks of credit cards and high-end merchandise. Continuing the ruse, he asked Austin where the burglar went within the bedroom, and she informed him that the burglar went through the two bedside tables. Lanfersiek asked Austin to open the drawers to those tables, which she did, and he observed additional credit cards, as well as prepaid value cards and receipts. Remaining in character, Lanfersiek "dusted" the tables for fingerprints. He then asked her where else the burglar went, and she directed him to the bathroom and closet. When Lanfersiek approached the closet, he observed a credit-card embossing machine on the shelf next to the closet door.

During this time, Austin believed that Lanfersiek was gathering evidence of the burglaries, when he was really looking for contraband. App. 104a, 106a–07a. Despite having confirmed the fraud, Lanfersiek did not reveal his true identity or purpose. Instead, he informed Iwaskewycz about what he had seen. Iwaskewycz asked Austin to take him in the master bedroom, and he observed the same items.

Phase III: The Officers End Their Ruse and Exploit It

The officers then separated Petitioners and ended the ruse. Bringing Austin outside the house, Iwaskewycz informed her for the first time that his primary responsibility was investigating fraud, and he asked her about the suspicious items he had seen. Upon learning that he was investigating credit-card fraud, Austin

immediately became concerned and uncooperative. App. 240a, 243a–45a, 207a–09a, 263a. After providing unsatisfactory answers to his questions, Iwaskewycz determined that Austin was not going to cooperate at all with his fraud investigation. Iwaskewycz had by then learned that there was an unrelated, outstanding warrant for Austin, and he arrested her. Austin was handcuffed and removed from the premises.

Back inside, the officers revealed the ruse to Spivey, who had been cooperative. Iwaskewycz informed Spivey that he was actually investigating credit-card fraud, Lanfersiek was in fact a Secret Service Agent, they had observed suspicious items in the residence, and he had just arrested Austin. So confronted, Spivey consented to a full-scale search of the home and electronic devices. A team of agents searched the home for several hours and found additional contraband. The officers later confronted Austin at the police station with the evidence found during that search, inducing her to make incriminating statements.

B. The District Court Finds as a Factual Matter that the Officers Misrepresented Their Investigatory Purpose

In accordance with the undisputed testimony, the district court found that the officers misrepresented the purpose of their investigation. Specifically, the court found that "[t]he agents went to the home on the pretext of following up on two burglaries." App. 39a. While following up on the burglaries would have been a "legitimate reason" for some officers to go there, it was "not the main or real reason" for the two officers in this case. *Id.*

The court further found that the officers "lied when they represented Lanfersieck to be a crime scene technician, who was interested in gathering evidence of a burglary. The sought-after evidence to be gathered was not intended to be used in a case where Spivey and Austin were victims, but it was used to be used against them." App 42a. It found that, to the extent there was "[a]ny motive to obtain evidence of a burglary," it "was clearly secondary and very minimal compared to the interest in a credit card investigation." *Id.* Yet Austin consented only because she "wanted to cooperate in solving the burglaries." App. 43a.

The court nonetheless concluded that her consent was voluntary. While it acknowledged that the officers' ruse was a relevant factor, it noted that "[n]ot all pretextual actions by the police are illegal." App. 39a (citing *Whren v. United States*, 517 U.S. 806 (1996)). The court alternatively concluded that, even if Austin's initial consent was involuntary, Spivey's subsequent consent and Austin's subsequent statements were not fruit of the poisonous tree. App. 40a, 43a–44a.

C. The Eleventh Circuit Holds as a Legal Matter that the Officers' Subjective Purpose is Irrelevant to the Voluntariness of Consent

On appeal, the parties vigorously contested whether the admitted police deception vitiated the voluntariness of Austin's consent. Petitioners argued that it did, relying on what had been the "well established rule" of the former Fifth Circuit (which binds the Eleventh) that consent induced by material misrepresentations is not voluntary. *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). Resisting that rule, the government argued that her consent was voluntary. In so arguing, the government asserted, *inter alia*, that "an officer's subjective intent is totally

irrelevant to analyzing the voluntariness of a defendant's consent." U.S. C.A. Br. 38. A divided Eleventh Circuit agreed with the government.

As a general matter, the majority acknowledged that police deception can sometimes be a relevant factor to voluntariness. *See* App. 8a–11a. But the court then determined that it was not relevant where, as here, the deception derives from an officer's subjective motivations. In unequivocal language, it stated:

> The subjective motivation of the officers is irrelevant. Consent is about what the suspect knows and does, not what the police intend. Coercion is determined from the perspective of the suspect. Whether officers deliberately lied does not matter because the only relevant state of mind for voluntariness is that of the suspect himself. . . . The officers' subjective purpose in undertaking their investigation does not affect the voluntariness of Austin's consent.
>
> Pretext does not invalidate a search that is objectively reasonable. *Cf. Whren v. United States*, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."); *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014) ("We do not examine the subjective understanding of the particular officer involved."). As long as the officers are engaging in "objectively justifiable behavior under the Fourth Amendment," *Whren*, 517 U.S. at 812, their subjective intentions will not undermine their authority to stop or search, or in this appeal, to ask for consent to search. Responding to a burglary report is objectively justifiable behavior, and we must ask only whether the officers prevented Austin from making a free and unconstrained choice.

App. 12a–13a (citations, quotation marks, and brackets omitted). "From Austin's perspective, her ability to consent to the search . . . was not dependent on whether the officers provided" an accurate "explanation of their intentions." App. 16a.

By declaring the officers' subjective investigatory purpose irrelevant, the majority effectively removed the ruse from the analysis. It continued: "Stripped of

its subjective purposes, the officers' ruse was a relatively minor deception that created little, if any, coercion." App. 13a. Absent the officers' deception of their investigatory purpose, all that remained of the ruse was the misidentification of Agent Lanfersiek. But the court determined that "[h]is identity [wa]s material *only* to the subjective purposes of the investigation," which, in the court's view, was legally irrelevant. App. 14a (emphasis added). And "[t]he factors other than deceit all point in favor of voluntariness." *Id.* Because the majority found Austin's consent to be voluntary, it expressly declined to address any question about fruit of the poisonous tree. App. 20a.

Judge Beverly Martin vigorously dissented. She emphasized, and the majority did not dispute, that: the facts were undisputed; the officers deliberately "lied about their real reason for being there;" they deliberately lied about Lanfersiek's identity and authority in order to conceal their "true purpose;" and "this record shows [Austin] would not have let [them] into her home" had she known that purpose. App. 21a–24a, 28a–32a & n.5, 33a n.7. By pretending to help Austin as a crime victim, the officers "took advantage of a public trust in law enforcement in order to search the Spivey/Austin home without a warrant." App. 21a, 33a.

Judge Martin rejected the majority's assertion that the "pretext for investigating the burglary is not relevant." App. 31a n.4. She explained that *Whren* was distinguishable, because it "was about inquiries into whether probable cause exists, which are made from a law enforcement officer's perspective," while voluntariness was about "Austin's subjective understanding." *Id.* And "[t]he

pretext of investigating a burglary" was highly relevant, because it was "the express reason given to Ms. Austin that led her to let the officers into her home." *Id.*

Judge Martin concluded by expressing grave concerns about the implications of the majority opinion. In her view, it "blesses the deliberate circumvention of constitutional protection, and in this way undermines the public trust in police." App. 22a. "The Majority opinion tells police that what happened here is not a problem. In effect, it teaches police they don't need to get a warrant so long as they can pre-plan a convincing enough ruse. . . . In doing so, I fear the Majority opinion undermines the public's trust in the police as an institution together with the central protections of the Fourth Amendment. When I read the record in Ms. Austin's case, I don't believe this is the 'reasonable' conduct our Founders had in mind when drafting the Fourth Amendment." App. 35a.

Petitioners filed a petition for rehearing en banc. Despite a request for en banc poll, the full court denied the petition. App. 36a–37a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH COUNTLESS FEDERAL AND STATE APPELLATE DECISIONS ANALYZING THE VOLUNTARINESS OF CONSENT

1. In a passage destined for police bulletin boards, the decision below explicitly announced the following rule: "The subjective motivation of the officers is irrelevant" to the voluntariness of consent. App. 12a. Practically inviting police deception, the court went so far to say this: "Whether the officers deliberately lie[ ] *does not matter* because the only relevant state of mind for voluntariness is that of the suspect himself." *Id.* (emphasis added; citations omitted). In short: "The

officers' subjective purpose in undertaking their investigation does not affect the voluntariness of Austin's consent." App. 13a. Because an officer's true investigatory purpose is inherently subjective, no misrepresentations about it—no matter how flagrant—could ever be legally relevant.

2. That reasoning is unprecedented. No other appellate court has adopted such a categorical ban on the consideration of such police deception. To the contrary, innumerable federal and state court decisions over the four decades since *Schneckloth* have uniformly recognized that such deception is a highly relevant circumstance when assessing whether consent is voluntary. Whether that deception ultimately vitiates the voluntariness of consent will depend on the totality of the circumstances. But, regardless of outcome, courts have always understood that police deception of their investigatory purpose bears on that determination.

a. The Ninth Circuit has held that "[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent." *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990). In *Bosse*, a local firearms official obtained consent to inspect the defendant's home as a part of a pending license application. An ATF agent accompanied that official, but deliberately failed to disclose his identity or his true purpose of searching for incriminating items. *Id.* at 114. In holding that this deception invalidated the consent, the court enforced the "rule for th[at] Circuit clearly prohibiting deliberate misrepresentation of the purpose of a government investigation." *Id.* at 116; *accord United States v. Little*,

753 F.2d 1420, 1437–38 (9th Cir 1984); *United States v. Phillips*, 497 F.2d 1131, 1135 & n.4 (9th Cir. 1974) ("The occupants were led to believe that they were admitting officers to investigate a burglary when, in fact, the officers and agents were entered to arrest Phillips.").

Similarly, the Tenth Circuit has found consent involuntary where officers implied that a bomb was planted in the defendant's apartment, when their real, subjective purpose was to search for drugs. *United States v. Harrison*, 639 F.3d 1273 (10th Cir. 2011). The court made clear that "[w]hen government agents seek an individual's cooperation with a government investigation by misrepresenting the nature of that investigation, this deception is appropriately considered as part of the totality of circumstances in determining whether consent was gained by coercion or duress." *Id.* at 1278–79. In its view, "[n]ot all deceit and trickery is improper, but 'when the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy . . . the consent should not be considered valid.'" *Id.* at 1280 (quoting 2 Wayne R. LaFave et al., Criminal Procedure § 3.10(c) (3d ed. 2007)).

The Sixth Circuit reached the same conclusion in *United States v. Hardin*, 539 F.3d 404 (6th Cir. 2008). There, the court found consent involuntary where an apartment manager, acting as an agent for the government, claimed to be investigating a water leak when the real, subjective purpose was to determine whether the defendant was inside. *Id.* at 407–08, 425–26. The court offered "numerous citations" to "illustrate the decidedly *non-novel* proposition that officers

may invalidate an individual's consent through the use of certain ruses or trickery," referring to cases involving misrepresentation of the officers' subjective investigatory purpose. *Id.* at 425 n.12.

Such deception has likewise played a key role in state court decisions finding consent involuntary under *Schneckloth*. For example, in *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006), an officer fabricated a story that a young girl had reported being raped by the defendant in his home, and the officer asked to enter in order to determine whether the girl's account was accurate; the officer's real purpose, however, was to search for drugs. *Id.* at 923–24, 926. The defendant, of course, "would have never consented to the search if [he] knew the trooper's true purpose." *Id.* at 926. The court determined that "the deception employed . . . was so unfair and unconscionable as to be coercive and thus, Appellant's consent to a search of his residence was constitutionally invalid." *Id.* at 927–28. The court emphasized that, in deceiving the defendant about his true purpose, the officer "exploited a citizen's desire to assist police in their official duties for the express purpose of incriminating that citizen." *Id.* at 927. That deception "crossed the line of civilized notions of justice" and "vitiat[ed] the long established trust and accord our society has placed with law enforcement." *Id.*

In *Commonwealth v. Slaton*, 608 A.2d 5 (Pa. 1992), the court also found that police deception of purpose vitiated the voluntariness of consent. In that case, officers truthfully went to the defendant's pharmacy for the stated purpose of investigating a suspect believed to be forging prescriptions. The officers obtained

the defendant's consent to do so, but during the investigation discovered forged prescriptions implicating the defendant. With that shifted investigatory focus, the officers later returned to the pharmacy a second time, but did not inform the defendant of their new investigatory purpose. *Id.* at 209–10. In finding the second consent involuntary, the court emphasized that "the agents obtained entry to the premises without any additional disclosure of purpose." *Id.* at 217. By permitting the defendant to rely on the earlier representation, the agents "obtained appellee's consent through deception," which "amount[ed] to implied coercion." *Id.*

In *McCall v. People*, 623 P.2d 397 (Col. 1981), *overruled on other grounds by People v. Davis*, 187 P.3d 562 (Col. 2008), the court found consent involuntary where officers "deceived the defendant's parents into believing that their purpose in being there was to question the defendant as a witness," when in reality their true, subjective purpose was to question him as a suspect. *Id.* at 403. The court concluded: "Where, as here, entry into the home is gained by a preconceived deception as to purpose, consent in the constitutional sense is lacking." *Id.* Again, that this purpose derived from an officer's subjective motivation was of no moment.

In *State v. Bailey*, 417 A.2d 915 (R.I. 1980), the court reasoned that "consent to enter one's home . . . cannot be deemed free or voluntary unless the person said to consent is aware of the purpose for which the police seek to enter. The notion of a free and voluntary consent necessarily implies that the person knows what it is he is allowing the police to do." *Id.* at 918. In that case, the officers came to the defendant's home for the purpose of "picking him" up on an investigation. When the

defendant asked what the investigation was about, the officers truthfully answered that they did not know, and they offered to use the defendant's telephone to find out. Upon learning that the defendant was wanted in connection with a rape, they arrested him. *Id.* at 917. The court concluded that the defendant's consent was not voluntary because he "allowed the police into his home for the purpose of using his telephone." *Id.* at 919. "Were we to find that the entry into defendant's apartment was consensual, we would be sanctioning a procedure whereby the police could circumvent the warrant requirement for an arrest in the home by initially entering the home for some innocuous reason and then seizing the person as soon as they were admitted. We are unwilling to so compromise the sanctity of the home from unreasonable government intrusion." *Id.*

Likewise, in *Redmond v. State*, 73 A.3d 385 (Md. Ct. Spec. App. 2013), the police "misrepresented" "that they were looking for a pedophile named 'Leroy Smalls,' going so far as to display a photograph of the supposed suspect. In fact, there was no such wanted pedophile, and no 'Leroy Smalls.' The real purpose the police had for entering . . . was to search for the stolen cell phone." *Id.* at 394. The court concluded that the consent was involuntary, because it was "eroded and w[as] directly induced by an affirmative misrepresentation by the police as to their purpose for entering the house." *Id.* at 397 (citations and brackets omitted). The court emphasized that "the ruse was designed to make [the defendants] think they were helping the police investigate the whereabouts of a dangerous pedophile,"

when their real purpose was to locate incriminating evidence. *Id.* at 398. *See Varriale v. State*, 119 A.3d 824, 835 n.10 (Md. 2015) (approving *Redmond*'s holding).

In *People v. Daugherty*, 514 N.E.2d 228 (Ill. Ct. App. 1987), an officer went to a home on the pretext of following up on a theft that had previously been reported, but the "real reason" for going "was to investigate if marijuana was present in the home." *Id.* at 230–31, 233. The court concluded: "Where, as here, the law enforcement officer without a warrant uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises when, in fact, his real reason is to search inside for evidence of a crime, we find that this deception under the circumstances is so unfair as to be coercive and renders the consent invalid." *Id.* at 233.

In *State v. Schweich*, 414 N.W.2d 227 (Minn. Ct. App. 1987), the court found consent involuntary where officers requested to search the defendant's home in order to find a firearm used to assault him, not to investigate whether the defendant possessed drugs. *Id.* at 230. The court recognized that even "[t]acit misrepresentation of the purpose of a search can rise to such a level of deception to invalidate the consent." *Id.* And, in *State v. McCrorey*, 851 P.2d 1234 (Wash. Ct. App. 1993), *abrogated on other grounds by State v. Head*, 964 P.2d 1187 (Wash. 1998), the court likewise "conclude[d] that police acting in their official capacity may not actively misrepresent their purpose to gain entry." *Id.* at 1240.

In all of these cases, the courts not only deemed relevant, but found dispositive, police deception of their real, albeit subjective, investigatory purpose.

b. Even in cases finding consent voluntary, federal and state appellate courts have made clear that police deception of investigatory purpose was by no means "irrelevant—it still may be considered along with other factors as part of the totality of circumstances." *United States v. Carter*, 884 F.2d 368, 375 (8th Cir. 1989). For example, the Eighth Circuit in one case held that consent was voluntary because the officers did not engage in any deceptive misrepresentation. *United States v. Briley*, 726 F.2d 1301, 1304–05 (8th Cir. 1984). But the court cautioned that "misrepresentation about the nature of an investigation may be evidence of coercion," and its conclusion in that case was "not meant to imply that [the] consent would be considered voluntary had the police intentionally attempted to trick her by falsely stating their purpose." *Id.* (citation omitted); *accord Vizbaras v. Prieber*, 761 F.2d 1013, 1017 (3d Cir. 1985) (finding consent voluntary because officers did not "deceptively describe[ ] their purpose").

Similarly, the Seventh Circuit emphasized in one case that "[m]ost important[ ]" to its conclusion on voluntariness was the "clear absence of any misrepresentation, deception, or trickery on the part of the police." *United States v. Griffin*, 530 F.2d 739, 743 (7th Cir. 1976). The court recognized that "[t]rickery, fraud, or misrepresentation on the part of the police to gain entry naturally undermines the voluntariness of any consent." *Id.* In that case, however, the officers accurately and "fully informed [the defendant] of the events leading to their presence and the reasons for their request to be admitted into," including the purpose of the investigation. *Id.* Given that "full disclosure by the police and the

absence of any signs of coercion by the officers," the consent was voluntary. *Id.* at 744; *cf. United States v. Watzman*, 486 F.3d 1004, 1006–07 (7th Cir. 2007) (government conceded on appeal, and court of appeals accepted, that consent was involuntary where officers told homeowner they were following up on burglary he had previously reported, when their real purpose was to search for contraband).

The Fifth Circuit has likewise recognized that "[a]ny misrepresentation by the government is a factor to be considered in evaluating the circumstances." *United States v. Davis*, 749 F.2d 292, 294 (5th Cir. 1984). In *Davis*, the court rejected as a factual matter the defendant's argument "that the officers intentionally misrepresented the nature and scope of their investigation." *Id.* It explained that the officers' secondary investigative purpose did not arise until after they had entered the home and the defendant voluntarily offered incriminating evidence. *See id.* at 294–97. Because the officers did not "mistate[ ] their purpose," and there was "no evidence in the record of any intent to deceive on the part of the officers," the consent was deemed voluntary. *Id.* at 295 & n.2, 297.

State courts are again on the same page, including those within the Eleventh Circuit. Emphasizing *Schneckloth*'s totality-of-the-circumstances approach, the Florida Supreme Court has made clear that "police deception [i]s one of many factors to be reviewed when analyzing the voluntariness of consent." *Wyche v. State*, 987 So.2d 23, 29 (Fla. 2008). Thus, while the court concluded in that case that deception did not vitiate the voluntariness of consent, it recognized that the "investigator's failure to inform Wyche of the actual purpose of the search" was a

relevant factor, just not one "so controlling as to overpower Wyche's will." *Id.* Illustrating the point, the court in that same opinion upheld a finding in a companion lower-court case "that the investigator's deception [of purpose] caused [the defendant] to feel coerced into consenting." *Id.* at 31.

The Georgia Supreme Court has likewise recognized that police deception may vitiate the voluntariness of consent. In *Welch v. State*, 229 S.E.2d 390 (Ga. 1976), the court acknowledged that "consent which is the product of . . . deceit on the part of the police is invalid," but it found no deception in that case. *Id.* at 397. In *Code v. State*, 214 S.E.2d 873 (Ga. 1975), the court also found no deception, but recognized that "[i]t is true that where deceit is used to obtain a consent . . . , a resultant consent by the accused to the search is invalid." *Id.* at 877. And that court more recently recognized that "[t]he subjective intent of the officer in requesting the search is relevant" to voluntariness where "that intent has been conveyed to the person confronted." *Daniel v. State*, 597 S.E.2d 116, 123 (Ga. 2004) (citation omitted), *abrogation on other grounds recognized in Salmeron v. State*, 632 S.E.2d 645, 647 (Ga. 2006).

* * *

In sum, in the 45 years since *Schneckloth*, federal and state courts have repeatedly recognized that police misrepresentation of their investigatory purpose can, and often will, bear heavily on the voluntariness inquiry. Yet the decision below categorically holds that such deception, no matter how deliberate or flagrant, is legally "irrelevant." The resulting disparity is manifest: in the Eleventh Circuit

alone, federal courts must now disregard the otherwise critical fact that the police misrepresented the purpose of their investigation. As a result, geography alone will play a determinative role in resolving whether such deception vitiates the voluntariness of consent. This case concretely illustrates the point: had Petitioners lived outside of the Eleventh Circuit—or had they been charged with state rather than federal offenses, *see* Fla. Stat. §§ 817.57–685 ("Credit Card Crimes")—the police deception would have, at the very least, been a dominant factor in the court's legal analysis. Fourth Amendment protection should not turn on such fortuity.

II. THE QUESTION PRESENTED IS UNSETTLED, RECURRING, AND IMPORTANT

Not only does the anomalous decision below fracture the legal landscape, but it creates perverse incentives for police behavior, it has deeply troubling implications for the Fourth Amendment, and it undermines the rule of law.

1. Consent searches are widespread in America. While "[i]t is difficult to assess the[ir] precise number," "[m]ultiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police, and that they are unquestionably the largest source of searches conducted without suspicion." Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 Fla. L. Rev. 509, 511 (2015) (quotation marks and footnotes omitted). As police "have increasingly come to rely upon purported 'consents' as the basis upon which wholesale searches are undertaken without probable cause and upon no or minimal suspicion," Wayne R. LaFave, 4 Search & Seizure § 8.2 (5th ed. 2016), they have resorted to deception. Indeed, "[l]ying meant to effectuate a search

or a seizure is routine practice for many police officers," including by "misrepresent[ing] [their] purpose." Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 Or. L. Rev. 775, 782 (1997). This controversial practice is reflected in the number of cases where the resulting consent is challenged as involuntary. *See* LaFave, *supra* § 8.2(n) (citing numerous cases addressing voluntariness and police "[d]eception as to purpose").

Yet, surprisingly, this Court "has never addressed how a government official's deception as to the purpose of the official's action or investigation may affect the voluntariness of an individual's consent to a search." *Wyche*, 987 So.2d at 38 n.12 (Anstead, J., dissenting). Nor has it even generally "addressed deception in the context of inducing consent to be searched." Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 Mich. L. Rev. 868, 882, 884 (2002). In fact, the Court has devoted sparse attention to the consent exception in recent years. Since 2006, it has meaningfully addressed it only twice, with both cases dealing with the discrete question of third-party consent. *See Fernandez v. California*, 571 U.S. __, 134 S. Ct. 1126 (2014); *Georgia v. Randolph*, 547 U.S. 103 (2006). Not since *United States v. Drayton*, 536 U.S. 194 (2002) has the Court addressed the voluntariness of a consent. Meanwhile, it has repeatedly granted certiorari to address numerous other Fourth Amendment issues pertaining to warrantless searches and seizures.[1] Given the prevalence of consent

[1] For examples in just the last two Terms, *see Byrd v. United States*, __ S. Ct. __, 2017 WL 2119343 (warrantless search of rental cars); *Collins v. Virginia*, __ S. Ct. __, 2017 WL 73634 (automobile exception, as applied to curtilage of home);

searches, and the widespread use of police deception to conduct them, this Court's review in this area is long overdue.

2. The need for such scrutiny is most pressing where, as here, police use trickery to invade the home without a warrant. It is axiomatic "that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welch v. Wisconsin*, 466 U.S. 740, 748 (1984) (citation omitted). Because this freedom from governmental intrusion stands "[a]t the very core of the Fourth Amendment," *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citation omitted), it is "a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable," *Payton v. New York*, 445 U.S. 573, 589 (1980) (quotation marks, brackets, and comma omitted). Because "*all* details [in the home] are intimate details," *Kyllo*, 533 U.S. at 37, the consent exception must remain "jealously and carefully drawn" in that context, *Randolph*, 547 U.S. at 109. With "the home . . . first among equals," *Florida v. Jardines*, 569 U.S. 1, 6 (2013), voluntariness review must be robust.

The decision below imperils these entrenched principles. Rather than promoting caution, it incentivizes the circumvention of the warrant requirement for the home. By concluding that investigatory purpose is irrelevant to the voluntariness inquiry—such that it "does not matter" whether officers "deliberately lie[ ]" about their purpose, App. 12a—the decision below encourages officers to trick

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Carpenter v. United States, 137 S. Ct. 211 (2017) (warrantless seizure of historical cell phone records); *District of Columbia v. Wesby*, 137 S. Ct. 826 (2017) (probable cause to conduct warrantless arrest); *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160 (2016) (warrantless blood/breath tests).

wary homeowners into opening their doors when they otherwise would not. In the Eleventh Circuit, officers can now rest assured that, if they develop a clever pretext and use it to induce a homeowner's consent, there is no risk that it will later be invalidated by a federal court. Moving forward, they can gin up wily subterfuges with Fourth Amendment impunity. So why would they *ever* tell the truth or seek a warrant? It is open season on the home.

The unconstrained employment of such deception would thus render the Fourth Amendment "of little practical value." *Jardines*, 569 U.S. at 6. Indeed, there is no limit to the forms that police deception may take. As this case and others illustrate, the police have sought consent to enter the home for a variety of irresistible purposes—*e.g.*, to assist the suspect as the victim of a crime, to assist her with official government business, to protect her from danger, to facilitate her exoneration of a crime, and to enlist her help as a good Samaritan—when their real purpose was to criminally investigate her. The police can now employ such deception at will, regardless of whether they have suspicion of any wrongdoing. Given the lack of legal repercussions, even innocent homeowners are at risk, not to mention those belonging to disfavored groups. In the Eleventh Circuit, police can now prey on the good-faith belief that government officials are truly there to protect and serve. Such deception is circumscribed only by the bounds of police imagination, not the law.

3. The unfettered police deception unleashed by the decision below creates serious public policy concerns. Routinely betraying the people's trust in

order to invade their home will have deleterious consequences not only for the people but for law-enforcement. People will stop reporting crime, assisting investigations, and engaging in open dialogue. They will no longer be the eyes and ears of the street. If they see something, they may not say something for fear of becoming a suspect. "But it is no part of the policy underlying the Fourth . . . Amendment[ ] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971).

This case illustrates the point: had Petitioners known that reporting burglaries would have invited police deception and ultimately their own prosecution, they never would have reported those crimes. And burglaries are commonplace: in 2016, one occurred every 20 seconds in America. Fed. Bureau of Investigation, Uniform Crime Report, 2016 Crime Clock Statistics.[2] Yet, in the Eleventh Circuit, reporting a burglary now "welcomes the warrantless search of [the] home for other illegal activity." App. 34a n.8 (Martin, J., dissenting).

Not only does the decision below discourage citizens from reporting crime, but it cuts deeper, threatening a cornerstone of our democracy. As one court has cogently explained:

> Inherent in our democracy is a belief that, since the government represents the will of the people, the people will accept its dictates voluntarily. There is a sense of trust between the government and the people. It [i]s the abuse of this trust which we [can]not accept . . . .
>
> We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably.

[2] https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/resource-pages/figures/crime-clock.

> When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

SEC v. ESM Govn't Sec., Inc., 645 F.2d 310, 316 (5th Cir. 1981) (citation omitted).

Those troubling policy implications align with precedent. "The constant element in assessing Fourth Amendment reasonableness in [our] consent cases . . . is the great significance given to widely shared social expectations." *Randolph*, 547 U.S. at 111. A society founded on the rule of law should not require its citizens to harbor such deep-seated mistrust of the uniformed officers sworn to protect and serve them. Just as it "reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding," *Drayton*, 536 U.S. at 207, it undermines the rule of law for the police to deceptively induce citizens to consent to searches that they would otherwise refuse. If that paradigm takes hold in the context of the home, perhaps the last refuge of privacy in the digital era, then the people will come to resent the government and even regard it as illegitimate. "The catastrophic consequences for a society which loses trust in its constables may be conjured without even the exercise of any creative effort." *United States v. Parson*, 599 F.Supp.2d 592, 606 (W.D. Pa. 2009).

* * *

As Judge Martin cautioned in dissent, the decision below will permit the routine circumvention of the warrant requirement for searches of the home,

draining the core of the Fourth Amendment. And because it emboldens the police to lie, deceive, and trick the American people in order to access their most intimate spaces, it will deliver a shocking blow to the already-fragile relationship between the citizenry and the government. By encouraging the police to become fraudsters, the decision below will blur the line between cop and criminal, foster cynicism, mistrust, and non-cooperation among the citizenry, and tear at the fabric of our democracy. These high stakes necessitate review by this High Court.

III. THIS IS AN IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED

1. This case is an optimal vehicle for review. For starters, "the parties do not dispute the facts and both rely solely on the testimony of the government's witnesses." App. 24a (Martin, J., dissenting). Because the officers candidly, if not boastingly, admitted to deliberately misrepresenting their investigatory purpose in order to induce Austin's consent, Petitioners did not challenge their credibility. They simply argued that this testimony established a lack of voluntariness.

The district court's factual findings track that undisputed testimony. The court specifically found that the officers "went to the home on the pretext of following up on two burglaries," which was "not the main or real reason" for their visit. App. 39a. It further found that the evidence they sought "was not intended to be used in a case where Spivey and Austin were victims, but it was to be used against them." App. 42a. And, to the extent Iwaskewycz had "[a]ny motive to obtain evidence of a burglary," it "was clearly secondary and very minimal compared to the interest in a credit card investigation." *Id.* Thus, there is no

dispute that the officers misrepresented their purpose. Rarely will the Court be presented with such a clean factual record on subjective purpose.

2. On appeal, and agreeing with the government's argument, U.S. C.A. Br. 38, the court of appeals explicitly ruled that "[t]he officers' subjective purpose in undertaking their investigation does not affect the voluntariness of Austin's consent." App. 13a. The court was emphatic on this point, repeating that: "[t]he subjective motivation of the officers is irrelevant;" it "does not matter" whether officers "deliberately lie[ ]" about their purpose; "pretext" is irrelevant where officers are engaged in "objectively justifiable behavior;" and Austin's "ability to consent was not dependent on whether the officers" truthfully explained their "intentions." App. 12a–13a, 16a. The court could not have been clearer.

That unequivocal point, moreover, was critical to the court's voluntariness conclusion. By declaring subjective purpose legally irrelevant, the court excised the police deception from the analysis. "Stripped of its subjective purposes, the officers' 'ruse' was a relatively minor deception that created little, if any, coercion." App. 13a. Without that deceptive purpose, all that remained of the ruse was the misidentification of Lanfersiek. But the court of appeals disposed of that deception on the same ground, pointing out it was "material only to [conceal] the subjective purpose of the investigation." App. 14a. Thus, by declaring the subjective purpose of the police legally irrelevant, the court removed the deception from the analysis. After that, the court had little trouble concluding that the consent was voluntary, for the remaining "factors other than deceit all point in favor of voluntariness." *Id.*

3. Not only did that reasoning form the linchpin of the court's analysis, but it represented a key point of contention with the dissent. Judge Martin disagreed that "pretext for investigating the burglary [wa]s not relevant." App. 31a n.4. She explained that the officers' pretext here was highly relevant because it was "the express reason given to Ms. Austin that led her to let the officers into her home." *Id.* And she explained that *Whren* was distinguishable, because it addressed probable cause, objectively analyzed from the officers' perspective, whereas voluntariness is a subjective analysis from the individual's perspective. *Id.*

Furthermore, Judge Martin relied heavily on the officers' deception of purpose to conclude that Austin's consent was not voluntary. App 21a, 28a, 31a. She repeatedly explained that, had the officers truthfully informed Austin that their purpose was to investigate credit-card fraud, she "would not have let [them] into her home." App. 29a, 33a n.7. Judge Martin correctly explained that, when the officers falsely told Austin that their purpose was to follow up on the burglaries, she became "genuinely excited," "relieved," "happy," and eagerly invited them inside. App. 31a. And, later on, "Austin refused to cooperate with law enforcement once the officers revealed their true purpose." *Id.* Had the officers' subjective purpose been relevant, Austin's consent "could not have been free, because it was entirely a product of the officers' untruthfulness." App. 31a–32a. Unable to dispute this key point, the majority instead declared their investigatory purpose legally irrelevant.

4. Finally, the decision below was based solely on the voluntariness of Austin's consent. While the district court denied the suppression motion on an

alternative ground, the court of appeals expressly declined to reach that issue. App. 20a. And for good reason: that alternative ruling was manifestly incorrect. As Austin explained at length below, the officers deliberately exploited the contraband they observed during the initial warrantless search of the home. As part of their plan, they strategically confronted Spivey and Austin with that evidence to induce his consent and her statements. Accordingly, everything was fruit of the unlawful initial search. *See* Pet. Austin C.A. Br. 42–56; Pet. Austin C.A. Reply Br. 17–27.

* * *

To recap: the undisputed testimony and factual findings establish that the officers misrepresented their investigatory purpose. The parties thoroughly disputed the voluntariness of Austin's consent below, and both courts resolved that question. The court of appeals expressly ruled that police deception of investigatory purpose is irrelevant to voluntariness. That reasoning formed the linchpin of its conclusion and was disputed by the dissent. The majority did not dispute that, absent the deception, Austin would have refused consent. It did not uphold the denial of the suppression motion on any alternative ground. And there are no state-law or tangential issues that might obstruct review. Accordingly, the question presented is squarely before the Court. The Court should decide it.

IV. THE DECISION BELOW IS WRONG

Finally, and as its outlier status reflects, the decision below is wrong.

1. As an initial matter, it defies common sense. When an officer comes to the door and asks to come in and look around, the very first question a homeowner

will have is: why? Where an officer affirmatively represents that his purpose is to *help* the homeowner as, say, the victim of a crime, when in reality his purpose is to *investigate* the homeowner as the perpetrator of a crime, then that misrepresentation will invariably affect the homeowner's decision. Had the homeowner known the officer's true purpose, she would be much less likely to consent; hence the reason for the police deception in the first place.

Put simply, such "misrepresentation on the part of the police to gain entry naturally undermines the voluntariness of any consent." *Griffin*, 530 F.2d at 743; *see Alexander v. United States*, 390 F.2d 101, 110 (5th Cir. 1968) ("Intimidation and deceit are not the norms of voluntarism. In order for the response to be free, the stimulus must be devoid of mendacity. We do not hesitate to undo fraudulently induced contracts."). But by concluding that an officer's subjective purpose is always irrelevant, the decision below ignores that common-sense reality.

2. For that same reason, the decision below also contravenes *Schneckloth*. In that seminal decision, the Court explained that the test for voluntariness is whether the consent is "the product of an essentially free and unconstrained choice," or instead whether the individual's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth*, 412 U.S. at 225 (citation omitted). As just explained, a citizen cannot make a meaningful decision, exercise self-determination, or "advise the police of . . . her wishes" when she is misled about their objective. *Drayton*, 536 U.S. at 207; *cf. United States v. Watson*, 423 U.S. 411,

424 (1976) (finding consent voluntary where there was "no indication of more subtle forms of coercion that might flaw his judgment").

Categorically exempting such deception from the analysis also runs afoul of *Schneckloth*'s repeated observation that voluntariness depends on "all the circumstances." 412 U.S. at 226–27, 233, 234 n.15, 249. The Court has since reiterated that "the totality of the circumstances must control," and "there are no *per se* rules." *Drayton*, 536 U.S. at 206–07; *see Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996); *United States v. Mendenhall*, 446 U.S. 544, 557–58 (1980); *Watson*, 423 U.S. at 424. The decision below, however, isolates one particular (and critical) circumstance—police deception of purpose—and declares it irrelevant as a matter of law. That *per se* exemption finds no support in this Court's consent precedents.

To the contrary, the Court has recognized that "[t]he Fourth Amendment can certainly be violated by guileful . . . intrusions into a constitutionally protected area." *Hoffa v. United States*, 385 U.S. 293, 301 (1966). In *Schneckloth* itself, the Court cautioned "that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair . . . police tactics poses a real and serious threat to civilized notions of justice." 412 U.S. at 225. It repeatedly recognized that "implied," "implicit," and "subtle" forms of coercion could vitiate the voluntariness of consent. *Id.* at 227–30, 248. "For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Id.*

at 228. The decision below contravenes that understanding by treating consent-inducing "pretexts" as legally irrelevant. App. 13a.

3. In addition to overlooking the points above, the decision below employs flawed reasoning. It replaces *Schneckloth*'s voluntariness inquiry—focusing on the defendant's "subjective" state and understanding, 412 U.S. at 229–30—with one based on whether the police have engaged in "objectively justifiable behavior," App. 13a. The authority it cites for that doctrinal transformation reveals its fallacy. *Whren* and its progeny address whether there is probable cause or reasonable suspicion to support a search or seizure. Because that is an objective inquiry undertaken from the perspective of the officer, pretexts and subjective motivations are irrelevant. *See Whren*, 517 U.S. at 810–13. Voluntariness, by contrast, is a subjective inquiry undertaken from the perspective of the individual. The inquiry focuses on the circumstances surrounding her decision. And that decision can certainly be informed by police misrepresentations of purpose.

To be sure, this Court's Fourth Amendment jurisprudence has generally eschewed examination of officers' subjective motivations. But the very nature of the voluntariness inquiry compels such an examination where officers affirmatively misrepresent their investigatory purpose. Again, such representations influence the decision to consent and thus bear on its voluntariness. Where officers affirmatively inject their investigatory purpose into the calculus, their true subjective purpose cannot be carved out of the ensuing analysis. That is particularly true here, where "[t]he pretext of investigating a burglary . . . was the

express reason given to Ms. Austin that led her to let the officers into her home." App. 31 n.4. (Martin, J., dissenting); *cf. Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988). And just as deliberate police misrepresentations to a neutral magistrate can bear on the validity of the resulting warrant, *see Franks v. Delaware*, 438 U.S. 154 (1978), deliberate misrepresentations to an individual can bear on the voluntariness of her resulting consent.

Lastly, the court of appeals reasoned that voluntariness depends solely on "what the suspect knows." App. 12a. But that cramped conception of voluntariness is irreconcilable with *Bumper v. North Carolina*, 391 U.S. 543 (1968). There, the Court held that consent was coerced where the police claimed to possess a warrant, but that warrant turned out to be invalid or non-existent. *Id.* at 549–50. The individual had no knowledge of that crucial fact, yet the Court nonetheless deemed her consent coerced. Had the individual been so informed, she would have refused consent. So too here. Moreover, if voluntariness depended only on what the suspect knew, then that would render virtually *all* forms of police deception irrelevant. After all, police deception is always designed to conceal the truth from the suspect.

* * *

In sum, while police deception of investigatory purpose need not vitiate the voluntariness of consent in every single case, it cannot be categorically excluded from *Schneckloth*'s totality-of-the-circumstances analysis. To the contrary, it will often be the most important circumstance of all. This Court's intervention is necessary to correct the anomalous and dangerous reasoning of the decision below.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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