No. 17-7046

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

REPLY BRIEF FOR PETITIONERS

MICHAEL G. SMITH
Litigation Building
633 South Andrews Ave., Suite 500
Ft. Lauderdale, FL 33301
(954) 761-7201

Counsel for Petitioner Spivey

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
150 W. Flagler St., Suite 1500
Miami, FL 33130-1555
(305) 536-6900
Andrew_Adler@fd.org

Counsel for Petitioner Austin

May 21st, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

In concluding that Petitioner Austin gave voluntary consent to search her home, the Eleventh Circuit expressly reasoned that, as a matter of law, it did "not matter" that the officers "deliberately lied" to her about their real investigatory purpose, because their subjective purpose was "irrelevant" to the voluntariness of her consent. Pet. App. 12a–13a. The court repeatedly employed that reasoning in order to "strip[ ]" their undisputed deception from the analysis. *Id.* at 13a. The message to police is unmistakable: "they don't need to get a warrant so long as they can pre-plan a convincing enough ruse." *Id.* at 35a (Martin, J., dissenting).

The government opposes review but disputes little. Factually, it does not dispute that the officers here deceived Austin about their investigatory purpose, or that such deception induced her to consent when she would have otherwise refused. Legally, it concedes that numerous federal and state courts have deemed such deception of purpose not only relevant but critical to the voluntariness inquiry. The government also does not dispute that a contrary rule exempting such police deception from Fourth Amendment scrutiny will have grave consequences for society, encouraging police to circumvent the warrant requirement and trick homeowners into opening their doors. And it does not meaningfully defend such reasoning under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) or its progeny. Rather, like the majority below, it uncritically extends the pretext-immunizing logic of *Whren v. United States*, 517 U.S. 806 (1996) to the context of voluntariness, without acknowledging the doctrinal and conceptual impediments to doing so.

Instead, the government's opposition boils down to one assertion: the court of appeals did not declare the subjective purpose of police officers irrelevant to the voluntariness of consent. "But a good rule of thumb for reading [judicial] decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243, 2254 (2016). Here, the court of appeals explicitly said that an officer's subjective purpose does not affect the voluntariness of consent. It repeatedly employed that reasoning to resolve this case. And that is why Petitioners, the dissent, and various interested organizations all cry foul.

Once that underbrush is cleared away, no real objections to review remain. The government does not otherwise dispute that the decision below conflicts with numerous decisions on a recurring issue of national importance that has not been addressed by this Court. And the government's lone vehicle argument backfires: it serves only to confirm that the decision below rested solely on voluntariness, and that this case is an excellent one in which to consider the relationship between an officer's subjective investigatory purpose and the voluntariness of consent.

ARGUMENT

I. THE GOVERNMENT MISCHARACTERIZES THE DECISION BELOW

The government seeks to muddy the waters, but the decision below is crystal clear: when police deliberately lie about the purpose of their investigation, that deception will have no bearing on the voluntariness of the consent it induces. In the course of two full paragraphs, the court of appeals proclaimed that, as a matter of law, "[t]he officers' subjective purpose in undertaking their investigation does not affect the voluntariness" of the resulting consent. Pet. App. 13a. Because the court

believed that consent is only "about what the suspect knows," and that such knowledge is informed only by officers' "objective" behavior, "[t]he subjective motivation of the officers is irrelevant." *Id.* at 12a–13a. "Pretext does not invalidate a search that is objectively reasonable." *Id.* at 13a. Leaving little to chance, the court spelled out the practical import of this reasoning: it "does not matter" whether officers "deliberately lie[ ]" about their investigatory purpose. *Id.* at 12a. That deception will thus be immune from Fourth Amendment scrutiny.

The government turns a blind eye to this fraught reasoning. It asserts (at 17) that the court of appeals "recogniz[ed] that a police officer's misrepresentations of investigatory purpose are relevant in evaluating the voluntariness of consent." But the court said just the opposite: the officer's subjective investigatory purpose is legally "irrelevant" to voluntariness, and so he is free to misrepresent it. Pet. App. 12a. Similarly, the government says (at 15) that the court "did not conclude that police officers may . . . make 'deliberate misrepresentations' without Fourth Amendment consequence." But that is precisely what it said: it "does not matter" whether they "deliberately lie[ ]" about the purpose of their investigation. *Id.*

The government's misreading is all the more puzzling because discarding the officers' subjective purpose served as the key move in the court's legal analysis. It carved the deception out of the equation. By "stripp[ing]" the ruse "of its subjective purposes," the court rendered it a "minor deception that created little, if any, coercion." Pet. App. 13a. Indeed, the court believed that Austin's "ability to consent . . . was not dependent on whether the officers provided" a truthful "explanation of

their intentions." *Id.* at 16a. Even the officers' brazen misidentification of Secret Service Agent Lanfersiek got thrown to the wind, because that deception was "material only to the subjective purpose of the investigation." *Id.* at 14a. So by declaring the officers' subjective purpose irrelevant, the court obviated their accompanying deception. And that shrewd maneuver all but resolved the case in the government's favor, since "[t]he factors other than deceit all point in favor of voluntariness." *Id.*

The government asserts (at 14–15) that the court *did* evaluate the officers' deception of purpose. But it did no such thing. The majority focused only on how the "objective" conduct of the officers impacted Austin's decision, without any regard for their true investigatory purpose. *See id.* at 13a–17a. That analytical omission is glaring because the dissent forcefully argued that Austin never would have consented had she known their true purpose. *See* Pet. 31. Nowhere did the majority dispute that key point. Instead, it declared their true purpose legally irrelevant. Nor did the majority recognize that other circumstances in the case weighed in the government's favor by virtue of the deception. For example, it was unnecessary for the officers to threaten Petitioners after hoodwinking them into submission. In short, the court of appeals dismissed the police deception under the guise of the officers' irrelevant subjective purpose.

The government (at 15) appears to suggest that the court could have somehow evaluated their deception without considering their subjective purpose. To do so, it seeks to distinguish "an officer's inward motivation (which is not

relevant to the analysis) [from] his or her outward conduct (which is)." But that distinction collapses under the facts here. The officers' "outward conduct" includes their representations about the purpose of their investigation; and whether those representations are deceptive depends on whether they comport with the officers' "inward motivation" (*i.e.*, their subjective purpose). By "stripp[ing]" their subjective purpose from the analysis, the court magically cleansed their representations of falsity. Because the deception vanished under that analysis, it did "not matter" that the police "deliberately lied" about their investigatory purpose. Pet. App. 12a.

Continuing to neglect that striking comment and the reasoning underlying it, the government (at 14) points to the preamble of the court's analysis, where it stated that some forms of deception can bear on voluntariness. *See id*. at 8a–10a (discussing cases where officers "claim[ed] authority they lack[ed]," made "false promises," or misrepresented criminal case as civil). But the court proceeded to make clear that deception will *not* be relevant where, as here, it derives from an officer's subjective purpose; the officer's true purpose "does not affect the voluntariness" of the individual's consent. *Id.* at 13a. That is the legal reasoning the court applied to resolve this case. And, as part of the court's holding, that is the legal reasoning that will apply moving forward. Prefatory dictum that other forms of deception can be relevant to voluntariness will not permit federal courts in the Eleventh Circuit to consider an officer's subjective investigatory purpose. As a result, the government may not use that language to obscure the legal reasoning driving the court's decision and thereby insulate it from review by this Court.

Revealingly, nobody else reads the decision below as the government does. Judge Martin, along with local and national organizations with diverse interests, all sounded the alarm precisely because they shared Petitioners' reading.[1] Surely then, police officers on the ground will take the same view. And, to defend their resulting consent searches, the government will not hesitate to cast aside its position here. Indeed, it has already begun to cite the decision below for its deception-inviting proposition that officers' "subjective intentions are irrelevant." *United States v. Alford*, U.S. Br., 2018 WL 1230194, at *29 (11th Cir. Mar. 1, 2018).

In short, the court of appeals said what it meant and meant what it said: "The officers' subjective purpose in undertaking their investigation does not affect the voluntariness" of consent, and so it "does not matter" whether they "deliberately lie[ ]" about their investigatory purpose. Every police officer from Miami to Atlanta to Mobile will take the court of appeals at its word. So too must this Court.

II. THE TRADITIONAL CRITERIA FOR REVIEW ARE OTHERWISE UNDISPUTED

When the decision below is taken at face value, all of the traditional criteria for review are satisfied. The government does not argue otherwise.

A. The Decision Below Conflicts With Countless Federal and State Decisions Analyzing the Voluntariness of Consent

In the forty-five years since *Schneckloth*, numerous appellate courts around the country have uniformly recognized that police deception of their subjective

[1] *See, e.g.*, Pet. App. 31 n.4 (Martin, J., dissenting) ("The Majority says the pretext for investigating the burglary is not relevant."); FACDL Br. 3, 5, 12 (decision below "hold[s] that officers' misrepresentation of their investigatory purpose is legally irrelevant," thus "carving out police deception as to purpose from the universe of relevant deceit"); PLF & RTF Br. 3, 5, 7, 13 (decision creates "deception exception").

investigatory purpose bears on the voluntariness of the resulting consent. Petitioners have identified such decisions from the Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, as well from state courts in Colorado, Florida, Georgia, Illinois, Kentucky, Maryland, Minnesota, Pennsylvania, Rhode Island, and Washington. *See* Pet. 14–23. The government concedes (at 17) that all of those decisions "recogniz[e] that a police officer's misrepresentations of investigatory purpose are relevant in evaluating the voluntariness of consent."

It claims (at 17) that there is no conflict only because the decision below "shared that same understanding." But, again, the face of the opinion belies that claim. The court specifically and repeatedly stated that an officer's subjective investigatory purpose is irrelevant to voluntariness. Pet. App. 12a–13a. With the exception of the decision below, the government does not identify any other judicial opinion to ever say that. It is literally "unprecedented." Pet. 2, 14. As a result, it conflicts with countless federal and state decisions on a principle of Fourth Amendment law. That alone compels review by this Court.

Geography alone will now play a determinative role as to the voluntariness of consent. In that regard, the government is careful not to argue (at 17–18) that the outcome here would have been the same had the case arisen elsewhere, as several courts have broad rules "clearly prohibiting deliberate misrepresentation of the purpose of a government investigation." *United States v. Bosse*, 898 F.2d 113, 116

(9th Cir. 1990).[2] At the very least, the analysis here would have been radically different: the court would have substantively evaluated rather than casually dismissed the deception. And, conversely, had the reasoning below been applied in the cited cases finding consent involuntary, the outcomes there would have been reversed, for they all turned on the officer's subjective investigatory purpose.

Some of those cases, moreover, involved indistinguishable facts. *See* FACDL Br. 6–7. One of them, notably, is wholly ignored by the government here. In *United States v. Watzman*, 486 F.3d 1004, 1006–07 (7th Cir. 2007), the government did not even challenge, and the court of appeals accepted, the district court's conclusion that a pretextual burglary follow-up vitiated consent. Other cases also involved the pretextual use of a burglary to infiltrate a home. *See* Pet. 15, 19. And, while other cases involved different schemes and ploys, that only highlights the breadth of police deception that the reasoning below will permit and thereby incentivize. That strengthens, not weakens, the need to resolve a conflict of law about the application of the Fourth Amendment. That is particularly true where that conflict will create legal uncertainty *within* two populous states like Florida and Georgia. *See* Pet. 3, 21–23; FACDL Br. 9. Fourth Amendment protection should not hinge on geography or on whether a prosecution is state or federal. It should be uniform, not patchy.

---

[2] *See, e.g.*, *McCall v. People*, 623 P.2d 397, 403 (Col. 1981) ("Where, as here, entry into the home is gained by a preconceived deception as to purpose, consent in the constitutional sense is lacking."); *State v. Bailey*, 417 A.2d 915, 918–19 (R.I. 1980) ("It seems to us that consent to enter one's home . . . cannot be deemed free or voluntary unless the person said to be consenting is aware of the purpose for which the police seek to enter.") (footnote and internal citation omitted); *State v. McCrorey*, 851 P.2d 1234, 1240 (Wash. Ct. App. 1993) ("We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry.").

B. The Question Presented is Recurring, Unsettled, and Important

Exacerbating that untenable conflict, the government also does not dispute that the question presented independently warrants review because it is recurring, unaddressed by this Court, and of great public importance.

The government does not dispute that consent searches comprise the vast majority of warrantless searches in America, and that officers often deceive subjects about their purpose in order to induce consent. *See* Pet. 23; FACDL Br. 12–13. That accounts for the dozens of reported decisions considering the relevance of such deception to voluntariness. Indeed, Petitioners cite decisions from each of the last five decades. Given the ubiquity of consent searches, and the deception used to induce them, the question presented is recurring. Yet the Court has never addressed it. The government does not dispute that review is overdue. Pet. 24–25.

Even more deafening is the government's silence about the profound public importance of the question presented. Petitioners, their *amici*, and Judge Martin in dissent have all explained that carving out an officer's subjective investigatory purpose from the voluntariness inquiry will incentivize police officers (and other state actors as well) to abuse their power and affirmatively lie their way into homes without a warrant. That will render the Fourth Amendment a dead letter in the sacred context of the home. It will deter citizens from cooperating with the police. It will imperil the mutual trust between the citizenry and the government upon which democracy depends. And it will otherwise undermine the rule of law. *See* Pet. 25–29; FACDL Br. 13–14; PLF & RTF Br. 4–5, 7, 10, 13–19; Pet. App. 21a–22a,

27a–28a, 35a (Martin, J., dissenting). Tellingly, the government does not deny any of those troubling dynamics or seismic societal implications.

III. THE GOVERNMENT CANNOT DEFEND THE LEGAL REASONING BELOW

The government also does not meaningfully defend the court of appeals' unprecedented legal reasoning that an officer's subjective investigatory purpose is irrelevant to voluntariness. And for good reason: it cannot be defended.

a. As Petitioners and their *amici* have explained, that reasoning defies common sense. Pet. 32–33; FACDL Br. 10. Where, as here, an officer tells a homeowner that he wants to search her home in order help her as the victim of a crime, when in reality he wants to investigate her as the perpetrator of a crime, that deception will naturally affect her "subjective understanding" of the situation. *Schneckloth*, 412 U.S. at 230. It will therefore affect whether her decision to consent is "the product of an essentially free and unconstrained choice." *Id.* at 225 (citation omitted). The government does not deny that dynamic. Nor does it deny that exempting such deception contravenes the totality-of-the-circumstances approach mandated by *Schneckloth* and re-affirmed by its progeny. *See* Pet. 33–34.

Instead, disregarding common sense and this Court's consent precedents, the government does precisely what the court of appeals did: invoke the principle from *Whren v. United States*, 517 U.S. 806 (1996) that, because Fourth Amendment reasonableness depends only on the objective conduct of the police, their subjective intent is irrelevant. Pet. App. 13a; BIO16. But Petitioners, their *amici*, and Judge Martin have all explained why that logic has no application when assessing the

voluntariness of consent. Pet. 35–36; FACDL Br. 9–11; Pet. App. 31a n.4 (Martin, J., dissenting). Nowhere does the government attempt to refute that argument.

To briefly repeat it: the reasonableness of a warrantless search of the home based on consent depends on the voluntariness of that consent. Unlike the probable-cause determination in *Whren*, which is an objective inquiry undertaken from the perspective of the reasonable officer, the voluntariness determination under *Schneckloth* is a subjective inquiry undertaken from the perspective of the individual. And an individual's decision to consent will be informed by what the officer tells her, especially about his purpose. Thus, "the subjective intent of the officer is relevant to an assessment of the Fourth Amendment implications of [the] police" where "that intent has been conveyed to the person confronted." *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (op. of Stewart, J.)). Here, of course, "[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." Pet. App. 31a n.4 (Martin, J., dissenting).

b. Unable to justify this unprecedented extension of *Whren*, the government changes the subject. It argues (at 11–14) that the court of appeals correctly concluded that Austin's consent was voluntary, and this fact-bound determination does not warrant review. But Petitioners sought review of the underlying *legal* question about the relevance of the officers' subjective purpose to voluntariness. *Compare* Pet. i, *with* BIO i. Again, the Eleventh Circuit's legal reasoning in that regard fatally infected its analysis. Were this Court to agree with

Petitioners that this legal reasoning was erroneous, then it could remand for a determination on voluntariness under the correct legal principles.

In any event, the deception here vitiated the consent. Like the majority, at no time does the government dispute—or even mention—Judge Martin's repeated assertion that Austin would have refused consent had she been informed of the officers' true purpose. Pet. 31. Nor could it: she hid contraband upon seeing them arrive; she became "excited," "happy," and "relieved" upon hearing that they were investigating the burglaries; and she became uncooperative upon hearing that they were investigating fraud. Indeed, the district court found that she "wanted to cooperate" only to help "solv[e] the burglaries." Pet. App. 43a. Absent the ruse, she never would have invited them inside, let alone given them a tour of her bedroom.

Although the government (at 12–13) cannot dispute the decisive role of the officers' deception, it still tries to downplay it. But these are the facts that the district court found: the officers "went to the home on the pretext of following up on two burglaries," which was a "legitimate reason" but "not the main or real reason" for the two officers here; "[t]he sought-after evidence to be gathered was not intended to be used in a case where Spivey and Austin were victims, but it was to be used against them;" and to the extent Iwaskewycz had "[a]ny motive to obtain evidence of a burglary" at all, it "was clearly secondary and very minimal compared to the interest in a credit-card investigation." Pet. App. 39a, 42a. Those undisturbed findings derived from undisputed facts: Agent Lanfersiek's exclusive purpose was to investigate the fraud; Iwaskewycz referred the tip to Lanfersiek for

that sole purpose; Iwaskewycz knew that the neighboring police department had already arrested the burglar, obtained his confession, and closed its case; and the supervisors authorizing the ruse were acting under the auspices of the fraud task force to which Iwaskewycz was assigned. Pet. 5; *see* Pet. App. 30a, 42a, 88a, 94a–95a, 218a–25a.[3] The government's attempt to minimize the deception falls flat.

IV. THE GOVERNMENT'S SOLE VEHICLE ARGUMENT IS ILLUSORY

a. In a last-ditch effort to evade review, the government asserts (at 19–20) that this case is an "unsuitable vehicle" for one reason: the *district court* denied the suppression motion on an alternative basis. But the government concedes (at 20) that "[t]he court of appeals did not reach this issue." *See* Pet. App. 20a ("we do not reach any question about Spivey's later consent and the fruit of the poisonous tree"). This poses no barrier to review at all. Rather than address that issue in the first instance, this Court could remand for resolution of it were Petitioners to prevail on the question presented. The government knows this: it advocates that normal course in support of its own petitions. *E.g.*, U.S. Reply Br., 2011 WL 2326714, at *9–10, *United States v. Jones*, 565 U.S. 400 (2012) (No. 10-1259).

In any event, and although not relevant at this stage, the government is wrong that Spivey's subsequent consent purged the taint of the initial search. It is

[3] The government points out that the Lauderhill file technically remained open, that Petitioners reported the burglaries, and that Petitioners knew that the officers were engaged in a criminal investigation. But those are the very conditions that allowed the ruse to succeed: Petitioners reasonably believed that the burglary pretext was truthful. The officers betrayed that trust. That further underscores the troubling implications of the decision below: merely reporting a burglary will now invite police deception and unbridled warrantless searches of the home.

undisputed that the officers successfully executed a plan to confront him with the contraband they observed during that search in order to induce him to consent to a full-scale search. That "exploitation of th[e] initial illegality" is textbook fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (citation omitted). And the district court found that the time between the initial search and Spivey's consent was "minimal." Pet. App. 43a. *See* Pet. Austin C.A. Br. 42–56; Pet. Austin C.A. Reply Br. 17–27. So the validity of Austin's consent will be dispositive.

b. The government does not otherwise identify any vehicle problems. It does not deny that the facts are entirely undisputed, including on the officers' subjective purpose. While the government seeks to minimize the degree of that deception, it does not dispute its existence: the officers unquestionably deceived Austin about their investigatory purpose. Pet. 29–30, 32. So the factual predicate here is undisputed. Procedurally too, there is no dispute that Petitioners preserved their arguments on voluntariness.[4] And the courts below both decided that issue.

Moreover, the decision below squarely tees up the legal question. Again, the court of appeals unambiguously reasoned in two full paragraphs that an officer's subjective investigatory purpose is "irrelevant" to voluntariness, such that it "does not matter" whether officers "deliberately lie[ ]" about it. Pet. App. 12a–13a. Try as

[4] In a footnote outside the vehicle section of its brief, the government asserts (at 16 n.4) that Petitioners advanced a more aggressive "bright line" rule in the court of appeals that any deception vitiates consent. Not so: Petitioners expressly disavowed any such position on appeal. Pet. Austin C.A. Reply Br. 7–8 ("[The government] repeatedly accuses her of seeking a *per se* rule that any and all use of police deception automatically renders consent involuntary. She does not. . . . Rather, Austin seeks nothing more than a ruling that, under the undisputed facts of this case, her consent was involuntary.") (citations and quotation marks omitted).

it might, the government cannot erase that indelible reasoning from the opinion; it is there in black and white for all to see (and for police to use). Thus, the decision below would facilitate a seamless review of the relationship between the subjective investigatory purpose of the police and the voluntariness of consent under the Fourth Amendment. And Petitioners specifically urged the court of appeals to reconsider its flawed reasoning on that very point. On rehearing, they cautioned that "[t]he majority breaks new ground by broadly asserting that an officer's investigatory purpose is irrelevant to the voluntariness inquiry." C.A. Pet. for Rehearing En Banc 3. Despite a call for en banc poll, the court of appeals held firm. Pet. App. 36a–37a. Thus, the Eleventh Circuit's deliberate yet anomalous reasoning will become permanently fixed absent intervention by this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition and accompanying *amici curiae* briefs, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL G. SMITH
Litigation Building
633 South Andrews Ave., Suite 500
Ft. Lauderdale, FL 33301
(954) 761-7201

Counsel for Petitioner Spivey

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
150 W. Flagler St., Suite 1500
Miami, FL 33130-1555
(305) 536-6900
Andrew_Adler@fd.org

Counsel for Petitioner Austin