No. 08-1152

In the Supreme Court of the United States

PRADEEP SRIVASTAVA, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The government's brief in opposition is as noteworthy for what it does not say as for what it does. The government does not dispute that there is a substantial conflict among the federal courts of appeals (and state courts of last resort) concerning the validity and application of the "flagrant disregard" doctrine. Nor does the government dispute that the question presented in this case is a recurring one of great importance in the administration of the exclusionary rule. Instead, the government devotes almost its entire brief to the contention that this case is a poor vehicle for addressing the question presented, and resolving the circuit conflict, because the court of appeals determined that there was no Fourth Amendment violation of any kind. That contention plainly lacks merit—and, once that contention is put

to one side, there is no valid reason for denying review here. Because the court of appeals' reasoning in this case was seriously flawed and its decision conflicts with the decisions of several other circuits, the petition for certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort

1. The government does not challenge the proposition that "the courts of appeals have adopted varying approaches to the 'flagrant disregard' doctrine and the relevance of an executing officer's subjective intent to that analysis." Br. in Opp. 15. That implicit concession is a wise one, because there is a deep and substantial conflict—involving decisions from all of the federal courts of appeals with jurisdiction over criminal matters—as to the relevance of officers' subjective views for purposes of determining whether the officers acted with "flagrant disregard" for the terms of the warrant (and thus whether blanket suppression is required under the exclusionary rule).

As explained at greater length in the petition, the cases fall into four discrete categories. See Pet. 8-14. Three circuits—the District of Columbia, Ninth, and Tenth—have explicitly considered officers' state of mind in determining the applicability of the "flagrant disregard" doctrine. That category includes all of the court of appeals decisions that have ordered the blanket suppression of evidence under the "flagrant disregard" doctrine—the very decisions on which the government urges the Court to focus. See *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States* v. *Foster*, 100 F.3d 846, 850 (10th Cir. 1996); *United States* v. *Medlin*, 842 F.3d 1194, 1199-1200 (10th Cir. 1988). By contrast, like the Fourth Circuit in this case, three other

circuits—the Third, Sixth, and Eighth—have looked only to objective factors, without reference to officers' actual state of mind, in applying the "flagrant disregard" doctrine. Three circuits—the First, Second, and the Eleventh—either have expressly left open the relevance of officers' state of mind or have taken ambiguous positions on the issue. And two other circuits—the Fifth and Seventh—have gone furthest and refused to recognize the "blanket disregard" doctrine at all.

Remarkably, the resulting conflict implicates decisions written by no fewer than three current members of this Court while serving on lower courts—including then-Judge Kennedy's opinion in *Rettig*, the foundational decision for the development of the "flagrant disregard" doctrine. See *Rettig*, 589 F.2d at 418 (Kennedy, J.); *State* v. *Valenzuela*, 536 A.2d 1252 (1987) (Souter, J.), cert. denied, 485 U.S. 1008 (1988); *United States* v. *Young*, 877 F.2d 1099 (1st Cir. 1989) (Breyer, J.). There can be no doubt that such a mature conflict, on an important aspect of the exclusionary rule, warrants this Court's review.

2. In its brief in opposition, the government primarily contends that the decision below does not implicate the foregoing circuit conflict, on the ground that "the court of appeals found there to be no underlying constitutional violation." Br. in Opp. 22. That contention plainly lacks merit.

a. As a preliminary matter, it is beyond dispute that the executing officers in this case seized items that were not covered by the warrants (and thereby violated the Fourth Amendment). As the court of appeals recognized, the officers seized, *inter alia*, papers concerning petitioner's summer home, petitioner's wallet, his credit cards, a CVS Pharmacy loyalty card, and some foreign currency. See Pet. App. 7a-8a. And to take but a few of

the most egregious other examples, the officers also seized an invitation to a cultural event, an American Automobile Association card, and various uncashed or unwritten checks. See *id.* at 54a n.15, 55a n.16. None of those items could even arguably fall within the scope of the warrants, which authorized the seizure only of "[f]inancial records" (or other enumerated types of records) "related to the business of [petitioner] * * * which may constitute evidence of violations of [18 U.S.C. 1347]." *Id.* at 5a & n.4. It is telling that, while the government takes great pains to characterize *what the court of appeals said* about the existence of a constitutional violation, the government did not deny below, and does not deny here, that a constitutional violation *actually took place*—and, indeed, all but concedes that it did. See, *e.g.*, Br. in Opp. 17 (stating only that *some* of the seized items "actually fell squarely within the warrants' terms").

Rather than denying that a constitutional violation actually occurred, the government contends that "the court of appeals found there to be no underlying constitutional violation," Br. in Opp. 22—or, putting it slightly differently, that "the court [of appeals] did not hold that any constitutional violation had taken place," *id.* at 19. As a logical matter, however, the government's characterization of the court of appeals' decision simply cannot be correct. If the court of appeals had really concluded that no Fourth Amendment violation had taken place, it would not have needed to engage in *any* analysis of the "flagrant disregard" doctrine, much less the extended analysis in which it did engage. See Pet. App. 28a-30a. That is because the whole premise of the "flagrant disregard" doctrine (as the government recognizes, see Br. in Opp. 14) is that it is sometimes necessary to suppress even properly seized items where the seizure of *other*

items was improper; absent the improper seizure of at least some items, blanket suppression is plainly inappropriate. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259-1260 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982). The court of appeals thus evidently operated on the assumption that the officers had seized at least some items not covered by the warrants—and, for that reason, that the "flagrant disregard" doctrine was potentially triggered here.

b. Notwithstanding the incontestable fact that the officers had seized items outside the scope of the warrants, the court of appeals held that the "flagrant disregard" doctrine was inapplicable on the ground that "the subjective views of [the supervising officer] were not relevant" to the analysis. Pet. App. 29a. In so ruling, the court of appeals deepened a conflict with at least three other circuits (and one state court of last resort) holding that an officer's state of mind is relevant in applying the "flagrant disregard" doctrine. See p. 2, *supra*; Pet. 9-11.

The government does not dispute that such a holding would implicate a circuit conflict worthy of this Court's review. Instead, the government contends (Br. in Opp. 21) that the court of appeals did not actually hold that an officer's state of mind was irrelevant to the question whether the suppression of evidence was warranted under the exclusionary rule, but instead held only that it was irrelevant to the question whether a constitutional violation had occurred in the first place. That is a conspicuous misreading of the court of appeals' opinion. See, *e.g.*, Pet. App. 30a (stating that "[Agent Marrero's] personal opinions were an improper basis *for the blanket suppression ruling*") (emphasis added). In holding that an officer's state of mind was irrelevant to the *exclusionary-rule* inquiry, the court of appeals did cite this Court's decision in *Maryland* v. *Macon*, 472 U.S. 463

(1985), which reiterated the settled proposition that an officer's state of mind is irrelevant to the *constitutional* inquiry. See Pet. App. 29a.[1] In so doing, however, the court of appeals erroneously conflated the two inquiries, and ignored a whole line of this Court's cases (which the government likewise ignores here) making clear that "the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." *Scott* v. *United States*, 436 U.S. 128, 139 n.13 (1978); see Pet. 16-18 (citing other cases).

For present purposes, the critical point is that the court of appeals ultimately held (in disagreement with the district court) that an officer's state of mind is irrelevant in applying the "flagrant disregard" doctrine—and thereby discounted the district court's finding, based on the supervising officer's "astonishing" testimony, that the officer "belie[ved] that the limiting words of the warrant were meaningless to him." Pet. App. 50a-51a, 53a-54a. The court of appeals' decision thereby implicates a circuit conflict that merits this Court's review.

c. The government suggests that, even if the court of appeals did recognize that the officers had unconstitutionally seized some items, it "did not find that the executing officers had *grossly* exceeded the scope of their search." Br. in Opp. 19 (emphasis added). That may be true, but it misses the point. The district court expressly found that "the executing agents grossly exceeded the scope of the search warrants," Pet. App. 55a, and the court of appeals ultimately did not disturb that finding. To be sure, the court of appeals did hold, in disagree-

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

ment with the district court, that the documents the government was planning to introduce at trial fell within the scope of the warrant, see *id.* at 19a-27a,[2] and it proceeded to state that its holding "substantially undercut[] the [district court's] blanket suppression ruling," *id.* at 29a. Critically, however, the court of appeals failed independently to analyze whether, even absent those documents, the executing officers had seized a substantial volume of items not covered by the warrants. If it had done so, it surely would have concluded that, even without the documents the government was planning to introduce, the officers had still "grossly exceeded" the scope of the warrants—as the district court evidently did in holding that blanket suppression was required *regardless whether the documents at issue were properly seized.* See, *e.g.*, *id.* at 49a, 90a.[3]

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[2] The government contends that suppression is particularly unwarranted here because "each document or record the government seeks to introduce as evidence at trial was held to be properly seized pursuant to the search warrants." Br. in Opp. 18. That is a perplexing contention, because the whole point of the "flagrant disregard" doctrine is that it mandates suppression even when the items the government seeks to introduce were properly seized. See pp. 4-5, *supra.* If the items in question had been improperly seized, there would be no need to get into the "flagrant disregard" doctrine at all; the items would simply be suppressed through a routine application of the exclusionary rule.

[3] The government states that the documents it was planning to introduce at trial constituted "the bulk of the records identified by the district court as exceeding the warrants' scope." Br. in Opp. 17. The government, however, provides no support for that proposition. And there is ample reason to doubt it, because, in response to a complaint by petitioner's counsel that the executing officers had seized items outside the warrants' scope, the government returned *twelve boxes* of items to petitioner. See Pet. App. 54a n.15, 55a, 90a. Contrary to the government's suggestion (Br. in Opp. 22 n.7), the

To the extent that some courts have looked only to objective factors in applying the "flagrant disregard" doctrine, therefore, the court of appeals went even further than those courts, and compounded its error in discounting the relevance of intent, by failing to engage in any meaningful inquiry concerning the objective overbreadth of the searches. For that additional reason, the Fourth Circuit's decision warrants this Court's review.

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

1. At most, the question presented in this case—*i.e.*, whether blanket suppression is appropriate where officers believed that limitations in a search warrant were meaningless and seized a substantial volume of items not covered by the warrant—is one that this Court's prior decisions have left open. In *Waller* v. *Georgia*, 467 U.S. 39 (1984), this Court acknowledged the existence of the "flagrant disregard" doctrine, but did not definitively resolve any question concerning that doctrine's validity or scope. See *id.* at 43 n.3.

The government suggests that *Waller* stands for the proposition that, under the "flagrant disregard" doctrine, "blanket suppression is appropriate only when officers exceed[] the scope of the warrant in the *places searched*, not when they exceed it in terms of the *items seized*." Br. in Opp. 19 (emphases added; internal quotation marks and citation omitted). It is true, as the government notes (*id.* at 20), that two courts of appeals have so interpreted *Waller*, and limited the "flagrant disregard" doctrine to circumstances in which officers search places not authorized in the warrant. See *United States*

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volume of returned items alone creates a strong inference that the overbreadth of the searches was substantial.

v. *Garcia*, 496 F.3d 495, 507 (6th Cir. 2007); *United States* v. *Decker*, 956 F.2d 773, 779 (8th Cir. 1992). That interpretation of *Waller*, however, cannot be reconciled with the text of the Fourth Amendment, which prohibits searches of unauthorized places and seizures of unauthorized items alike. Nor can it be reconciled with *Waller* itself, which approvingly cites the decisions in *Rettig* and *Heldt*—decisions indicating that blanket suppression would be appropriate where officers act with "flagrant disregard" for the terms of the warrant *with regard to the items seized.* See *Heldt*, 668 F.2d at 1266-1269; *Rettig*, 589 F.2d at 423. Accordingly, at least one court of appeals has expressly interpreted *Waller* to sanction application of the "flagrant disregard" doctrine to cases involving seizures of unauthorized items, as well as searches of unauthorized places. See *Medlin*, 842 F.2d at 1198-1199. Insofar as there is any uncertainty about the correct interpretation of *Waller*, that uncertainty counsels in favor of, not against, further review here.

2. The government does not dispute that the question presented in this case is a recurring one of great importance in the administration of the exclusionary rule. Nor could it, in light of the innumerable (and irreconcilable) cases in the lower federal and state courts concerning the validity and application of the "flagrant disregard" doctrine. See Pet. 20. Indeed, the government goes so far as to hint that it believes the "flagrant disregard" doctrine should be abrogated altogether—a position that, if sincerely held, further illustrates the need for this Court's review. See Br. in Opp. 21 (stating that "total suppression is not an appropriate remedy (*if at all*) unless the officers executing the search grossly exceeded the scope of the warrant") (emphasis added).

3. Finally, this case is an optimal vehicle in which to clarify the standards for invocation of the "flagrant disregard" doctrine. The government suggests (Br. in Opp. 11-12) that the mere fact that this case arises in an interlocutory posture provides a sufficient basis for denying certiorari. While it is true that a defendant does not ordinarily have a right of interlocutory appeal where a district court denies a motion to suppress in the first instance, see, *e.g.*, *United States* v. *Williams*, 413 F.3d 347, 354 (3d Cir. 2005), it was *the government* that initiated interlocutory review of the district court's order *granting* suppression in this case, by pursuing an appeal under 18 U.S.C. 3731. In so doing, the government was required to (and did) certify that "the appeal [was] not taken for the purpose of delay and that the evidence [was] a substantial proof of a fact material in the proceeding." *Ibid.* Once an interlocutory appeal has been commenced, it would be artificial (and inequitable) to terminate the appeals process as soon as the government obtains a favorable decision before the court of appeals, without allowing a defendant to litigate the issue to its natural conclusion before this Court.[4]

In any event, the interlocutory posture of a case is not a categorical bar to this Court's review; instead, the Court weighs prudential considerations in determining whether to review a case despite its interlocutory status. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007) (citing cases). And to the extent the Court does so here, those prudential considerations counsel strongly in favor of further review. This

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[4] By the government's logic, a defendant would seemingly be precluded even from seeking rehearing in the court of appeals once the panel issues a decision in the government's favor. That cannot be correct.

case presents a clean legal question; additional proceedings on remand will not develop the factual record pertinent to that question; and resolving that question in petitioner's favor will surely bring proceedings in this case to an end, because the government does not dispute that, without the tax returns and other tax-related documents at issue, it will be unable to proceed with petitioner's prosecution for tax fraud and evasion. There is no point in requiring petitioner to endure the burden and expense of a criminal trial (and to take a plainly futile appeal) before seeking this Court's review on a question of such obvious importance. The circuit conflict on that question, implicitly recognized by the government, warrants resolution in this case—and it warrants resolution now.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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