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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that blanket suppression of all the evidence seized was inappropriate after determining that the search warrants authorized the seizure of petitioner's personal financial records and made no determination that any evidence was seized unconstitutionally.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 540 F.3d 277. The opinion of the district court (Pet. App. 33a-83a) is reported at 444 F. Supp. 2d 385, and its opinion denying the government's motion for reconsideration (Pet. App. 84a-94a) is reported at 476 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2008. A petition for rehearing was denied on October 14, 2008. Pet. App. 32a. On December 31, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 2009. On January 29, 2009, the Chief Justice further extended the time until March 13, 2009, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Maryland on two counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of making false statements on a tax return, in violation of 26 U.S.C. 7206(1). Before trial, petitioner moved to suppress financial records that had been seized from his residence and two medical offices and were to be used as evidence. The district court granted the motion, ordering the suppression of the documents and all other evidence seized in the searches. The court of appeals reversed the district court and remanded for further proceedings. Petitioner now seeks review of that interlocutory judgment.

1. Petitioner is a licensed cardiologist who lives in Potomac, Maryland, and conducts his medical practice through Pradeep Srivastava, M.D., P.C., a Subchapter S Corporation. Gov't C.A. Br. 3. In early 2003, the Department of Health and Human Services (HHS) and other federal agencies initiated a criminal investigation into an alleged health care fraud scheme involving petitioner. Petitioner, along with his associates, were suspected of submitting false claims to various health care benefit programs, in violation of 18 U.S.C. 1347. Pet. App. 2a-3a.

In March 2003, HHS Special Agent Jason Marrero applied for warrants to search petitioner's medical offices in Greenbelt and Oxon Hill, Maryland, and his residence in Potomac. The applications were supported by a 19-page affidavit, in which Agent Marrero established that he had probable cause to believe that "fruits, evi-

dence and instrumentalities of false claim submissions" by petitioner's medical group to health care benefit programs were located in petitioner's medical offices and residence.[1] Pet. App. 3a-4a.

On March 20, 2003, a magistrate judge issued the three requested search warrants. Each warrant was accompanied by an identical two-page "Attachment A," captioned "Items To Be Seized Pursuant To A Search Warrant." Attachment A detailed ten categories of documents and records to be seized at each location, "including, but not limited to, financial, business, patient, insurance and other records related to the business of [petitioner and his two associates], for the period January 1, 1998 to Present, which may constitute evidence of violations of Title 18, United States Code, Section 1347." As is relevant here, the warrants specifically authorized the seizure of "[f]inancial records, including but not limited to accounting records, tax records, accounts receivable logs and ledgers, banking records, and other records reflecting income and expenditures of the business." Pet. App. 4a-6a.

On March 21, 2003, federal agents simultaneously executed the search warrants at petitioner's offices and residence. Before the searches were conducted, Agent Marrero briefed the executing officers and summarized for them the contents of the warrants and affidavit. The officers seized documents at each location, but only the searches of petitioner's residence and his Greenbelt office led to the seizure of records specifically at issue here. From petitioner's residence, "the officers seized,

[1] With respect to petitioner's residence, the affidavit explained that petitioner did most of the insurance billing from his home and that his residence was listed as the billing address for claims submitted electronically to Medicare. Pet. App. 3a-4a.

inter alia, copies of [petitioner's] tax returns; stock brokerage account records; information about the construction of a second home; bank records relating to several family financial transactions; travel information; [petitioner's] wallet; unopened mail; credit cards; Indian currency; a pharmacy card; and checks from various banks."[2] Pet. App. 7a (emphasis added). From petitioner's Greenbelt office, the officers seized, *inter alia*, copies of facsimile transmissions on business stationary directing wire transfers to the State Bank of India and copies of bank remittance records relating to the State Bank of India. Those records indicated that petitioner had, between 1999 and 2000, transferred more than $4 million to the State Bank of India. *Id*. at 7a-8a; Gov't C.A. Br. 6.

After the searches were completed, Agent Marrero advised the United States Attorney's Office of the contents of the Bank of India records. In April 2003, the United States Attorney's Office provided copies of the documents to the Internal Revenue Service (IRS). Because the documents suggested a possible violation of federal treasury regulations, namely the failure to disclose a foreign financial account, the IRS commenced its own investigation. In the course of that investigation, the IRS determined that petitioner had failed to report any foreign bank accounts on his 1999, 2000, and 2001 personal income tax returns. In so doing, petitioner concealed more than $40 million in capital gains on in-

[2] Shortly after the searches were conducted, and pursuant to an agreement between the parties, the government returned to petitioner approximately 80% of the documents that had been seized from his residence, including some Indian currency, the pharmacy card, and various checks. Pet. App. 55a n.16. In doing so, the government did not concede that the records had been improperly seized. *Id*. at 8a & n.6.

vestments in technology stocks and stock options. Pet. App. 8a-9a.

2. On October 12, 2005, a federal grand jury sitting in the District of Maryland returned an indictment charging petitioner with two counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of making false statements on a tax return, in violation of 26 U.S.C. 7206(1). The indictment alleged that petitioner underpaid his income taxes by more than $16 million for tax years 1998 and 1999 and that petitioner failed to disclose certain short-term capital losses on his tax return for 2000.[3] Pet. App. 9a, 34a n.1; Gov't C.A. Br. 12-13.

On January 21, 2006, petitioner filed a motion to suppress the evidence seized in the searches. Petitioner contended that the officers exceeded the scope of the warrants by seizing documents and records that were not related to his business or evidence of health care fraud. Pet. App. 9a-10a, 41a. As is relevant here, the government responded that the warrants authorized the seizure of the documents it intended to use at trial—specifically, 25 financial records (including personal tax documents) seized from petitioner's residence and the Bank of India records seized from petitioner's Greenbelt office. See *id.* at 10a-12a, 37a n.5 (identifying relevant documents).

3. On August 4, 2006, after an evidentiary hearing where it heard testimony from Agent Marrero and an IRS agent, the district court granted petitioner's motion and ordered the suppression of the financial records

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[3] Petitioner has not been criminally charged with health care fraud. In July 2007, however, petitioner agreed to pay the United States $476,000 to settle claims that he fraudulently billed federal health care programs between 1999 and 2003. Pet. App. 34a n.2; Gov't C.A. Reply Br. 4-5 & n.1.

seized from petitioner's residence, the Bank of India records seized from the Greenbelt office, and all other evidence seized in the three searches. The court began by finding that, under the terms of the warrant, the officers were only authorized to seize "documents that related to [petitioner's] business and that may show in some way that health care fraud had been committed." Pet. App. 41a (emphasis omitted).

With respect to the personal financial records seized at petitioner's residence, such as his "personal bank accounts, spreadsheets reflecting his stock transactions, [and] 1099 forms," the district court held that those documents "neither tended to show violations of the health care fraud statute, nor related to the business of [petitioner]." Pet. App. 46a-47a. Accordingly, the court determined that the records were not within the scope of the warrant and should be suppressed. As for the Bank of India records, the court acknowledged that those documents "arguably may have related to the business of [petitioner]." *Id.* at 47a. The court concluded, however, that those documents should also be suppressed because "nothing about them could be seen as suggesting possible violations of 18 U.S.C. 1347." *Id.* at 47a-48a.

The district court further held that, even if the warrants authorized the seizure of some of the documents at issue, suppression was nonetheless required because "the conduct of the agents who executed [the warrants] was so inappropriate as to warrant the exclusion of *all* evidence seized on March 21, 2003." Pet. App. 49a. The court based its blanket suppression holding on two factors. First, the court found that, based on his testimony at the evidentiary hearing, Agent Marrero "did not consider himself to be bound by the language of the warrant specifying that agents were to seize only evi-

dence which tended to show violations of § 1347 *and* was a record of [petitioner's] business." *Id.* at 50a. The court emphasized that Agent Marrero "indicated that he *intended* to seize personal financial records and didn't intend to limit the financial records to business records."[4] *Id.* at 51a (internal quotation marks omitted). Second, the court determined that the "executing agents grossly exceeded the scope of the search warrants." *Id.* at 55a. In addition to the seizure of the specific documents at issue here, the court relied on the fact that the government eventually returned approximately 80% of the records seized at petitioner's residence. The court concluded that such a "large-scale return of information" demonstrated the grossly excessive nature of the searches. *Id.* at 55a n.16. Because the court believed that the "agents' seizure of the many items outside the warrant transformed what should have been a particularized search into a general, unrestricted fishing expedition," it held that such flagrant disregard for the warrants' limitations required blanket suppression of all the evidence seized. *Id.* at 57a.

Finally, the district court found that no exception to the exclusionary rule, such as the inevitable discovery or independent source doctrines, was applicable here. Pet. App. 58a-81a. The district court later denied the government's motion for reconsideration. *Id.* at 84a-94a.

4. The court of appeals vacated and remanded for further proceedings, holding that the documents the government sought to use as evidence were within the

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[4] The district court also found that Agent Marrero's "approach taint[ed] the execution of all three search warrants" because the warrants were essentially identical and Agent Marrero was the officer who briefed the other agents before the searches were conducted. Pet. App. 58a n.17.

scope of the warrants and that the district court had erred in ordering blanket suppression. Pet. App. 1a-31a.

The court of appeals began by noting that it agreed with the district court that the search warrants authorized the seizure only of those documents that were related to petitioner's business and that may have constituted evidence of health care fraud. Pet. App. 18a. It also emphasized that search warrants are "not to be assessed in a hypertechnical manner," but rather should be read "in a commonsense and realistic fashion." *Id.* at 21a (internal quotation marks omitted). In light of those principles, the court then addressed whether the specific documents at issue were covered by the warrants.

With respect to the personal financial documents seized from petitioner's residence, the court of appeals held that the district court erred in finding that those records were "neither business-related nor evidence of health care fraud." Pet. App. 19a. As to the first requirement, the court noted that petitioner's medical practice was operated as a Subchapter S corporation, which meant that petitioner's "portion of the practice's income was passed through and taxed directly to him as an individual." *Id.* at 22a. Consequently, the court held, it was reasonable for the officers executing the warrant to "deem the financial records relating to the medical practice as being nearly synonymous with the financial records of [petitioner] individually." *Id.* at 22a-23a. As to the second requirement, the court of appeals made clear that, in order to be subject to seizure, the documents "were not required, on their face, to necessarily constitute evidence of health care fraud—rather, they only potentially had to be evidence of such fraud." *Id.* at 24a. Noting that a "time-honored concept in white-collar and fraud investigations is simply to 'follow the

money,'" the court held that petitioner's personal financial records, which reveal the magnitude of the funds he possessed and the manner of their acquisition, plainly satisfied the requirement that they "may" constitute evidence of health care fraud. *Id.* at 24a-25a. The court accordingly held that the seizure of documents from petitioner's residence was consistent with the scope of the warrant and the mandate of the Fourth Amendment. *Id.* at 25a.

With respect to the Bank of India records seized from petitioner's Greenbelt office, the court of appeals held that the district court erred in finding that those documents did not constitute potential evidence of health care fraud. In accordance with its "follow the money" observation, the court of appeals stated that "the financial records of a suspect may well be highly probative of violations of a federal fraud statute," and the district court was mistaken in suggesting otherwise. Pet. App. 26a; *id.* at 26a-27a (noting that, in the context of a fraud investigation, "the financial and accounting records of the suspects—and, as here, records reflecting the overseas transfer of large sums of money by a prime suspect—are potentially compelling evidence that the scheme has been conducted and carried out, and that, in the terms of § 1347, 'money or property' has been obtained as the result of false or fraudulent billing practices"). As a result, the court found that the Bank of India records were properly seized. *Id.* at 27a.

Having determined that the documents at issue were within the scope of the warrants, the court of appeals next examined the district court's blanket suppression order. The court noted that, "as a general rule, if officers executing a search warrant exceed the scope of the warrant, only the improperly-seized evidence will be

suppressed; the properly-seized evidence remains admissible." Pet. App. 28a (quoting *United States* v. *Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001)). The court further emphasized that blanket suppression is only warranted in "extraordinary circumstances," such as when "officers flagrantly disregard the terms of the warrant by engaging in a fishing expedition for the discovery of incriminating evidence." *Ibid.* (internal quotation marks omitted).

The court of appeals held that it was "unable to identify any extraordinary circumstances" that justified blanket suppression here. Pet. App. 29a. It noted that the district court's conclusion that the executing officers had grossly exceeded the scope of the warrants was based largely on the view that the agents had improperly seized petitioner's personal financial records and that Agent Marrero had "intended" to seize such documents. *Ibid.* But those justifications, the court of appeals observed, were "substantially undercut[]" by its determination that those documents were, in fact, within the scope of the warrants. *Ibid.* The court of appeals also rejected the district court's reliance on the fact that the government returned to petitioner approximately 80% of the documents seized from the residence, noting that the mere fact that property seized pursuant to a valid warrant was voluntarily returned "does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional." *Id.* at 30a n.20.

Finally, the court of appeals held that even assuming Agent Marrero subjectively believed that he was not limited by the terms of the warrant, as the district court found, "such an assumption does not support the blanket suppression ruling." Pet. App. 29a. This was because "a constitutional violation does not arise when the actions

of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer." *Ibid.* (citing *Maryland* v. *Macon*, 472 U.S. 463 (1985)) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." (internal citations omitted)). Because the court of appeals determined that no constitutional violation had occurred, it concluded that Agent Marrero's subjective belief as to the scope of the warrants was irrelevant. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-23) that all of the evidence seized pursuant to the search warrants should have been suppressed. The court of appeals correctly held otherwise, and its ruling does not conflict with any decision by this Court or any other court of appeals. Further review is therefore unwarranted.

1. As an initial matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals reversed a pretrial suppression order and remanded the case to the district court for further proceedings. Pet. App. 31a. Petitioner has not yet gone to trial. The lack of any final judgment below is "a fact that of itself alone furnishe[s] sufficient ground" for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (explaining that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen* v. *Bangor &*

Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 n.63 (9th ed. 2007). That salutary practice, which promotes judicial efficiency and prevents unnecessary trial delays, should be followed here. If petitioner is acquitted at trial, his claim that all the evidence seized from the searches should be suppressed will be moot. In contrast, if petitioner is convicted and his conviction is affirmed on appeal, he will be able to reassert his current claim, together with any other legal challenges to his conviction and sentence he may have, in a single petition. Accordingly, review by this Court would be premature at this juncture.[5]

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[5] Petitioner contends (Pet. 22) that it would be "inequitable" for the government to suggest that review should be denied because of the interlocutory posture of this case when the government itself had initiated interlocutory review under 18 U.S.C. 3731. That claim is unfounded. The government has a statutory right to bring an interlocutory appeal from the suppression of evidence because double jeopardy would preclude an appeal if the government went to trial without the evidence and petitioner were acquitted. A defendant, in contrast, has no right of interlocutory appeal because an order denying suppression can be appealed at the conclusion of a case if it ends in conviction. See *United States* v. *Williams*, 413 F.3d 347, 354 (3d Cir. 2005). The ruling of the court of appeals restores petitioner to the same position that he would have occupied if the district court had denied suppression. There is nothing inequitable about asking petitioner to follow the rules generally applicable to criminal defendants and wait until the end of his case to present his claims to this Court in one petition.

2. Petitioner asserts (Pet. 8-14) that the "court of appeals' decision deepens a conflict among the federal courts of appeals and state courts of last resort concerning the validity and application of the 'flagrant disregard' doctrine," particularly on the "relevance of officers' subjective views to the analysis." Pet. 8. This case does not present an occasion for resolving the alleged conflict, and no further review is warranted.

a. Under the Fourth Amendment, a warrant must "particularly describ[e] the place to be searched[] and the persons or things to be seized." U.S. Const. Amend. IV. The principal purpose of the particularity requirement is to prevent general searches. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Ibid.*; see also *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976); *Marron* v. *United States*, 275 U.S. 192, 196 (1927).

The principles underlying the particularity requirement extend to the execution of a warrant. As this Court has held, "if the scope of the search exceeds that permitted by the terms of a validly issued warrant * * * , the subsequent seizure is unconstitutional without more." *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999) (quoting *Horton* v. *California*, 496 U.S. 128, 140 (1990)). Thus, absent some exception to the exclusionary rule, evidence seized that was not authorized by the warrant will be suppressed.

When a warranted search yields both properly seized evidence and improperly seized evidence, however, the

courts of appeals have consistently held that, "as a general rule, * * * only the improperly-seized evidence will be suppressed; the properly-seized evidence remains admissible." Pet. App. 28a (quoting *United States* v. *Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001)); see, *e.g.*, *United States* v. *Hamie*, 165 F.3d 80, 84 (1st Cir. 1999); *United States* v. *Chen*, 979 F.2d 714, 717 (9th Cir. 1992) (citing *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir. 1982)); *Marvin* v. *United States*, 732 F.2d 669, 674 (8th Cir. 1984); *United States* v. *Wuagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982). This Court has recognized the validity of those decisions. See *Waller* v. *Georgia*, 467 U.S. 39, 44 n.3 (1984).

Notwithstanding that basic approach, most courts of appeals have recognized a narrow exception to the general rule of partial suppression. According to those courts, total suppression is required, including for items that were within a warrant's scope, if the officers demonstrated a "flagrant disregard for the limitations in a warrant" and thereby "transform[ed] an otherwise valid search into a general one." *Heldt*, 668 F.2d at 1259 (citing *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978)); see, *e.g.*, *United States* v. *Liu*, 239 F.3d 138, 141 (2d Cir. 2000) (noting that "blanket suppression" is warranted when a search "is essentially indistinguishable from a general search"), cert. denied, 534 U.S. 816 (2001); *United States* v. *Foster*, 100 F.3d 846, 853 (10th Cir. 1996); *Chen*, 979 F.2d at 717; *Marvin*, 732 F.3d at 674.

The courts of appeals are in agreement, however, that use of a blanket suppression remedy should be re-

served for only the most extraordinary circumstances. It has been said to be justified only in those "extreme situations" where, despite the existence of a validly issued warrant, the investigators engaged in a "fishing expedition" that resembled the indiscriminate rummaging associated with general searches. *Hamie*, 165 F.3d at 83-84; see, *e.g.*, *United States* v. *Hill*, 322 F.3d 301, 306 (4th Cir.), cert. denied, 540 U.S. 894 (2003); *Chen*, 979 F.2d at 717. But blanket suppression is to be the rare exception, not the rule. See *Foster*, 100 F.3d at 852 (noting that blanket suppression should be "exceedingly rare").

b. Even assuming, as petitioner contends, 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, this case does not implicate any such conflict. This is because no court of appeals, including those that purportedly consider subjective intent, would have ordered blanket suppression on the facts of this case.

Although many courts of appeals have recognized the existence of the "flagrant disregard" doctrine, only three published federal appellate decisions appear to have applied the doctrine in favor of blanket suppression. See *United States* v. *Rettig*, 589 F.2d 418 (9th Cir. 1978); *United States* v. *Medlin*, 842 F.2d 1194 (10th Cir. 1988); *United States* v. *Foster*, 100 F.3d 846 (10th Cir. 1996); see also 2 Wayne R. LaFave, *Search and Seizure* § 4.10, at 769 n.189 (4th ed. 2004). Each of those decisions is plainly distinguishable from the present case.

In *Rettig*, the Ninth Circuit held that all the evidence seized during a warranted search of a residence must be suppressed because the warrant, "[a]s interpreted and executed by the agents," "became an instrument for con-

ducting a general search." 589 F.2d at 423. Specifically, the court found that the seizure of 2288 items, the "vast majority" of which were written materials, "substantially exceeded any reasonable interpretation" of a warrant that authorized the seizure of marijuana drug paraphernalia and indicia of residency in the home being searched. *Id.* at 421, 423. Similarly, in *Medlin*, the Tenth Circuit found that the agents flagrantly disregarded the limiting terms of a warrant when they seized "667 items of property none of which were identified in the warrant authorizing the search." 842 F.2d at 1196, 1199. Because the officers "employed the execution of the federal search warrant as a 'fishing expedition,'" and thereby "transformed" a valid warrant into a "general warrant," the court held that blanket suppression was required. *Id.* at 1199. Finally, in *Foster*, the Tenth Circuit held that total suppression was necessary where officers, executing a warrant that authorized the seizure of marijuana and four firearms from a residence, seized "anything of value" from defendant's home, regardless of whether it was specified in the warrant. 100 F.3d at 849-853. The court explained that such a search was, in essence, "a general search conducted in flagrant disregard for the terms of the warrant." *Id.* at 853. Accordingly, the court upheld the blanket suppression order.

Unlike those three cases, the court of appeals here did not find that the agents "grossly exceeded" the scope of the warrant or otherwise "transformed" a valid warrant into an instrument for conducting a "general search." Indeed, the court of appeals rejected the district court's interpretation of the warrants and held that petitioner's personal financial documents were within the scope of the warrants and, therefore, properly seized by the executing officers. Pet. App. 22a-23a. Based on

the court of appeals' interpretation, which petitioner does not presently challenge, the bulk of the records identified by the district court as exceeding the warrants' scope, such as petitioner's "personal bank accounts, spreadsheets reflecting his stock transactions, 1099 forms, etc.," *id.* at 46a, actually fell squarely within the warrants' terms.[6] Because the district court's "flagrant disregard" finding was premised on its mistaken interpretation of the warrants' limitations, the court of appeals correctly observed that its reading of the warrants "substantially undercut[]" the district court's rationale for blanket suppression. *Id.* at 29a. Thus, contrary to the district court's finding, the executing agents did not grossly exceed the scope of the warrants; therefore, unlike the cases that have ordered blanket suppression, the searches here were not transformed into an impermissible general search. Given that finding, the court of appeals correctly held that total suppression was not warranted.

The court of appeals' decision is also consistent with the rulings of those courts that have recognized, but not applied, the flagrant disregard exception. Those courts have stated that blanket suppression is appropriate only where the executing officer's violation of a warrant is so extreme that it "transform[s] an otherwise valid search into a general one." *Heldt*, 668 F.2d at 1259; *Hamie*, 165 F.3d at 83-84; *United States* v. *Liu*, 239 F.3d 138, 141-142 (2d Cir. 2000); *United States* v. *Robinson*, 275 F.3d 371, 381-382 (4th Cir. 2001), cert. denied, 535 U.S. 1006,

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[6] As for the documents voluntarily returned to petitioner, which the district court relied on as evidence of a grossly excessive search, the court of appeals rejected any such inference and held that there was no evidence that the "initial seizure" of those records "was unconstitutional." Pet. App. 30a n.20.

and 535 U.S. 1070 (2002); *United States* v. *Garcia*, 496 F.3d 495, 507-508 (6th Cir. 2007); *Marvin*, 732 F.2d at 674-675; *Wuagneux*, 683 F.2d at 1352-1353. For the reasons discussed above, the searches conducted here did not constitute a general search.

Critically, no court of appeals has indicated that total suppression would be appropriate absent some underlying constitutional violation, a finding that is noticeably lacking here. See, *e.g.*, *Marvin*, 732 F.2d at 674 ("Even if there was an unlawful seizure beyond the limitations of the warrant, a question we do not reach, the [defendants] have not made a sufficient showing to require that all documents seized during the search of the clinic be returned."); *Hamie*, 165 F.3d at 83-84; *Liu*, 239 F.3d at 141-142; *Wuagneux*, 683 F.2d at 1354; *United States* v. *Lambert*, 771 F.2d 83, 93 (6th Cir.), cert. denied, 474 U.S. 1034 (1985); see *Scott* v. *United States*, 436 U.S. 128, 135-136 (1978) ("determining whether application of the exclusionary rule is appropriate" takes place "*after* a statutory or constitutional violation has been established"). As petitioner acknowledges (Pet. 16), "a constitutional violation does not arise when the actions of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer." Pet. App. 29a. The court of appeals correctly articulated that principle and, in accordance with it, did not find that any constitutional violation had taken place during the searches. *Ibid*.

Moreover, each document or record the government seeks to introduce as evidence at trial was held to be properly seized pursuant to the search warrants. That fact further distinguishes this case from those that ordered blanket suppression and strongly counsels against the imposition of any total suppression remedy.

See *United States* v. *Schandl*, 947 F.2d 462, 465 (11th Cir. 1991) (noting that "seizure of items not covered by a warrant does not automatically invalidate an otherwise valid search" and that "[t]his is especially true where the extra-warrant items were not received into evidence against the defendant"), cert. denied, 504 U.S. 975 (1992); see also *Waller*, 467 U.S. at 43 n.3 (finding "there is certainly no requirement that lawfully seized evidence be suppressed" when defendant contends "only that the police unlawfully seized and took away items unconnected to the prosecution").

In sum, the court of appeals did not find that the executing officers had grossly exceeded the scope of their search, or otherwise transformed a valid search into a general one. To the contrary, the court did not hold that any constitutional violation had taken place, an essential predicate for triggering the potential application of the exclusionary rule and a blanket suppression remedy. Finally, all of the documents the government seeks to introduce as evidence were found to have been properly seized. Under these circumstances, no court of appeals would have ordered blanket suppression, regardless of whether subjective intent is considered in the analysis.

2. Petitioner next contends (Pet. 14-20) that the court of appeals' decision conflicts with "this Court's decisions concerning the exclusionary rule." Pet. 14. That argument lacks merit and does not warrant this Court's review.

a. As an initial matter, to the extent this Court has considered the "flagrant disregard" doctrine, it has indicated that blanket suppression is appropriate only when "officers exceeded the scope of the warrant in the places searched," not when they exceed it in terms of the items seized. *Waller*, 467 U.S. at 43 n.3. In *Waller*, the Court

responded to petitioners' argument that evidence should be suppressed because the police had "flagrantly disregarded the scope of the warrants in conducting the seizure" by referencing *Heldt* and *Rettig* and noting that "[p]etitioners do not assert that the officers exceeded the scope of the warrant in the places searched." *Ibid.* The Court then found that only those items "unlawfully seized" were subject to exclusion. *Ibid.*

Based on the Court's statements in *Waller*, two courts of appeals have concluded that "an officer flagrantly disregards the limitations of a warrant only where he exceeds the scope of the warrant *in the places searched* (rather than the items seized)." *Garcia*, 496 F.3d at 507 (internal quotations marks omitted); *United States* v. *Decker*, 956 F.2d 773, 779 (8th Cir. 1992). Even if the Court's approach in *Waller* did not establish the outer boundaries of the flagrant disregard doctrine, see Pet. 15, the court of appeals' decision here is, at the very least, entirely consistent with the Court's ruling in that case.

b. Even assuming that the flagrant disregard doctrine has application in the context of excessive seizures, the court of appeals' decision does not conflict with this Court's decisions concerning the exclusionary rule.

This Court has repeatedly recognized that the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, and thereby allowing culpable defendants to go free. See, *e.g.*, *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 364 (1998); *United States* v. *Payner*, 447 U.S. 727, 734 (1980); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). Given the "rule's 'costly toll' upon truth-seeking," this Court has cautioned that "[s]uppression of evidence" should be a "last resort," not

a "first impulse." *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006); *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009). The Court has also emphasized that the exclusionary rule is a "remedial device," and that its application has therefore been "restricted to those instances where its remedial objectives are thought most efficaciously served." *Arizona* v. *Evans*, 514 U.S. 1, 11 (1995).

In light of those concerns, total suppression is not an appropriate remedy (if at all) unless the officers executing the search grossly exceeded the scope of the warrant. And blanket suppression is surely unacceptable when, as is the case here, a court has not found there to be a constitutional violation in the first place. See p. 18, *supra* (quoting *Scott* v. *United States*, 436 U.S. at 135-136). Accordingly, the court of appeals correctly concluded that blanket suppression, particularly when the only evidence to be introduced at trial was properly seized, was not justified here.

c. Petitioner also contends that the court of appeals erred by holding that "the subjective views of [Agent Marrero] were not relevant in determining the applicability of the flagrant disregard doctrine." Pet. 16 (internal quotation marks omitted). Petitioner's argument is misplaced. Although the court of appeals did hold that the "subjective views of Agent Marrero were not relevant," it did so in the context of determining that "the actions of the executing officers [were] objectively reasonable and within the ambit of [the] warrants"—a context that was undeniably proper—not in formulating a remedy for a constitutional violation. Pet. App. 29a. Indeed, there was no finding by the court of appeals that the scope of the warrants was exceeded, much less that the searches were conducted in a "flagrant" manner. Because the court of appeals found there to be no under-

lying constitutional violation, it did not need to address whether an officer's subjective intent is relevant to the question of appropriate remedy. *Ibid.* (citing *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985)). Therefore, the question of whether, or to what extent, an officer's subjective intent plays a role in determining the potential exclusion of evidence is not presented by this case. Furthermore, even if an executing agent's subjective motivations were relevant, blanket suppression would not be appropriate here given that the officers did not grossly exceed the scope of the warrants, but instead seized personal financial records in accordance with the warrants' authorization.[7] See, *e.g.*, *Liu*, 239 F.3d at 141-142 (holding that the officers' intent was irrelevant to the exclusion inquiry where the "officers did not 'grossly exceed' the terms of the warrant").

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[7] Petitioner also argues (Pet. 19-20) that the court of appeals erred by "failing to engage in any inquiry concerning the overbreadth of the searches." Pet. 19. That contention is incorrect. As noted above, the court of appeals determined that, in light of its interpretation of the warrants, its holding "substantially undercut[]" the district court's determination that the officers grossly exceeded the scope of the warrants. Pet. App. 28a-29a. The court of appeals also held, without challenge from petitioner here, that the mere fact that property seized pursuant to a valid warrant was voluntarily returned "does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional." *Id.* at 30a n.20. Based on those two observations, it is evident that the court of appeals rejected the notion that the searches conducted here were substantially overbroad.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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