COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 United States Petition for Writ of Certiorari Court of Appeals No. 24CA0683 Opinion by Judge Tow Dunn and Meirink, JJ., concur	DATE FILED June 12, 2025 3:26 PM FILING ID: 8E403E0A76202 CASE NUMBER: 2025SC348
Petitioner: Ruby Johnson, v. **Respondents:** Gary Staab, an officer of the Denver Police Department, in his individual capacity, and Gregory Buschy, an officer of the Denver Police Department, in his individual capacity.	
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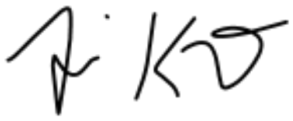
PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I here certify that this Petition for Writ of Certiorari complies with all the requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with the applicable word limits set forth in C.A.R. 52(f)(1) because it contains 3,798 words.



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ISSUES PRESENTED

(1) Whether, in a civil cause of action under C.R.S. §13-21-131 for violation of article II, section 7 of the Colorado Constitution premised on falsehoods and omissions in a search warrant affidavit that were necessary to the finding of probable cause, a plaintiff must also show that the misrepresentations were made knowingly or with reckless disregard for the truth.

(2) Whether, where the jury concluded that Respondents willfully and wantonly caused the unlawful search of Petitioner's home by submitting a materially misleading search warrant affidavit, it was error to reverse even under the court of appeals' standard that falsehoods and omissions had to be made knowingly or with reckless disregard for the truth.

JURISDICTION

This petition seeks review of the court of appeals' opinion in No. 24CA0683, *Johnson v. Staab*, 2025 COA 45, announced May 1, 2025. This Court has jurisdiction under Colo. Const. art. VI, §§1-2 and C.R.S. §13-4-108. No party sought rehearing nor any extension of time within which to file this petition.

PENDING CASES

Petitioner is not aware of any pending cases in which this Court has granted review of the issues presented.

STATEMENT OF THE CASE

This is a case of first impression about the meaning of our state constitution's command, under article II, section 7, that searches require probable cause.

Article II, section 7 of the Colorado Constitution guarantees that

> "the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place . . . shall issue without describing the place to be searched . . . without probable cause, supported by oath or affirmation reduced to writing."

Petitioner Ruby Johnson is a 79-year-old retiree whose world was turned upside down when her Montbello home became the wrongful subject of a police search in the investigation of a downtown theft. Ms. Johnson had just taken a shower and was watching television in her robe, bonnet, and slippers when the SWAT team swarmed her property.

After a week-long trial, a jury determined that the search warrant affidavit contained material false statements and omissions that were necessary to the finding of probable cause. It found for Ms. Johnson on her single claim for relief under C.R.S. §13-21-131 ("section 131"), a statute enacted as part of the landmark Enhance Law Enforcement

Integrity Act, S.B. 20-217, which authorized a civil cause of action against peace officers who violate individual rights protected under the Colorado Constitution. The jury also concluded beyond a reasonable doubt that Respondents, the law enforcement officers who submitted the materially misleading affidavit, acted willfully and wantonly in causing the unlawful search, and awarded Petitioner exemplary damages on that basis.

The court of appeals ("COA") reversed the jury's verdict, concluding that it was mis-instructed on what is necessary to impose civil liability for a violation of article II, section 7 based on false and misleading statements in a search warrant affidavit.

The jury instructions explained that "[t]o obtain a search warrant, a law enforcement officer must show probable cause" and that "a judge generally relies on the facts stated in an affidavit signed by a law enforcement officer." They stated that for Petitioner to show Respondents caused a violation of her article II, section 7 rights, she needed to prove that:

> (1) In the warrant affidavit, [Respondents] made false statements, or omissions that created a falsehood; and

(2) Those false statements or omissions were material, or necessary, to the finding of probable cause.

The instructions further directed that "[t]o determine whether any misstatements or omissions were material," the jury should "subtract the misstatements from the warrant affidavit and add the facts that were omitted, and then determine whether the warrant affidavit, with these corrections, would establish probable cause." They defined probable cause and explained that it "involves a practical, commonsense evaluation of the totality of the circumstances," requiring the jury to "consider what [Respondents] knew, the reasonably trustworthy information [Respondents] received, and reasonable inferences that may flow from the information in the affidavit."

The trial court (Scoville, J.) declined Respondents' request to instruct the jury based on the federal standard for liability for officers sued under 42 U.S.C. §1983 for violating the Fourth Amendment based on a misleading affidavit. That test, first articulated in *Franks v. Delaware*, 438 U.S. 154 (1978), defines liability under section 1983 for officers with qualified immunity, a judge-made doctrine that prevents

compensation for constitutional violations unless they were "objectively unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986).[1] The federal test imposes liability for material falsehoods and omissions only where they were made either intentionally or with reckless disregard for the truth.

In rejecting an instruction based on the federal test, the trial court concluded that this Court's precedents suggest such a state of mind showing is not required to determine whether a search was conducted without probable cause under the Colorado Constitution.

In a published opinion, the COA reversed. It held as a matter of first impression that falsehoods and omissions in an affidavit, even if they are necessary to the finding of probable cause, do not establish liability under section 131 unless they were made intentionally or with reckless disregard for the truth. *Johnson v. Staab*, 2025 COA 45, ¶2. The court ruled it was reversible error not to instruct the jury to review the

[1] *Green v. Thomas*, 3:23-CV-126-CWR-ASH, 2024 WL 2269133, at *1 (S.D. Miss. May 20, 2024) (explaining that §1983 itself imposes strict liability for constitutional violations and that the invention of qualified immunity was "an unconstitutional error" of the judiciary).

affidavit with that state of mind requirement. *Id*. In effect, the COA adopted the federal test for section 131 claims asserting violations of the state constitution.

In so holding, the COA rejected Petitioner's arguments that adopting the federal test would conflict with the text and purpose of section 131, which explicitly (1) rejects the doctrine of qualified immunity, (2) contemplates liability where officers act on a good faith, reasonable belief their actions are lawful, and (3) requires a remedy when a peace officer *causes* the deprivation of an individual's rights. *Id.* ¶¶31–33. The court did not consider whether the federal *Franks* test, crafted to address when the suppression of evidence is necessary in a criminal case, is the proper gauge for when Coloradans should be compensated after their rights are violated by the police. Finally, the court rejected the argument that any possible error in the instructions was harmless given the jury's verdict on exemplary damages. *Id.* ¶38.

ARGUMENT

Several weighty considerations intersect to warrant review of this Petition. First, Issue 1 presents a question of first impression and

profound public importance: the standard for proving a violation of article II, section 7 of the Colorado Constitution in a civil suit brought under C.R.S. §13-21-131 based on a search resulting from an officer's false, materially misleading affidavit. The COA adopted the federal test, infused with qualified immunity, based on its use in the criminal context for when evidence seized in a search must be suppressed. But in so doing, the court failed to grapple with crucial distinctions between the civil and criminal contexts and between liability under section 131 and federal law. It mistook the test for a disfavored remedy—suppression of evidence—as the dividing line between what does and does not offend the constitution. And by importing that test into section 131, it imposed a bad faith requirement for liability that the General Assembly rejected.

The court's wrongly reasoned decision blesses the notion that officers can demonstrate probable cause through falsehoods. That is wrong. It misconstrues this Court's precedents, weakens the protection of article II, section 7, and thwarts the intent of section 131. This Court's review is necessary to ensure the state standard is decided based on the

robust consideration that question is due and to curb the harm of the COA's published opinion.

Second, this case is an ideal vehicle for addressing the legal question it presents. The issue is preserved; it has been a central dispute in the case since summary judgment; the parties are well positioned to aid the Court's review; and consideration of the legal question will not mire this Court in fact disputes. And because this case does not involve a criminal prosecution, it presents the constitutional issue separate and apart from the countervailing policy concerns animating criminal suppression jurisprudence.

On the other hand, declining review would stifle this Court's opportunity to mitigate the corrosive effect of the COA's decision, which bars future claims as a matter of law. Permitting the opinion below to stand will invite careless police investigations, bless law enforcement's overreliance on new technology to the detriment of personal privacy, and undermine courts' ability to serve as meaningful checks in the warrant application process.

Finally, while reversal is warranted under Issue 1, Issue 2 also raises unsettled questions regarding the intersection of different state of mind requirements and the role of a jury's damages verdict in harmless error review. To preserve its flexibility in addressing the legal issues potentially implicated by this appeal, this Court should grant review of the Petition in its entirety.

I. Issue 1 presents a question of first impression concerning the meaning of a fundamental right, a state constitutional protection, and landmark legislation, and this case is the right vehicle for addressing it.

The proper standard under section 131 for proving a violation of article II, section 7 of the Colorado Constitution based on a materially misleading affidavit is a question deserving this Court's consideration.

The issue is one of first impression. It was only in 2020 that the legislature enacted section 131, which created a civil cause of action for law enforcement officers' violations of the state bill of rights. The statute imposes liability wherever a "peace officer. . . under color of law, subjects or causes to be subjected . . . any other person to the deprivation of any individual rights . . . secured by the bill of rights, article II of the state constitution." C.R.S. §13-21-131(1). The legislature chose to provide relief

even when an officer acts in good faith, *id.* §131(4), and expressly rejected qualified immunity, *id.* §131(2)(b).

Prior to the enactment of section 131, a person aggrieved by a misleading affidavit could seek a remedy in two contexts. First, if the resulting search returned probative evidence, the defendant in any criminal prosecution could move to suppress such evidence under *Franks v. Delaware*, 438 U.S. 154, 166 (1978), and *People v. Dailey*, 639 P.2d 1068 (Colo. 1982). Second, the individual could seek to overcome qualified immunity and sue for damages under the federal constitution through a civil rights action under 42 U.S.C. §1983.

Under federal law, securing either remedy required a showing that the officer made knowing or reckless falsehoods or omissions material to probable cause. *United States v. Leon*, 468 U.S. 897, 923 (1984); *Malley*, 475 U.S. at 345–46. Under Colorado criminal law, while this Court held that suppression is *necessary* where a warrant issued on intentional or reckless material falsehoods, it declined to prescribe "the consequences which would follow under the United States and Colorado Constitutions" where the probable cause finding resulted from misrepresentations in the

affidavit that were not the product of an affiant's bad faith, leaving that to the discretion of trial courts. *Dailey*, 639 P.2d at 1075; *People v. Reed*, 56 P.3d 96, 99 (Colo. 2002). This case is the first opportunity to address the proper standard under state law for relief in the civil context.

In considering what test to apply to Petitioner's civil claim under the new section 131, the trial court concluded the Colorado Constitution did not require the same showing as federal law. The court noted that this Court has construed article II, section 7 as more protective of individual rights than the Fourth Amendment, including in the context of veracity hearings. It observed that in *Dailey* and its progeny, this Court left room for trial courts to determine what consequences should follow when officers secure warrants based on falsehoods not shown to have been made in bad faith. It also noted that, given doctrinal differences, the civil test for proving violation of a constitutional right should not necessarily track the criminal test for suppression of evidence. Ultimately, the court instructed the jury to review the affidavit for material falsehoods and "consider what Defendants knew, the reasonable trustworthy information Defendants received, and reasonable inferences

that may flow from the information in the affidavit." The court left it to the parties to make their arguments to the jury about whether, given the officers' state of mind in their preparation of the affidavit, their representations amounted to material falsehoods that vitiated probable cause.

In reversing the jury's verdict, the COA acknowledged that this Court has allowed that material misrepresentations not made in bad faith still carry constitutional consequence. *Johnson*, ¶28 (quoting *Dailey*, 639 P.2d at 1075); *id.* ¶26 n.3. Yet the COA nonetheless went on to construe some statements from this Court's criminal jurisprudence as precluding such misrepresentations from forming the basis for section 131 liability—even though the legislature designed the statute to impose liability notwithstanding an officer's good faith. The COA opinion is worth this Court's reconsideration for several reasons.

First, the entire decision rests on flawed deductions from this Court's precedents reviewing criminal veracity hearings. The COA notes that in *Dailey*, this Court disagreed with the lower court's "assumption that all false information in an affidavit for search warrant must be

stricken, without regard to the source of the error, before determining its sufficiency to establish probable cause." *Johnson*, ¶28 (quoting 639 P.2d at 1075). And the COA observed that, in *Reed*, this Court reversed a suppression ruling based on a trial court's excision of certain statements from an affidavit. *Id.* But neither case is fairly read as signifying this Court's broader conclusion that the probable cause requirement of article II, section 7 can be satisfied through falsehoods. Neither case requires or even supports the conclusion that where a person's home would not have been searched but for falsehoods in the affidavit, the person can be denied a remedy under section 131.

Instead, the discussion in both cases is a product of their procedural posture: appeals of rulings on *motions to suppress evidence* based on a veracity challenge. At most, they are examples of the principle that the exclusionary remedy is not always appropriate. *See Reed*, 56 P.3d at 99 ("false statements may result in a mistaken finding of probable cause"; when such falsehoods are not a result of the affiant's bad faith, that raises "*the question of appropriate sanctions*") (emphasis added). The COA's decision separated these cases from their doctrinal context.

The *Dailey* test derives from *Franks*, which reversed a state supreme court ruling that a criminal defendant could never challenge the veracity of a sworn statement used to secure a search warrant. 438 U.S. at 155. Reasoning that when the constitution "demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing," *id.* at 165, the *Franks* Court held that a defendant must be able to challenge the truthfulness of factual statements made in an affidavit supporting the warrant, with the potential to exclude the fruits of the search. But because the exclusion of probative evidence raised "competing values," the Court limited such challenges to those where the defendant could show the officer's deliberate falsification or reckless disregard for the truth. *Id.* at 165–171.

The Court conceived of the exclusionary rule as "a judicially created remedy extended where its benefit as a deterrent [of official misconduct] promises to outweigh the societal cost of its use . . . interfering with a criminal conviction," *not* a means to vindicate personal constitutional rights. *Franks,* 438 U.S. at 166. Indeed, in adopting its test, the *Franks* Court acknowledged that it left "a broad field where the magistrate is the

sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination," or, put differently, where a constitutional violation could occur without the state of mind required for suppression.

Only this Court can clarify whether its statements in *Dailey* and *Reed* should be read to preclude liability under section 131 and allow some falsehoods to satisfy the probable cause requirement of article II, section 7. That requires considering whether the doctrine that justified limitations on when a criminal defendant could challenge an affidavit's truthfulness, for the purpose of suppressing evidence probative of their guilt, should limit when a plaintiff in a civil suit can vindicate the intrusion of their home based on a warrant that never should have issued. *Id.* at 165.

Collapsing the two inquiries allowed the COA to reject out of hand Petitioner's arguments that adopting the federal test would (1) graft a qualified immunity defense onto section 131 that the legislature expressly rejected, (2) read into the statute a state of mind requirement

where the legislature included none, and (3) conflict with language in the statute expressly contemplating liability for officers who act in good faith. *See Johnson*, ¶¶31–33. But these arguments merit meaningful consideration.

This Court should grant review of Issue 1 to afford the standard under section 131 the robust and careful analysis that question is due.

This case is the right vehicle for taking up that question. First, whether the jury was properly instructed is a pure question of law. The issue has been contested since the earliest stages of this litigation, and counsel are well prepared to assist this Court's review. Moreover, the two lower courts presented with the question came to opposing conclusions, providing this Court competing judicial analyses to consider.

Further, it is undisputed that Ms. Johnson was never a suspect and that the stolen items were never at her house. She brought this case solely to vindicate the violation of her privacy and security in her home. The relief she seeks risks none of the societal costs that courts have weighed in considering the suppression of evidence; instead, it serves

precisely the public purpose section 131 was designed to advance. The case thus cleanly presents the constitutional question.

On the other hand, denying review in this case risks eliminating future opportunities for this Court to weigh in. Should the COA's opinion stand, future plaintiffs will be barred as a matter of law from bringing complaints under section 131 to vindicate their rights absent proof of an officer's state of mind. The COA's conclusion will settle the matter, effectively endorsing certain types of false statements and omissions in warrant affidavits.

Especially troubling is that the COA does so in the context of officers' misrepresentations about technology with which they had no experience, knowledge, or training. When a warrant application relies on such technology, the importance of candor to the tribunal is at its height. Here, among other things, Respondents swore in their affidavit that a Find My screenshot signified that contraband was inside Ms. Johnson's home—even though a quick google search would have told them that was false. And they said nothing to disclose their total ignorance of the technology. They thus deprived the reviewing judge of the ability to

properly weigh the facts. Blessing the officers' misrepresentations in this case will undermine judges' ability to evaluate probable cause independently. This Court's intervention is necessary to prevent the weakening of the probable cause requirement and the reviewing judge's constitutional function.

II. Granting review of Issue 2 will preserve this Court's flexibility in resolving this appeal.

Petitioner requests that this Court also grant review of Issue 2, which asks whether reversal on the basis of the jury instructions was appropriate given the jury's conclusion, evidenced by its exemplary damages verdict, that Respondents acted willfully and wantonly.

As the COA acknowledged, under harmless error review, reversal based on instructional error is only appropriate where the jury "probably would have decided [the] case differently if given a correct instruction." *Johnson*, ¶36.

Here, the jury concluded—beyond a reasonable doubt—that Respondents acted "in a willful and wanton manner in causing Plaintiff's injuries or damages." *Id.* ¶39. The sole claim in the litigation was that Respondents caused Petitioner's injuries and damages by making "false

statements, or omissions that created a falsehood," which were "material, or necessary, to the finding of probable cause." "Willful and wanton" means conduct "purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." *Id.* ¶40. Nonetheless, the COA reversed because of its conclusion that there was a possibility that the jury thought the misrepresentations necessary to probable cause were merely negligent.

This Court's review of Issue 2 is warranted not merely to correct the COA's error, but to remedy confusion generated by its reasoning. The COA suggested that the definition of reckless disregard for the truth "differs" from the definition of willful and wanton conduct. *Id.* ¶40. But it failed to explain how misstatements or omissions made in a willful and wanton manner would not necessarily satisfy the standard for ones made with reckless disregard for the truth. In any event, this Court has not addressed the relationship between these two standards, and granting review of Issue 2 would permit it to clarify the law.

In addition, citing no law, the COA explained that it could not deem the supposed instructional error harmless because the jury was instructed to reach the question of exemplary damages only after concluding the properly revised warrant lacked probable cause. *Id.* ¶42. It reasoned that had the jury been instructed to disregard falsehoods that were merely negligent, "it may not have found liability at all and, thus, may never have reached the question of punitive damages." *Id.* But that logic turns harmless error review on its head. The question is whether "the record shows that the jury might have reached a different verdict with a correct instruction." *Waneka v. Clyncke*, 134 P.3d 492, 494 (Colo. App. 2005). Here, the jury's verdict on exemplary damages demonstrates that it rejected any theory that the material misstatements were merely negligent. This Court should grant review of Issue 2 to address confusion introduced by the COA's harmless error review.

Finally, because each of these legal questions could provide a basis for reversal, this Court should grant review of Issue 2 to preserve flexibility in resolving this appeal.

CONCLUSION

Because this case involves uncharted legal territory deserving of the depth of consideration only this Court is institutionally situated to provide, and because this case is well suited to addressing the legal questions it presents, Petitioner respectfully requests that the Court grant the petition.

Respectfully Submitted, Date: June 12, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2025, I served a true and correct copy of the foregoing document to all counsel of record via the Colorado Courts E-Filing System. Courtesy copies were sent via email to counsel of record from the appeal, 24CA0683.

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