

DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO Denver City & County Building 1437 Bannock St., Room 256 Denver, CO 80202	DATE FILED August 25, 2026 9:55 PM FILING ID: 7B9B211EFD9F4 CASE NUMBER: 2022CV33434
Plaintiff: RUBY JOHNSON, v. Defendants: 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.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Timothy R. Macdonald, No. 29180 Sara R. Neel, No. 36904 Mark Silverstein, No. 26979 Emma Mclean-Riggs, No. 51307 American Civil Liberties Union Foundation of Colorado 303 E. 17th Ave., Suite 350 Denver, Colorado 80203 tmacdonald@aclu-co.org sneel@aclu-co.org msilverstein@aclu-co.org emcleanriggs@aclu-co.org P: 720.402.3114 F: 303.777.1773 Paul G. Karlsgodt, No. 29004 Michelle R. Gomez, No. 51057 BAKER & HOSTETLER LLP 1801 California Street, Suite 4400 Denver, CO 80202-2662 pkarlsgodt@bakerlaw.com mgomez@bakerlaw.com P: 303.861.0600 F: 303.861.7805 Colby M. Everett, No. 56167 JONES & KELLER P.C. 1675 Broadway 28th Floor Denver, CO 80202-4609 ceverett@joneskeller.com P: 303.573.1600 F: 303.573.8133 <i>In cooperation with the ACLU Foundation of Colorado</i>	Case No: 2022CV33434 Div.: 269
PLAINTIFF’S COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS’ RENEWED MOTIONS FOR SUMMARY JUDGMENT	

INTRODUCTION

In February of 2024, a Denver jury concluded that Defendants Gary Staab and Gregory Buschy, two Denver Police Department (DPD) officers, violated the Colorado Constitution by submitting a false and misleading search warrant affidavit that resulted in the unlawful raid of Plaintiff Ruby Johnson's home without probable cause.

Defendant Staab swore out the misleading affidavit and Defendant Buschy approved it. Among their many misrepresentations was the false assertion that a screenshot of Apple's Find My application "signif[ied] the phone being inside the [Plaintiff's] house." But the screenshot meant no such thing. On the contrary, the image displayed a large blue circle spanning six properties in the vicinity. A quick internet search or consultation with DPD resources would have revealed that the screenshot actually meant the device could not be located with any greater precision than that broad circle—i.e., that the screenshot provided *no* basis for individualized suspicion of Ms. Johnson's address. Defendants conceded on appeal that the jury could reasonably have concluded that the affidavit's explanation of the screenshot was false. Ex. C, Buschy Br. at 20; Ex. D, Staab Br. at 5. This false assertion, the lynchpin of the affidavit, was the very definition of reckless.

Defendants also failed to disclose to the reviewing judge their complete lack of knowledge regarding the technology they were describing. They made no attempt to verify or qualify their definitive assertion. Instead, they elected to present an uneducated interpretation as an empirical fact, imbuing it with the false pretense of their own first-hand knowledge.

Based on this misrepresentation and many others proven at trial, the jury concluded that the warrant application included falsehoods and omitted facts that were material to probable cause and found both Defendants liable under C.R.S. § 13-21-131 (the Enhance Law

Enforcement Integrity Act). The jury awarded exemplary damages against both Defendants, concluding that the officers acted “in a willful and wanton manner,” 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.”

Ex. A, Jury Inst. No. 25; Ex. B, Verdict Form.

The court of appeals reversed the jury’s verdict based on one jury instruction, holding that the jury must decide whether the officers included false and misleading statements intentionally or recklessly (and the same for omissions). *Johnson v. Staab*, 2025 COA 45, ¶¶ 2, 37. This is a fundamental question of fact that cannot be resolved on summary judgment, particularly when making all inferences in favor of Plaintiff.¹ *People In Interest of A.C.*, 25CA0042, 2025 WL 1586895, at *3 (Colo. App. June 5, 2025). This Court should deny the motions and let the case go back to a jury.

RESPONSE TO DEFENDANT BUSCHY’S STATEMENT OF UNDISPUTED FACTS

The facts in the following paragraphs of Buschy’s statement are undisputed: 1, 5, 6, 8, 14, 17, 18, 25, 27, and 29.

2. Disputed in part. Disputed that McDaniel reported the contents of the stolen truck to Officer Randall. Randall never spoke with McDaniel; Officer Monthathong interviewed McDaniel, and Randall prepared the report using information supplied by Monthathong. Ex. F, Randall Test., 91:20–23, 136:11–25, 142:10–145:21.

¹ Following the first trial, Judge Scoville denied Defendants’ Rule 59 motion, holding that there was substantial evidence to support the jury’s verdict that Defendants made false statements and material omissions that vitiated probable cause and “even by clear and convincing evidence, that Defendants acted with willful disregard of [Plaintiff’s] constitutional rights.” Order on Rule 59 Motions at 6-8.

3. Undisputed that at the time of trial, Staab had served 26 years as a District 6 detective. Ex. F, Staab Test., 215:22–216:19.

4. Undisputed that at the time of trial in 2024, Buschy was a DPD sergeant assigned to District 6 and had served 25 years. Ex. G, Buschy Test., 54:14–25.

7. Disputed in part. Staab recorded only part of a call with McDaniel. Staab’s motivation for doing so is a credibility question for the jury to weigh. Ex. F, Staab Test., 231:16–232:22.

9. Disputed in part. McDaniel told Defendant Staab that the address Find My showed “as far as that map’s concerned” was 5380 Worchester Street. Disputed that the phone ever pinged specifically to Ms. Johnson’s house, rather than a vicinity in which several houses were located, or that McDaniel said it had. Undisputed that McDaniel said the first ping in the vicinity of 5380 Worchester occurred at the stated time. Disputed to the extent McDaniel had relayed pings at other locations around Denver earlier in the day. Ex. F, Randall Test., 94:3–95:8; Ex. F, Monthathong Test., 184:17–186:19, 200:20–204:5; Ex. F, Staab Test., 226:3–228:17, 231:16–232:11; Ex. H, Grant Test., 186:9–195:14; Ex. J, McDaniel Partial Call.

10. Disputed. The assertion in the affidavit about the “first” ping was not in fact the first ping; the phone had been pinging all over Denver on the morning of January 3. It is also untrue that the phone ever pinged “at Plaintiff’s home.” The only evidence of any ping near Ms. Johnson’s home spanned multiple properties, and there was no basis to believe the phone was more likely in her home than anywhere else in the blue circle. Nor was there any basis to believe that any unseen pings were any more precise than the one mischaracterized in the affidavit. Detective Staab’s state of mind with regard to his misleading characterization of a “first” ping is a central fact dispute in the case and a question of credibility for the jury. Ex. F, Randall Test.,

94:3–95:8; Ex. F, Monthathong Test., 155:12–23, 191:8–192:16; 200:20–204:5; Ex. G, Staab Test., 35:3–38:4; Ex. H, Grant Test., 186:9–195:14.

11. Disputed. The report that McDaniel stated the phone was pinging at Plaintiff’s home when he drove by is in neither the recorded call between him and Staab nor in Staab’s General Offense (GO) report. Ex. G, Staab Test., 40:19–43:15. This is a credibility question for the jury. Further disputed that the phone had ever pinged to Plaintiff’s home, rather than in the general vicinity, and that McDaniel ever relayed a contemporaneous ping, as opposed to the same stale result displayed in the 11:53 a.m. screenshot. Ex. F, Monthathong Test., 178:8–18; 180:24–181:9; Ex. F, Staab Test., 240:23–241:11; Ex. H, Grant Test., 205:8–24. McDaniel misconstrued the 11:53 a.m. screenshot, which displayed a 28-minute-old result, as meaning that the phone had not moved for 28 minutes. EX. F, 177:17–181:9; EX. H, 205:8–24. To the extent McDaniel reported pings at 5380 Worchester after 11:25 a.m., those were also based on his misunderstanding. Ex. I, Plt’s Closing, 57:1–60:17.

12. Disputed. In the only objective evidence of any communication Staab had with McDaniel, the partial audio recording, McDaniel never said mentioned renting a car and going by the house, let alone believing the truck could be in the garage. During his testimony, Staab could not say whether McDaniel said so during the unrecorded portion of the call. Ex. J, McDaniel Partial Call; Ex. F, Staab Test., 307:24–208:6. The only evidence of *any* officer asking whether McDaniel was “on location,” McDaniel answered “no.” Ex. K, Monthathong and McDaniel Texts.

13. Disputed in part. McDaniel said 3:55 p.m. was the last time the display showed him a location. Disputed that he stated there was a new ping at 3:55 p.m., let alone at Plaintiff’s

specific address, or that the phone was pinging in the vicinity of that address for any duration of time. The only Find My result near Worchester Street McDaniel provided displays a single ping to an area covering at least five other properties. Ex. J, McDaniel Partial Call; Ex. F, Staab Test., 241:8–15; Ex. H, Grant Test., 205:8–24.

15. Disputed in part. Staab pasted into the affidavit only one of many screenshots McDaniel shared with DPD. Disputed that the screenshot verified anything McDaniel stated about the phone’s location. Ex. L, Affidavit at 1; Ex. H, Grant Test., 186:9–195:14, 205:8–24. *See also* Responses to Undisputed Facts Nos. 10, 11, and 13.

16. Disputed to the extent this implies the screenshot “identified” Ms. Johnson’s address was the location of the device.

19. Disputed. Beck had no independent recollection of any such call. Ex. H, Beck Test., 109:3–25, 173:2–18. Staabs’s testimony is the only evidence of this alleged conversation which are matters of credibility for a jury to weigh. Further disputed to the extent this suggests Staab shared all relevant facts with Beck or that she made any kind of probable cause determination based on all the facts. If the conversation happened at all, as alleged, Staab testified that he still had concerns afterwards, which he brought to Buschy. Ex. F, Staab Test., 317:12-319:2. Buschy had similar concerns after speaking with Staab. Ex. G, Buschy Test., 87:16-88:13; 131:13-132:2.

20. Disputed that Beck described the DA’s review as ensuring “there is probable cause.” She testified that the DA’s role is not to conduct an independent investigation, but to evaluate whether probable cause is supported by a four-corners review of the affidavit based on the assumption that the affiant has included all facts germane to the analysis. Ex. H, Beck Test., 154:16–155:20.

21. Disputed. Beck had no recollection of any such call at her deposition. Ex. M, Beck Depo., 65:25–66:13. She changed her position at trial to say she “believed” they had a conversation. Ex. H, Beck Test., 109:3–25. There is no evidence of the conversation other than Buschy’s testimony. Further disputed to the extent this suggests Buschy shared all relevant facts with Beck or that she made a probable cause determination. Undisputed that Buschy was concerned about probable cause.

22. Disputed. Beck had no recollection of any such call at her deposition and stated that speaking to a sergeant would be an infrequent occurrence. Ex. M, Beck Depo., 65:25–66:13. *See also*, Response to Undisputed Fact No. 21.

23. Disputed. Staab and Buschy each testified to conversations with McDaniel that recounted conflicting reports of McDaniel’s prior experience using the Find My app. Buschy testified at one point that the lost device on the prior occasion was McDaniel’s own phone and that he had lost it on a job site. Ex. G, Buschy Test., 84:20–23; Ex. N, Buschy Depo., 62:5–16. Staab, on the other hand, testified that it was McDaniel’s wife’s phone, and that he found it in a field. Ex. F, 317:25–318:10. Staab testified that McDaniel had communicated only a single prior experience using Find My. Ex. G, Staab Test., 50:8–17. These discrepancies are questions of credibility for the jury.

24. Disputed. Beck had no recollection of any such call at her deposition. Ex. M, Beck Depo., 63:23–64:7. She changed her position at trial to say she “believed” they had a conversation, but still had no specific recollection of it. Ex. H, Beck Test., 109:3–25.

26. Disputed in part. Disputed to the extent this suggests Sharp had access to any facts not included within the affidavit’s four corners or made an evaluation about the existence of

probable cause based on anything other than a facial review of the Defendants' representations in the affidavit. Ex. H, Beck Test., 154:16–155:20.

28. Disputed. This suggests there was a single Find My screenshot. The affidavit excluded other screenshots displaying Find My results at different locations throughout Denver.

30. Disputed. Staab admitted he did not believe probable cause existed when he prepared the affidavit, and that even after Beck allegedly told him she was “good” with the warrant, he continued to argue with Buschy about whether to move forward. Staab testified that in a paramilitary organization, you do as you're told. Buschy testified to his surprise at Beck's approval. Ex. O, Staab Depo., 51:4–12, 53:6–23; 203:10–204:4; Ex. F, Staab Test., 241:16–242:12, 253:24–254:13, 257:10–18; 292:8–293:12; Ex. G, Buschy Test., 80:22–81:5; Ex. N, Buschy Depo., 58:5–62:16.

31. Disputed. Beck's experience with the app was not “extensive” and there was not evidence that she “knew” the app to be precise. Her testimony was that she believed it to be “incredibly precise.” Beck's testimony demonstrated there was no technical basis for her beliefs about the app, that she fundamentally misunderstood how it worked, and that she was wrong about its precision and reliability. Further disputed because the app's precision varies with each usage and is represented by the size of the blue shaded circle, something Beck admitted she had never paid attention to. Ex. M, Beck Depo. 70:24–71:12; Ex. H, Beck Test., 134:11–136:3; 161:25–165:1; 167:17–24; 168:15–24; Ex. H, Grant Test., 186:9–193:2.

32. Disputed in part. Disputed to the extent this suggests Beck made an independent determination about whether a search was supported by probable cause. She conducted a facial review of the representations in the affidavit. Ex. H, Beck Test., 154:16–155:20.

RESPONSE TO DEFENDANT STAAB’S STATEMENT OF UNDISPUTED FACTS

The facts in the following paragraphs of Staab’s statement are undisputed: 1, 2, 15, 16, 22, and 23.

3. Disputed in part. Undisputed that Defendant Staab had served 26 years and was a District 6 detective as of the time of trial in 2024. *Supra* Response to Defendant Buschy’s Statement of Undisputed Facts (DBSUF), ¶ 3.

4. Disputed in part. McDaniel told Staab that the address Find My showed “as far as that map’s concerned” was 5380 Worcester Street. Disputed that the phone ever pinged specifically to Ms. Johnson’s house or that McDaniel said it had. Ex. F, Randall Test., 94:3–95:8; Ex. F, Monthathong Test., 184:17–186:19, 200:20–204:5; Ex. F, Staab Test., 226:3–228:17, 231:16–232:11; Ex. H, Grant Test., 186:9–195:14; Ex. J, McDaniel Partial Call.

5. Disputed in part. Staab recorded part of his call with McDaniel but his motivations for not recording the entire call are credibility questions. Ex. F, Staab Test., 231:16–232:20.

6. Disputed in part. Disputed as to assertions regarding the “pings,” *supra* DBSUF ¶ 9. Ex. F, Randall Test., 94:3–95:8; Ex. F, Monthathong Test., 184:17–186:19, 200:20–204:5; Ex. F, Staab Test., 226:3–228:17, 231:16–232:11; Ex. H, Grant Test., 186:9–195:14; Ex. J, McDaniel Partial Call.

7. Disputed. *Supra* DBSUF, ¶ 12. Ex. G, Staab Test., 40:19–43:15.

8. Disputed in part. Undisputed that the phone had not pinged to the vicinity of the house after 3:55 p.m. and that McDaniel conveyed his belief the phone might have died. Ex. J, McDaniel Partial Call; Ex. F, Staab Test., 241:8–15; Ex. H, Grant Test., 205:8–24. Disputed as to any statement regarding “new pings.” *Supra* DBSUF, ¶ 13.

9. Disputed. *Supra* DBSUF, ¶ 22.

10. Disputed. The screenshot contained a large blue shaded circle encompassing multiple properties and did not identify the device's location. Ex. F, Staab Test., 241:8–15, 242:19–243:12; Ex. G, DeFoe Test., 198:22–200:10; Ex. H, Grant Test., 188:1–192:13. The CAD report and officer testimony at trial established a ping at Falcon Park that was conveyed to dispatch at 11:30:45 a.m. Officer Randall testified that Officer Monthathong would have conveyed that location to dispatch as soon as he received it. There is a reasonable inference that must be drawn in Plaintiff's favor that the CAD report reflected a ping *after* 11:25 a.m. not in the vicinity of Plaintiff's home. Further the image in Defendants' motions includes Defense counsel's edits and annotations.

11. Disputed in part. See *supra* DBSUF, ¶ 4. Disputed to the extent there was ever a ping "at the house." See *supra*, DBSUF, ¶¶ 10, 11. Further disputed that Staab was merely concerned. See *supra* DBSUF, ¶ 30.

12. Disputed. Beck had no recollection of any such call at her deposition. *Supra*, DBSUF ¶ 19; Ex. M, Beck Depo., 63:23–64:7. She changed her position at trial to say she "believed" they had a conversation. Ex. H, Beck Test., 109:3–25; 171:21–173:18.

13. Disputed. *Supra*, DBSUF ¶ 31.

14. Disputed in part. Staab looked up Ms. Johnson's address, but the phone was never shown to be located there. Staab did not research any of the other properties displayed in the blue circle in the screenshot. Ex. F, Staab Test., 240:21–243:9; Ex. H, Grant Test., 193:18–194:13. Any information about Ms. Johnson's son was not a factor in the officers' evaluation of probable

cause, was not included in the affidavit, and was not disclosed to the issuing judge. Ex. F, Staab Test., 318:24–319:19; Ex. G, 45:9–23.

17. Disputed that Staab “agreed” with Beck’s revisions. In fact, Staab did not even submit the version of the affidavit that Beck approved. *Supra*, DBSUF ¶ 30. Ex. F, Staab Test., 276:23–277:18, 279:8–16.

18. Disputed in part. Staab pasted the only Find My result showing an area in the vicinity of the Plaintiff’s home, while excluding any mention of others displaying locations around Denver. *Supra* DBSUF, ¶ 15.

19. Disputed in part. Dispute that either Beck or Sharp made “a probable cause determination.” Any conclusion from their four-corners review that the affidavit was facially sufficient relied on falsehoods and misrepresentations. *Supra* DBSUF, ¶¶ 20, 26; Ex. H, Beck Test., 154:16–155:20.

20. Disputed in part. Undisputed that Judge Faragher signed the warrant, but she did so based on falsehoods and misrepresentations in the affidavit.

21. Disputed. There was evidence that Defendants had no reason to believe, and did not believe, the truck was at the house. Ex. F, Staab Test., 257:5–18; Ex. G, Buschy Test., 105:11–22.

24. Disputed. *Supra* DBSUF, ¶ 30.

STATEMENT OF ADDITIONAL MATERIAL FACTS

Ruby Johnson

1. Ruby Johnson is an 81-year-old retired United States Postal Service worker who, as of January 4, 2022, had lived alone at 5380 Worchester Street for decades. She had raised her three

children there and felt safe. Ex. E, Johnson Test., 262:4–11; Ex. F, Johnson Test., 14:16–24, 16:15–18:10.

2. On the morning of January 4, 2022, Ms. Johnson was at home alone, sitting in her robe, bonnet, and house shoes, watching television. That was when she heard a loud bullhorn outside order her to “come out right now.” Ex. F, Johnson Test., 17:14–20, 19:8–24, 23:18–24:2.

3. Ms. Johnson opened the door to SWAT officers with large guns pointed toward her. A big, armored SWAT vehicle had driven up on her lawn, close to her front door. Her home was surrounded. She was afraid and did not understand why police were at her home. She kept composed because she did not want to get shot. Ex. F, Johnson Test. 19:8–24, 22:3–21, 23:6–13, 24:24–25:7, 27:3–17, 28:2–5, 29:19–30:9; Ex. H, Sinnema Test., 52:15–53:8, 55:6–25.

4. Ms. Johnson was detained in a locked police vehicle and driven down the street, far enough that she could not see her house while DPD searched it. Ex. F, Johnson Test., 30:10–15; Ex. H, Stolper Test., 30:24–31:8, 32:15–23, 36:6–17. The officer that locked the car door never told Ms. Johnson she was free to leave. Ex. H, Stolper Test., 40:12–41:14. She remained there, frightened, not knowing what was going to happen to her. Ex. F, Johnson Test., 32:18–24.

5. When the police left, Ms. Johnson called her son, Greg, crying and shaking. In the months after that, she struggled emotionally and spent extended periods with her children rather than be in her home alone. She would never feel safe again in her home of more than 40 years. Ex. E, Greg Brunson Test., 199:14–200:16, 202:8–203:10, 209:17–214:13; Ex. F, Johnson Test., 44:1–45:13, 47:24–49:23, 50:17–52:1; Ex. G, Gwen Brunson Test., 235:20–236:15, 237:20–238:5, 239:15–243:7, 243:13–244:2.

6. Ms. Johnson was never a suspect in DPD’s investigation. Ex. F, Staab Test., 281:16–20;

Ex. A, Jury Inst. No. 4.

7. The search turned up nothing. Ex. A, Jury Inst. No. 4.

The Warrant Affidavit

8. DPD searched Ms. Johnson's home for evidence of a truck theft that occurred at the Downtown Denver Hyatt. Jeremy McDaniel reported his stolen truck contained six firearms, approximately 1,000 rounds of ammunition, two drones, \$4,000 in cash, and an old iPhone. Ex. F, Randall Test., 88:13–89:4; Ex. F, Monthathong Test., 157:3–23.

9. The theft report was unusual enough that it “blew [Staab's] mind.” Ex. F, Staab Test., 221:4–223:22. But Staab never inquired into McDaniel's profession, why he was in Denver, or the reason that the guns, ammunition, cash, drones and suppressor were in his truck. Ex. F, Staab Test., 224:9–225:12.

10. Instead, Staab swore out the affidavit to search Ms. Johnson's home and Buschy reviewed, approved, and signed it. Ex. A, Jury Inst. No. 4.

11. The affidavit contained numerous false and misleading statements. It also omitted information adverse to probable cause, and the affidavit was misleading as to probable cause.

Find My

12. Find My is an Apple application used to locate devices associated with a user's Apple account. The phone uses available sources to estimate its position relative to known locations. Ex. G, Grant Test., 278:13–280:6. Because Find My precision varies from result to result depending on the type and number of location sources available to the device and its settings, precision on one occasion is no way predictive of the precision of a different result. Ex. G, Grant Test., 282:6–25.

13. Find My communicates the uncertainty of a result to the user on the face of the app. When location services cannot determine a device’s position precisely, they calculate an error radius that effectively says, *I have no idea where I am precisely, but I think I’m somewhere within a circle of a certain radius*. Find My displays that uncertainty as a shaded blue circle on the map, and the size of the circle depends on the quality and accuracy of the location sources available to the phone. Ex. G, Grant Test., 283:13–285:5; Ex. H, Grant Test., 187:1–18.

14. The blue circle does not reflect a “margin of error” around location services’ best guess at where the device is located. Instead, it identifies an error radius, and the center point is the point from which the radius is plotted. The center dot has “no significance” as to where within the shaded area the device is likely to be. A street address displayed with the result reflects only the center of the mapped radius. Ex. H, Grant Test., 189:2–15, 190:22–192:15. Even when the application displays a result with very low levels of precision, it displays a center dot and associated address because it always needs a center coordinate to draw the uncertainty radius. Ex. H, Grant Test., 192:16–193:2.

15. Zooming the map does not make the underlying error radius more precise; the size of the circle stays constant relative to the scale of the map. Ex. H, Grant Test., 192:3–13.

16. Apple’s website explains that iPhone location services determine only an approximate location using information from cellular networks, Wi-Fi, GPS, and Bluetooth. It explains that when a location cannot be determined precisely, the display uses a blue circle around the location marker, and “[t]he size of the circle shows how precisely your location can be determined—the smaller the circle, the greater the precision.” Ex. P, Apple Website Pages.

The Screenshot

17. The affidavit falsely asserted that the Find My screenshot included in the app “signif[ied] the phone being inside the house.” Ex. G, Staab Test., 47:8–17. The screenshot did not mean that, and McDaniel never said it did. Ex. F, Staab Test., 231:16–232:8; Ex. H, Grant Test., 193:19–195:14.; Ex. J, McDaniel Partial Call; Ex. K, Monthathong and McDaniel Texts.

18. The screenshot displayed a large shaded blue area that spanned about six properties, including an intersection, multiple structures, and yards. Ex. H, Grant Test., 186:9–189:15.

19. The screenshot indicated that there was no basis to conclude the phone was more likely inside Ms. Johnson’s home than anywhere else within the blue shaded area. It was just as likely to be in a neighbor’s house, a neighbor’s yard, or across the intersection. Ex. H, Grant Test., 189:2–15, 190:22–195:14.

20. Neither Defendant knew what the screenshot signified. Yet neither made any attempt to determine whether their characterization was true before swearing to it. Neither Defendant had training or experience with Find My, nor understood its accuracy or limitations. Neither spent any time trying to address their known knowledge gap. They did not consult Apple’s website or do a Google search. Ex. F, Staab Test., 250:4–252:15; Ex. G, Staab Test., 47:8–48:11; Ex. G, Buschy Test., 69:14–73:2, 76:9–80:7, 86:14–17, 93:1–15.

21. Defendants could easily have learned that they were misrepresenting the digital evidence, through DPD’s own resources. In January 2022, DPD had analysts trained specifically on Find My, available department-wide, whom an officer could simply call, email, or see in person while an investigation was ongoing. They would have been able to tell “immediately” from the screenshot that the affidavit’s assertion about its meaning was false. Also “a phone call away”

was a DPD unit that could have forensically analyzed the phone McDaniel was using to track the stolen one and downloaded its historical Find My data. Federal resources were also available to DPD that could have helped pinpoint the stolen device's location. Defendants also could have simply checked Apple's website. Ex. G, DeFoe Test., 166:2–169:3, 169:20–25, 170:9–171:7; Ex. H, Grant Test., 193:18–194:13, 203:12–204:22.

22. Nor did the Defendants disclose to the reviewing judge the their total illiteracy with the technology the affidavit described. Failure to do so misleadingly cloaked their misrepresentation with knowledge and authority. Ex. L, Affidavit.

23. The false characterization of the screenshot contributed to and falsely inflated the precision of every other asserted ping described in the affidavit. Ex. L, Affidavit.

24. The Find My screenshot pasted into the affidavit, and McDaniel's assertions about what the Find My app said, were the only things linking the truck theft to Ms. Johnson's home. Ex. L, Affidavit; Ex. G, Buschy Test., 106:8–11.

25. There was no basis to conclude any other asserted pings to the vicinity of Ms. Johnson's home were *more* precise than the only one Defendants had seen.

Pings Around Denver

26. The affidavit falsely described the approximately 11:24 a.m. Worchester-area result as the phone's "first ping." Defendants knew McDaniel had reported earlier locations. The Worchester-area result was not the first, second, or even third reported location. Ex. F, Monthathong Test., 155:12–23, 191:8–192:16; Ex. G, Staab Test., 35:3–38:4; Ex. Q, GO Report.

27. DPD records reflected reported locations near the airport and 5558 Lewiston Court at approximately 9:51 a.m., Lowry/Dayton at approximately 10:50 a.m., Montview/Lansing at

approximately 10:52 a.m.; 5562 Potomac Way at approximately 11:14 a.m., and Randolph Place/Yost Court at approximately 11:20 a.m. McDaniel sent several of these screenshots to DPD. Ex. F, Monthathong Test., 175:2–22; 191:8–193:8. Ex. K, Monthathong and McDaniel Texts.

28. The approximately 11:53 a.m. Find My screenshot used in the warrant displayed a location update from approximately 11:25 a.m. in the vicinity of Worchester Street/Victor Way. A 12:32 p.m. screenshot demonstrated the same 11:25 a.m. result. Ex. F, Monthathong Test., 175:2–22; 180:10–181:9; Ex. K, Monthathong and McDaniel Texts.

29. The CAD recorded another aired report of the iPhone pinging at 13600 E Maxwell Place, at 11:30:45 a.m. Ex. R, CAD Report; Ex. F, Monthathong Test., 167:15–168:7.

30. McDaniel sent no other screenshots of any Find My results.

31. Defendants could have, but did not, include any of the screenshots, CAD information, Incident Detail Reports or any documentation of reported locations other than the 11:53 a.m. screenshot in the affidavit. The screenshots reflected a Find My update near Worchester and Victor Way “one time and one time only.” No screenshot demonstrated that the phone had been stationary in that area for any amount of time. Ex. F, Monthathong Test., 172:5–25, 174:23–176:22, 200:20–201:15, 241:8–11; Ex. G, Staab Test., 38:5–39:20, 96:1–25, 130:10–131:5.

32. Had Defendants reviewed McDaniel’s other screenshots and contemporaneous communications or discussed them with Monthathong, they would also have encountered evidence of McDaniel’s own misunderstanding of Find My. After McDaniel sent the Worchester screenshot, he told Monthathong that the phone had been at the “same house for 28 minutes.” But the screenshot did not show that, it showed a result that was 28 minutes stale. Ex. F,

Monthathong, 177:17–181:9; 240:21–241:15; Ex. H, Grant Test., 205:8–24; Ex. K, Monthathong and McDaniel Texts.

33. The assertion that the phone did not move between 11:24 a.m. and 3:55 p.m. was false. Ex. F, Monthathong Test., 192:24–193:8; Ex. G, Staab Test., 38:15–39:20; Ex. G, Buschy Test., 122:4–20, 131:2–5; Ex. H, Grant Test., 205:8–24. Buschy knew on January 3, 2022 that McDaniel’s phone had pinged in a location other than the Worchester/Victor Way intersection during the four hours the affidavit said it had remained in the same place, because Monthathong told him so. Ex. F, Monthathong Test., 181:20–182:5, 183:17–22, 184:1–186:19.

34. The statement that McDaniel reported a “last ping” at 3:55 p.m. was misleading. McDaniel’s purported 3:55 p.m. “ping” was not a live Find My location update. The only result showing the phone in the Worchester Street vicinity was screenshotted at 11:53 a.m. and 12:32 p.m., and even those were old. Ex. F, Monthathong Test., 175:23–176:22; 200:23–201:16. McDaniel later told Staab only that “3:55 is the last time it showed me yesterday”; there was no screenshot or other record of a new 3:55 p.m. location update, and Staab never asked McDaniel for one. Ex. F, Staab Test., 285:7–286:22; Ex. G, Staab Test., 52:18–53:20.

McDaniel’s Supposed Drive By

35. The assertions that McDaniel told Staab he rented a car, drove by the address, didn’t see his truck at the location but stated it could be in the garage, and the phone was pinging at the address when McDaniel drove by, are unsupported by the evidence. In the only objective evidence of any communication Staab had with McDaniel, the partial recording, McDaniel never said anything about renting a car, going by the house, or believing the truck could be in the garage. And Staab could not say whether McDaniel said so during the unrecorded portion of the

call either. Ex. J, McDaniel Partial Call; Ex. F, Staab Test., 307:24–308:6. In fact, in the only evidence of *any* officer asking whether McDaniel was “on location,” McDaniel answered “no.” Ex. K, Monthathong and McDaniel Texts. That McDaniel said his phone was pinging nearby at the time is not in Staab’s GO report. Ex. G, Staab Test., 40:19–43:15.

Inflating McDaniel’s Prior Usage

36. The affidavit falsely stated that McDaniel had used Find My on “other occasions” and described one prior success locating his wife’s phone in a field. The information Staab obtained from McDaniel supplied only one such prior example, and Staab could identify no reason for using the plural “other occasions.” Ex. G, Staab Test., 50:8-17. And Buschy’s story was materially different: it involved McDaniel’s own phone, and at a job site. Ex. F, Randall Test., 86:4–17; Ex. N, Buschy Depo., 62:5–16.

37. The falsely inflated description of McDaniel’s prior usage of the app is the only basis in the affidavit suggesting the technology’s reliability.

38. Especially considered together, false information in the affidavit Defendants characterized as drafting choices or typographical errors reflect the broader haste and recklessness the officers exhibited in pushing forward with the warrant.

Observation of the Home Provides No Reason for Suspicion

39. DPD’s first-hand investigation did not raise any suspicion that the truck, weapons, or stolen property was at Ms. Johnson’s home. Ex. F, Staab Test., 256:13–257:18; Ex. G, Buschy Test., 105:11–22.

40. Before the affidavit was submitted, DPD surveillance officers photographed Ms. Johnson’s home. The photographs did not show the stolen truck. No one saw the truck arrive at

or leave the property on January 4. Ex. G, Buschy Test., 105:11–22. The absence of the truck increased Staab’s doubt about probable cause, and left him with no reason to believe the truck was there. Ex. F, Staab Test., 256:13–257:9, 257:10–18.

41. The surveillance team reported no suspicious activity at Ms. Johnson’s home. The absence of the truck and suspicious activity was not conveyed either to Beck or the reviewing judge. Instead, Defendants falsely swore they had reason to believe the truck was there. Ex. F, Staab Test., 257:19–258:4, 259:24–260:5; Ex. L, Affidavit.

42. Staab looked up the owner of the home and learned that it belonged to Ms. Johnson, a 78-year-old woman. That information immediately led Staab to conclude that Ms. Johnson had not committed the truck theft. Ex. F, Staab Test., 258:14–259:9.

43. Neither the reviewing judge nor Beck knew an elderly woman owned the home or that the affiant suspected the homeowner was an innocent party. Ex. F, Staab Test., 259:3–17, 265:1–7; Ex. L, Affidavit.

44. At approximately 10:52 a.m. on January 4, McDaniel reported an attempted online purchase using his wife’s debit card and contacted Staab within minutes. Staab neither pursued that fresh investigative lead nor mentioned it in the affidavit. Ex. F, Staab Test., 260:9–262:1.

45. The omission of these adverse facts was important to probable cause. Ex. G, DeFoe Test., 189:19–190:24; 193:7–199:23; 200:11–202:11.

Buschy Approval

46. Buschy reviewed, approved, and signed the affidavit. Without his approval, Ms. Johnson’s home would not have been searched. Ex. G, Buschy Test., 98:9–21, 130:10–131:12.

47. Supervisory review of a search warrant affidavit is an important safeguard. The

investigative sergeant is expected to conduct a close review of the facts and substance and ensure probable cause exists before the warrant proceeds to a prosecutor and judge, with particular care because a home is constitutionally protected. Ex. G, DeFoe Test., 162:12–163:19.

48. Yet, Buschy spent about as long reviewing the affidavit as it took him to read it. Ex. G, Buschy Test., 98:9–21.

49. Buschy approved the affidavit without speaking to Monthathong or Randall and without reviewing the Incident Detail Report containing the Falcon Park CAD entry. Ex. G, Buschy Test., 130:10–131:5.

50. Buschy pressured Staab to submit the affidavit as written. Staab did so at Buschy's direction. Ex. F, Staab Test., 292:8–293:12.

Defendants Pushed Forward Despite Doubts About Probable Cause

51. When Staab prepared the affidavit, he did not believe probable cause existed to search Ms. Johnson's home. That concern did not dissipate based on any conversation with Beck. He continued to dispute with Buschy whether probable cause existed. Other detectives working near Staab knew that he did not want to seek the warrant. From Staab's perspective, Buschy's direction to "do the warrant" was the final decision. Staab recognized that he could have fought the direction more, but figured Buschy could assign another detective and that refusing the order could create trouble for him. Staab understood DPD as a "paramilitary organization" in which "when you're told to do something, you do it." Ex. O, Staab Depo., 53:6–23; Ex. F, Staab Test., 242:1–25, 253:24–254:13, 292:8–293:12; 317:12–319:2.

52. Buschy also doubted probable cause. He discussed his concern with the timing of the Find My result at length with experienced narcotics supervisor Tony Foster, who regarded the

screenshot as stale. Buschy expected Beck to conclude that probable cause was lacking. Ex. G, Buschy Test., 65:16–68:5, 68:16–69:2, 130:17–131:1.

53. Staab would not have pursued the warrant but for Buschy’s direction. Ex. F, Staab Test., 292:8–293:12, 317:12–318:2.

Four-Corners Review

54. Beck, Sharp, and the reviewing judge all rested their evaluation of probable cause on only a four-corners review of the misleading affidavit Defendants submitted. Their review was confined to the facts presented in the affidavit. Ex. F, Staab Test., 302:8–12; Ex. H, Beck Test., 101:23–103:20, 115:16–118:18, 154:16–155:20.

55. Because of this four-corners review, Beck expects an affiant to include all facts germane to the probable cause determination. Ex. H, Beck Test., 101:23–103:20; 154:16–155:20.

The Asserted Belief in Probable Cause Rested on Admitted Falsehoods

56. The central mischaracterization of the Find My screenshot and false assertion that the phone had not moved for the stated duration were very significant to Beck’s conclusion that the affidavit established probable cause. Ex. H, Beck Test., 131:16–132:12.

57. Buschy likewise relied on the screenshot and the representation that the phone had not moved for approximately four hours in defending the view that probable cause existed. Ex. G, Buschy Test., 90:18–91:25.

58. Staab selected Ms. Johnson’s house rather than the other properties within the blue shaded circle because the Find My display placed the center dot over her house and displayed her address. Ex. G, Staab Test., 16:20–17:5.

No Haste

59. Urgency about the weapons in McDaniel's truck did not justify Defendants' submission of a materially misleading affidavit in reckless pursuit of the warrant.

60. DPD did not react to McDaniel's report with urgency. Despite Buschy's knowledge that McDaniel's stolen truck contained several firearms, and that he had reported tracking the truck to several specific locations throughout Denver, the theft was not assigned to a DPD detective for investigation until almost 24 hours after it was reported. Indeed, McDaniel was upset by DPD's inaction on the day he reported his truck stolen. Ex. Q, GO Report at 10; Ex. O, Staab Depo. 15:22–24, 38:3–10; Ex. F, Randall Test., 94:7–95:25; 126:1–11; 145:1–146:24.

61. DPD did not treat the moving location reports on January 3 as requiring immediate pursuit. District 5 advised that the vehicle needed to be stationary before officers would respond, and the call was assigned priority 5, in the middle of DPD's priority scale. Ex. F, Monthathong Test., 165:22–166:13, 167:2–14.

62. Buschy himself knew about the truck containing weapons moving around Denver on January 3. Monthathong told him. Ex. F, Monthathong Test., 180:10–185:19. Monthathong even asked whether a detective or additional investigation should be sent to a reported location or whether he should be "doing more." Ex. F, Monthathong Test., 180:10–185:19. Buschy spoke to McDaniel that day, too, such that McDaniel knew to email him by the morning of January 4. Ex. F, Staab Test., 239:5–20.

63. By the time the warrant was being prepared on January 4, a surveillance team was watching Ms. Johnson's home. The team saw no truck or other suspicious activity. And the team could have alerted Staab or Buschy if anyone began moving weapons, or anything that could

transport or conceal weapons, out of the house. Ex. F, Staab Test., 256:13–257:24; Ex. G, Staab Test., 48:15–49:16.

64. At that point, there was no need to rush, as a matter of public safety or as a matter of evidence preservation. The officers could have continued surveillance and used additional investigative techniques to corroborate the location. Ex. G, DeFoe Test., 195:23–196:12.

65. Although they had “nothing but time,” and nothing observed at the house corroborated any suspicion of criminal activity there, Defendants pursued no further investigation. They did not look into any of the other properties displayed in the screenshot, each just as likely to be the location of the device. Ex. F, Staab Test., 241:16–242:12; Ex. H, Grant Test., 193:18–194:13, 196:4–12. In fact, at least one officer was under the impression that the phone could be in the yard. Ex. F, Arnold Test., 211:14–212:24. They did not educate themselves about Find My, look into McDaniel and the reason the stolen truck contained weapons, ammunition, cash, and drones, or review other documents from the investigation in DPD’s possession. Instead, they pushed forward with the warrant and raid of Ms. Johnson’s home.

Aftermath

66. Because of the events of January 4, 2022, Ms. Johnson became a different person; her spirit was broken. She would never be the same. Ex. E, Greg Brunson Test., 199:14–200:16, 202:8–203:10, 209:17–214:13; Ex. F, Johnson Test., 44:1–45:13, 47:24–49:23, 50:17–52:1; Ex. G, Gwen Brunson Test., 235:20–236:15, 237:20–238:5, 239:15–243:7, 243:13–244:2; Ex. H, R. Brunson, 86:1–87:1.

ARGUMENT

“Summary judgment is a drastic remedy,” *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 21, that is “never warranted except on a clear showing that there exists

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988). Defendants’ motions essentially present their theory of the case – what they would like to argue to a jury – that any untrue statements in the affidavit were innocent mistakes. But under the “difficult standard” of summary judgement, Defendants need to show that “no reasonable jury could reach a different conclusion.” *Rocky Mountain*, ¶ 31. Neither Defendant can meet that burden here. For that reason, both rely on asserted “facts” that are disputed, characterizations of the evidence in the light most favorable to them, and inferences drawn in their favor. Because summary judgment requires the opposite, this Court should reject both motions.

I. Defendants made misrepresentations with at least reckless disregard for their truth.

Both Defendants frame their motions under an incomplete definition of reckless disregard. They leave out that a “factfinder may infer reckless disregard from circumstances evincing ‘obvious reasons to doubt the veracity’ of the allegations.” *Johnson v. Staab*, 2025 COA 45, ¶ 40 (quoting *Beard v. City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994)). Omissions are made with reckless disregard when a law enforcement officer leaves out facts “any reasonable person would have known . . . the judge would wish to know.” *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993). Here, a reasonable jury could infer from the evidence that the Defendants’ misrepresentations were made with at least reckless disregard for their truth.

A. The affidavit is made of falsehoods.

Defendants now attempt to argue that the affidavit contains no misstatements. Staab MSJ at 2, Buschy MSJ at 17. But both acknowledged on appeal that the jury could have found that

two of the affidavit's central factual premises were false: that the Find My dot signified the phone was inside Ms. Johnson's home and that the phone had not moved between 11:24 a.m. and 3:55 p.m. Ex. C, Buschy Br. at 20; Ex. D, Staab Br. at 5.

Numerous witnesses, including Staab and Monthathong, testified that the phone could have been anywhere in the blue-shaded circle, which spanned several neighbors' houses, yards, and public streets, even across the street or another house. Ex. F, Monthathong Test., 176:19–177:13; Ex. F, Staab Test. 243:1–12. And Plaintiff's expert on geolocation technologies explained that the big shaded blue circle surrounding the red dot meant the phone could not tell where it was with any precision beyond the blue radius. The expert confirmed that the screenshot provided no reason to believe the phone was in Ms. Johnson's home. Ex. H, Grant Test., 194:17–195:14. The jury also watched body camera footage of two DPD officers saying they heard the phone may just be in the yard. Ex. F, Monthathong Test., 174:4–8. Staab's sworn statement that the screenshot signified that the phone was *inside* 5380 Worchester was false.

Defendants also conceded on appeal that there was evidence that DPD had recorded an 11:30 a.m. ping somewhere other than Ms. Johnson's home, a fact that was not included in the affidavit and contradicts the statement that the phone had not moved. Ex. R, CAD Report at 2, Ex. C, Buschy Br. at 20.

The false characterization of the screenshot calls into question every other of Defendants' characterizations in the affidavit of reported pings "to" or "at" Ms. Johnson's home. The evidence provides no reason to believe those results would have been *more* precise than the only one Staab saw for himself. A jury could reasonably conclude that it was misleading to state that the phone had *ever* reported itself "at" 5380 Worchester Street, let alone for the stated duration

of time. Ex. F, Staab Test., 305:14–18; Ex. G, Staab Test., 52:21–23, 53:8–11; Ex. G, DeFoe Test., 199:18–23.

The affidavit also misleadingly indicated that McDaniel “reported the first [Find My] ping occurred on 01/03/2021, at 1124 hours.” The evidence at trial was that McDaniel had reported pings all over Denver prior to 11:24 a.m. Defendants attempt to explain away this falsehood by insisting the affidavit did not mean to suggest the phone did not start pinging until 11:24 a.m., but instead just that the first ping *at the house* occurred then. Ex. C, Buschy Br. 20–21. Defendants are free to so argue at trial. What matters here is that a jury could draw the contrary inference. And in any event, the earlier pings all over Denver are an undisputed, and significant, omission.

The jury could also conclude that McDaniel never stated the phone was pinging at the address when he drove by. As Staab admitted at trial, there is no support for the statement that McDaniel said his phone was pinging nearby in the portion of the call that Stabb elected to record or in Staab’s GO report. Ex. G, Staab Test., 40:19–43:15. Moreover, Staab had no idea when during the day that drive-by and alleged ping occurred, and he never asked to see any screenshot of such a ping. Ex. G, Staab Test., 43:2–20. Staab’s testimony at trial raised a credibility question for the jury.

Next, a reasonable jury could conclude the officers had no reason to believe that the stolen truck was at Ms. Johnson’s home when they swore in the affidavit to the contrary. Staab and Buschy both testified at trial to exactly that. Ex. F, Staab Test., 257:10–18; Ex. G, Buschy Test., 105:7–14. Staab also testified at his deposition that he knew the truck was not there. Ex. O, Staab Depo. 42:13-24; 44:12-19; 47:14-25; 53:24–54:4.

There is also evidence that Staab falsely swore McDaniel had reported using Find My on multiple previous occasions: Staab admitted he had been told by McDaniel of only *one* previous use, when he found his wife’s phone in a field. Ex. F, Staab Test., 267:9–11. Defendants try to characterize “on other occasions” as simply a misplaced “s.” But on its face, even without the other falsehoods and omissions, characterizing this as a typographical error is wrong. Without the “s,” the sentence makes no sense. It would read: “[McDaniel] has used this iPhone app on other occasion, where he found his wife’s phone in the middle of...” Ex. L, Affidavit. The structure of the sentence is written for a plural, to inflate McDaniel’s experience beyond what Defendants knew it to be.

In addition to these affirmative false statements, there was evidence at trial that Defendants omitted a host of adverse facts from the affidavit that a jury could conclude a reasonable person would know a judge would have wanted to know. These included Defendants’ total inexperience, personal and professional, with Find My—the technology that formed the only nexus to Ms. Johnson’s home and that they misrepresented in the affidavit. Their omissions also included information about the homeowner of the address under investigation, Ms. Johnson—that was she was 78 years old, lived alone, had no criminal history, and that they knew she was not involved in the crime. Defendants did not tell the judge that DPD had set up surveillance at Ms. Johnson’s house and not only had no reason to believe the truck was there, but saw no weapons or suspicious activity at all, just the elderly Ms. Johnson briefly going outside to get her mail. In other words, they left out that the only first-hand investigation pointed to the truth: that this crime had absolutely nothing to do with Ms. Johnson.

The affidavit also omitted that McDaniel reported on the morning of the raid, following

the pings around Denver, that someone had tried to use McDaniel's wife's credit card online, but that lead had not been investigated. And finally, the affidavit said nothing about the Defendants' concerns about probable cause. While the officers tried to say that their concerns had dissipated by the time they submitted the affidavit, contrary evidence allows a reasonable jury to conclude otherwise, including Buschy's surprise at the district attorney's approval and Staab's testimony that he moved forward with the warrant because he figured another detective would do it if he didn't, because he was worried about getting in trouble, and because in a paramilitary organization, you do as you're told. Ex. F, Staab Test., 292:15–293:12.

B. Defendants submitted the misleading affidavit with reckless disregard for the truth.

Defendants assert there is “no evidence” that they had the requisite state of mind, but they ignore record evidence adverse to them and assume inferences in their favor. Moreover, courts should be cautious “in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.” Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 730, Actions Involving State of Mind (4th ed.). “In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.” *Id.* Here, Defendants' “no evidence” position is belied by the first jury's conclusion their conduct was willful and wanton. A reasonable jury could conclude that the various falsehoods and omissions proven at trial were a product of the same reckless disregard for the truth.

The false assertion in the affidavit that the Find My screenshot signified the phone being inside Ms. Johnson's home was the definition of reckless. A quick internet search or call to available DPD resources would have confirmed that the screenshot meant that the phone did not

know where it was. *Supra*, Statement of Additional Material Facts (SAMF) ¶ 21. A jury could reasonably conclude that the big blue circle gave obvious reason to doubt the truth of Staab's baseless characterization.

Including the screenshot itself in the affidavit does not cure the recklessness of the false characterization. The affidavit did not merely include the photo and allow the judge to assess its probative value. Instead, it described its significance in absolute terms, and swore that the conclusions there were derived from Staab's experience and training. Ex. L, Affidavit. And as Staab points out, judges give "due consideration . . . to a police officer's experience and training in determining the significance of his observations to the ultimate issue of probable cause." Staab MSJ at 9. An officer's candor is especially important when probable cause depends on technology whose output is not self-explanatory. The issuing court cannot exercise its constitutional function if officers provide a technological result and affirmatively misstate its meaning. The conclusive summation of the screenshot in the affidavit wrested from the reviewing judge the ability to make an independent evaluation of probable cause based on only the facts.

That was especially reckless because it gave the false impression that the assertion was based on the Defendants' independent understanding of the described technology. The suggestion that Defendants' inexperience with the app was "wholly immaterial," Staab MSJ at 16, is absurd. Any reasonable person would know that the reviewing judge would wish to have brought to her attention an affiant's complete illiteracy with the technology that indisputably formed the sole basis for probable cause, and a reasonable jury could find Defendants' failure to do a reckless, even knowing, omission.

Moreover, a reasonable jury could conclude that Defendants' failure either to perform any due diligence or to qualify their statement demonstrated a reckless disregard for the truth. The evidence at trial was that they could easily have learned that they were misrepresenting the digital evidence. DPD had analysts trained specifically on Find My, available department-wide, whom an officer could simply call, email, or see in person while an investigation was ongoing. *Supra*, SAMF ¶ 21; Ex. G, DeFoe Test., 166:2–167:24. The analysts would have been able to tell “immediately” from the screenshot that the affidavit’s assertion about its meaning was false. Ex. H, 203:10–204:22. Also “a phone call away” was a DPD unit that could have downloaded historical Find My data from the phone McDaniel was using to track the stolen phone. Ex. G, DeFoe Test., 168:6–24, 169:20–25. Defendants used none of these resources, even though they knew they were available. Ex. F, Staab Test., 279:21–281:15; Ex. G, Buschy Test., 79:23–80:2, 88:1–16. A police practices expert testified that the officers’ first question should have been whether the information was verified, and that they should have consulted available resources. Ex. G, Grant Test., 197:2–23, 198:1–21.

But not only did Defendants fail to check with resources specially available to law enforcement officers—they did not even perform the most basic internet search. Ex. F, Staab Test., 250:4–11, Ex. G, Buschy Test., 93:1–15. A reasonable jury could conclude that had they done so, they would have learned from Apple’s own website that the big blue shaded circle meant there was no basis for individualized suspicion to search Ms. Johnson’s home. Ex. H, Grant Test., 186:9–187:18.

Defendants’ view is that it was not reckless to make no effort to independently verify their false characterization of the screenshot because they were entitled to rely on McDaniel’s

statements or because the affidavit was approved by Beck who was familiar with the app. Buschy MSJ at 17, 21-22; Staab MSJ at 14-15. At best, this is a factual dispute about the officers' state of mind for a jury to resolve. But at bottom, there is no evidence that either McDaniel or Beck told the officers that the screenshot signified the phone being inside Ms. Johnson's home. The evidence is that this definitive, crucial assertion was the addition of an untrained, uneducated, reckless officer.

Moreover, the record provides reason to doubt the officers ever discussed Find My with Beck at all. She had no recollection of that. *Supra*, DBSUF ¶¶ 19, 21, 22, 24. And even if Defendants' testimony is believed, what Beck advised was to ask McDaniel about the app's reliability, belying the notion that her own familiarity with the app provided any guardrail. Buschy MSJ at 10, ¶ 22; Ex. O, Staab Depo., 39:2–5. In any event, Beck's asserted knowledge of the Find My app was not accurate as it relates to this case, and it is irrelevant. She conveyed no such knowledge or experience to Staab at any point during her editing of the affidavit, and it is not mentioned in the affidavit itself. *People v. Dailey*, 639 P.2d 1068, 1073 (Colo. 1982) (the constitution "prohibit[s] the rehabilitation of a defective warrant by the introduction of additional evidence not contained in the warrant affidavit").

While witnesses' reports of percipient facts, like their first-hand observations of a crime, might generally justify trust in their statements to police, Defendants have not shown that their assurances can suffice to corroborate the reliability of a technological process furnishing the sole basis for probable cause. McDaniel had no specialized knowledge of the app; on the contrary, his own statements to DPD about various screenshots he sent showed that he, too, misunderstood it. Moreover, a reasonable jury is entitled to be skeptical of the statements of a person who reported

that his vehicle was stolen from a hotel parking lot, containing six guns, a thousand rounds of ammunition, drones, and thousands of dollars in cash.

Defendants tried to excuse a failure to do basic police work by arguing that time was of the essence. But there was ample evidence undermining that justification too. *Supra*, SAMF ¶¶ 59–65. First, Plaintiff’s police practices expert testified that once the home was under surveillance, there was no need to rush to get a warrant rather than continue the investigation; he testified the officers had “nothing but time.” Ex. G, DeFoe Test., 190:8–24, 196:2–12. Second, DPD had not treated the case as an emergency the day before, despite already knowing about the guns and the phone pinging all over Denver. Ex. F, Monthathong Test., 165:22–166:13; 167:2–14. Buschy knew the day before the search that McDaniel’s phone had been pinging all over Denver and had pinged at an address *other* than Ms. Johnson’s during the four hours the affidavit said it was stationary. *Supra*, SAMF ¶¶ 26–31. This testimony was from an officer who personally relayed those facts to Buschy. *Supra*, SAMF ¶ 33.

While Buschy denied the conversation, a jury would be entitled to credit the testimony of his fellow officer as more trustworthy. *See Gresser v. Banner Health*, 2023 COA 108, ¶110. Bolstering the inference that Buschy knew about the theft and pings a day earlier, unexplained documentary evidence showed direct communication between Buschy and McDaniel early the morning of January 4. Ex. F, Staab Test., 239:5–20. Finally, the evidence was that it would have taken no time for the officers to learn that the crux of the affidavit was false, either from DPD analysts or from Apple’s website. From this evidence, a reasonable jury could reject Defendants’ narrative that their failure of due diligence was somehow justified by their haste – there is plenty of evidence that there was no haste at all.

In sum, a reasonable jury could easily conclude that Defendants had reason to doubt their interpretation of the screenshot, and that they could have learned the screenshot's true meaning or qualified their representation of it rather than swear to a false characterization. This is especially likely because the only evidence that implicated Ms. Johnson's home in the crime under investigation was the technology Defendants misrepresented. A reasonable jury could also conclude that it would have mattered to a reviewing judge that all the evidence the police observed first-hand—the elderly homeowner, the absence of the truck or any suspicious activity during surveillance of the property—all weighed against a finding of probable cause to search.

A reasonable jury could conclude that the failure to include the other pings outside the vicinity of 5380 Worchester was knowing. Buschy argues that because the affidavit was prepared to support a request for a search warrant at Ms. Johnson's home, any evidence of pings at other locations were irrelevant. Buschy MSJ at 14. This argument is illogical: evidence that the phone is somewhere other than Ms. Johnson's house is evidence the phone is not at Ms. Johnson's house. A reasonable jury could reject the idea that the Defendants, experienced police officers, believed the evidence of other pings was irrelevant when they submitted the affidavit.

So too, a reasonable jury might conclude that Defendants knew they were inflating McDaniel's prior experience with the app, and stating there was reason to believe the truck was at the house when they had none. *Supra*, SAMF ¶¶ 36-38. A jury could conclude the same about the statement that the phone was pinging when McDaniel drove by. *Supra*, SAMF ¶ 35. There was evidence Buschy knew before the search that the statement that the phone had not moved between the stated hours was false. *Supra*, SAMF ¶¶ 26-31. The jury heard this from an investigating officer who personally relayed those facts to Buschy. *Supra*, SAMF ¶ 33. While

Buschy denied the conversation, the jury was entitled to credit the testimony of his fellow officer as more trustworthy.

Staab's inclusion of the false statement and his assertion that McDaniel had reported a discrete ping at 3:55 p.m. were a consequence of his failure not only to educate himself about the technology but to review the evidence in DPD's own possession, *supra* SAMF ¶ 21, which a reasonable jury could conclude demonstrated reckless disregard. For these and the other errors in the affidavit, like identifying entirely the wrong year, the parties dispute whether they were merely innocent mistakes or a product of the recklessness that defined the investigation. But that is precisely the kind of dispute that is improper for resolution on summary judgment and should be presented to a jury to weigh.

II. Defendants' reckless misrepresentations were material to probable cause.

Defendants take aim at the materiality of each reckless misstatement and omission on its own, but the question is whether a reasonable jury could conclude that in totality, they made the affidavit materially misleading as to probable cause. *People v. Reed*, 56 P.3d 96, 99 (Colo. 2002) (the inquiry is whether, after correcting the affidavit's falsehoods and omissions, "the remaining statements establish probable cause").

The two falsehoods Defendants have already acknowledged—that the screenshot's red dot signified the phone was inside Ms. Johnson's home and that from 11:24 to 3:55, the phone did not move—are themselves enough to preclude summary judgment in their favor. Indeed, the evidence put on by *both* sides at trial was that they were critical to probable cause.

Buschy testified specifically that these were the factual assertions he relied on to determine it was appropriate to move forward with the warrant. Ex. G, Buschy Test., 91:20–25. He admitted

that the screenshot was the only link between the theft and 5380 Worchester. Ex. G, Buschy Test., 91:20–25, 106:8–11. Staab testified that the red dot in the screenshot was the only reason he sought a warrant for Ms. Johnson’s home as opposed to the other neighboring properties. Ex. F, Staab Test., 242:19–243:12; Ex. G, Staab Test., 16:20–17:5, 20:20–21:17. And he cited the red dot as the reason for thinking it unnecessary to disclose in the affidavit his total inexperience with Find My. Ex. G, Staab Test., 20:25–21:6. Finally, the district attorney who approved the warrant and whom Defendants proffered as an expert in probable cause repeatedly testified to the importance of the placement of the red dot, Ex. H, Beck Test., 131:16–132:1, 136:4–14, and the report that the phone had not moved, in her probable cause evaluation. Ex. H, Beck Test., 132:2–12, 183:23–184:10. Defendants’ theory of the case at trial essentially rested on these asserted facts. Defendants cannot credibly argue they were immaterial.

In addition, Plaintiff’s Find My expert explained that the affidavit misrepresented the essential feature of probable cause: the likelihood that the phone was where the affidavit asserted it was. Ex. H, Grant Test., 188:2–195:14. Plaintiff’s police practices expert also opined that the meaning of the red dot was essential to the probable cause determination. Ex. G, DeFoe Test., 194:11–196:12.

The screenshot was the only first-hand evidence Defendants cited that even remotely related to Ms. Johnson’s home, and they ascribed it false precision. That infected every other description of an asserted ping “to” or “at” Ms. Johnson’s house. There was no basis to believe that any unseen ping in that vicinity would have been more precise than the only one in DPD’s possession.

Other than the false statement that the red dot signified the phone being inside Ms.

Johnson's home, no fact in the affidavit purporting to establish a nexus to Ms. Johnson's residence even claimed to be based on the affiant's first-hand knowledge. And where the affiant relies on some other source, the reliability of that source is open to question in the probable cause analysis. *See People v. Fortune*, 930 P.2d 1341, 1345 (Colo. 1997). The affidavit procedure relies on the notion that an affiant's observations are "supported by oath or affirmation." Colo. Const. art. II, § 7. Here, every other fact in support of probable cause relied on a different source—either McDaniel or Find My itself—that had not sworn any oath and would not be accountable for any misrepresentations. *Cf. Cortez v. McCauley*, 478 F.3d 1108, 1118 (10th Cir. 2007) ("That unsubstantiated double-hearsay . . . , standing alone, does not give rise to probable cause should have been patently obvious to any reasonable law enforcement official.").

The treatment of dog alerts in the probable cause analysis provides a useful analogy. Like informants' tips, veracity, reliability, and corroboration are highly relevant in the determination of its trustworthiness. *See e.g., Florida v. Harris*, 568 U.S. 237, 247-249 (2013). Therefore, indicia of reliability must be proven. *Illinois v. Gates*, 462 U.S. 213, 245 (1983). Here, all the affidavit had to say about Find My's reliability or accuracy was the false assertion about the red dot and McDaniel's alleged report of prior use. The mere assertion from a person with no purported specialized knowledge that the technology helped him locate a phone once in the past, with no information about the comparability of the uses cannot be enough to validate reliance on a technological process to furnish the sole basis for probable cause.

III. Defendants' other legal arguments are without merit.

A. Buschy cannot disclaim responsibility for the affidavit's falsehoods.

Buschy seeks to avoid accountability for the misleading affidavit, just as he argued to the jury and the court of appeals, by insisting that because he was not its initial drafter, he is not at

fault for information it wrongly included or excluded. Judge Scoville rejected that argument based on the evidence at trial that Buschy reviewed, approved, and signed the affidavit, and that Staab only submitted the affidavit at Buschy's direction. Rule 59 Order at 7. The court of appeals likewise remanded for a new trial against both Defendants. In sum, the record shows the misleading affidavit is attributable to both Staab and Buschy, and a reasonable jury could so conclude.

B. A judicial finding of probable cause based on a misleading affidavit is not owed deference.

Staab notes that judges' probable cause determinations are generally owed "great deference." Staab MSJ at 10. But that is not the case where the record shows the affidavit underlying that finding was misleading. It would make little sense to defer to a probable cause determination that was secured by a misleading affidavit. *See Franks v. Delaware*, 438 U.S. 154, 168 (1978); *People v. Reed*, 56 P.3d 96, 99 (Colo. 2002).

Moreover, because the analysis requires the fact-finder to consider a re-imagined affidavit, stripped of any material falsehoods and restored any omitted adverse facts, this court is not "reviewing" the judge's original decision. In this context, there is effectively no judicial decision to defer to—the fact-finder must engage in its own analysis of the totality of the circumstances of the reformed affidavit, which is before it for the first time.

C. The DAs and reviewing judge were limited to a four-corners review of the affidavit, but the jury may consider extrinsic evidence to evaluate the affidavit's falsity and the officers' reckless disregard.

Defendants confuse the role of the rule that "probable cause must be established within the four corners of the affidavit in support of a search warrant." *People v. Pacheco*, 175 P.3d 91, 94 (Colo. 2006). Buschy suggests that means Defendants' failure to inquire into Find My is

irrelevant. Buschy MSJ at 21. That is wrong. Extrinsic evidence is essential to evaluating whether falsehoods and omissions in the affidavit were the product of reckless disregard for the truth. *Cf. Reed*, 56 P.3d at 99.

On the other hand, the constitution “prohibit[s] the *rehabilitation* of a defective warrant by the introduction of additional evidence not contained in the warrant affidavit.” *Dailey*, 639 P.2d at 1073 (Colo. 1982) (emphasis added). Defendants’ various attempts to bolster probable cause based on things not contained within the affidavit, like Beck’s purported use of the app or any inquiry into Ms. Johnson’s son, therefore fail.

The rule of four corners review also explains why Defendants’ attempted reliance on the district attorneys’ or judge’s review of the affidavit is unavailing. First, as a matter of law, a police officer who seeks a warrant unsupported by probable cause to search a person’s home cannot escape liability “simply because a [reviewing judge] . . . approved the application,” or because it was reviewed “by an officer’s superior or a deputy district attorney.” *Messerschmidt v. Miller*, 565 U.S. 535, 554-555 (2012); *People v. Leftwich*, 869 P.2d 1260, 1269 n.11 (Colo. 1994). Four corners review is exactly why officer-affiants’ candor is so important. Defendants thus have it backwards: failing to hold the officers to account here is what would threaten the warrant requirement as a constitutional safeguard, not the other way around. *See* Staab MSJ at 10.

D. Cases featuring use of Find My in police investigations do not establish that Defendants’ reliance on Find My and lack of candor to the tribunal were not reckless in this case.

Finally, Buschy asserts that a collection of string-cites from out-of-state cases where police used Find My in their investigations establish, as a matter of law, that it was “reasonable” for Defendants to rely on McDaniel’s reported Find My evidence in this case to justify their false

statements in the affidavit or the unlawful search of Ms. Johnson's home. Not so.

First, most of the cited cases merely reference officers' use of Find My in the course of various investigations. *See Commonwealth v. Gil*, 566-EDA-2014, 2015 WL 575708 (Pa. Super. Feb. 10, 2015); *People v. Easton*, No. H041704, 2017 WL 393263 (Cal. App. Jan. 30, 2017); *People v. Foy*, 199 Cal. Rptr.3d 208 (Cal. App. 2016). Moreover, the alerts in the cited cases bore more indicia of reliability than the ones at issue here. In each case Buschy cites, the Find My app was either used in real-time by law enforcement officers themselves, was corroborated by other direct observation, or both. But the question is not whether police can ever reasonably "utilize 'Find My iPhone' in attempting to locate stolen cellphones and related property." Buschy MSJ at 23. The uncontroversial point that the app has provided clues in unrelated criminal investigations does nothing to answer whether Defendants' misleading characterization of a technological result they knew they did not understand was the product of reckless disregard. Nor do they answer whether a Find My result that on its face demonstrates the absence of individualized suspicion can supply probable cause.

Finally, cases that have actually addressed the adequacy of reliance on Find My to establish probable cause—or even reasonable suspicion—support the view that Find My pings do not suffice without officers' averments of personal experience with the app's reliability as well as other evidence contributing to individualized suspicion. *See, e.g., State In Int. of J.A.*, No. A-1624-14T2, 2016 WL 763923 at *5 (N.J. Super. Ct. App. Div. Feb. 29, 2016); *Commonwealth v. Milburn*, 191 A.3d 891 (Pa. Super. Ct. June 22, 2018); *State v. Carter*, 906 N.W.2d 183 (Wis. Ct. App. 2017); *United States v. Rivera*, 234 F. Supp.3d 346 (D.P.R. Feb. 10, 2017); *United States v. Thorne*, No. 4:18-CR-00029-FL, 2019 WL 7596303, at *2 (E.D.N.C. Aug. 23, 2019). To

the extent any of these cases presumes the reliability of GPS technology as a general matter, they are of limited value here, where the record establishes the facial unreliability of the Find My result used to justify the search warrant. *Cf. Harris*, 568 U.S. at 247; *see supra* SAMF, ¶¶ 16-21. Contrary to Buschy's suggestion, these cases do not instruct that the affidavit here, even on its face, could establish probable cause. Plaintiff is aware of no case that has blessed an officer's reliance on a Find My ping to search a home where the officer had no familiarity with the technology nor any other basis to suspect a nexus to the property.

This Court should not endorse, as a matter of law and on disputed facts regarding the officers' state of mind, the casual reliance on technology officers do not understand to invade the privacy of people's homes. It was unreasonable under the circumstances to obtain a search warrant when further police investigation could have avoided such a profound intrusion into Ms. Johnson's life. The constitution requires more, and this case demonstrates why.

CONCLUSION

The essential purpose of the constitutional proscription against unreasonable searches and seizures "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 585 U.S. 296, 303 (2018). When it comes to this protection, "the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Here, the raid on Ms. Johnson's home was the height of an arbitrary intrusion. A reasonable jury has already concluded that it would not have happened but for Defendants' reckless conduct. For all the reasons stated above, Plaintiff respectfully requests that the Court deny Defendants' Motions for Summary Judgment.

August 25, 2026

Respectfully submitted,

By: /s/ Sara R. Neel

Sara R. Neel, No. 36904
Emma Mclean-Riggs, No. 51307
Timothy Macdonald, No. 29180
Mark Silverstein, No. 26979
American Civil Liberties Union
Foundation of Colorado
303 E. 17th Ave, Suite 350
Denver, Colorado 80203
emcleanriggs@aclu-co.org
tmacdonald@aclu-co.org
sneel@aclu-co.org
msilverstein@aclu-co.org

Paul G. Karlsgodt, No. 29004
Michelle R. Gomez, No. 51057
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, Colorado 80202
pkarlsgodt@bakerlaw.com
Mgomez@bakerlaw.com

Colby M. Everett, No. 56167
JONES & KELLER P.C.
1675 Broadway
28th Floor
Denver, Colorado 80202
ceverett@joneskeller.com
*In cooperation with the ACLU
Foundation of Colorado*

Attorneys for Plaintiff Ruby Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2026, a true and correct copy of the foregoing **COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' RENEWED MOTIONS FOR SUMMARY JUDGMENT** was electronically filed and served through the E-Filing System, to all counsel of record.

/s/ Kara S. Narberes
Paralegal