No. 14-5963

IN THE

Supreme Court of the United States

RONALD BRETT GRASSI,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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October 15, 2014

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

The National Association for Public Defense ("NAPD") is an association of approximately 8500 public defense practitioners. Formed in 2013, 50 years after this Court recognized the right to counsel as "fundamental and essential," *Gideon v. Wainright*, 372 U.S. 335, 344 (1963), NAPD's mission is to fulfill *Gideon*'s promise of fairness and equal access to justice in America's criminal courts. NAPD includes every professional who is critical to delivering the right to counsel: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, civil legal aid providers, education advocates, expert support, information technology gurus, teachers and trainers, financial

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[1] Pursuant to Rule 37.2, both parties received notice of the filing of this brief more than 10 days prior to the due date. A letter of consent from each party accompanies this filing. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

professionals, researchers, legislative advocates, communications personnel, and administrative personnel. NAPD's collective expertise represents the full array of public defender systems: state, county and local systems.

While NAPD is newly formed (and thus new to practice in this Court), NACDL files numerous *amicus* briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as *amicus* in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests.

While *Amici* fully support the arguments set forth by Petitioner, *Amici* write separately to emphasize the widespread disagreement among courts regarding the application of the fellow officer or collective knowledge doctrine in Fourth Amendment cases, the importance of the issue to the administration of justice, and the reasons this case can serve as an excellent vehicle for resolving the confusion surrounding the doctrine.

SUMMARY OF ARGUMENT

Petitioner's case squarely raises a question that has sharply divided the lower courts: Does the Fourth Amendment permit a police officer to conduct a search or seizure when neither that officer, nor any officer in the chain of command, possesses the requisite amount of suspicion

necessary to justify the search or seizure under the Fourth Amendment? The Colorado Supreme Court answered the question "yes," by applying a doctrine that allowed the searching officer's knowledge to be pooled with that of other officers with whom he had not spoken and who were not in the chain of command. Many other courts have answered the question "no" on the same or similar facts. These conflicting decisions create confusion in an important area of Fourth Amendment law, an area in which clear rules are most vitally needed. This Court's corrective intervention is needed to return uniformity and coherence to this important area of the law, and Petitioner's case (in which the questions presented were fully litigated below) presents an excellent vehicle for doing so. The Court should grant the petition.

ARGUMENT

I. The Facts of Petitioner's Case Implicate the Collective Knowledge Doctrine

Though *Amici* fully support Petitioner's recitation of the facts at issue in this case, *Amici* offer the following brief summary as relevant to the discussion of the "fellow officer" doctrine.

The issues presented by this case arose from an automobile crash in the early morning hours of September 4, 2003. *Grassi v. Colorado*, 320 P.3d 332, 334 (Colo. 2014). Petitioner Ronald Grassi was seriously injured and rendered unconscious, and another person in the car was killed. Paramedics responded and learned that Petitioner had been driving the car when it crashed. Paramedics then took Petitioner to the hospital, and the Colorado State Police (CSP) handled the

investigation of the accident. The first CSP trooper to arrive at the scene found no apparent explanation for the crash and determined that the car "'just ran off the right side of the roadway.'" *Id.* Trooper Waters, an accident reconstruction specialist, arrived shortly thereafter and began a more comprehensive investigation. *Id.*

As Trooper Waters investigated, a police supervisor, Corporal Riley, enlisted Trooper Duncan (until then uninvolved in the case) to go to the hospital where Petitioner was being treated. Corporal Riley told Duncan to determine whether "'alcohol was involved'" in the accident, and if so, to have hospital staff draw Petitioner's blood for testing. *Id.* At the hospital, Duncan smelled a strong odor of alcohol on Petitioner's breath. At Duncan's direction, a hospital technician then drew Petitioner's blood. *Id.* at 334-35.

At the time Corporal Riley gave his orders to Duncan, Riley and Duncan together knew only that Petitioner's car was involved in an as-yet unexplained accident, and that Petitioner's breath smelled of alcohol. The Colorado Supreme Court determined that under "well-established" law, this did not form the requisite probable cause necessary to conduct a blood draw in compliance with the Fourth Amendment. *Id.* at 339.

As it happened, however, Trooper Waters was wrapping up his accident investigation just as Trooper Duncan was about to order the blood draw. Back at the accident scene, Waters ruled out mechanical failure as an explanation for the accident and also observed that Petitioner's vehicle went off the roadway in a manner indicative of drunk driving. *Id.* at 334. Although it was clear that Trooper Duncan did not have this information

at the time he conducted the blood draw, the Colorado Supreme Court determined that Trooper Waters' information could be imputed to Trooper Duncan, and that once the knowledge of his fellow officer was added to the equation, then (and only then) did Duncan have probable cause to draw Petitioner's blood. *Id.* at 339-40. As a result, the Colorado Supreme Court held that the blood draw met the Fourth Amendment requirements for conducting such a search and affirmed Petitioner's conviction for driving under the influence of alcohol and related charges. *Id.* at 340.

II. "Horizontal" Rather Than "Vertical" Collective Knowledge Is at Issue Here

In reaching its decision, the Colorado Supreme Court applied what is known as the "collective knowledge" or "fellow officer" rule. In general terms, the rule stands for the proposition that knowledge possessed by one law enforcement officer can sometimes be imputed to another officer performing a search or seizure, such that the first officer's knowledge can be used to justify the second officer's actions.[2] The question presented by this case concerns when the imputation of such knowledge is proper. This question is the subject of much disagreement between both state and federal courts.

The most divisive aspect of this doctrine arises in the situation where courts are seeking to determine whether the knowledge of investigating officers working together can be imported to one

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[2] The "fellow officer" rule applies with equal force to all searches and seizures, including searches, arrests, and *Terry* stops and frisks.

another. Such "horizontal" collective knowledge differs substantially from its analytical cousin—"vertical" collective knowledge—which generally arises when an officer who has probable cause to search a suspect instructs another officer to act in her stead and perform the search for her. Vertical collective knowledge is a relatively uncontroversial doctrine that is applied fairly consistently by courts across the country. It has its roots in two of this Court's opinions: *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971) and *United States v. Hensley*, 469 U.S. 221 (1985). Courts consistently hold that the directing officer need not explain the underlying facts that gave rise to probable cause. So long as the directing officer actually has probable cause, her knowledge is vertically imputed to the searching officer, such that the searching officer is entitled to act on the directive alone.[3]

In contrast, the doctrine of "horizontal" collective knowledge has caused great confusion, as we discuss in detail below. It is also important to note that, although some elements of this case resemble a typical vertical collective knowledge case—namely, Corporal Riley's directive to Trooper

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[3] Though vertical collective knowledge is generally uncontroversial, one issue has created a split among courts. When an officer issues a directive despite lacking probable cause, then develops probable cause *before* the other officer performs the search, can the subsequently obtained information be vertically imputed to the searching officer? Some courts have answered yes, others no. *E.g., compare In re M.E.B*, 638 A.2d 1123, 1132-33 (D.C. 1993) (imputing subsequently obtained information to searching officer) with *Hunt v. Georgia*, 441 S.E.2d 514, 515 (Ga. Ct. App. 1994) (refusing to impute subsequently obtained information).

Duncan—this is exclusively a case about horizontal knowledge pooling. Here, it is undisputed that Corporal Riley, at the time he gave his command, did not possess enough information to reach the probable cause threshold. Thus, the only question presented here is whether Trooper Duncan's "knowledge" at the time he conducted the blood draw could properly count Trooper Waters' on-scene accident investigation, even though the two did not speak to each other before Petitioner's blood was drawn, and even though there is no evidence that Trooper Waters spoke to anyone in the chain of command before Trooper Duncan conducted his Fourth Amendment triggering action. That is a question on which courts around the country give wildly divergent answers, and a question that warrants this Court's corrective intervention.

III. Federal Appellate Courts Have Reached Vastly Different Conclusions About How to Apply the Doctrine of Horizontal Collective Knowledge

Among the federal courts of appeal, there is virtually no agreement even as to origins of the horizontal collective knowledge doctrine, much less its contours.[4]

1. The rule does not follow logically from anything contained in this Court's opinions in *Whiteley* or *Hensley*, which established the vertical collective knowledge doctrine. One early Sixth

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[4] *See* Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. Rev. 663, 674-78 (2014) (describing circuit split); Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 Notre Dame L. Rev. 1085, 1105-12 (2007) (same).

Circuit opinion cited no Supreme Court authority when it declared that "[W]e do mutually impute the knowledge of all the agents working together on the scene and in communication with each other." *United States v. Woods*, 544 F.2d 242, 260 (6th Cir. 1976). More recent opinions often cite this Court's opinion in *Illinois v. Andreas*, 463 U.S. 765 (1983). This is so despite the fact that *Andreas* bears little resemblance to the typical cases in which the horizontal collective knowledge doctrine arises.[5] Nonetheless, the Ninth Circuit has cited *Andreas* for the proposition that: "The general rule is that 'where law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all.'" *Bailey v. Newland*, 263 F.3d 1022, 1031 (9th Cir. 2001) (quoting *Andreas*, 463 U.S. at 772 n.5). "However," the court added, "the Supreme Court has not addressed whether there must be a communication between the officers to support this presumption." *Id.*

2. While it is true that this Court has not addressed the "horizontal" collective knowledge doctrine, it is not at all clear that the Ninth Circuit was correct in describing any sort of "general rule." In the first place, the Fourth Circuit has rejected

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[5] *Andreas* was focused on the question of whether the intended recipient of a mailed container retained a reasonable expectation of privacy in its contents after customs officials lawfully opened it, discovered that it contained illicit drugs, and then resealed it so DEA agents could perform a "controlled delivery" and arrest him as he took possession of it. Though the agent was not present when customs officials resealed the container, their knowledge (that the contents of the container had not changed) was imputed to the agent, such that he was entitled to re-open it without a search warrant. 463 U.S. at 766-73.

the doctrine of "horizontal" collective knowledge altogether. In *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011), the court of appeals addressed a situation in which two officers approached and questioned the defendant before one of the officers conducted a frisk without any justification for doing so. On appeal, the government sought to preserve the ultimate search on the basis that the non-searching officer had noticed a small bulge in the defendant's pocket prior to the frisk, but the court refused to do so, making clear that it was rejecting any "horizontal aggregation of uncommunicated information." *Id.* at 494 (internal quotation marks omitted). The Fourth Circuit declared that the such an approach would "promote[] none of the proper ends of law enforcement." *Id.*

On similar facts, however, the First Circuit took a diametrically opposite approach in *United States v. Cook*, 277 F.3d 82 (1st Cir. 2002). *Cook* involved a three-officer patrol team, which had been monitoring defendant's conduct for evidence of suspicious drug activity. Each member of the team made different observations of the defendant's behavior and had varying levels of knowledge about the defendant's criminal background. *Id.* at 84-85. Each officer's knowledge and observations, taken separately, would have been insufficient to justify the *Terry* stop which they ultimately conducted, but taken together, their knowledge was sufficient. *Id.* at 86. Though the officers never communicated their knowledge to each other, the court upheld the stop, declaring that "common sense suggests that, where law enforcement officers are jointly involved in executing an investigative stop, the knowledge of

each officer should be imputed to others jointly involved in executing the stop." *Id.*

The approach in *Cook* stemmed largely from the fact that the team itself was working together closely and communicating generally, even if no evidence existed one way or the other that the exact communication was relayed prior to the search or seizure. Many circuits focus their analysis on this "team" approach, generally imputing information between officers operating as a team, engaged in a coordinated investigation.

But although the circuits largely unite in their focus on this "team" approach, they fracture again on the level of communication that must exist between officers for "horizontal" pooling of knowledge to occur.

Sometimes this requirement is satisfied easily, as when two or more officers are patrolling together in the same vehicle, or have arrived at the same scene to jointly engage in some law enforcement activity. If the officers are not in close physical proximity, some circuits will still hold that the requirement is satisfied when there is some level of communication between the officers. *See, e.g., United States v. Terry*, 400 F.3d 575, 581 (8th Cir. 2005) ("We impute information if there has been 'some degree of communication' between the officers. This requirement distinguishes officers functioning as a team from officers acting as independent actors who merely happen to be investigating the same subject.") (internal citation omitted); *United States v. Allison*, 953 F.2d 1346, 1350 (11th Cir. 1992) ("Where there is at least minimal communication between different officers, the collective knowledge of the officers determines probable cause."); *Collins v. Nagle*, 892 F.2d 489,

495 (6th Cir. 1989) ("Since the knowledge of the mining investigators working together on the scene and in communication with each other is mutually imputed, we do not require that every arresting officer possess all of the information that, when amassed, gives rise to probable cause."); *United States v. Parra*, 402 F.3d 752, 766 (7th Cir. 2005) (horizontally pooling information known by agents who were "in close contact" throughout a sprawling drug investigation, and noting that their "knowledge may be mutually imputed even when there is no express testimony that the specific or detailed information creating the justification for a stop was conveyed.") (internal quotation marks omitted).

It is one thing to presume communication from the existence of a coordinated team and an otherwise silent record. It is quite another to impute communication even where the record is clear that the relevant communication never occurred. In those federal circuits that follow the "team" approach, there are different approaches about what to do when the record affirmatively shows that no communication occurred.

At least three circuits will not impute knowledge on a clear record that no sharing of information occurred. For example, in *United States v. Shareef*, 100 F.3d 1491 (10th Cir. 1996), the Tenth Circuit determined that it "might be willing" to aggregate the knowledge of officers "working closely together at the scene" in the absence of evidence that pertinent facts had been communicated (based on a presumption officers working side-by-side might convey their suspicions to one another through nonverbal cues). *Id.* at 1504 and n.6, but it could not do so when the record

was clear that the pertinent evidence had *not* been communicated. *Id.* at 1504. *Accord Felders v. Malcom*, 755 F.3d 870, 881 (10th Cir. 2014) (reiterating restrictive reading of horizontal collective knowledge doctrine, explaining that the knowledge of officers acting together may be aggregated, "provided that they have *actually communicated* the information to each other.") (emphasis added); *United States v. Blair*, 524 F.3d 740, 751-52 (6th Cir. 2008) (Munday's knowledge could not be imputed to Holmes, because the record was clear that Munday had not conveyed the pertinent facts at the time of *Terry* stop); *United States v. Ellis*, 499 F.3d 686, 690 (7th Cir. 2007) (refusing to impute knowledge among officers at the scene because it was clear from the record that those officers had never conveyed any information to the officer who broke into the home).

Other circuits, however, appear to impute knowledge even where doing so is contrary to the evidence. *See*, *e.g., United States v. Gillette*, 245 F.3d 1032, 1033-34 (8th Cir. 2001) (imputing knowledge of detective to searching officer, where the only connection between the two was that searching officer came to scene based on a request for backup); *United States v. Ragsdale*, 470 F.2d 24, 30-31 (5th Cir. 1972) (upholding search by one officer based on knowledge of other, which searching officer admitted he did not have himself at time of search); *and see United States v. Terry-Crespo*, 356 F.3d 1170, 1177 (9th Cir. 2004) ("there is room in our precedent to conclude that the collective knowledge of law enforcement can support reasonable suspicion, even if the information known to others is not communicated to the detaining officer prior to a *Terry* stop.").

In short, the federal circuits are widely and persistently split on how to approach the collective knowledge doctrine. Some refuse to apply the doctrine at all, and other circuits apply the doctrine to officers working as a "team" but are divided about who is on the team and what to do in the face of evidence that the relevant communication did not occur. The time has come for this Court to make some sense of these widely conflicting views. *See* S. Ct. R. 10(c).

IV. State Courts are also Sharply Divided Over the Horizontal Collective Knowledge Doctrine

State courts are as widely divided over the application of the horizontal collective knowledge rule as are the federal circuits. For examples of state courts taking an expansive view of horizontal collective knowledge, *see Massachusetts v. Montoya*, 984 N.E.2d 793, 802 (Mass. 2013) (imputing uncommunicated information between officers conducting joint drug investigation); *Doleman v. Nevada*, 812 P.2d 1287, 1290 (Nev. 1991) (upholding warrantless entry of hotel room because police collectively had probable cause, even if detective who entered room "may not have been specifically aware of each and every one of these facts."); *Minnesota v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007) ("[T]he officer who conducts the search is imputed with knowledge of all facts known by other officers involved in the investigation, as long as the officers have some degree of communication between them."); *Smith v. Florida*, 719 So.2d 1018, 1023 (Fla. Dist. Ct. App. 1998) (though detective conducted pat down merely "for officer safety," his actions were nonetheless

justified because federal agent who had knowledge sufficient to justify a frisk was on scene with him, and agent's knowledge could be imputed to detective); *Michigan v. Davis*, 660 N.W.2d 67, 70 (Mich. 2003) (information acquired by two detectives interviewing witnesses at the scene of an arson could be aggregated to support one detective's independent decision to arrest the defendant, despite no evidence that detectives shared information); *Connecticut v. Butler*, 993 A.2d 970, 978-79 (Conn. 2010) (knowledge possessed by officers jointly conducting traffic stop could be aggregated to justify frisk of defendant, despite lack of evidence that officers communicated information to one another); *North Carolina v. Bowman*, 666 S.E.2d 831, 835 (N.C. Ct. App. 2008) (when team of officers conducted traffic stop, knowledge of officer who had probable cause could be imputed to officer who initiated vehicle search, despite lack of evidence that pertinent information was shared).

For examples of state courts rejecting or taking a narrow view of horizontal collective knowledge, *see Oregon v. Mickelson*, 526 P.2d 583 (Or. Ct. App. 1974) (refusing to impute knowledge between two officers conducting searches in different rooms of the same house); *New York v. Mitchell*, 585 N.Y.S.2d 759, 761 (N.Y. App. Div. 1992) (police officers "cannot be considered to have relied on information possessed by each other without there having been any communication of either the information itself or a direction to arrest."); *Pennsylvania v. Gamit*, 418 A.2d 554 (Pa. Super. 1980), *aff'd*, 462 A.2d 211 (Pa. 1983) (refusing to impute to arresting officer the information contained in a police radio broadcast,

even though fellow officers heard the information, because the arresting officer admitted he did not hear it).

In addition to this general array of cases, the split between state courts can be demonstrated by pointing to cases involving facts virtually identical to those at issue in Petitioner's case. Consider the following: *Massachusetts v. Rivet,* 573 N.E.2d 1019 (Mass. Ct. App. 1991) (knowledge of two officers jointly participating in accident investigation could be aggregated to find probable cause to draw defendant's blood, even though no evidence that officers shared information); *Louisiana v. Weber*, 139 So.3d 519 (La. 2014) (knowledge of officer at accident scene could be imputed to officer at hospital who was directing that defendant's blood be drawn, despite the former never conveying his findings to the latter); *Delaware v. Cooley*, 457 A.2d 352 (Del. 1983) (knowledge of officer on accident scene, who had probable cause to arrest defendant but had not yet communicated his findings, could not be imputed to sergeant who arrested defendant and performed a breathalyzer test, rendering incriminating test results inadmissible); *McDuff v. Mississippi*, 763 So.2d 850 (Miss. 2000) (blood test results of DUI defendant deemed inadmissible because officer who ordered blood test lacked probable cause at the time, and subsequently-obtained evidence could not be imputed to those performing the blood draw because it had not been communicated to them before the test). In short, the state appellate courts are also in disarray on this issue, which is yet another factor that points in favor of review.

V. The Question Presented Is Critically Important to the Administration of Criminal Justice

Although the level of disagreement alone would be enough to warrant this Court's intervention, the question presented also deserves review because it is critically important to the administration of criminal justice. As this Court and lower courts have made clear over time, the procedural guidelines for law enforcement must be calibrated to allow officers sufficient flexibility to do their jobs effectively. *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (discussing argument that "police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."). At the same time, the power to search or seize should not be expanded without adequate justification, and certainly should not be extended merely to make law enforcement a more convenient enterprise at the expense of individual liberty. *See Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."); *United States v. Robinson*, 414 U.S. 218, 258 n.7 (1973) ("Mere administrative inconvenience . . . cannot justify invasion of Fourth Amendment rights.").

The horizontal collective knowledge doctrine expands the authority of law enforcement to conduct searches and seizures, but the rationale for this expansion is troublingly elusive. By comparison, the *vertical* horizontal collective

knowledge doctrine represents an expansion of police power with a firm rationale behind it. Given the collaborative nature of modern law enforcement, the work of police officers would be unduly hampered if they could not request help from one another without first reciting the factual justifications for their requests. But given that vertical collective knowledge is a firmly established rule, what additional law enforcement need is served by the horizontal doctrine? As one scholar has pointed out, dissenting judges from panels upholding the doctrine have demanded a rationale and been offered little in response. *See* Stern, *supra* note 4, at 1111 n.107 (collecting cases). Given that modern technology enables law enforcement officers to communicate instantaneously, there seems to be little reason why officers would be hampered by a requirement that they convey information to one another before making a decision to conduct a search or seizure. In cases where a single officer has probable cause, horizontal pooling is of limited utility, since that officer can rely on the *vertical* collective knowledge rule by simply instructing another officer to search or seize a suspect. In cases where no single officer is aware of sufficient facts to justify a search or seizure, it hardly seems unreasonable to require that the officers confer with one another and ensure that the actions they are about to undertake will not violate the Fourth Amendment.

Though the benefits of the horizontal collective knowledge rule are not obvious, the dangers to individual liberty are clear. This Court's Fourth Amendment jurisprudence is based largely on the notion that before police officers may conduct a search or seizure, they must possess the

requisite level of suspicion—"probable cause" for searches and arrests; "reasonable suspicion" for stops and frisks. Officers who lack sufficient information to justify a search or seizure will typically refrain from acting until they know more. But the doctrine of horizontal pooling undermines that framework by giving officers a reason to conduct searches and seizures even when they do not have adequate justification for doing so. As the Fourth Circuit explained in *United States v. Massenburg*, "an officer who knows she lacks cause for a search will be more likely to roll the dice and conduct the search anyway, in the hopes that uncommunicated information existed." 654 F.3d 480, 494 (4th Cir. 2011).

Moreover, the horizontal collective knowledge doctrine exacerbates an already-existing problem in Fourth Amendment law—the problem of hindsight bias in ex post probable cause determinations. When officers are challenged in court regarding whether they had sufficient information to justify a search or seizure, the officers are susceptible to having their memories affected by the outcome of the action they took. As one scholar explains:

> [O]fficers, after finding incriminating evidence, are much more likely to emphasize facts that support the probable cause determination and ignore facts that undermine it. For example, a suspect who looks down while an officer requests permission to conduct a frisk, which may be a normal reaction to the stress of a police encounter, may be characterized as having made a furtive gesture by the

> government as it makes its case that probable cause existed for the eventual non-consensual frisk.

Fettig, *supra* note 4, at 691. *See also id.* at 691-93 (collecting social science research on hindsight bias in the criminal justice system). In horizontal collective knowledge cases, where uncommunicated information is aggregated ex post, this problem arguably worsens. If slightly exaggerated recollections by a single officer are problematic, the problem is multiplied when several officers pool their biased recollections. This is especially true in evaluating *Terry* stops and frisks, where the legal standard of "reasonable suspicion" is so easy to satisfy. If Officer A remembers a furtive gesture that was actually a downward glance, and Officer B remembers a gun-sized bulge in a person's pocket that was actually much smaller, these observations, pooled together, might justify a frisk when, in fact, a frisk was completely unjustified.

Lastly, the Court should resolve the issue presented in this case because the current state of the law, in which some state courts hold a very different view of the collective knowledge doctrine than do the federal courts covering the same geographic area, creates significant opportunities for forum shopping. For example, as law enforcement officers and prosecutors are undoubtedly aware, the Fourth Amendment analysis for a search of an individual like Mr. Grassi, who was arrested in Colorado, will be materially different depending upon the jurisdiction in which he is prosecuted. If prosecutors decide to bring a case in state court, the collective knowledge of the officers will be measured under the Colorado Supreme Court's rule, which imputes knowledge to the searching

officer even on a record that conclusively shows such knowledge did not exist. By contrast, if prosecutors decide to pursue the charges in federal court, these same facts will present a much stronger Fourth Amendment claim measured under a much more exacting rule. *Felders v. Malcom*, 755 F.3d 870, 881 (10th Cir. 2014) (requiring actual communication). The same would go for a North Carolinian charged in state court whose search or seizure would be analyzed under the government-friendly standard of *North Carolina v. Bowman,* 666 S.E.2d 831, 835 (N.C. Ct. App. 2008), versus a North Carolinian charged in federal court whose Fourth Amendment rights would be governed by *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011), which rejects the horizontal pooling doctrine altogether.

These disparities will be hard for law enforcement officials to ignore in their searching and seizing decisions, and for prosecutors to ignore in their charging decisions. And while such disparities are sometimes inevitable in our federal system, in this situation they threaten to pose a unique sort of mischief. For the most part, divergent treatment of this sort can be harmonized without this Court's intervention, since state court convictions infected by constitutional error can be reviewed in federal court on habeas corpus review. But *this* type of constitutional issue—a Fourth Amendment claim—is not cognizable in habeas corpus proceedings, *Stone v. Powell*, 428 U.S. 465 (1976), which means that, in the absence of this Court's intervention, the Fourth Amendment claims of individuals in Colorado, North Carolina and other jurisdictions will be measured under vastly different standards, depending on whether

they are charged in state court and federal court. Given often overlapping federal and state jurisdiction in the criminal arena, these divergent Fourth Amendment rules create a significant potential for forum shopping, which is yet another reason this Court should hear this case and harmonize the conflicting rules that currently govern in this important area of constitutional law.

VI. Petitioner's Case Presents an Excellent Vehicle for Resolving These Important Questions

Beyond the significance of the issue presented here, Petitioner's case provides this Court with an excellent vehicle for resolving it. Petitioner's case presents a simple set of facts, and the issue was fully and fairly litigated below. In addition, as noted, the split in the circuit courts is well developed, and it is unlikely that further percolation of the issue will occur. The explicit framing of the issue below ensures that this case presents only a pure question about the scope of the collective knowledge doctrine.

What is at stake here is whether Fourth Amendment searches and seizures can continue to occur in an absence of a showing that the officer has the requisite knowledge to justify the Fourth Amendment invasion, or at least received an order to take the action from someone who did. *Amici* suggest that allowing such conduct to continue vitiates the core protection of the Fourth Amendment right.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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