No. 10-704

In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

Petitioners,

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, and WILLIAM JOHNSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY COULD REASONABLY BELIEVE PROBABLE CAUSE SUPPORTED THE WARRANT.

This Court's jurisprudence establishes that when an officer relies on a warrant later determined invalid, the officer's conduct should be deemed "objectively reasonable," and qualified immunity should apply, absent egregious circumstances essentially rendering the warrant process meaningless. (Brief of Petitioners ["Pet.Br."]19-38.)

Respondents do not directly address petitioners' analysis. Rather, they assert *Malley v. Briggs*, 475 U.S. 335 (1986), and *Groh v. Ramirez*, 540 U.S. 551 (2004), imposed an independent duty on officers to exercise "reasonable professional judgment," and the officers here were "plainly incompetent" in seeking a general warrant they should have known was unsupported by probable cause. (Brief for Respondents ["Resp.Br."]19-20, 45.)

Respondents are wrong. The officers had a logical basis for believing probable cause supported the warrant, and no clearly established law would have notified them they should not even have sought a determination of probable cause.

A. The Officers Could Reasonably Believe There Was A "Fair Probability" Bowen Kept Firearms At Plaintiffs' Residence And They Were Subject To Seizure.

Probable cause exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Respondents argue Bowen's assault on Kelly with a particular firearm did not establish probable cause to seize other firearms at plaintiffs' residence, because there was no reason to suspect Bowen possessed other firearms or kept them at plaintiffs' residence. (Resp.Br.33.) Respondents and *amici* also note that guns at plaintiffs' residence might lawfully belong to "innocent" persons and be protected by the Second Amendment. (Resp.Br.33 & n.16, 36 n.17; NRA Amicus Br.26-29, 34-36.)

They ignore the obvious. Bowen was a gang member who had threatened and attempted to murder his girlfriend in public by shooting at her repeatedly with a sawed-off shotgun – an illegal weapon associated with gangs, which commonly possess and use firearms illegally. (Pet.Br.40.) Bowen had an extensive criminal history including prior felonies with numerous assault and weapons charges. (Pet.Br.41-42.) Many circuits have held that prior arrests or convictions, particularly involving similar conduct, can help establish probable cause. *United*

States v. Conley, 4 F.3d 1200, 1207 (3d Cir. 1993) (citing cases); *United States v. Ryan*, 293 F.3d 1059, 1062 (8th Cir. 2002). Given the circumstances, the officers could draw the "common-sense conclusion[ ]" that there was at least a "fair probability" Bowen possessed other firearms. *Gates*, 462 U.S. at 231, 238. (Pet.Br.39-43.) Because the officers had probable cause to believe Bowen was living or staying at plaintiffs' residence, there was a fair probability he would keep such firearms there and hide them anywhere on the premises. (Pet.Br.43-44.) And because he was a felon who had threatened and attempted to kill his girlfriend, there was at least a fair probability those weapons could be lawfully seized. (Pet.Br.44-46.)

That firearms may be lawfully owned or constitutionally protected, or might belong to residents not suspected of crime, does not render the search for them invalid. Constitutionally protected items may be the proper subject of a search warrant. *United States v. Rubio*, 727 F.2d 786, 791-92 (9th Cir. 1984). And "search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found"; thus, property owned or occupied by "innocent" persons may be searched under a valid warrant. *Conley*, 4 F.3d at 1207; *Zurcher v. Stanford Daily*, 436 U.S. 547, 554, 556 (1978).

Respondents attempt to distinguish cases recognizing the close nexus between guns and drug trafficking, arguing the affidavit linked Bowen not to

drug trafficking but only to a "spousal assault." (Resp.Br.34.) Respondents miss the point. If guns are tools of the drug trade, justifying a search for them based on evidence of drug dealing, then surely guns are tools of illegal firearms activity – *i.e.*, there is probable cause to search for firearms when a member of a gang, an association commonly linked with violent crime and illegal weapons, actually fires an illegal weapon at a person. (Pet.Br.42-43.)

Further, Bowen's crime was no ordinary "spousal assault," but attempted murder by a gang member and felon with a sawed-off shotgun. The notion that officers could lawfully search only for a sawed-off shotgun and were required to leave any other weapons that might belong to Bowen for his later use in a renewed attack on Kelly, defies common sense. Nothing in this Court's case law compels this nonsensical result, and – as expressly recited in the warrant (JA48) – California law squarely authorizes seizure of items possessed with the intent to use them as a means of committing a crime. (Pet.Br.44.) Respondents conspicuously fail to address this point.

B. Bowen's Felon Status Additionally Established Probable Cause, And Its Omission From The Affidavit Was A Reasonable "Mistake Of Fact" To Which Qualified Immunity Applies.

As noted, the affidavit amply supported probable cause for the search. Yet, petitioners could also

believe probable cause existed based on Bowen's status as a felon barred from possessing firearms, with an extensive criminal history. Messerschmidt's omission of this information from the affidavit was at the very least a reasonable "mistake of fact" warranting qualified immunity. (Pet.Br.47-51.)

Respondents argue *Gates*, 462 U.S. at 238-39, and *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971), prohibit courts from considering information supporting probable cause known to the officer but withheld from the magistrate. (Resp.Br.36-37.) Both decisions address a warrant's validity under the Fourth Amendment, not qualified immunity. Moreover, *Whiteley* involved a conclusory, "bare-bones" affidavit. *Whiteley*, 401 U.S. at 565 & n.8. These cases do not address whether an officer is entitled to qualified immunity where, as here, he submits a detailed affidavit he could reasonably believe establishes probable cause, or reasonably fails to realize he has omitted a fact that would help establish probable cause.

On the other hand, this Court has explicitly stated that qualified immunity applies to reasonable mistakes of fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting); *Butz v. Economou*, 438 U.S. 478, 507 (1978). In the suppression context, the Court has also repeatedly found officers acted in objective good faith where they obtained warrants based on reasonable but mistaken factual assumptions. (Pet.Br.48-49 [discussing cases].)

Respondents cite Ninth Circuit suppression cases holding that courts may not consider information known to the officer but omitted from the affidavit, at least where the affidavit lacks any indicia of probable cause. *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988); *United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006). (Resp.Br.38.) These decisions contradict well-reasoned decisions of the majority of circuits holding that, given this Court's direction in *Leon* to consider "all the circumstances" in determining whether an officer has reasonably relied on a warrant, it is appropriate to consider facts known to the officer but never presented to the magistrate. *See United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir. 2002) (collecting cases); *United States v. Leon*, 468 U.S. 897, 922 & n.23 (1984). Indeed, both *Hove* and *Luong* produced dissents finding the good-faith exception applicable because the officers knew facts not included in the affidavit that supported a colorable probable-cause determination. *Hove*, 848 F.2d at 141 (Lovell, J., dissenting); *Luong*, 470 F.3d at 905-07 (Callahan, J., dissenting).

Respondents concede courts may appropriately consider facts omitted from an affidavit if "there are sufficient indicia of probable cause to make an officer's reliance on the warrant 'not entirely unreasonable'" – *i.e.*, when an officer makes "a mistaken but reasonable judgment" that facts presented to the magistrate establish probable cause. (Resp.Br.38-39.) Here, the officers did so – they submitted a detailed affidavit that established a logical basis for believing

they would likely find firearms at plaintiffs' residence and those firearms would be subject to seizure. Significantly, both *Hove* and *Luong* stated the test for whether an affidavit is "so deficient" that officers cannot reasonably believe it establishes probable cause is "whether the affidavit was sufficient to 'create disagreement among thoughtful and competent judges as to the existence of probable cause.'" *Hove*, 848 F.2d at 139; *Luong*, 470 F.3d at 903. Here, two dissenting judges concluded probable cause supported the search for all firearms at plaintiffs' residence even considering only the facts in the affidavit. (App.41-42 & n.1.)

Respondents assert that if officers know information not presented to the magistrate can save a defective warrant, they will "become careless" in ensuring that they give the magistrate all the information relevant to probable cause. (Resp.Br.39.) But an officer who bothers to seek a warrant has every incentive to include all facts he knows that might help establish probable cause, because if he leaves out important facts he probably will not get a warrant. Accordingly, this Court has never expressed concern about officers withholding facts that help establish probable cause; rather, the Court has been concerned only when officers procure a warrant by intentionally making false statements that establish probable cause, or omitting exculpatory facts. *See Franks v. Delaware*, 438 U.S. 154, 155, 168, 171 (1978). Moreover, the Court has been concerned not with mere carelessness or negligence, but only with

deliberate or reckless misrepresentations. *Id.* at 168, 170-71; *see also Leon*, 468 U.S. at 923. Similarly, qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Respondents argue that considering information not presented to the magistrate encourages officers, after a warrant is challenged, to falsely assert they had such information. (Resp.Br.39-40.) But no such thing happened here; Messerschmidt undisputedly knew Bowen's criminal history and felon status when he sought the warrant. (App.8, 25 & n.7; JA21, 28-29.) Moreover, respondents' concern is misplaced because to receive qualified immunity, officers must affirmatively prove that they knew the omitted facts when they sought a warrant. If they can do so, they *should* receive qualified immunity.

Respondents assert Messerschmidt did not actually make a mistake, because he testified he did not omit any important information from the affidavit. (Resp.Br.41 & n.21.) But Messerschmidt's testimony simply confirms he viewed the affidavit from a "commonsense" perspective rather than as a "legal technician[ ]," *Gates*, 462 U.S. at 230-31, and accordingly believed it was accurate.

Respondents urge that it is contradictory to say the officers presumptively acted in good faith by relying on a warrant, yet are "entitled to the benefit of material they withheld from the magistrate." (Resp.Br.41-42.) Respondents miss the point. That an

officer has sought or relied on a warrant bespeaks the officer's good faith. This is no less so when the officer makes a reasonable mistake by inadvertently omitting from a detailed affidavit a fact that might bolster a showing of probable cause. Respondents' argument might apply if an officer *intentionally* withheld information from the magistrate – but again, no officer would have any incentive to omit information that would increase the chances of obtaining a warrant.

Respondents assert the issue is further "complicat[ed]" because Messerschmidt omitted facts from his affidavit that might have undermined probable cause – specifically, Kelly said Bowen was merely "hiding out" at plaintiffs' residence, and Bowen had stayed there only temporarily since being raised there as a foster child 15 years earlier. (Resp.Br.40-41 n.20.) According to plaintiffs, these facts suggest Bowen would neither be found at plaintiffs' residence nor stash firearms there. (*Id.*) But this argument has no bearing on whether the Court should consider facts omitted from the affidavit that would *help* establish probable cause.

Moreover, as the dissent noted (App.60-61 & n.15), plaintiffs lost these issues in the district court and did not revive them on appeal. The district court found (1) the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence (JA307, 310-11), (2) Messerschmidt's statement in the affidavit that Bowen "resided" there was not a misrepresentation (JA316), and (3) Messerschmidt acted reasonably in failing to include Kelly's actual words –

i.e., that Bowen might be "staying at" or "hiding out" at plaintiffs' residence – and the fact his computer searches revealed alternative addresses for Bowen (JA316-19). The court further noted Bowen's foster mother's home was a logical place for him to be staying. (JA318-19.)

The district court denied plaintiffs' application for an order certifying an interlocutory appeal regarding whether the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence. (JA385-94; Order filed 5/25/07 [docket #114], at 13-14.) Plaintiffs did not raise the issue in the Ninth Circuit. (*See* Appellees' Answering Brief, filed 1/23/08 [9th Cir. docket #19], at 16-30; App.60-61 & n.15.) Thus, they cannot resurrect it here. *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (declining to consider arguments rejected by district court and not addressed by court of appeals); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("we generally do not address arguments . . . not the basis for the decision below").

Respondents also argue the "objective reasonableness" standard precludes "examination of an officer's subjective knowledge or state of mind." (Resp.Br.40, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).) While *Harlow* held that an officer's state of mind, *i.e.*, motive and "intentions," would be irrelevant to qualified immunity, *id*. at 815, the Court nowhere used the term "subjective knowledge."

Moreover, in considering information Messerschmidt knew but inadvertently omitted from the affidavit, the Court need not examine the officers' state of mind – *i.e.*, whether they acted with malice or actually knew they were violating constitutional rights. Rather, the question is whether the officers reasonably "could have believed [their actions] lawful, in light of clearly established law *and the information the officers possessed*" – an inquiry this Court has held proper. *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Put differently, as Justice Kennedy explained in *Groh,* 540 U.S. at 566, the question is "whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment." As explained, Messerschmidt could reasonably believe his detailed affidavit established probable cause, and could reasonably fail to notice he had omitted Bowen's felon status.

C. The Officers Could Reasonably Believe There Was Probable Cause To Search For Gang-Related Items.

Respondents contend the officers could not reasonably have relied on the warrant's authorization to search for gang-related items because Bowen's attack on Kelly was not gang-related. (Resp.Br.27-28.) But as petitioners explained, since Bowen was a gang member and felon who had fired a sawed-off shotgun at someone in public, Messerschmidt, a gang specialist, could reasonably have believed that Bowen's

possession or concealment of the gun might be related to his gang membership, or that gang paraphernalia might help tie Bowen to firearms found at plaintiffs' residence. (Pet.Br.51-52.) Bowen's gang membership was relevant, just as a suspect's membership in a terrorist organization would be relevant had he attempted to murder his girlfriend with a chemical weapon or bomb.

Respondents assert gang paraphernalia could not tie Bowen to items at plaintiffs' residence because other Mona Park Crip gang members also lived there. (Resp.Br.29; *see* JA28.) Nonetheless, gang-related items were relevant; they might have been found next to the sawed-off shotgun or contain Bowen's moniker. Or, Kelly or the other residents might be able to identify the items as Bowen's.

Respondents criticize Messerschmidt's description of his previous gang experience as "boilerplate," citing *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990), where an expert's experience with pedophiles was irrelevant because the affidavit did not indicate the suspect was a pedophile. (Resp.Br.29.) Here, Bowen undisputedly was a gang member and had committed a crime using an illegal weapon associated with gangs.

Respondents also challenge the warrant's gang-related provisions because they sought items "showing . . . affiliation with any Street Gang" – not just Mona Park Crips – and photographs depicting "evidence of criminal activity." (Resp.Br.29-30; JA52.)

Plaintiffs never challenged the former provision below, and the district court did not rule on either provision. (*See* JA331-33.) Plaintiffs also failed to challenge these provisions in the Ninth Circuit, and the court did not address them. (*See* Appellees' Answering Brief [9th Cir. docket #19], at 22-25; App.28-29, 63-64, 75.) Thus, this Court should not consider respondents' newly minted argument. *Cutter*, 544 U.S. at 719 n.7; *Matsushita Elec. Indus. Co.*, 516 U.S. at 379 n.5.

Regardless, the officers reasonably sought to search for items related to "any" gang because Messerschmidt knew Bowen was a member of at least one other gang. (3ER 561, 8ER [videotape]; JA39, 64; *see* JA19, 21.)

The officers also reasonably sought approval to search for photographs depicting "evidence of criminal activity." This phrase appears in a paragraph seeking various types of gang-related items, including "photographs or photograph albums depicting" items "relevant to gang membership, . . . or which may depict *evidence of criminal activity*." (JA52, emphasis added.) Since gangs by their nature regularly engage in numerous types of criminal activity, *see People v. Gardeley*, 927 P.2d 713 (Cal. 1997), photographs depicting evidence of criminal activity might be gang-related and thus would constitute indicia of gang membership.

Moreover, the officers could reasonably believe the phrase "evidence of criminal activity" referred to

gang-related criminal activity. The D.C. Circuit has held "a warrant's catch-all phrase must be read in light of the items that precede it," and thus the phrase "any other evidence of a violation of [a specified statute]" was not overbroad because, read in context, it referred to evidence of such violations concerning a specific victim. *United States v. Pindell*, 336 F.3d 1049, 1053 (D.C. Cir. 2003); *see also United States v. Potts*, 586 F.3d 823, 834 (10th Cir. 2009) (applying good-faith exception on similar facts); *United States v. Rosa*, 626 F.3d 56, 58, 64-65 & n.3 (2d Cir. 2010) (applying good-faith exception where warrant authorized search of computer equipment identifying "criminal conduct," but supporting documents referred to child pornography).

Messerschmidt also knew when he sought the warrant that Bowen had an extensive criminal record including numerous assault and weapons charges with several felony convictions, and was on probation. (JA21, 26-29; *see* JA70-71.) Prior arrests and convictions can help establish probable cause. *Conley*, 4 F.3d at 1207 (citing cases); *Ryan,* 293 F.3d at 1062; *see United States v. Harris*, 403 U.S. 573, 583 (1971). This Court has also recognized a "probationer 'is more likely than the ordinary citizen to violate the law.'" *United States v. Knights*, 534 U.S. 112, 120 (2001). Thus, since Bowen had committed yet another crime using an illegal weapon, the officers could reasonably have believed there was a fair probability he was committing other crimes. Moreover, Messerschmidt knew Bowen had photographed himself posing with

an illegal weapon (3ER 557, 629; 8ER [videotape]), and could reasonably infer Bowen might have photos evidencing his other crimes.

Finally, even assuming the authorization to search for photographs depicting "evidence of criminal activity" was overbroad, this overbreadth did not expand the scope of the search. The district court found the officers had probable cause to search for evidence of control of the premises (JA333-34), which could include photographs – *e.g.*, a photo showing Bowen at plaintiffs' residence might suggest he lived there. Thus, a search for photos depicting evidence of criminal activity would not encompass any additional areas. Accordingly, applying qualified immunity here is consistent with this Court's direction to avoid applying hypertechnical standards when reviewing warrants. *See Groh*, 540 U.S. at 570-71 (Kennedy, J., dissenting).

Indeed, plaintiffs' newfound focus on language that went unnoticed by a magistrate, a district judge, 11 appellate judges, and even plaintiffs' own attorneys confirms that the officers acted reasonably in failing to notice any deficiency, and is emblematic of the sort of *ex post facto* nitpicking of warrants that has become a ubiquitous part of the legal landscape.

D. Respondents Have Identified No Cases Clearly Establishing The Warrant Was Unconstitutional.

Respondents and *amici* contend the law "clearly established" the warrant's authorization to search for firearms and gang-related items was unconstitutional. (Resp.Br.21-26; NRA Amicus Br.26-37.) But they fail to identify any "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing the warrant's unconstitutionality "beyond debate," as required to defeat qualified immunity. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083-84 (2011).

Respondents cite (1) the Fourth Amendment's probable cause and particularity requirements, (2) this Court's decisions prohibiting "general, exploratory" searches, and (3) Ninth Circuit cases holding a warrant's scope must be limited to the extent of the probable cause. (Resp.Br.21-23.) Yet, this Court has "repeatedly" admonished courts "not to define clearly established law at a high level of generality," because general propositions do not help determine "whether the violative nature of *particular* conduct is clearly established." *al-Kidd*, 131 S.Ct. at 2084 (emphasis added); *Anderson*, 483 U.S. at 639, 644. Rather, clearly established law must be determined "'in light of the specific context of the case.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

This Court has stated that "'novel factual circumstances,'" even if not "outrage[ous]," may violate clearly established law. *Safford Unified School Dist.*

v. Redding, 129 S.Ct. 2633, 2643 (2009). But the Court has denied qualified immunity in such circumstances only in cases involving egregious conduct – for example, where officers handcuffed a prisoner to a "hitching post" shirtless, in hot sun, for seven hours with little water and no bathroom breaks – conduct involving "obvious," unnecessary "cruelty." *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). Similarly, a judge who sexually assaulted five women had "fair warning" his conduct was unconstitutional. *United States v. Lanier*, 520 U.S. 259, 271 (1997) (conviction under 18 U.S.C. §242). These holdings mirror *Malley*'s admonition that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Respondents cite Ninth Circuit cases that "invalidated warrants authorizing a search for a general class of items when probable cause existed only for specific items within that class." (Resp.Br.24-25.) None of these cases involved facts where a gang member and felon attempted murder using an illegal weapon associated with gangs, and officers sought a warrant to search the suspect's residence or hideout for firearms or gang-related items – or anything close. Respondents and *amici* fail to identify any case invalidating a search for "all firearms" where a specific firearm is used, or holding that although officers can search for guns based on suspected drug activity, they cannot infer the presence of firearms based on a gang member's assault with an illegal firearm. Or suggesting that gang indicia is irrelevant

to the possession or concealment of an illegal weapon associated with gangs and used by a gang member to commit a crime.

Rather, respondents cite cases invalidating unlimited searches for documents or jewelry – items that, given the circumstances, were not inherently dangerous, associated with the crime at issue, or illegal for the suspect to possess. For example, in *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995), the warrant "authorized the seizure of virtually every document and computer file at [defendants' business]," even though there was no basis to believe all documents could be evidence of crime. *See also VonderAhe v. Howland*, 508 F.2d 364, 369 (9th Cir. 1974) (similar facts); *United States v. Bridges*, 344 F.3d 1010, 1017-18 (9th Cir. 2003) (same); *United States v. Stubbs*, 873 F.2d 210, 211-12 (9th Cir. 1989) (same). In *United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986), a warrant authorized a search for all gemstones and jewelry at defendant's jewelry store, although agents suspected only a few stolen diamonds and had no reason to believe they might find more. Similarly, the cases cited from other circuits (Resp.Br.25 n.12) involve searches for essentially all documents or media at a business, or unspecified "evidence," without any reason to believe there might be probable cause to search for all such items.

Here, in contrast, Bowen was a gang member and felon who had shot at someone with an illegal firearm associated with gangs; the officers had reason to believe he would have multiple illegal firearms,

and gang indicia would be relevant to his use, possession or concealment of such weapons.

II. THE WARRANT'S PURPORTED OVERBREADTH DID NOT EXPAND THE SCOPE OF THE SEARCH.

Petitioners explained the officers should not be denied qualified immunity based on a hypertechnical reading of the warrant, partly because the purported overbreadth did not expand the search beyond areas otherwise properly searched. (Pet.Br.63-65.)

Respondents assert *Groh*, 540 U.S. at 560, rejected the contention that a defective warrant may be cured because the defect did not expand the scope of the search. (Resp.Br.43.) But that portion of the opinion addresses the warrant's validity, not qualified immunity. In addressing qualified immunity, the majority held that because the warrant was facially invalid, no reasonable officer could rely on it. *Groh*, 540 U.S. at 563. The Court never suggested that for qualified immunity purposes, courts cannot consider whether a defect unapparent on the warrant's face expanded the search.

Respondents further argue (1) Justice Kennedy's dissent is inapposite because *Groh* involved a "clerical error," unlike here where the warrant lacked probable cause, and (2) the authorization to search for gang-related items and photographic indicia of criminal activity expanded the search by allowing the officers to examine plaintiffs' dresser drawers and photo

albums. Yet, there was probable cause to search for all firearms and gang-related items in plaintiffs' residence. (Pet.Br.40-46, 51-52.) Moreover, the majority found probable cause to search for disassembled parts of the sawed-off shotgun, which could fit into a dresser drawer. (App.20, 43 & n.4.) And the district court found probable cause to search for evidence of control of the premises, which could include photographs. (JA333-34; §I.C, *supra*.)

Respondents contend the warrant expanded the scope of the seizure because Augusta Millender's gun and ammunition were seized. They overlook that there was probable cause to search for *all* firearms at plaintiffs' residence. (Pet.Br.40-46.) Because Bowen was a gang member and felon who had shot at someone with a sawed-off shotgun in public, and the officers reasonably believed he was living or staying at plaintiffs' residence, the officers had probable cause to believe Bowen had other firearms and would keep or hide them there, *anywhere on the premises*, and such firearms could be lawfully seized. (Pet.Br.43-46.) Thus, the officers had probable cause to seize Augusta Millender's gun and ammunition because there was a "fair probability" they were Bowen's. The issue is not whether some firearms at the premises could lawfully belong to third parties, but whether there was probable cause to believe any firearms found might belong to Bowen and thus be subject to seizure. (*See* §I.A, *supra*.)

III. AS THIS COURT HAS RECOGNIZED, SOUND POLICY CONSIDERATIONS SUPPORT APPLYING UNIFORM STANDARDS FOR DETERMINING APPLICATION OF QUALIFIED IMMUNITY OR SUPPRESSION OF EVIDENCE ARISING FROM PROCUREMENT OF A WARRANT.

Respondents and *amici* criticize petitioners' reliance on this Court's exclusionary-rule decisions in analyzing qualified immunity. (Resp.Br.50-53; ACLU Amicus Br.15-20.) They urge the Court to depart from *Malley* insofar as it expressly incorporated "the same standard of objective reasonableness . . . applied . . . in *Leon*" in the suppression context. *Malley*, 475 U.S. at 344; *Groh*, 540 U.S. at 565 n.8. This argument is tied to an attempt to sidestep this Court's recent decision in *Herring v. United States*, 555 U.S. 135 (2009), which again emphasized that merely negligent conduct by a police officer cannot support suppression of evidence. *Herring*, 555 U.S. at 145-48.

As a threshold matter, numerous cases of this Court and circuit courts outside the suppression context explicitly state that officers are entitled to qualified immunity based on reasonable mistakes of fact. (Pet.Br.47-51.) In any event, as this Court recognized in *Malley*, when an officer procures a warrant later determined invalid, there is no principled reason for imposing a different standard for qualified immunity than for the exclusionary rule's good-faith exception.

Both doctrines balance the need to protect individual rights by deterring police misconduct, against the need to permit effective investigation and prosecution of crime. (Pet.Br.26-27.) As this Court has noted, exclusion is warranted only if its "deterrence benefits . . . outweigh its heavy costs" in the form of "suppress[ing] the truth" in criminal proceedings. *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011); *see also Herring*, 555 U.S. at 141. Similarly, civil lawsuits against public officials, while necessary to vindicate constitutional guarantees and deter misconduct, entail "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638; *Harlow*, 457 U.S. at 814; *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Although civil liability serves the additional purpose of compensating victims of unconstitutional conduct, ultimately that purpose too must be weighed against the danger that penalizing officers for reasonable, good-faith conduct (measured by objective standards) will deter officers from vigorously enforcing the law. *Anderson*, 483 U.S. at 638.

In the search-and-seizure context, this Court has expressed "a strong preference for warrants," because a warrant manifests an officer's good faith and interposes a neutral third party to safeguard constitutional rights. *Leon*, 468 U.S. at 913-14. The Court has emphasized that officers should be encouraged to seek warrants when they have probable cause.

Malley, 475 U.S. at 353-54 (Powell, J., concurring and dissenting). This policy does not change depending on whether the officer's conduct is assessed for purposes of suppression or civil liability. It would be confusing to give officers two different standards to follow, since they cannot know in advance whether the warrant will be challenged in the suppression or the civil liability context. In either context, subjecting officers to endless litigation based on hypertechnical interpretations of warrants will ultimately discourage them from seeking warrants when they have probable cause, or encourage them to rely on exceptions to the warrant requirement. *Malley*, 475 U.S. at 352-53 (Powell, J., concurring and dissenting); *Gates*, 462 U.S. at 263 (White, J., concurring). Contrary to respondents' assertion (Resp.Br.47-48), this is no less so because no one has performed an empirical study proving officers are being deterred from seeking warrants.

Finally, respondents and *amici* cite *Hudson v. Michigan*, 547 U.S. 586, 598 (2006) to argue officers may be held civilly liable for Fourth Amendment violations even if evidence is not suppressed. But *Hudson* involved execution, not procurement, of a warrant. The Court merely held that violations of the "knock and announce" rule do not require suppression of evidence found during a search, largely because such a violation is not a "but-for" cause of obtaining the evidence – regardless of the violation, the police would have executed the warrant and found the evidence. *Id.* at 592-94. No similar causation concerns

arise in the context of claims premised on the manner in which an officer procured a warrant.[1]

Malley properly recognizes the need to provide uniform standards for both evaluating qualified immunity and suppressing evidence. As petitioners have noted, however, other aspects of *Malley* warrant consideration by this Court.

IV. *STARE DECISIS* DOES NOT FORECLOSE NECESSARY CLARIFICATION OR RECONSIDERATION OF THE AMORPHOUS "SO LACKING IN INDICIA OF PROBABLE-CAUSE" STANDARD.

Petitioners submit they are entitled to qualified immunity under this Court's existing jurisprudence. Nonetheless, as noted in their petition for writ of

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[1] Respondents also cite *United States v. Cazares-Olivas*, 515 F.3d 726, 729 (7th Cir. 2008), which incorrectly surmised that this Court would not have suppressed the evidence in *Groh* even though the officer was not immune. (Resp.Br.52 n.27.) *Groh*, 540 U.S. at 565 n.8, explicitly relied on *Leon*'s analysis in the suppression context, and observed that "'the same standard of objective reasonableness'" applied there "'defines . . . qualified immunity.'"

United States v. Rosa, 626 F.3d 56, 66 (2d Cir. 2010) (Resp.Br.52 n.27), actually supports petitioners' position. The court distinguished *Groh* and relied on both dissents to apply the good-faith exception where an overbroad warrant authorized a search of computer media identifying "criminal conduct," but the surrounding circumstances indicated the officers believed it authorized a search for evidence only of child pornography. 626 F.3d at 58, 64-66 & n.3.

certiorari and merits brief, and as review of the Ninth Circuit opinion reveals, courts plainly are having difficulty applying *Malley*'s "so lacking in indicia of probable-cause" standard in the context of both civil claims and suppression hearings in criminal cases. This, at the very least, warrants the Court taking a close look at *Malley*'s open-ended standard.

Respondents contend *stare decisis* precludes this Court from overruling its precedents, particularly where a statutory provision is involved. (Resp.Br.44-49.) Nonetheless, this Court has reconsidered prior decisions that have proved "unworkable" or "badly reasoned," *Arizona v. Gant*, 129 S.Ct. 1710, 1728 (2009), or have "defied consistent application by the lower courts," *Pearson*, 555 U.S. at 235 – particularly with respect to the procedural and substantive aspects of qualified immunity. *See id.* at 233-36 (overruling *Saucier v. Katz*, 553 U.S. 194 (2001)); *Harlow*, 457 U.S. at 815-19 (eliminating "subjective" element of qualified immunity). That is precisely the case here.

Petitioners suggested this Court consider whether the "so lacking in indicia of probable-cause" standard should be retained, since the burden it imposes on the judicial system by inviting endless relitigation of probable-cause determinations far outweighs any incremental benefit there may be in providing additional disincentive for officers to seek warrants without a proper basis – the primary disincentive being that magistrates generally reject inadequate

warrant applications. (Pet.Br.15-16, 37.) If officers are routinely submitting plainly inadequate warrants, the issue is inadequate training or supervision and correction is available via municipal liability under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). However, imposing liability on officers for relying on a fully informed magistrate's independent, if ultimately erroneous, determination of probable cause does nothing to foster recourse to the warrant process in borderline cases, since the magistrate's decision affords the officer no additional protection. It is the officer's understanding of the law, and not the magistrate's, that ultimately determines liability.

Respondents argue that officers have many incentives to seek warrants because courts defer to a magistrate's probable-cause determination in close cases, and some warrantless searches are "presumptively unreasonable." (Resp.Br.47-48.) But under the "so lacking in indicia of probable-cause" standard, courts are *not* paying appropriate deference to warrants. They feel free to substitute their judgment for that of a magistrate, and find not simply a lack of probable cause, but that no reasonable officer (including, by implication, no reasonable judicial officer) could even entertain the possibility. To be sure, as respondents note, reasonable judges can be expected to disagree on close questions. Yet, *Malley* and *Leon* make it clear that qualified immunity is to be denied and evidence is to be suppressed only where the question is not even close, *i.e.*, where someone believing in probable cause could only be described as

plainly incompetent or knowingly violating the law. When judges disagree about so fundamental a question as probable cause, it is little consolation to an officer who is on the losing side of that legal debate that he is no more plainly incompetent nor knowingly violating the law than a learned judicial officer.

Malley and *Leon* afford redress where officers subvert the basic purpose of the warrant process by improperly manipulating the proceedings. Absent evidence of such conduct, officers should be insulated from liability for relying on an independent, albeit erroneous, determination of probable cause by a magistrate.

CONCLUSION

Petitioners are entitled to qualified immunity. The Ninth Circuit's judgment should be reversed, with directions to vacate the district court's order insofar as it denies qualified immunity to petitioners, and to enter judgment for petitioners.

Respectfully submitted,

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