

No. 10-704

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IN THE  
**Supreme Court of the United States**

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CURT MESSERSCHMIDT, ET AL.,  
*Petitioners,*

*v.*

AUGUSTA MILLENDER, ET. AL,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR RESPONDENTS**

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## QUESTIONS PRESENTED

1. Whether police officers are entitled to qualified immunity for obtaining a warrant to search the residence of an innocent third party, where that warrant was plainly defective because it authorized a sweeping search for and seizure of any and all firearms, any gang-related items, and any photographic evidence of any criminal activity, even though the police only had reason to search for a specifically-identified firearm and knew the offense in which that firearm was used was not gang-related.

2. Whether this Court should overturn decades of settled jurisprudence by holding that police officers have no responsibility to exercise independent judgment when obtaining warrants to assure themselves that the warrant is supported by probable cause.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	v
STATEMENT .....	1
SUMMARY OF ARGUMENT.....	12
ARGUMENT.....	14
I. THIS COURT’S QUALIFIED IMMUNITY PRECEDENTS PRESERVE CONGRESS’S RE- MEDIAL PURPOSE IN SECTION 1983 BY DE- NYING IMMUNITY TO POLICE OFFICERS WHO ACT UNREASONABLY IN OBTAINING SEARCH WARRANTS.....	14
A. Qualified Immunity Doctrine Is De- signed To Accommodate Societal In- terests While Preserving Congress’s Broad Remedial Purpose In Enacting Section 1983 .....	14
B. This Court Has Maintained The Bal- ance Struck By The Qualified Immu- nity Doctrine In Cases Involving Search Warrants .....	17
II. THE COURT OF APPEALS CORRECTLY AP- PLIED THIS COURT’S QUALIFIED IMMUNITY PRECEDENTS.....	20
A. It Was Clearly Established At The Time Of The Search That Each Of the Items Identified In A Warrant Must Be Supported By Probable Cause .....	21

**TABLE OF CONTENTS—Continued**

	Page
B. No Reasonable Officer Would Have Believed That There Was Probable Cause To Search The Millender Home For The Broad Classes Of Items Sought In The Warrant.....	27
1. Gang-related items and “photographs ... of criminal activity” .....	27
2. Firearms and firearm-related materials.....	31
C. This Court Should Reject Petitioners’ Attempt To Alter The Objective Reasonableness Inquiry .....	35
1. Information omitted from the warrant application does not entitle petitioners to qualified immunity .....	35
2. It is both irrelevant and untrue that petitioners could have obtained a warrant supported by probable cause that authorized a search of identical scope.....	42
III. PETITIONERS HAVE GIVEN THIS COURT NO REASON TO OVERRULE ITS PRECEDENTS.....	44
A. This Court’s Longstanding Jurisprudence Strikes An Appropriate Balance That Should Not Be Unsettled .....	45
B. This Court’s Recent Exclusionary Rule Cases Do Not Suggest A Contrary Result.....	49
CONCLUSION .....	53

## TABLE OF AUTHORITIES

### CASES

	Page(s)
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) .....	21, 24
<i>Andresen v. Maryland</i> , 427 U.S. 463 (1976) .....	22, 30
<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S. Ct. 1710 (2009) .....	46
<i>Ashcroft v. al-Kidd</i> , 131 S. Ct. 2074 (2011) .....	20, 21, 24
<i>Berger v. New York</i> , 388 U.S. 41 (1967) .....	22
<i>Boyd v. United States</i> , 116 U.S. 616 (1886) .....	15
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978) .....	15
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998) .....	49
<i>Davis v. United States</i> , 131 S. Ct. 2419 (2011) .....	51
<i>Dickerson v. United States</i> , 530 U.S. 428 (2000) .....	46
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008) .....	33
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 131 S. Ct. 2060 (2011) .....	48
<i>Go-Bart Importing Co. v. United States</i> , 282 U.S. 344 (1931) .....	22
<i>Graham v. Connor</i> , 490 U.S. 386 (1989) .....	40
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004) .....	<i>passim</i>
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) ...	16, 17, 21, 40
<i>Herring v. United States</i> , 555 U.S. 135 (2009) .....	49, 50
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002) .....	17, 21
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006) .....	52
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983) .....	33, 37, 42

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976) .....	15
<i>In re Grand Jury Proceedings</i> , 716 F.2d 493 (8th Cir. 1983).....	25
<i>In re Grand Jury Subpoenas Dated Dec. 10,</i> <i>1987</i> , 926 F.2d 847 (9th Cir. 1991) .....	22
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	<i>passim</i>
<i>Maryland v. Garrison</i> , 480 U.S. 79 (1987).....	22
<i>Massachusetts v. Sheppard</i> , 468 U.S. 981 (1984) ....	22, 43
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978) .....	15
<i>Muehler v. Mena</i> , 544 U.S. 93 (2005) .....	36
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	32
<i>Ortiz v. Van Auken</i> , 887 F.2d 1366 (9th Cir. 1989) .....	23
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) .....	15, 48, 51
<i>Payton v. New York</i> , 445 U.S. 573 (1980) .....	22, 48
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009).....	16, 49
<i>People v. Gardeley</i> , 927 P.2d 713 (Cal. 1996).....	28
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992).....	45
<i>Robertson v. Seattle Audubon Society</i> , 503 U.S. 429 (1992) .....	44
<i>Stanford v. Texas</i> , 379 U.S. 476 (1965).....	15, 30
<i>Staples v. United States</i> , 511 U.S. 600 (1994).....	33

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Stone v. Powell</i> , 428 U.S. 465 (1976) .....	48
<i>United States v. Bridges</i> , 344 F.3d 1010 (9th Cir. 2003).....	25
<i>United States v. Bynum</i> , 293 F.3d 192 (4th Cir. 2002) .....	39
<i>United States v. Cazares-Olivas</i> , 515 F.3d 726 (7th Cir. 2008).....	52
<i>United States v. Clay</i> , 646 F.3d 1124 (8th Cir. 2011) .....	39
<i>United States v. Cook</i> , 657 F.2d 730 (5th Cir. 1981) .....	25
<i>United States v. George</i> , 975 F.2d 72 (2d Cir. 1992) .....	25, 30
<i>United States v. Guzman</i> , 507 F.3d 681 (8th Cir. 2007).....	36
<i>United States v. Hensley</i> , 469 U.S. 221 (1985) .....	50
<i>United States v. Hillyard</i> , 677 F.2d 1336 (9th Cir. 1982).....	25
<i>United States v. Hove</i> , 848 F.2d 137 (9th Cir. 1988) .....	38, 39
<i>United States v. Johnson</i> , 256 F.3d 895 (9th Cir. 2001).....	32
<i>United States v. Kow</i> , 58 F.3d 423 (9th Cir. 1995) .....	23, 24, 25, 26, 31, 32
<i>United States v. Lanier</i> , 520 U.S. 259 (1997).....	24

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Leary</i> , 846 F.2d 592 (10th Cir. 1988) .....	25
<i>United States v. Leon</i> , 468 U.S. 897 (1984) ..	18, 38, 40, 51
<i>United States v. Luong</i> , 470 F.3d 898 (9th Cir. 2006) .....	38
<i>United States v. Martin</i> , 297 F.3d 1308 (11th Cir. 2002).....	38
<i>United States v. Riley</i> , 906 F.2d 841 (2d Cir. 1990) .....	30
<i>United States v. Roche</i> , 614 F.2d 6 (1st Cir. 1980) .....	25
<i>United States v. Rosa</i> , 626 F.3d 56 (2d Cir. 2010) .....	52
<i>United States v. Rubio</i> , 727 F.2d 786 (9th Cir. 1983) .....	28
<i>United States v. Spilotro</i> , 800 F.2d 959 (9th Cir. 1986) .....	24, 27, 30, 31
<i>United States v. Stubbs</i> , 873 F.2d 210 (9th Cir. 1989) .....	23, 25
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965) .....	47
<i>United States v. Washington</i> , 797 F.2d 1461 (9th Cir. 1986).....	22
<i>United States v. Weber</i> , 923 F.2d 1338 (9th Cir. 1990) .....	29, 34
<i>VonderAhe v. Howland</i> , 508 F.2d 364 (9th Cir. 1974) .....	24, 33

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<i>Whiteley v. Warden</i> , 401 U.S. 560 (1971) .....	37
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999) .....	21
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) .....	16
<i>Wyatt v. Cole</i> , 504 U.S. 158 (1992) .....	16

**INTERNATIONAL CASES**

<i>Entick v. Carrington</i> , 19 How. St. Tr. 1029 (C.P. 1765).....	14
<i>Wilkes v. Wood</i> , Lofft 1, 98 Eng. Rep. 489 (C.P. 1763).....	14

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. Const. amend. IV .....	21, 42
42 U.S.C. § 1983 .....	8

**OTHER AUTHORITIES**

Alschuler, Albert W., <i>Herring v. United States: A Minnow or a Shark?</i> , 7 Ohio St. J. Crim. L. 463 (2009) .....	15
Cal. Gang Node Advisory Comm., Policy and Procedures for the CALGANG® System 7 (Sept. 27, 2007), available at <a href="http://ag.ca.gov/calgang/pdfs/policy_procedure.pdf">http:// ag.ca.gov/calgang/pdfs/policy_procedure.pdf</a> .....	37
Davies, Thomas Y., <i>Recovering the Original Fourth Amendment</i> , 98 Mich. L. Rev. 547 (1999) .....	14
2 LaFave, Wayne R., <i>Search and Seizure</i> (4th ed. 2004) .....	23, 26, 30

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**BRIEF FOR RESPONDENTS**

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**STATEMENT**

On November 4, 2003, Detective Curt Messerschmidt of the Los Angeles County Sherriff's Department, under the supervision of Sergeant Robert Lawrence, applied for and obtained warrants to arrest Jerry Ray Bowen at 2234 E. 120th Street, Los Angeles, and to search that address and seize property in connection with a "spousal assault ... with a deadly weapon" that Bowen was suspected of committing two weeks earlier. JA 55.

But there were two problems. First, the police had only a tenuous basis to conclude that they would find

Bowen at the 120th Street address. In fact, the police knew, but did not inform the magistrate, that the address was the family home of Augusta Millender. An elderly widow and great-grandmother eleven times over, Mrs. Millender shared her immaculately-kept home with her adult daughter Brenda Millender and grandson William Johnson (collectively, “the Millenders”).<sup>1</sup> Augusta Millender had served as Bowen’s foster parent fifteen years earlier, but Bowen had not resided with her since then, although Mrs. Millender had allowed Bowen to stay temporarily at the property eight months earlier, when Bowen was in the middle of a marital dispute.

Second, the scope of the search warrant far exceeded any relation to the crime under investigation. Although Bowen was wanted for a domestic assault that the police had no reason to believe was gang-related, the warrant allowed the search and seizure of all “[a]rticles of evidence showing street gang membership or affiliation” and “[a]ny photographs or photograph albums ... which may depict evidence of criminal activity.” JA 52. Further, although the police had a specific description and photograph of the weapon that Bowen had used—a “black sawed off shotgun with a pistol grip” (JA 56)—the warrant authorized the search and seizure of “any firearms capable of firing ammunition” (JA 52).

The search of the Millenders’ home yielded neither Bowen nor his shotgun; Bowen had not stayed there for

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<sup>1</sup> Augusta Millender passed away on July 17, 2011. An unopposed motion to substitute Brenda Millender as her representative was filed with this Court on October 17, 2011, pursuant to Rule 35.1.

months. Instead, the search terrified an innocent family and damaged their home, and sent Augusta Millender to the hospital. The police also seized Augusta Millender's personal firearm, which she lawfully possessed for self-defense.

1. The incident that precipitated the warrant at issue was a domestic dispute between Bowen and Shelly Kelly, whom Bowen had been dating. When Kelly decided to terminate their relationship, Bowen reacted violently, and fired at Kelly with a "black sawed off shotgun with a pistol grip" as she fled in her vehicle. Kelly alerted police, identified Bowen from a photo line-up, and provided officers with photographs of Bowen. JA 55-57.

According to Messerschmidt's warrant affidavit, Kelly provided Messerschmidt with two possibilities for Bowen's whereabouts: the 120th Street address—where, "if [she were] not mistaken," Bowen might be "hiding out" (Pet. App. 111; JA 205)—or Kelly's residence where the assault took place (JA 58). Messerschmidt's affidavit stated that he had "determined" through a search of "departmental records, state computer records and other police agency records" that Bowen "reside[d]" at the 120th Street address. JA 58.

The records Messerschmidt reviewed, however, were at best ambiguous as to whether Bowen resided with the Millenders. The DMV records showed that as of the month before the assault, Bowen's address was the same as Kelly's. JA 26, 63; *see* Pet. App. 113 ("[Kelly's address] was the most current, not the 120th Street Address"). A restraining order issued against Bowen six months earlier in May 2003, for the protection of Bowen's wife and children, established that Bowen's address was on Marvin Street. ER 584. More-

over, before the search, officers surveilling the Millender house spoke with Augusta Millender and learned from her that Bowen did not live at the house. JA 238.

Because of the violent nature of the crime and Bowen's supposed "ties to the Mona Park Crip gang," Messerschmidt requested night service for the warrant. JA 58-59. But despite an "extensive background search on [Bowen]," the affidavit mentioned no other weapons or crimes, nor whether Bowen had a criminal record.<sup>2</sup> And although Bowen's identity as a gang member was offered to support night service, nothing in the affidavit suggested the assault was gang-related; to the contrary, the altercation was described as a "spousal assault."<sup>3</sup> Nor did the affidavit take account of the fact that the home to be searched belonged to an innocent family.

Messerschmidt also averred his belief that "recovery of *the weapon* could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed." JA 59 (emphasis added). Messerschmidt had good reason to focus on a specific weapon: Kelly had not only described the weapon as a "black sawed off shotgun with a pistol grip" (JA 56), but also had given Messerschmidt a photograph of Bowen posing with the gun. Pet. App. 20; ER 629.

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<sup>2</sup> In fact, Bowen had previous felony convictions and was on summary probation for spousal battery and driving without a license. JA 27-29.

<sup>3</sup> Messerschmidt later testified that he had no basis for believing the assault on Kelly was gang-related. He answered "No" to the question, "So you didn't have any reason to believe that the assault on Kelly was any sort of a gang crime, did you?" ER 877.

Messerschmidt prepared a “Search Warrant and Affidavit” form authorizing the search of the 120th Street address. But although Messerschmidt’s affidavit explained that the police sought to arrest Bowen for committing a spousal assault with a specific weapon, the scope of the warrant Messerschmidt drafted was far broader and the warrant failed to identify the crime for which the search was being authorized. Specifically, Messerschmidt sought authorization to search for and to seize

All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

And

Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to “Mona Park Crips”, including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identi[ty] of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict

the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the “Mona Park Crips” street gang.

JA 52 (Attachment 2). Along with the search warrant, Messerschmidt prepared an arrest warrant for Bowen (JA 60-62) and completed an affiant statement detailing his experience working in a “specialized unit, investigating gang related crimes and arresting gang members for various violations of the law” (JA 53-54). He showed the warrants and affidavit to his superiors, including Lawrence and a deputy district attorney. Pet. App. 9. On November 4, 2003, a magistrate approved the warrants and the request for night service. *Id.*

2. On November 6, 2003 at 5:00 a.m., approximately thirty officers, including about twenty SWAT officers, arrived at the Millender home to serve the warrants. JA 234; JA 258. The Millenders were asleep. JA 185. The officers forced open the front security door, broke a picture window, and entered the premises with guns pointed. Pet. App. 119; JA 245-249. The Millenders were terrified. Augusta Millender “[h]eard like gun shots going through that glass, coming through my kitchen window ... I said, ‘Lord, Whoever this is is going to kill us that night.’” ER 806. The officers ordered Augusta and Brenda Millender outside in their nightclothes and without shoes (JA 250-252) and handcuffed William Johnson, though he was not under investigation for any crime (JA 192). While the officers looked

for Bowen, Augusta and Brenda Millender stood outside or sat wrapped in blankets in patrol cars. JA 190.<sup>4</sup> Because a deputy refused to allow the 73-year-old Augusta Millender to use the bathroom in her house, she had to urinate in the street. JA 191.

After the house was cleared, the Millenders were allowed to sit in their living room while officers continued the search. JA 256.<sup>5</sup> The officers failed to find either Bowen, his sawed-off shotgun, or any evidence that Bowen lived with the Millenders, except for a single, five-month-old letter from Social Services addressed to Bowen, which he apparently never received. JA 97-98. The officers nevertheless seized Augusta Millender's personal gun—an unloaded 12-gauge “Mossberg” with a wooden stock—and a box of .45 caliber “American Eagle” ammunition. JA 95-96; ER 670-671.

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<sup>4</sup> After the main house was cleared, the SWAT officers moved to the back addition, where Willie Millender, one of Augusta Millender's adult sons, resided. Willie Millender was charged with a misdemeanor for being “under the influence” of a controlled substance (though no such substance was found). He moved to quash the warrant in California Superior Court on the ground that the affidavit did not establish probable cause to believe Bowen would be found at the 120th Street address. The court granted the motion and dismissed the case. *See* JA 193-194; Pet. App. 122-123.

<sup>5</sup> While the Millenders' home was being cleared, Messerschmidt was directing traffic near the property, and he later watched the Millenders as they waited outside. JA 31-32. After the location was secured, Lawrence watched the Millenders as they sat in the living room. JA 257. Messerschmidt “did not use the affidavit at the Millenders' residence to provide more specific direction to the investigators who searched the house ... [n]or did the investigators executing the warrant understand the affidavit to narrow the scope of the search.” Pet. App. 18.

Augusta Millender was hospitalized later that day for dangerously high blood pressure. ER 805.<sup>6</sup>

3. The Millenders filed suit under 42 U.S.C. § 1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including petitioners, alleging violations of the Fourth and Fourteenth Amendments as well as state law. The parties filed cross-motions for summary adjudication on, *inter alia*, the validity of the arrest and search warrants.<sup>7</sup> While the court concluded—on a “very close” question—that there was probable cause to believe that Bowen would be found at the 120th Street address (Pet. App. 135), the court invalidated for lack of probable cause all but one sentence of the search warrant's authorization for items to be searched and seized (*see* Pet. App. 152-160).<sup>8</sup> The court ruled that, because the “crime speci-

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<sup>6</sup> Approximately two weeks later, Messerschmidt again contacted Kelly, who told Messerschmidt that Bowen might be found at a local motel. JA 33-34. Messerschmidt went to the motel, knocked on the door, was admitted by Bowen's wife, and arrested Bowen after discovering him hiding under the bed. Pet. App. 122. Bowen was later convicted of assault with a deadly weapon arising out of the incident with Kelly. JA 34.

<sup>7</sup> The parties also filed cross-motions for adjudication on whether the Millenders' detention was reasonable, whether the SWAT officers' entry into the Millender home was unlawful, and whether the SWAT officers were entitled to qualified immunity. The district court determined that qualified immunity was warranted on the issue of the Millenders' detention (Pet. App. 176-177), but that the SWAT officers' entry raised triable issues (Pet. App. 168-169, 171-172).

<sup>8</sup> The sentence held valid authorized the search and seizure of “[a]rticles of personal property tending to establish the ident[ity] of person in control of the premise or premises.” JA 52.

fied” was “a physical assault with a very specific weapon” and had no gang connection, there was no probable cause to search for any and all firearms or for a broad class of gang-related items. Pet. App. 157-158. Noting that petitioners “made no additional arguments as to why, even if the warrant was overbroad, [they] acted reasonably,” the court denied them qualified immunity. Pet. App. 171.

4. Petitioners appealed the denial of qualified immunity.<sup>9</sup> A divided panel of the court of appeals reversed. Pet. App. 79-105. The court voted to rehear the case en banc and, by an 8-3 vote, with Judge Ikuta writing on its behalf, affirmed the denial of qualified immunity. *See* Pet. App. 1-39.

The court first held that the warrant’s authorization to search for all firearms and firearm-related materials was unconstitutionally overbroad. Although stating there was probable cause to search for the “black sawed off shotgun with a pistol grip,” the court stressed that Messerschmidt’s affidavit “does not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders’ residence.” Pet. App. 15-16, 24. The court rejected petitioners’ arguments that a broader search was justifiable given Bowen’s violent tendencies or the hazard inherent to firearms, noting that “there is no ‘dangerousness’ excep-

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<sup>9</sup> The Millenders sought to appeal the district court’s ruling that there was probable cause to believe that Bowen would be found at the 120th Street address (JA 385-394), but the district court declined to certify that issue for interlocutory appeal, *see* Order, Case No. 05-2298, Dkt. No. 114 (C.D. Cal. May 25, 2007).

tion to the Fourth Amendment’s probable cause requirement.” Pet. App. 23.<sup>10</sup> The court also rejected Bowen’s criminal history as irrelevant because “Messerschmidt did not inform the magistrate of Bowen’s prior felonies” (Pet. App. 25), and there is no “per se rule that police have probable cause to search the residences of ex-felons for firearms and firearm-related items” (Pet. App. 23). Because the police lacked “*any* basis, let alone a ‘substantial basis,’ for probable cause to search and seize the broad category of ... firearm-related materials,” the court found the warrant invalid for “this broad range of items.” Pet. App. 28 (citation omitted).

The court also held that the warrant’s authorization to search for indicia of gang membership lacked probable cause because the affidavit’s statements that Bowen had “gang ties” or was a gang member did not suggest “‘contraband or evidence of a crime’ ... would be found at [the Millenders’] residence.” Pet. App. 28-29 (citation omitted). The court noted that neither being a gang member nor having gang ties is a crime in California, and that both the affidavit and the record “failed to establish any link between gang-related materials and a crime.” Pet. App. 29.

Second, the court held the deputies were not entitled to qualified immunity because the lack of probable cause was “obvious.” Pet. App. 34. “The affidavit indi-

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<sup>10</sup> The court also rejected the argument that the “affidavit narrowed the scope” of the search where “there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant’s overbreadth.” Pet. App. 18.

cated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items.” Pet. App. 35 (citation omitted).

The court also rejected petitioners’ argument that they were entitled to immunity because they “‘reasonably relied’ on the review and approval of ‘their superiors, the district attorney, and the magistrate to correct the alleged over breadth in the search warrant.’” Pet. App. 36-37. Relying on this Court’s precedents stressing officers’ obligation to exercise independent judgment, as well as numerous Ninth Circuit precedents making clear that probable cause to search for a specific item does not provide probable cause to search for all items of its type, the court determined that the deputies had not exercised reasonable professional judgment. Where “a reasonable officer in the deputies’ position would have been well aware” that neither the warrant nor the affidavit “established probable cause” for the broad classes of items sought, petitioners were not entitled to qualified immunity simply because “they obtained a warrant, consulted with their superiors, and acted in good faith.” Pet. App. 35-36.

Judges Callahan, Tallman, and Silverman dissented in two separate opinions. Pet. App. 39-76. All the dissenters agreed with the majority that the warrant’s authorization to search for gang-related indicia was unconstitutionally overbroad (Pet. App. 45 n.7), and one agreed that the firearms-related provision was overbroad as well (Pet. App. 73) (Silverman, J.). They concluded, however, that the officers were entitled to qualified immunity because “[a]t least” part of the warrant was supported by probable cause, and “absent

some showing of bad faith on the part of the officer or of a failure to present all the relevant known facts to the magistrate ... the officer should be allowed to rely on his superiors, the district attorney and the magistrate to correct any overbreadth.” Pet. App. 68-69 (Callahan, J.).

### SUMMARY OF ARGUMENT

As every judge to have considered this case has recognized, the warrant to search the Millender home violated the Fourth Amendment because its scope far exceeded the probable cause supporting it. The only question before this Court is whether petitioners are entitled to immunity for obtaining that warrant, notwithstanding the fact that all twelve judges that have reviewed it have found it to be flawed.

Consistent with Congress’s intent expressed in 42 U.S.C. § 1983, this Court has refused to grant immunity to officers who have sought search warrants “so lacking in indicia of probable cause” that reliance on the warrant was objectively unreasonable. *Malley v. Briggs*, 475 U.S. 335, 344 (1986). While this Court has recognized that officers must be given latitude to act at the outer perimeter of their authority without fear of reprisal, it has also recognized that the animating principles of § 1983 favor denying immunity in those cases where officers fail to exercise reasonable professional judgment and instead seek warrants that are invalid under clearly established law. That principle was unequivocally established in *Malley* and reaffirmed in *Groh v. Ramirez*, 540 U.S. 551 (2004). It is directly applicable here.

Controlling authority from this Court and the court of appeals clearly put petitioners on notice that each

category of items in a warrant must be supported by probable cause, and that probable cause to search for a single specific item does not constitute probable cause to search for every item of that type. Yet here, where petitioners at most had probable cause to search for a specifically-described firearm, petitioners instead sought a warrant to search for any and all firearms. And despite having no belief that the domestic assault at issue had any connection to Bowen’s alleged gang ties, petitioners also sought the right to search for any indicia of gang activity, and—even broader still—any photographs “which may depict” *any* criminal activity whatsoever. JA 52. Any reasonable officer would have known that the scope of this request was so disconnected from the crime under investigation as to render the warrant completely lacking in indicia of probable cause. Under this Court’s established precedents, petitioners are not entitled to qualified immunity.

Nor should this Court abrogate the obligation of officers to exercise reasonable professional judgment in obtaining warrants. *Stare decisis* favors retaining the important safeguard of requiring officers to reflect before submitting a warrant request to a magistrate. And petitioners have presented no evidence that this rule has proved unworkable or that its foundation has been eroded by subsequent cases. Nor are this Court’s recent exclusionary rule cases inconsistent with *Mallory*. In any event, § 1983 and the exclusionary rule do not serve identical purposes. As this case starkly illustrates, police officers have few powers more intrusive than the ability to seek and execute search warrants; those who exercise that power without the “reasonable professional judgment” this Court has required, *Mallory*, 475 U.S. at 346, should be held accountable.

**ARGUMENT****I. THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS PRESERVE CONGRESS'S REMEDIAL PURPOSE IN SECTION 1983 BY DENYING IMMUNITY TO POLICE OFFICERS WHO ACT UNREASONABLY IN OBTAINING SEARCH WARRANTS****A. Qualified Immunity Doctrine Is Designed To Accommodate Societal Interests While Preserving Congress's Broad Remedial Purpose In Enacting Section 1983**

This is not a suppression case. It does not involve an application of the exclusionary rule, a judge-made doctrine that this Court has continually adjusted to reconcile society's compelling interest in the search for truth in the criminal justice system with the need to deter unconstitutional conduct by law enforcement officers. Rather, this is a civil action for damages brought by a family that was innocent of criminal activity, but nonetheless had their house entered into and thoroughly searched and their possessions seized because the police managed to secure an overbroad warrant when looking for a suspect who did not even live there.

The Millenders' cause of action has ancient roots in the common law. It goes back at least to *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763), and *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), which established that general warrants are invalid, and that officers who conduct searches pursuant to an overbroad warrant may be liable for trespass, even though at common law a valid warrant generally provided a searching officer with immunity from liability. See Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 588 (1999) ("Because a general warrant was clearly deemed illegal by the framing era, it

did not protect either the issuing magistrate or the executing officer against trespass liability. Only a legal (that is, specific) warrant indemnified the officer against trespass liability.” (footnote omitted); Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 501-504 (2009) (noting that historically, a warrant that was invalid gave “no privilege, and without a privilege, [an officer] was strictly liable for his trespass”). That was the public understanding of the law governing search and seizure when the Fourth Amendment was adopted. See *Stanford v. Texas*, 379 U.S. 476, 481-485 (1965); see generally *Boyd v. United States*, 116 U.S. 616 (1886), overruled as recognized in *Fisher v. United States*, 425 U.S. 391, 407 (1976).

Here, the Millenders are proceeding under 42 U.S.C. § 1983, which Congress enacted “to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.” *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 700-701 (1978); see *Carey v. Phipps*, 435 U.S. 247, 254-257 (1978) (tracing compensatory purpose of § 1983); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (§ 1983 reflects the judgment that “[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees”). The Millenders are seeking redress for a violation of the Fourth Amendment, a constitutional wrong for which Congress intended to provide a remedy when it enacted § 1983.

Although § 1983 “creates a species of tort liability that on its face admits of no immunities,” *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), this Court has concluded that Congress intended to incorporate certain immunities that were deeply entrenched at common

law. *See Wood v. Strickland*, 420 U.S. 308, 317 (1975). The Court has recognized that history and public policy support providing immunity to public officials who have done nothing more than make reasonable mistakes. Construing § 1983 as imposing liability under such circumstances would unfairly penalize officials for merely having failed to accurately predict the outcome of future cases.

But the Court has also recognized that overly expansive immunity would frustrate Congress’s intent to ensure a remedy for victims of unconstitutional conduct. *See Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (“Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions.”); *id.* at 171-172 (Kennedy, J., concurring) (“[W]e are devising limitations to a remedial statute, enacted by the Congress[.]”). “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court recognized that this balance could best be achieved by having the availability of immunity hinge on “the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.” Officials will not be penalized for failing “to anticipate subsequent legal developments,” but will be liable when “their conduct ... violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 818. This test “ensure[s] that before they are subjected to suit, officers

are on notice their conduct is unlawful.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). But it also imposes an expectation that “a reasonably competent public official should know the law governing his conduct.” *Harlow*, 457 U.S. at 818-819. “Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.” *Id.* at 819; *see Hope*, 536 U.S. at 740 (immunity unavailable to officials who have “fair warning” that their conduct is unlawful).

**B. This Court Has Maintained The Balance Struck By The Qualified Immunity Doctrine In Cases Involving Search Warrants**

This Court has refused to deviate from the fundamental balance struck in the qualified immunity doctrine generally and the objective-reasonableness test in particular in cases involving search warrants. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court was asked to provide absolute immunity to police officers acting pursuant to warrants, or in the alternative, to hold that applying for a warrant is *per se* objectively reasonable provided that the officer believes that the facts alleged in his affidavit are true. This Court refused to do so, and instead preserved the independent obligation of police officers to take reasonable steps to ensure that they are acting lawfully in seeking and executing warrants.

In rejecting the request for absolute immunity, the Court stressed that its role was “to interpret the intent of Congress in enacting § 1983,” and that because common law did not provide absolute immunity to one who procured the issuance of a warrant, it could not be pre-

sumed that Congress intended to afford such immunity to officers requesting warrants. 475 U.S. at 339-342. The Court also noted that even if public policy were a permissible consideration, “[i]n the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity.” *Id.* at 343. Qualified immunity is preferable because it forces a police officer to engage in “reflection” with respect to “whether he has a reasonable basis for believing that his [warrant] affidavit establishes probable cause.” *Id.* The Court concluded that over-deterrence of police officers would not result from such an approach. *Id.*

The Court also noted that it had held in *United States v. Leon*, 468 U.S. 897 (1984), that a warrant is not an absolute shield against the exclusionary rule, and found it “incongruous” to treat warrants as providing an absolute bar to damages under § 1983, since the remedy in a § 1983 action (unlike the exclusionary rule) “is benefitting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong[.]” 475 U.S. at 344. Thus, *Malley* followed *Leon* in holding that police officers would receive only qualified immunity, and that such immunity would be denied where “the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.” *Id.* at 344-345.

*Malley* also rejected the argument that requesting a warrant is *per se* objectively reasonable, and that officers are therefore automatically entitled to qualified immunity, so long as the officer does not intentionally mislead the magistrate. 475 U.S. at 345. The Court noted that such an approach would be “at odds with ... *Harlow* and *Leon*” because it would turn on the subjec-

tive state of mind of the affiant rather than any objective ascertainable fact. *Id.* Rather, the test “analogous” to the one outlined in *Harlow* is “whether a reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause.” *Id.* That test was the right one because even though “in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it,” (*id.*), “ours is not an ideal system,” (*id.*), and a magistrate “working under docket pressures” may erroneously approve unsupported warrants (*id.* at 345-346). It is thus “reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.” *Id.* at 346.

In *Groh v. Ramirez*, 540 U.S. 551 (2004), the Court reaffirmed that officers who have sought warrants have an independent “duty to ensure that the warrant conforms to constitutional requirements.” *Id.* at 563 n.6. *Groh* involved a damages action against a federal agent who conducted a search after obtaining a warrant that erroneously listed a description of the place to be searched instead of the person or property to be seized. *Id.* at 554. As a result of that omission, the warrant was “plainly invalid” because it did not satisfy the particularity requirement of the Fourth Amendment. *Id.* at 557. The officer nonetheless argued that he was entitled to qualified immunity because the flaw in the warrant was “the product, at worst, of a lack of due care” and thus did not fail the *Malley* standard of objective reasonableness. *Id.* at 563-565. This Court disagreed, concluding that the officer was not entitled to qualified immunity because the warrant was so facially deficient that the officer could not reasonably presume it to be valid. *Id.* *Groh* thus preserves (and perhaps

even extends) *Malley*'s holding that the mere absence of bad faith is not sufficient to guarantee qualified immunity when a warrant is clearly invalid; it remains "incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted" (*id.* at 563), at least to ensure that the warrant is not invalid under clearly established law.

*Malley* and *Groh* are directly applicable to this case. As explained in Part II *infra*, the court of appeals correctly applied those decisions when it determined that petitioners neglected to fulfill their independent duty to ensure that the search of the Millenders' home was lawful. Petitioners sought a warrant that, under clearly established law, was plainly overbroad. Because a reasonable officer would have known that the warrant was invalid, petitioners are not entitled to qualified immunity.

## II. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS

Officials are not immune from suit under § 1983 when "a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (internal quotation marks omitted). As the United States recognizes (Br. 13), the petition for a writ of certiorari presented only a question of immunity, and in particular, whether, in light of clearly established law, a reasonably well-trained officer would have understood that the warrant here was invalid. The court of appeals correctly concluded that a reasonable officer would have known that the warrant to search the Millenders' home was invalid.

**A. It Was Clearly Established At The Time Of The Search That Each Of the Items Identified In A Warrant Must Be Supported By Probable Cause**

For a right to be clearly established, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Harlow*, 457 U.S. at 818-819. The controlling law in the jurisdiction where the constitutional violation occurred or a “consensus of cases of persuasive authority” provides the touchstone for determining whether a rule was clearly established at the time of the wrongdoing. *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *see also Hope*, 536 U.S. at 742-745; *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring) (officeholders who work in a single jurisdiction “are expected to adjust their behavior in accordance with local precedent”).

The text of the Fourth Amendment, this Court’s precedents, and Ninth Circuit authority all clearly established at the relevant time that probable cause is required for each item authorized for search and seizure in a warrant. It was equally clearly established that probable cause for one specifically-identified item does not create probable cause for a generic class of similar items. As the court of appeals recognized, this case involves a routine application of these well-settled principles.

1. The text of the Fourth Amendment makes clear that “no Warrants shall issue, but upon probable cause ... and particularly describing the ... things to be seized,” U.S. Const. amend. IV. The Fourth Amendment’s requirement that a search warrant be supported

by probable cause is essential to prevent “unauthorized invasions of the sanctity of a man’s home and privacies of life.” *Berger v. New York*, 388 U.S. 41, 58 (1967) (internal quotation marks omitted); *see also Payton v. New York*, 445 U.S. 573, 585 (1980). Moreover, “[b]y limiting the authorization to search to the specific areas and things *for which there is probable cause to search*,” the Warrant Clause ensures that “the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (emphasis added); *see Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (Fourth Amendment “prevents the issue of warrants on loose, vague or doubtful bases of fact” and thus prohibits a “general exploratory search in the hope that evidence of crime might be found”). Were this not so, the Fourth Amendment would do nothing to “make[] general searches ... impossible.” *Stanford*, 379 U.S. at 485; *see also Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) (“The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.”).

Thus, courts have uniformly held that, to prevent a “general, exploratory rummaging in a person’s belongings,” *Andresen v. Maryland*, 427 U.S. 463, 480 (1976), the scope of the warrant must be limited to the extent of the probable cause. *See In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856-857 (9th Cir. 1991) (citing cases). And if evidence of a crime is sought, the warrant must contain guidelines to aid the officers in deciding what may or may not be seized. *See United States v. Washington*, 707 F.2d 1461, 1472 (9th

Cir. 1986). As a leading treatise has summarized, even “an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based.” 2 LaFave, *Search & Seizure* § 4.6(a), at 607 (4th ed. 2004).<sup>11</sup>

Although petitioners and *amici* acknowledge the “general rule that the full breadth of the warrant must be supported by probable cause” (U.S. Br. 30), they contend that this principle is too general to provide the necessary guidance to overcome qualified immunity. In particular, the United States argues that because no precedent involved the specific facts at issue here—an unlawful search of an innocent family’s home for all firearms and gang-related items that might belong to the perpetrator of a spousal assault who did not live with that family—there was no clearly established law that alerted the officers to the unreasonableness of their actions. But this Court has never allowed imma-

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<sup>11</sup> Petitioners rely (Br. 56) on *Ortiz v. Van Auken*, 887 F.2d 1366 (9th Cir. 1989), but *Ortiz* did not involve an overbroad warrant. Rather, the issue in *Ortiz* was whether the officer could reasonably conclude that the particular facts from an anonymous informant put before the magistrate were sufficiently reliable to establish probable cause. As *Ortiz* explained, cases involving an overbroad warrant are distinguishable because they “provide[] officers no guidance as to the boundaries of the search which they must execute.” *Id.* at 1370. Moreover, contrary to petitioners’ assertions, the Ninth Circuit has attributed a warrant’s overbreadth to a lack of probable cause. See *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (“affidavit did not establish the probable cause required to justify the widespread seizure ... authorized by the warrant”); *United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989) (“no[] probable cause to seize all documents in Stubbs’s office”).

terial factual distinctions to inform the standard for determining when clearly established law exists. *See Anderson*, 483 U.S. at 640 (explaining that “the very action in question” need not “previously [have] been held unlawful”); *United States v. Lanier*, 520 U.S. 259, 271 (1997) (“[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.” (internal quotation marks omitted)). As the Court recently explained, “[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *al-Kidd*, 131 S. Ct. at 2083.

2. The Ninth Circuit has also repeatedly invalidated warrants authorizing a search for a general class of items when probable cause existed only for specific items within that class. *See, e.g., United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (“affidavit did not establish the probable cause required to justify the widespread seizure of documents authorized by the warrant”); *United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986) (Kennedy, J.) (where accompanying affidavit “mentioned only a few stolen diamonds” warrant’s “authorization to seize ‘gemstones and other items of jewelry’ ... [bore] no relation to whatever probable cause the government had”); *VonderAhe v. Howland*, 508 F.2d 364, 369 (9th Cir. 1974) (invalidating warrant where “there may have been ‘probable cause’ to search for and seize the yellow sheets and green cards for 1966 and 1967, [but] there was no probable cause shown for a seizure of all the doctor’s dental books and records, or

his personal and private papers”).<sup>12</sup> This requirement has particular force where, as here, the warrant provided for the “unrestricted seizure of items ... without describing the specific crimes suspected,” *United States v. Bridges*, 344 F.3d 1010, 1018 (9th Cir. 2003), and there were no guidelines to distinguish items used lawfully from those the government had probable cause to seize, *see United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989).<sup>13</sup>

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<sup>12</sup> Although Ninth Circuit precedent is most relevant here for purposes of determining the contours of “clearly established” rights, other circuits also have invalidated warrants that purport to authorize a search for a general class of items when probable cause existed only for specific items within that class. *See, e.g., United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980); *United States v. Cook*, 657 F.2d 730, 733-734 (5th Cir. 1981); *In re Grand Jury Proceedings*, 716 F.2d 493, 498-499 (8th Cir. 1983); *United States v. Leary*, 846 F.2d 592, 602, 604-605 (10th Cir. 1988); *see also United States v. George*, 975 F.2d 72, 75-76 (2d Cir. 1992).

<sup>13</sup> The Ninth Circuit has recognized that the Fourth Amendment does not preclude all use of generic language, because “[i]n many cases officers are unable to specify in advance all seizable evidence on the premises to be searched.” *United States v. Hillyard*, 677 F.2d 1336, 1339-1340 (9th Cir. 1982) (Kennedy, J.). But it has also stressed that, when such generic language is used, there must also be “objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not.” *Id.* at 1340. That requirement was not met in this case, for the warrant provided no way to identify those firearms (or other items) properly subject to seizure from among the generic class. And the Ninth Circuit has also made clear that “generic classifications in a warrant are acceptable only when a more precise description is not possible.” *Kow*, 58 F.3d at 427 (internal quotation marks omitted). Here, of course, the officers knew exactly how to describe the weapon used in the spousal assault; they even had a photograph of Bowen posing with that weapon.

Based on this extensive case law, the “contours of the right”—that probable cause to search for and seize one specific item does not establish probable cause to search for and to seize all similar items of a generic class—were sufficiently clear for a reasonable officer to understand and follow. *See* 2 LaFare § 3.7(d), at 435-436 (summarizing the principle that “probable cause to search for [] two items [of stolen property] ... does not establish the suspect’s ongoing activities as a fence so as to justify issuance of a warrant authorizing search for other stolen property as well”). That the relevant precedent involved different generic classes of items from the ones sought in this case—documents, stolen jewelry, and stolen cars as opposed to firearms—is irrelevant.

Finally, petitioners and *amici* argue that the contours of the law are unclear because the three judges who dissented from the en banc court’s decision believed that the law enforcement officers acted reasonably in relying on the search warrant, even if some provisions of the warrant were overbroad. But every single judge of the court of appeals acknowledged that the warrant was flawed. Nor did the judges disagree about the legal principles applicable to the warrant. The primary disagreement that divided the en banc court concerned qualified immunity law, not Fourth Amendment law. And in any event, in determining whether the contours of a right are “clearly established,” this Court has required only that existing precedent have settled the question—not that there be unanimity among judges as to the application of that precedent. *Compare Groh*, 540 U.S. at 565 (denying officer qualified immunity), *with id.* at 576 (Thomas, J., dissenting) (arguing that no Fourth Amendment violation had occurred).

**B. No Reasonable Officer Would Have Believed That There Was Probable Cause To Search The Millender Home For The Broad Classes Of Items Sought In The Warrant**

In light of this clearly established law, no reasonable officer could have concluded that the search of the Millender home was lawful. “[T]he warrant application [was] so lacking in indicia of probable cause as to render official belief in its existence unreasonable.” *Malley*, 475 U.S. at 344-345. Petitioners failed to provide *any* facts or circumstances from which a magistrate could properly conclude that there was probable cause to seize the broad classes of items being sought, beyond the specific firearm that Kelly had identified (and was displayed in a photograph of Bowen she provided the police). Here, the warrant “authorize[d] wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide[d] no guidelines to distinguish items used lawfully from those the government had probable cause to seize.” *Spilotro*, 800 F.2d at 964. No reasonable officer could have presumed that such a warrant was valid.

**1. Gang-related items and “photographs ... of criminal activity”**

With respect to the warrant’s authorization to search for and seize all gang-related items and photographs “which may depict ... criminal activity,” it is all but conceded that the warrant was unconstitutionally overbroad. Petitioners, however, maintain that these provisions were not “so lacking in indicia of probable cause” to make reliance on the warrant objectively unreasonable. That argument is meritless.

Messerschmidt’s affidavit provided only that Bowen was “a known Mona Park Crip gang member”

based on “information provided by the victim and the cal-gang data base.” JA 58-59. Gang paraphernalia may, of course, show membership in a gang, but gang membership, without more, is not a crime in California, *see People v. Gardeley*, 927 P.2d 713, 725 (Cal. 1996). And searches and seizures for indicia of association, without any basis for establishing that that association has anything to do with the particular crime under investigation, lack probable cause. *See United States v. Rubio*, 727 F.2d 786, 793-794 (9th Cir. 1983) (affidavit in support of search warrant authorizing seizure of indicia of membership or association with Hell’s Angels “insufficient to provide the requisite nexus between the association of the defendants with ... criminal activity”).

Here, no reasonable officer could have believed that the affidavit presented to the magistrate contained a sufficient basis to conclude that the gang paraphernalia sought was contraband or evidence of a crime. Indeed, Messerschmidt, who prepared the affidavit, testified that he knew at the time he drafted the affidavit that the assault he described was not gang-related. ER 877; *see also supra* note 3. Nor could the magistrate have reasonably concluded, based on the affidavit, that Bowen’s gang membership had anything to do with the crime under investigation. The affidavit described a “spousal assault” that ensued after Kelly decided to end her “on going dating relationship” with Bowen. JA 55. Nothing in that description suggests that the crime was gang-related or that the gang paraphernalia described in the warrant was contraband or evidence of the crime.

Petitioners’ attempt (Br. 43) to imagine a reasonable nexus between the crime and gang-related activity based on Messerschmidt’s previous experience in the “manners in which gang-related assaults are commit-

ted, the motives for such assaults, and the concealment of weapon(s) used in such assaults” (JA 53-54) is unavailing. An affiant’s “boilerplate recitations” do not contribute to probable cause where they were “not drafted with the facts of this case or this particular defendant in mind.” *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990). Messerschmidt’s statement merely recites his general experience and “training pertaining to gang related crimes.” JA 53-54. It draws no correlations between gang membership and domestic violence, nor does it offer any details regarding Messerschmidt’s experience with the manners, motives, or instrumentalities of non-gang-related assaults.

The United States contends (Br. 20) that petitioners could reasonably have believed that there was probable cause to search for gang-related items “at least as part of a search for identity information.” Petitioners, however, never made that argument in the courts below, demonstrating that it is, at best, a *post hoc* rationalization for the warrant. And in any event, the identity of Bowen “in the event of his arrest” (U.S. Br. 20) was never in question. Kelly and another witness had identified him, and petitioners had his photograph. *See* JA 61, 91, 94. Nor could gang-related paraphernalia have established that *other* items at the house belonged to Bowen, particularly where petitioners also assert (Br. 4-5; JA 26, 28) that they were aware at the time the warrant was sought that unnamed persons “associated” with the Millender home were also Mona Park Crip members. If that is so, then Mona Park Crip indicia could not even plausibly serve to identify *Bowen* or to establish *Bowen’s* control of the premises.

Moreover, the warrant sought not just indicia related to the Mona Park Crips, but “[a]rticles of evi-

dence showing street gang membership or affiliation with *any Street Gang*,” as well as “any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership ... *or which may depict evidence of criminal activity.*” JA 52 (emphasis added). This provision reaches far beyond anything that might reasonably be considered contraband or evidence of a crime. Indeed, its authorization, which reaches “writings,” non-descript “items of evidence,” and “photographs ... of criminal activity,” could comprise virtually anything, and thus impermissibly leaves “[every]thing ... to the discretion of the officer executing the warrant.” *Stanford*, 379 U.S. at 485 (internal quotation marks omitted); *see also* 2 LaFare, § 4.6 (“[t]here is no end to the objects which may constitute ... evidence of criminal activity”). Warrants that authorize searches for “evidence of criminal activity” have long been held constitutionally inadequate. *See United States v. George*, 975 F.2d 72, 75-76 (2d Cir. 1995) (warrant authorizing search for “evidence relating to the commission of a crime” “offends the Fourth Amendment”); *Spilotro*, 800 F.2d at 965 (“evidence of a violation of any one of thirteen statutes” inadequate). The warrant thus has a “glaring deficiency” no reasonable officer could overlook. *Groh*, 540 U.S. at 564.<sup>14</sup>

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<sup>14</sup> Nor could it be said that the language of the warrant could be “construed in light of an illustrative list of seizable items.” *United States v. Riley*, 906 F.2d 841, 844 (2d Cir. 1990). Here the only seizable items described were broad classes of firearm- and gang-related indicia, and the warrant itself did not identify the crime under investigation. *Cf. Andresen*, 427 U.S. at 481-482.

## 2. Firearms and firearm-related materials

Petitioners claim that a reasonably well-trained officer would not have known that the search warrant failed to establish probable cause to search for and seize “any firearms” or firearms-related materials in the Millender home. But not a single fact presented to the magistrate even arguably supports probable cause for, among other items, “any firearms capable of firing ammunition.” JA 52. A reasonable officer would have recognized not only that the warrant lacked probable cause to seize such broad classes of items, making it unconstitutionally overbroad, but also that it was so completely devoid of probable cause as to make reliance on the warrant objectively unreasonable.<sup>15</sup>

An officer seeking a warrant must provide in the affidavit adequate supporting facts about the underlying circumstances to show that probable cause supports the particular search requested. Probable cause to

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<sup>15</sup> Notably, petitioners have abandoned *all* of the arguments that they raised in the court of appeals with respect to whether their reliance on the warrant was objectively reasonable. They no longer contend that the warrant’s authorization to search for “any firearms” was reasonable because “Kelly could have been mistaken in her description of the gun”—an assertion the court of appeals rejected as having “little force” where Kelly in fact “provided the officers with a picture of the weapon.” Pet. App. 20-21; *see Spilotro*, 800 F.2d at 963 (reasonable to draft the description broadly only where a more precise description of the items to be seized was not available). Nor do petitioners assert that Messerschmidt’s affidavit narrowed the scope of the warrant such that “executing officers [could] differentiate items subject to seizure from those which are not.” *Id.* As the court of appeals determined, “there is no evidence in the record” that the officers relied on the affidavit to cure the warrant’s overbreadth. Pet. App. 18; *see also Kow*, 58 F.3d at 429 n.3.

search “exist[s] where the known facts and circumstances are sufficient to [convince] a man of reasonable prudence in the belief that contraband or evidence of a crime will be found” in a particular place. *Ornelas v. United States*, 517 U.S. 690, 696 (1996); see *United States v. Johnson*, 256 F.3d 895, 906 (9th Cir. 2001) (en banc) (police “obtain probable cause because the facts indicate that they will find what they are looking for in the place to be searched”).

Here, neither the warrant nor the affidavit provided any substantiation that the broad categories of firearms or firearm-related material described in the warrant were “contraband or evidence of a crime.” To the contrary, the affidavit indicated exactly what item was evidence of a crime—the “black sawed off shotgun with a pistol grip.” JA 56. No facts established that Bowen possessed any other firearms, let alone that such firearms (if they existed) were “contraband or evidence of a crime,” or were likely to be found at the Millenders’ residence. Indeed, in this respect, the warrant was also plainly deficient as it contained no way at all for the executing officers to distinguish between firearms legally possessed and those being sought by the warrant. See *supra* note 13. Accordingly, a reasonably well-trained officer would have readily perceived that there was no probable cause to search the house for *all* firearms and firearm-related items.

The affidavit sworn by Messerschmidt supports no other conclusion. It simply stated that (1) two weeks earlier, Bowen, a known gang member, (2) had assaulted Kelly, with whom he was in “an ongoing dating relationship,” and (3) fired a “black sawed-off shotgun with a pistol grip” in her direction as she fled. JA 55-57. But evidence that Bowen assaulted Kelly with a particularly-described weapon in a domestic dispute

does not support probable cause to believe that other firearms that might be found at the Millenders' house would also be contraband or evidence of a crime.

First, firearms are not contraband; owning them is “usually licit and blameless conduct,” *Staples v. United States*, 511 U.S. 600, 613-614 (1994), and, in a residence, may be protected by the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Second, even if the sawed-off shotgun Bowen used to commit the assault was also evidence of possession of an illegal or unregistered gun, that fact would still merely provide probable cause to seize *that* weapon. It would not provide a factual basis to suspect that Bowen possessed other firearms, let alone that those firearms could be found at the Millenders' home.<sup>16</sup> See *VonderAhe*, 508 F.2d at 370 (“Were this the law, the Commissioner, upon finding any suspicious deficiency, could order a seizure of every such taxpayer’s records upon the mere allegation that the omission or an inaccurate statement of one item might bespeak inaccuracies as to others which, in his opinion, necessitates a seizure of all records, at office and home.”). Indeed, as the United States acknowledges (Br. 27), it is “obvious” that the warrant in this case could not have authorized a search for stolen vehicles or drugs. But there is no principled difference between a warrant that would authorize a search for drugs or stolen vehicles and the warrant

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<sup>16</sup> Even if, as petitioners argue (Br. 41), “[m]any people who own guns own more than one,” the issue is not whether there was a “fair probability” that Bowen had other guns, but whether there was a fair probability that such guns were “contraband or evidence of a crime” that were likely to be found at the Millender residence (see *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). The affidavit provided no evidence to support such a conclusion.

here. Both have an “obvious” gap between “the facts alleged in the affidavit and the scope of the warrant” so as to “place the ... question beyond debate.” U.S. Br. 27 (internal quotation marks omitted).

Petitioners’ emphasis (Br. 42-43) on the “close nexus” between guns and serious criminal activity, including drug trafficking, does not help their cause. Nothing in Messerschmidt’s affidavit linked Bowen to drug trafficking or any other ongoing criminal enterprise. The crime under investigation was a “spousal assault.” It was neither plausibly related to Bowen’s gang membership nor remotely in furtherance of some broader criminal conspiracy. These facts readily distinguish this case from the decisions on which petitioners rely; in those cases, the police were investigating ongoing criminal activity such as drug trafficking, to which the possession and use of weapons were integral. *See* Pet. Br. 42-43 (citing cases). None of these decisions suggests that an isolated non-gang-related crime by a gang member establishes, or reasonably could have been thought to establish, probable cause to search for and to seize any firearms. To arrive anywhere close to petitioners’ contrary position requires stacking inference upon inference until the conclusion is too weak to support an objectively reasonable belief that the relevant provision was supported by probable cause. *Weber*, 923 F.2d at 1344 (“[W]ith each succeeding inference, the last reached is less and less likely to be true.”).

Petitioners’ and *amici*’s remaining arguments are meritless. In particular, although officers executing a warrant may surely secure firearms they find to ensure safety while the operation is being carried out, that does not provide probable cause for a warrant to search for and to seize all firearms during a search. Such a

rule would effectively place firearms outside the protection of the Fourth Amendment as a categorical matter, by allowing the police always to seize (not just temporarily secure) any firearms during a search, and also allowing the police to rummage through every house they search to find such firearms. As the court of appeals explained, if “a warrant’s overbreadth could be cured simply because of potential danger to police officers at some point in the future,” officers could “transform every warrant into a ‘general, exploratory search[.]’” Pet. App. 23.

**C. This Court Should Reject Petitioners’ Attempt To Alter The Objective Reasonableness Inquiry**

This Court has made clear that, when a law enforcement officer violates the Fourth Amendment, that officer may be held liable for his objectively unreasonable conduct. Petitioners attempt to alter the objective reasonableness inquiry by relying on facts never presented to the magistrate and recharacterizing the warrant they sought. Those arguments should be rejected.

**1. Information omitted from the warrant application does not entitle petitioners to qualified immunity**

Petitioners argue (Br. 62-63) that, although they did not present the fact of Bowen’s felon status to the magistrate, their personal knowledge of Bowen’s criminal history should be credited in the analysis of whether the warrant was “so lacking in indicia of probable cause” that no reasonable officer would have relied on it. It is unclear what this additional information about Bowen’s criminal history would have added to the calculus, because the mere fact that Bowen was a

felon could not provide probable cause to conclude that broad classes of firearms potentially belonging to Bowen might be found at the Millenders' house. Bowen could, to be sure, be charged with unlawful possession of a firearm by a felon, and on that basis the police might have had probable cause to search for the specific firearm he was known to possess. Still, the police had no reason to believe that Bowen possessed any other firearms, and his felon status did not give them probable cause to search the Millenders' home for "[a]ll handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition" (JA 52).<sup>17</sup>

More fundamentally, petitioners' argument runs counter to this Court's precedent and the Ninth Circuit rule that reviewing courts may not credit information arguably supporting probable cause known to the officer but withheld from the magistrate.<sup>18</sup> Whether a

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<sup>17</sup> Petitioners (Br. 45) and the United States (Br. 30 n.6) note three decisions from other circuits—two of them unpublished—holding that under certain circumstances it may be appropriate to search a felon's home for all firearms. But none of those cases approved of such a broad search of a home that the police knew (but did not tell the magistrate) belonged to a wholly innocent third party with numerous law-abiding residents. The United States cites two other cases that involved similarly worded warrants, *United States v. Guzman*, 507 F.3d 681 (8th Cir. 2007), and *Muehler v. Mena*, 544 U.S. 93 (2005), but neither addressed whether a suspect's felon status justifies a search for all firearms.

<sup>18</sup> The information actually provided to the magistrate plainly did not establish probable cause to conclude, or to reasonably infer from the totality of that information, that Bowen was a convicted felon. Although the affidavit established that Kelly broke off her relationship to Bowen because of Bowen's "violent temper," and that Bowen, a gang member, fired a weapon at her, no facts in the affidavit suggested that Bowen even had a criminal record, let alone that his felon status rendered illegal his possession of *any*

search warrant is valid depends on whether “*the magistrate* had a substantial basis for concluding that probable cause existed.” *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983) (emphasis added). An officer may rely in objective good faith on the warrant only when he has a reasonable belief that the magistrate had a substantial basis for finding probable cause. The reasonableness of the magistrate’s probable cause determination is solely a function of the information presented to the magistrate; indeed, “[a] contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.” *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971).

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firearm. To the contrary, although the affidavit stated that Messerschmidt undertook an “extensive background search [on Bowen],” it provided no criminal history whatsoever. A reasonable magistrate would surely have expected the affidavit to recite Bowen’s criminal history, if there was one. The “practical, common-sense” reading of the affidavit, *Gates*, 462 U.S. at 238, is precisely contrary to the one that petitioners and amici now propose.

Moreover, as any reasonably well-trained officer would be aware, a magistrate could not have reasonably inferred that information about Bowen’s membership in a gang as established in “the cal-gang data base” could support that Bowen had prior felony convictions. “[A] name may be added to the database based on nothing more than information that a [s]ubject has been seen frequenting gang areas’ or ‘has been seen affiliating with documented gang members.’” Pet. App. 25. The Advisory Committee for the CALGANG database therefore warns that it “is not designed to provide users with information upon which official actions may be taken,” and “*cannot be used to provide probable cause* for an arrest or be documented in an affidavit for a search warrant.” Cal. Gang Node Advisory Comm., Policy and Procedures for the CALGANG® System 7 (Sept. 27, 2007), available at [http://ag.ca.gov/calgang/pdfs/policy\\_procedure.pdf](http://ag.ca.gov/calgang/pdfs/policy_procedure.pdf) (emphasis added).

Information not presented to the magistrate cannot be relevant to the question of “whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” *Leon*, 468 U.S. at 922 n.23. As the Ninth Circuit has explained:

The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer’s later testimony on his subjective intentions or knowledge.

*United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988) (citation omitted); *see also United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006).

Petitioners’ reliance (Br. 62) on *United States v. Martin*, 297 F.3d 1308 (11th Cir. 2002), to argue that information beyond the four corners of the warrant may be considered in determining whether an officer would have known a search was illegal despite a magistrate’s authorization, is misplaced. The *Martin* court itself distinguished *Hove*, making clear that, where an affidavit lacks any indicia of probable cause, “an officer’s later testimony of his intentions or knowledge ... could not be taken into account in the face of such a deficient warrant.” *Id.* at 1319 n.11. Only where there *are sufficient indicia* of probable cause to make an officer’s reliance on the warrant “not entirely unreasonable” may a court “look beyond the four corners of the affidavit to determine whether the *Leon* good faith exception applies.” *Id.* In other words, when an officer reaches a mistaken but reasonable judgment that specific facts presented to the magistrate establish probable cause to search for specific items, it may be that

courts can look outside the affidavit to determine if the officer's overall conduct was "reasonable."<sup>19</sup> But it does not follow that, when an officer provides *no* facts to the magistrate that support probable cause to search for and seize broad classes of items, the officer can later excuse his failure based on what he might hypothetically have told the magistrate.

And this Court should not now adopt such a rule. "To permit the total deficiency of the warrant and affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant would ... unduly erode the protections of the fourth amendment." *Hove*, 848 F.2d at 140. Petitioners argue (Br. 62) that "Messerschmidt had every incentive to disclose to the magistrate all of the facts he knew supporting probable cause, including that Bowen was a convicted felon." But that is hardly a self-evident proposition; if officers know that they can rely, *post hoc*, on information that they knew but did not provide the magistrate to save a patently overbroad warrant, they are likely to become careless in ensuring that they give the magistrate all the information relevant to the probable cause determination. Such a *post hoc* rule also

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<sup>19</sup> Similarly, in the cases cited by the United States (Br. 23), the circuit courts considered information known to the officers but withheld from the judge because the warrant or affidavit contained some indicia of probable cause to support a search. *See United States v. Clay*, 646 F.3d 1124, 1126-1128 (8th Cir. 2011) (suggesting some indicia of probable cause existed to support the search, even though the warrant failed to establish a confidential informant's reliability); *United States v. Bynum*, 293 F.3d 192, 199 (4th Cir. 2002) ("Wholly apart from the information known to [the agent] but not included in his affidavit, th[e] affidavit contained sufficient indicia of probable cause so as not to render reliance on it totally unreasonable.").

invites mischief, for it may encourage officers, once the warrant is challenged, to claim that information not given to the magistrate was known to them before the warrant was issued, even if that is not true.

Moreover, examination of an officer's subjective knowledge or state of mind is the kind of inquiry that this Court rejected when it settled on objective reasonableness as the lodestar for both the good-faith exception to the exclusionary rule and qualified immunity. See *Harlow*, 457 U.S. at 815. As this Court affirmed in *Leon*, “[w]e adhere to the view” that “[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate.” 468 U.S. at 915 n.13. “[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). Thus, the relevant question is whether the officer reasonably believed that the warrant was properly issued, not whether, in retrospect, the officer could have established that there was probable cause.<sup>20</sup>

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<sup>20</sup> Petitioners’ argument raises additional complications because Messerschmidt was aware of several facts that were omitted from the warrant application that *undermined* his assertion that probable cause supported the search. These include the fact that Kelly told Messerschmidt only that Bowen might be “hiding out” at his former foster mother’s house (Pet. App. 111-112), a fact that would have cast doubt not only on the likelihood that Bowen would be at the Millenders’ (who were not suspected of any crime), but also on whether Bowen would have stashed at the Millenders’ the broad classes of items the warrant sought to seize. Similarly, it remains unclear why petitioners did not include information in the warrant or affidavit that the Millender home was a place where Bowen had been raised as a foster child fifteen years earlier and

Petitioners' remaining arguments to the contrary are meritless. In particular, petitioners are incorrect (Br. 47) that omitting Bowen's felon status from the warrant was a "reasonable 'mistake of fact' to which qualified immunity applies." First, where an omission renders a warrant "so lacking indicia of probable cause," that omission is decidedly unreasonable. *Malley*, 475 U.S. at 345; *cf. Groh*, 540 U.S. at 565 (a "facially deficient" warrant "cannot reasonably [be] presume[d] ... valid"). In any event, the record in this case does not support that any such mistake of fact occurred. Messerschmidt testified that he did not inadvertently omit any fact from his affidavit.<sup>21</sup> To the contrary, just as in *Malley*, the affidavit relied upon by the magistrate was precisely what petitioners intended to submit. *See* 475 U.S. at 337-339.

Petitioners' reliance on information not provided to the magistrate is also fundamentally in tension with their argument that an officer acts in good faith by relying on a neutral magistrate's judgment that probable cause supports a search for the items listed in a warrant. Petitioners are trying to claim the advantages of having sought a warrant, while simultaneously claiming that they are entitled to the benefit of material they withheld from the magistrate. Petitioners should not

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had stayed only temporarily since then, undermining Messerschmidt's assertion that it was Bowen's residence.

<sup>21</sup> *See* ER 850-851 (Q: Anything you would change [in your warrant affidavit]? A: No. Q: Anything you would add to it? A: No. Q: Do you think anything important was left out of it? A: No.); ER 883 (Q: Is it still true [that you wouldn't make any changes to your affidavit] now that you've had an opportunity to reevaluate and look more closely at the case? A: *I wouldn't change anything.* (emphasis added)).

be able to justify their conduct by reference to the “greater incompetence of the magistrate,” *Malley*, 475 U.S. at 346, n.9, while also arguing that the magistrate need not be privy to all of the relevant facts. Moreover, petitioners are particularly ill-situated to claim reliance on the magistrate’s mistake, because Messerschmidt prepared the invalid warrant and submitted it to the magistrate for approval. He may not now argue that he “reasonably relied on the [m]agistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.” *Groh*, 540 U.S. at 564.

A magistrate who does not have all the information known to the officer cannot make reliable probable cause determinations. That deficiency fatally undermines the Fourth Amendment’s warrant requirement. After all, the point central to the Fourth Amendment is not *why* information is not presented to a magistrate, but that the omission of information can prevent “probable cause, supported by Oath or affirmation,” from being presented to a neutral magistrate as the Constitution requires. U.S. Const. amend. IV; *see Gates*, 462 U.S. at 239 (problem with inadequate affidavits is that they “give[] the magistrate virtually no basis at all for making a judgment regarding probable cause”).

**2. It is both irrelevant and untrue that petitioners could have obtained a warrant supported by probable cause that authorized a search of identical scope**

Petitioners argue (Br. 63-65) that even if all their other arguments were to fail, they are nevertheless entitled to qualified immunity because they *could* have sought a warrant to search the Millender home limited to the item for which probable cause did exist—the

sawed-off shotgun—and the scope of *that* search would have been as broad as the search that was executed. Not only have petitioners failed to cite any decision by *any* court that would support such an argument, but they are wrong on the facts as well.

*First*, the language they recite from the dissenting opinions in *Groh* is taken completely out of context. In particular, they mischaracterize Justice Kennedy’s dissent, which focused on the fact that a “clerical error” in the warrant inflicted no actual harm on plaintiffs because the search was conducted as if the warrant had been accurate. *See Groh*, 540 U.S. at 570-571 (Kennedy, J., dissenting). Those circumstances are a far cry from the situation here, where a *substantive* defect in the warrant—it lacked probable cause—authorized a highly intrusive search of the Millenders’ home and the seizure of Mrs. Millender’s personal, lawful firearm and ammunition. Indeed, *Groh* expressly rejected that a constitutionally defective warrant may be cured by the fact that the defect did not expand the actual scope of the search. *See* 540 U.S. at 560. Petitioners also mischaracterize the holding of *Massachusetts v. Sheppard*, 468 U.S. 981, 987 (1984). Contrary to petitioners’ assertion (Br. 64), nowhere did the Court in *Sheppard* even consider whether the officers might have acted reasonably based on the argument that the scope of the search was not expanded.

*Second*, the premise of petitioners’ argument is incorrect—the scope of the search *was* expanded. In particular, the warrant’s authorization to search for all gang-related items and all photographic indicia of criminal activity allowed the officers to rifle through the Millender family’s photo albums and to turn out the contents of dresser drawers, looking for articles of clothing and other items that could not possibly have

been evidence of the crime under investigation or have established Bowen's identity or control of the premises. And the warrant expanded the scope of the seizure: Mrs. Millender's personal firearm and ammunition were seized by the officers, notwithstanding the warrant's complete lack of probable cause to do so. The warrant executed by the officers was thus much more invasive than one that petitioners *could* have sought—but did not.

### III. PETITIONERS HAVE GIVEN THIS COURT NO REASON TO OVERRULE ITS PRECEDENTS

As they are unable to prevail under this Court's precedents, petitioners and their *amici* have asked the Court to overturn those decisions. Petitioners call for *Malley* to be overruled and for officers to be freed from any independent obligation to ensure that warrants are supported by probable cause. The State of Texas goes even further, asking the Court to overrule not just *Malley* but much of this Court's Warrant Clause jurisprudence.<sup>22</sup> The United States refrains from explicitly calling for any precedents to be overturned, but it asks the Court to take such a cramped reading of *Malley* as to render it a nullity. The Court should reject these calls.

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<sup>22</sup> The Court should disregard Texas's request (Br. 9-12) that it upend decades of settled jurisprudence and hold that the Fourth Amendment does not ordinarily require a warrant to search a private home. Texas's argument would require a complete reconceptualization of the Warrant Clause. This Court generally does not consider such sweeping arguments raised only by *amici*. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). And Texas's argument is particularly tangential to the questions presented here, which *presuppose* a Fourth Amendment violation and involve only the scope of immunity.

**A. This Court's Longstanding Jurisprudence Strikes An Appropriate Balance That Should Not Be Unsettled**

As noted in Part I, *supra*, this Court has long struck a careful balance between the broad remedial purposes of § 1983 and the need to give adequate breathing room to law enforcement officials competently performing their duties. A critical element of that balance is the requirement set forth in *Malley* that police officers exercise “reasonable professional judgment.” 475 U.S. at 346. This rule is quite forgiving of law enforcement officers. It leaves them room to act with confidence at the outer perimeter of their authority, and it shields officers who make reasonable mistakes. *See id.* at 343.

What immunity doctrine properly does not do, however, is turn warrant-seeking into an absolute shield against liability. Nor is an officer immune from liability merely because he acts without malice. While warrants protect reasonable officers, they do not give a free pass to the “plainly incompetent”; using professional judgment in carrying out official duties is an essential component of acting “reasonably.” *See Malley*, 475 U.S. at 341, 346. *Malley* recognized that this rule was consistent with congressional intent, good policy, and necessary to prevent a conflict with principles of qualified immunity set forth in *Harlow*. *Id.* at 339-345.

*Stare decisis* weighs heavily against petitioners' request to uproot this Court's settled qualified immunity jurisprudence. While *stare decisis* is not an “inexorable command,” this Court has repeatedly recognized that respect for precedent is an “indispensable” value. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). Accordingly, this Court reconsiders its past

holdings only when there is a “special justification,” *Dickerson v. United States*, 530 U.S. 428, 443 (2000), such as when the past holding has been found to be unworkable or has been undermined by subsequent decisions, *see Arizona v. Gant*, 129 S. Ct. 1710, 1727-1728 (2009) (Alito, J., dissenting) (cataloging cases).<sup>23</sup>

Petitioners challenge this Court’s considered judgment in *Malley* on several grounds, none persuasive. It is worth noting first an argument that petitioners omit. This Court, at petitioners’ request, granted review to consider whether “the *Malley/Leon* standards” should be “reconsidered or clarified in light of the lower courts’ [purported] inability to apply them.” Pet. i. Yet petitioners’ merits brief nowhere contends that the lower courts have struggled with *Malley* or found it unworkable. Their silence on a question that they presented to this Court is telling.<sup>24</sup>

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<sup>23</sup> Petitioners have not shown that *Malley* has been undermined by subsequent decisions. To the contrary, in *Groh*, this Court explicitly reaffirmed that officers have a “duty to ensure that the warrant conforms to constitutional requirements.” 540 U.S. at 563 n.6.

<sup>24</sup> In their petition for certiorari, petitioners attempted to establish the supposed unworkability of the *Malley/Leon* standard by noting that a handful of decisions—most of which related to the exclusionary rule, not qualified immunity—produced dissents. Pet. 29-39. It is hardly surprising, however, that, in the twenty-seven years since *Leon* was decided, judges have occasionally disagreed about its application in a diverse array of circumstances, particularly given how frequently exclusionary rule issues are litigated. If judicial disagreement over the application of a legal standard to particular facts were conclusive evidence that a standard this Court had adopted was unworkable, this Court would be doing little else than reconsidering its previous decisions.

Having abandoned their argument that the *Malley* standard is unworkable, petitioners instead offer various policy arguments against the *Malley* rule. Again, however, one argument is notable for its absence. Nowhere do petitioners offer evidence—or even a contention—that *Malley* has frequently resulted in officers inappropriately being held liable for executing invalid warrants (or even being forced to go to trial on such allegations). Neither does the United States or Texas make such an argument, or argue that officers have been chilled in their duties by such a prospect. Nor does any *amicus* organization of law enforcement officers appear before this Court with such a submission. If the narrow exception to immunity that *Malley* recognized for officers who have not exercised reasonable professional judgment were having deleterious effects on law enforcement, one would expect some evidence of it—but none is offered to this Court. Given that petitioners must persuade this Court that *Malley* should be overruled, the absence of this showing is a grave defect in their argument.

Petitioners do argue that, unless a warrant effectively frees officers from responsibility to ensure that probable cause supports a search, “an officer, in borderline situations, may opt to effect a warrantless arrest or search.” Br. 37. But this argument ignores that officers have many incentives to seek a warrant for the significant protection it provides, including the deference to the magistrate’s probable cause determination and the preference accorded to warrants in close cases. See *United States v. Ventresca*, 380 U.S. 102, 106, 109 (1965). Even if that protection is not absolute, officers will continue to seek warrants, not least because some searches are “presumptively *unreasonable*” unless conducted pursuant to a warrant. *Groh*, 540 U.S. at 559

(emphasis added); *Payton*, 445 U.S. at 586. And petitioners produce no evidence that officers in fact are currently forgoing warrants.

Petitioners also assert (Br. 37) that the *Malley* rule is unnecessary because “[o]fficers have little incentive to submit a patently inadequate warrant application because in most circumstances, a reasonable magistrate will refuse the warrant.” But as *Malley* recognized, even if the likelihood of obtaining a warrant in the complete absence of probable cause is comparatively small, “ours is not an ideal system, and it is possible that a magistrate, working under docket pressures,” may approve an inadequately supported warrant. 475 U.S. at 345-346. If officers no longer faced any repercussions for seeking plainly inadequate warrants, they would have no incentive to engage in desirable “reflection” before making an application. *Id.* at 343; *cf. Stone v. Powell*, 428 U.S. 465, 492 (1976) (“exclusion ... discourage[s] law enforcement officials from violating the Fourth Amendment”). The number of deficient applications would, accordingly, rise. And there would be a corresponding increase in the number of citizens subjected to searches that violate the Fourth Amendment. Fostering this outcome would unacceptably undermine the Constitution’s protection against unreasonable searches and seizures.

Finally, *stare decisis* carries “special force” in this case because the challenged holding relates to the scope of a statutory provision. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (“the scope of ... immunity from liability under § 1983 is essentially one of statutory construction”). Congress has the authority to fix any potential over-expansiveness of § 1983 and, were Congress dissatisfied with *Malley*, it

could amend that statute to explicitly immunize police officers who have obtained warrants. *See Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (noting that authority to fix potential over-expansiveness of § 1983 “lies with the Legislative Branch, not with us”). Yet in the past 25 years, Congress has taken no action to amend the statute.<sup>25</sup>

### **B. This Court’s Recent Exclusionary Rule Cases Do Not Suggest A Contrary Result**

In attacking the decision below, petitioners and their *amici* repeatedly invoke this Court’s recent exclusionary rule decisions, most notably *Herring v. United States*, 555 U.S. 135 (2009). *See* Pet. Br. 31, 48-49 (citing *Herring* for the proposition that negligence or innocent mistake cannot support exclusion); U.S. Br. 21. They imply that *Herring* expanded qualified immunity and effectively disapproved *Malley*’s denial of immunity to officers who failed to exercise reasonable professional judgment. But *Herring* is fully consistent with *Malley*. In *Herring*, a wholly blameless officer performed an arrest in reliance on what turned out to be a negligent entry in a database maintained by police in a neighboring county. The Court found exclusion to

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<sup>25</sup> This case is distinguishable from *Pearson v. Callahan*, 555 U.S. 223 (2009), because it concerns the substantive scope of qualified immunity rather than the process through which qualified immunity questions are judicially resolved. In *Pearson*, this Court noted that the *Saucier* rule was akin to a procedural or evidentiary rule and that it concerned “internal Judicial Branch operations.” *Pearson*, 555 U.S. at 233-234. Thus, any alteration to that process would naturally “come from this Court, not Congress.” *Id.* The *Malley* rule, by contrast, directly pertains to the scope of § 1983, and is squarely within the domain where Congress would be expected to act.

be unwarranted, reasoning that any marginal deterrence from suppression was not justified under the exclusionary rule because the mistake resulted from “isolated negligence attenuated from the arrest.” 555 U.S. at 137.

If *Herring* had been a § 1983 suit, there can be little question that the arresting officer in *Herring* would have been entitled to qualified immunity. He behaved in an objectively reasonable manner when he made the arrest based on the database entry. The officer was not responsible for the database error and had no reason to know that the arrest was erroneous. He thus would have been entitled to protection under *Harlow* and *Malley*, which ensure protection for reasonable mistakes. See *United States v. Hensley*, 469 U.S. 221, 232 (1985) (noting that an officer who reasonably relies on incorrect information provided by another jurisdiction “may have a good-faith defense to any civil suit”).

In any event, policy concerns regarding the appropriate scope of the exclusionary rule should not automatically control whether the Millenders will be able to obtain redress for the violation of their constitutional rights. Although the Court has at times (including in *Malley*) described the *Leon* good-faith exception to the exclusionary rule as being coextensive with the *Malley* qualified immunity rule, there are several important differences between the doctrines that militate against slavishly applying an alteration in one to the other.<sup>26</sup>

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<sup>26</sup> Notably, in *Malley*, where the two doctrines were first intertwined, the Court noted that it would be “incongruous” for qualified immunity to be *less* protective of constitutional rights than the exclusionary rule. 475 U.S. at 344. The Court did not say that the scope of qualified immunity should always track the ex-

First, qualified immunity delimits the reach of a statute, § 1983. The good-faith exception to the exclusionary rule, by contrast, “is a judicially created exception to [a] judicially created rule.” *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011). Accordingly, the Court has more latitude to revise its exclusionary rule jurisprudence than it has to alter the scope of qualified immunity.

Second, § 1983 and the exclusionary rule do not serve identical purposes. “[T]he *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.” *Davis*, 131 S. Ct. at 2432; *see also Leon*, 468 U.S. at 906 (noting that “the exclusionary rule is neither intended nor able to cure the invasion of the defendant’s rights which he has already suffered.” (internal quotation marks omitted)). Section 1983, by contrast, was enacted not only to deter misconduct, but also to “provide compensation” and “vindicat[e] cherished constitutional guarantees.” *See Owen*, 445 U.S. at 651.

Third, as this Court noted in *Malley*, “in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason.” 475 U.S. at 344. These differences in equities explain why courts (including this Court) have declined to suppress evidence based on Fourth Amendment violations even when recognizing

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clusionary rule in all instances, or that any future restrictions on the exclusionary rule should necessarily be incorporated into qualified immunity doctrine.

that the officers who committed the violations may be liable under § 1983. In *Hudson v. Michigan*, 547 U.S. 586, 598 (2006), this Court held that violations of the “knock-and-announce” rule would not lead to exclusion, but noted that civil suits would remain available as a means to deter and remediate violations, and suggested that qualified immunity would not bar recovery of damages under § 1983 in such cases.<sup>27</sup> In light of these considerations, the *Malley* rule should be preserved even if there is a narrow divergence between qualified immunity and the exclusionary rule.

Finally, even if *Herring* announces a new rule that modifies *Malley* and that rule is applicable to the qualified immunity analysis, qualified immunity should still be denied here. This case does not involve garden-variety negligence that is attenuated from the search. Rather, given the complete lack of fit between the warrant and the supporting affidavit, the search and seizure at issue was at least grossly negligent. No reasonable officer could have possibly concluded that the domestic assault at issue constituted grounds for a far-ranging search of an innocent family’s home for a broad class of “any” firearms, indicia of gang membership, and photographic evidence of “criminal activity.” Holding the police accountable will provide the Millenders

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<sup>27</sup> See also *United States v. Cazares-Olivas*, 515 F.3d 726, 729 (7th Cir. 2008) (suggesting that the evidence in *Groh* would not have been suppressed even though the officer was not immune); *United States v. Rosa*, 626 F.3d 56, 66 (2d Cir. 2010) (noting that “while the objective inquiries underlying the good-faith exception and qualified immunity are the same, ... [suppression] requires the additional determination that the officer’s conduct was ‘sufficiently deliberate that exclusion can meaningfully deter it’”) (petition for certiorari pending).

both some measure of redress for the constitutional wrong they have suffered, and will deter future abuses of this type. Imposing liability here is wholly consistent with both the purposes of § 1983 and this Court's qualified immunity precedents.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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