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No. 10-704

In The
Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

Petitioners,

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, and WILLIAM JOHNSON,

Respondents.

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

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QUESTIONS PRESENTED

This Court has held that police officers who procure or rely on a warrant later determined to be invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986).

1. Under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a detailed affidavit supported the warrant, a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search?

2. Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct and improper exclusion of evidence in criminal cases?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Augusta Millender, Brenda Millender, and William Johnson, plaintiffs, appellees below, and respondents here.
- Robert J. Lawrence and Curt Messerschmidt, defendants, appellants below, and petitioners here.

The County of Los Angeles was a defendant in the underlying action and an appellant below, but is not a party to the petition for writ of certiorari.

No corporations are involved in this proceeding.

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OPINIONS BELOW

The Ninth Circuit's *en banc* opinion is reported at 620 F.3d 1016 (9th Cir. 2010). (Appendix to Petition for Writ of Certiorari ["App."]1-76.) The Ninth Circuit's initial opinion is published at 564 F.3d 1143. (App.79-105.) Its order granting rehearing *en banc*, filed October 2, 2009, is published at 583 F.3d 669. (App.77-78.) The district court's decision denying qualified immunity was not published in the official reports. (Joint Appendix ["JA"]281-384.)

JURISDICTION

The Ninth Circuit initially filed its opinion on May 6, 2009. (App.79.) Respondents timely petitioned for rehearing, and on October 2, 2009, the Ninth Circuit ordered the case reheard *en banc*. (App.77-78.) The *en banc* panel issued its opinion on August 24, 2010. (App.1-2.) On November 22, 2010, petitioners filed a timely petition for writ of certiorari in this Court. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Ninth Circuit's August 24, 2010 decision on writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioners violated their rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case arises from a nighttime search of plaintiffs' residence under warrants to arrest a suspect and search for evidence. The suspect had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and police officers believed they would find him at the residence.

A. The Attack.

The warrants' affidavit related the following incident:

Jerry Ray Bowen had a violent temper and had repeatedly physically assaulted his girlfriend, Shelly Kelly. Kelly decided to end the relationship and move out of her residence. (JA55.) Fearing Bowen, she asked sheriff's deputies to stand by while she retrieved some of her belongings. When the deputies left to field a call, Bowen attacked her. He attempted to throw her off the second-story landing, bit her and tried to drag her by the hair back into the residence. When Kelly managed to run to her car, Bowen followed, holding "a black sawed off shotgun with a pistol grip." (JA55-56.) Standing in front of the car, he pointed the gun at Kelly and shouted, "If you try to leave, I'll kill you bitch." (JA57.) Although Kelly managed to drive away, Bowen fired a shot at her, blowing out the car's left front tire. He then chased the car firing and missing four more times. (JA57.)

B. The Investigation.

After Kelly reported the attack, Curt Messerschmidt, a sheriff's detective, was assigned to investigate the assault. (JA18-21.) He interviewed Kelly and another witness who corroborated her account of the attack. (JA21-22, 24-25, 82-88; 8 Appellants' Excerpts of Record ["ER"] [videotaped interview of Kelly].)[1] Both identified Bowen, a known Mona Park Crip gang member, from a photo lineup. (JA23-29, 39, 64-65, 89-94; 8ER.)

Kelly told Messerschmidt she believed Bowen was staying or "hiding out" at 2234 E. 120th Street, Los Angeles, the home of his foster mother, Augusta Millender. (JA21, 149; 8ER.) Kelly also said Bowen was not living at her residence at 1425 W. 97th Street, where the attack occurred, although he had keys to the residence. (JA18, 21, 25, 83; 8ER.) Kelly said she had been to the Millenders' house with Bowen before the assault. (JA21-22.)

Messerschmidt went to the W. 97th Street location and verified that Bowen was not staying there. (JA22.) From DMV and Cal-Gangs records, he confirmed that Bowen was probably staying at the 120th Street address. (JA25-26, 63, 69.) A sergeant told him the

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[1] In the district court, plaintiffs submitted a purported transcript of Messerschmidt's videotaped interview of Kelly, prepared by their counsel. (3ER 530, 547-71.) Defendants objected to the transcript as lacking foundation. (4ER 1076; *see* JA313 n.6.)

station considered the address a "problem house." (JA26.)[2]

Messerschmidt also checked California law enforcement and criminal history records, the National Criminal Index Center, and the County Warrant System. (JA21, 25-27.) He determined that Bowen was on summary probation for spousal battery and driving without a license, had an extensive criminal background including numerous assault and weapons charges with several felony convictions, and was a "third strike" candidate under California law. (JA21, 26-29; *see* JA70-81.)

C. The Warrants and Affidavit.

Messerschmidt prepared an affidavit and warrants to arrest Bowen for assault with a deadly weapon and search the 120th Street residence. (JA18, 27-28, 31, 47-62.) The affidavit stated Messerschmidt had 14 years' experience as a peace officer, was a "Gang Investigator" in a special unit for gang-related crimes, and had considerable training and experience as a gang detective, including extensive knowledge concerning "manners in which gang related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (JA53-54.)

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[2] Sometime before the warrant was executed, Messerschmidt learned that other members of the Millender household were Mona Park Crip gang members. (JA28.)

The affidavit recited Kelly's description of the assault, and stated Messerschmidt had "conducted an extensive background search" on Bowen using "departmental records, state computer records, and other police agency records," confirming Bowen resided at the location. (JA55-58.) The affidavit requested night service of the search warrant because Bowen was affiliated with the Mona Park Crip gang and the nature of the crime – assault with a deadly weapon – showed "night service would provide an added element of safety to the community" and "the deputy personnel serving the warrant, based on the element of surprise." (JA58-59.) The affidavit opined "recovery of the weapon could be invaluable" in successfully prosecuting Bowen and curtailing "further crimes." (JA59.) The affidavit did not mention Bowen's prior criminal record and felony convictions, although it noted Bowen "ha[d] gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base." (JA59.)

The warrant authorized search and seizure of (1) items tending to establish the identity of persons in control of the premises, (2) all firearms and firearm-related items, and (3) articles of evidence showing, or relevant to, gang membership. (JA52.)

The warrants and affidavit were reviewed by Messerschmidt's superiors, including petitioner Sergeant Robert Lawrence and a lieutenant, and a deputy district attorney, before a magistrate approved them. (JA27-28.)

D. The Search.

The Sheriff's Department's SWAT team served the warrants at 5:00 a.m. on November 6, 2003. (JA31.) Messerschmidt and Lawrence were present but did not participate in the search. (JA31-32, 257; 2ER 346-47.) The officers seized Augusta Millender's personal shotgun (a black 12-gauge "Mossberg" with a wooden stock), a box of .45 caliber "American Eagle" ammunition, and a letter from Social Services addressed to Bowen at the 120th Street address. (JA32-33, 95, 97-98.) The officers did not find Bowen or the sawed-off shotgun at the residence. (JA33.)

E. The Lawsuit.

Augusta Millender, Brenda Millender, and William Johnson, residents of the 120th Street address, 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 Messerschmidt and Lawrence. (2ER 322-23.) As relevant, plaintiffs alleged violations of their Fourth Amendment rights. (2ER 327.) The parties filed cross motions for summary adjudication on the validity of the arrest and search warrants. (JA99-145; 2ER 477-510.)

The district court concluded the search and arrest warrants were facially valid (JA311), the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence (JA306-11), Messerschmidt did not violate plaintiffs' constitutional rights

by deliberately or recklessly misleading the magistrate regarding whether Bowen was staying at plaintiffs' residence (JA311-19), and the facts in the affidavit justified night service (JA323-27). The court granted defendants' motion for summary adjudication on these issues. (JA311, 319, 327, 383.)[3]

The district court also held the search warrant's authorization to search for all firearms, firearm-related materials, and gang-related items was unconstitutionally overbroad, but its authorization to search for evidence of control of the premises was constitutional. (JA332-34.) Accordingly, the court granted plaintiffs' motion for summary adjudication as to firearm- and gang-related evidence, but granted defendants' motion as to identification evidence. (JA335.) The district court then rejected the deputies' claim of qualified immunity, holding their actions were not objectively reasonable. (JA346.)

F. The Appeal.

Messerschmidt and Lawrence appealed the denial of qualified immunity. (App.11.) On May 6, 2009, the Ninth Circuit reversed. (App.79-105.) Judges

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[3] The district court denied plaintiffs' application for an order certifying an interlocutory appeal regarding whether the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence, reasoning that it would not materially advance the termination of the litigation and there were no "exceptional circumstances" justifying piecemeal appeals. (JA385-94; Order filed 5/25/07 [docket #114], at 13-14.)

Callahan and Fernandez, in separate opinions, concluded defendants were entitled to qualified immunity. Judge Ikuta dissented. (App.79-105.)

Plaintiffs petitioned for rehearing, and the Ninth Circuit ordered the case reheard *en banc*. (App.77-78.) On August 24, 2010, the *en banc* panel issued a new opinion affirming the denial of qualified immunity. (App.1-39.)

First, the court held the warrant's authorization to search for all firearms and firearm-related materials was overbroad, because although the deputies had probable cause to search for the "'black sawed off shotgun with a pistol grip,'" the affidavit contained no evidence that Bowen possessed other firearms, that "such firearms were contraband or evidence of a crime," or that such firearms were likely present at plaintiffs' residence. (App.15-16, 24.)

Second, the court held the authorization to search for indicia of gang membership lacked probable cause, because the affidavit's statements that Bowen was a gang member did not suggest "'contraband or evidence of a crime' . . . would be found at [plaintiffs'] residence." (App.28-29.)

Finally, the court held the deputies were not entitled to qualified immunity, reasoning the affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" because the "affidavit indicated 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" without additional probable cause for those items. (App.3, 31, 35, 38.)

Three judges dissented in two separate opinions. (App.39-76.) First, Judge Callahan, joined by Judge Tallman, found the officers had probable cause to search for firearms and firearm-related materials because Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; thus, there was "a 'fair probability'" he had other firearms in his residence and they were "'contraband or evidence of a crime.'" (App.41-42.) Moreover, the officers' and residents' safety justified seizing any firearms encountered in the nighttime search for a dangerous felon. (App.42-43.)

All three dissenting judges found the warrant's authorization to search for gang-related indicia unconstitutionally overbroad, but concluded the officers were entitled to qualified immunity for that provision, as well as any alleged overbreadth in the authorization to search for firearms and firearm-related items. (App.72-73.)

Regarding gang-related items, the dissent[4] noted Messerschmidt knew Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; he believed Bowen resided at plaintiffs'

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[4] We refer to Judge Callahan's dissent simply as "the dissent," and to Judge Silverman's dissent by name.

residence. (App.63.) Messerschmidt also had extensive experience with gang-related crimes. (App.64 n.17.) Thus, Messerschmidt could "reasonably have conceived of possible ties between the crime, the weapon and the gang." (App.63-64.)

In concluding the officers were entitled to qualified immunity as to both firearms and gang-related indicia, the dissent noted: (1) there was probable cause for a nighttime search of plaintiffs' residence (App.60-61); (2) the search and arrest warrants were facially valid (App.61); (3) Messerschmidt's superiors and a deputy district attorney approved the warrants (App.62); (4) there was no indication that Messerschmidt acted dishonestly in procuring the warrant (App.62-63, 74); (5) when Messerschmidt sought the warrant, no clear precedent established that it lacked probable cause (App.65-67); and (6) since the officers undisputedly were entitled to search for disassembled parts of the sawed-off shotgun, the warrant's purportedly overbroad provisions did not expand the scope of the search (App.69).

SUMMARY OF ARGUMENT

Qualified immunity shields public officials from liability for allegedly unconstitutional conduct as long as their conduct was "objectively reasonable" in light of clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This standard strikes a balance between the need to deter official misconduct, and the

need to protect public officials from liability so that they can perform their duties vigorously. *Id.* at 807; *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Accordingly, it provides "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

This Court has recognized that where a police officer procures or relies on a warrant later determined invalid, the protections of qualified immunity should be particularly strong. This is because the very fact that an officer has obtained or relied on a warrant bespeaks good faith, and a neutral third party's review of the warrant for probable cause substantially protects Fourth Amendment rights. Moreover, because the policies underlying qualified immunity have largely been served in the typical case where an officer relies on a warrant, the officer's actions should be deemed objectively reasonable, and qualified immunity should be denied, only in the most egregious cases involving flagrant violations of Fourth Amendment rights. *See United States v. Leon*, 468 U.S. 897, 913-14, 921-23 & n.21 (1984); *Malley*, 475 U.S. at 344-45, 346 n.9.

In *United States v. Leon*, the Court enumerated the limited, egregious circumstances where an officer's reliance on a warrant would not be deemed "objectively reasonable": (1) the officer intentionally or recklessly submitted false information to the magistrate; (2) the magistrate "wholly abandoned his judicial role"; (3) the warrant was "so facially deficient – i.e.,

in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid"; and (4) the warrant affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923.

Here, Bowen, a known gang member and felon, threatened to kill his girlfriend, Kelly, and attempted to do so by firing five rounds from a sawed-off shotgun at her in public. Before seeking a warrant to search Bowen's residence, petitioners Messerschmidt and Lawrence prepared an extensive affidavit and had the affidavit and application reviewed and approved by both their supervisors and a deputy district attorney. The judge issued a warrant, authorizing a search and seizure of all firearms and firearms-related materials, and indicia of gang membership.

The Ninth Circuit *en banc* majority, notwithstanding the thoughtful dissents of three colleagues, nonetheless concluded that the warrant materials were so lacking in indicia of probable cause that no reasonable officer should have applied for or relied on the warrant and, in short, the actions of the officers (and their dissenting colleagues) were patently incompetent or bespoke a knowing violation of the law.

The Ninth Circuit flatly erred. As a threshold matter, as the dissent noted, there was probable cause to search for firearms. Officers could logically infer that a gang member and a felon who possessed a sawed-off shotgun and fired it repeatedly at a person

in public would have other firearms and keep them where he lived. Moreover, the officers could reasonably believe such firearms were subject to seizure, given that California law allows issuance of a search warrant for items possessed "with the intent to use them as a means of committing a public offense," Cal. Penal Code §1524(a)(3), and it was conceivable – indeed, likely – that Bowen would use any firearm in his possession to carry out his threat to kill Kelly. Further, under both state and federal law, Bowen, as a felon, could not legally possess firearms. And, in seeking the nighttime arrest of a dangerous felon, the officers had reason to fear for their own and others' safety.

Similarly, as to the search for gang-related items, Messerschmidt was a gang specialist and knew that Bowen had fired a sawed-off shotgun at a person in public and was a felon and gang member. He could reasonably conclude that Bowen's procurement, possession and concealment of the sawed-off shotgun might be related to his gang affiliation. Moreover, since other people lived at the residence, gang paraphernalia might help establish that any guns belonged to Bowen.

Even putting aside the ultimate questions of whether there was probable cause to search for firearms and gang-related items, at the very least, for qualified immunity purposes, the officers could reasonably have thought there might be sufficient probable cause to submit the issue to a magistrate for determination. Numerous circuit courts have construed *Leon* and

Malley as creating a presumption that an officer has acted in an objectively reasonable manner in seeking a warrant. This presumption is rebutted only where there is a showing of egregious misconduct by the officer that corrupts the warrant process or essentially renders it meaningless, *i.e.*, where an officer intentionally submitted false or misleading information or omitted relevant facts from the application, the magistrate wholly abandoned his or her judicial role, or the warrant was facially deficient – circumstances the Ninth Circuit did not find to be, and were not, present here.

To the extent the presumption may be rebutted by showing that the warrant was "so lacking in indicia of probable cause" that no reasonable officer could believe a valid warrant could be issued, such a standard at the very least must meet the ordinary requirement for determining that the law is "clearly established" for purposes of qualified immunity. Namely, plaintiff must point to a "robust 'consensus of cases'" that would indicate to an officer that given the particular facts he or she confronted, the issue of probable cause was not even debatable. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011). Neither plaintiffs nor the *en banc* majority cited any such cases here.

Yet, it is also worth considering whether the "so lacking in indicia of probable cause" standard should be retained in any form, given that the burden it imposes on the judicial system by inviting endless relitigation of probable cause determinations is not outweighed by any marginal deterrent impact it may

have on officers' attempting to procure warrants when there is no factual basis to do so. As a practical matter, officers have no incentive to submit patently inadequate warrant applications, because they will typically be rejected. Further, the other *Leon* factors amply protect the warrant process from abuse.

Finally, all of the circumstances surrounding procurement of the warrant here manifest the officers' good faith and confirm that they acted reasonably in seeking and relying on the magistrate's finding of probable cause. The warrant itself was facially valid, and a detailed affidavit supported it. The officers had supervisors and an attorney review the warrant materials. Probable cause supported the search, even if the affidavit might have omitted some facts that established probable cause. Moreover, since even the *en banc* majority found probable cause to search for a sawed-off shotgun and its disassembled parts, the warrant's purported overbreadth did not expand the scope of the search beyond areas properly searched even if the warrant were narrowly tailored.

There was no egregious misconduct by petitioners. In good faith, they sought an independent determination of probable cause by a neutral magistrate. Even if that determination is ultimately deemed erroneous, the officers acted with objective good faith both in securing and in relying on the warrant. These are precisely the circumstances in which qualified immunity is appropriate.

ARGUMENT

I. POLICE OFFICERS WHO PROCURE OR RELY ON A WARRANT LATER DETERMINED INVALID ARE ENTITLED TO QUALIFIED IMMUNITY ABSENT EGREGIOUS CONDUCT SHOWING THAT THEY ACTED UNREASONABLY IN RELYING ON THE MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE.

A. Qualified Immunity Shields Public Officials from Liability for Actions Taken in Objective Good Faith.

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, whether a police officer or other government official may be held personally liable for allegedly unconstitutional conduct depends on the "objective reasonableness of [that] conduct, as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818; *see also Wilson v. Layne*, 526 U.S. 603, 614 (1999) (similar language); *Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) (same); *Elder v. Holloway*, 510 U.S. 510, 512 (1994) (same). An officer will not be held liable if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the officer[ ]

possessed." *Wilson*, 526 U.S. at 615; *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

To be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640; *see also Wilson*, 526 U.S. at 614-15 (same). In other words, an officer must have "fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Even if an officer violates a clearly established constitutional right, he may be entitled to qualified immunity if his conduct nonetheless is objectively reasonable – for example, if an officer executing a search warrant "reasonably but mistakenly conclude[s] that his conduct complie[s] with the Fourth Amendment" because he "misunderstand[s] important facts about the search." *Groh v. Ramirez*, 540 U.S. 551, 566-67 (2004) (Kennedy, J., dissenting). Qualified immunity "applies regardless of whether the [officer's] error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting)); *see also Butz v. Economou*, 438 U.S. 478, 507 (1978) (public officials "will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law").

Qualified immunity balances "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,* 555 U.S. at

231; *see also Elder*, 510 U.S. at 514-15 (similar reasoning).

Recognizing that public officials will inevitably make mistakes, qualified immunity assumes that "it is better to risk some error and possible injury . . . than not to . . . act at all." *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). Accordingly, this Court recently reaffirmed that qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments" and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011); *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

B. An Officer's Reliance on a Warrant Normally Establishes That the Officer Acted Reasonably for Qualified Immunity Purposes, Absent Egregious Conduct Manifesting Bad Faith or Gross Incompetence.

In a trio of cases, this Court has clarified application of qualified immunity to an officer's procuring or relying on a warrant later determined to be invalid. Consistent with qualified immunity's focus on protecting individual constitutional rights while also encouraging public officials to perform their duties fully, in each case the Court has emphasized the need to strike a balance between deterring officers from deliberate misconduct and, at the same time, encouraging them to seek judicial intervention before effecting an arrest or search.

These cases, read in the context of this Court's larger jurisprudence concerning qualified immunity and warrants, demonstrate that when an officer procures or relies on a warrant, qualified immunity should be applied with particular rigor. Specifically, the Court has recognized: (1) the fact that an officer has obtained a warrant manifests good faith; (2) the magistrate's review of the warrant for probable cause substantially protects citizens' Fourth Amendment rights; and (3) accordingly, because the policies underlying qualified immunity have largely been served, officers who rely on a warrant later deemed invalid are entitled to qualified immunity absent only the most egregious circumstances negating the presumption of good faith.

1. *United States v. Leon*, *Malley v. Briggs*, and *Groh v. Ramirez*.

In *United States v. Leon*, 468 U.S. 897 (1984), the Court recognized a good-faith exception to the Fourth Amendment exclusionary rule, and set forth the standards it would later adopt for determining qualified immunity in the warrant context. The Court addressed whether evidence procured in violation of the Fourth Amendment via an invalid warrant would nevertheless be admissible in a criminal proceeding. The Court held that as long as the officer procured or executed the warrant in "objective good faith," the evidence would be admissible. *Id*. at 920-22.

The Court noted that it had expressed "a strong preference for warrants" because "the detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id*. at 913-14 (citations and internal quotation marks omitted). Moreover, because "[r]easonable minds frequently may differ on . . . whether a particular affidavit establishes probable cause, . . . the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Id*. at 914.

The Court further reasoned that the exclusionary rule is "designed to deter police misconduct" and should be applied "only in those unusual cases" where exclusion will further that purpose. *Id*. at 916-18. The Court noted that exclusion could have little deterrent effect – except to deter the police from performing their duties – when officers acted in "complete good faith" or with the "objectively reasonable belief" their conduct was lawful. *Id*. at 918-20. In particular, "'a warrant issued by a magistrate normally suffices to establish' that [an] officer has 'acted in good faith,'" because ordinarily, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id*. at 920-22 & n.21. Thus, an officer was entitled to rely on a magistrate's determination, and any evidence procured would be admissible, absent some showing that the officer's reliance

was, in no way, "objectively reasonable." *Id*. at 920-22 & n.23.

The Court explained that under this standard, the evidence would be suppressed in only the most extraordinary circumstances, where the officer's conduct in applying for or relying on the warrant bespoke bad faith. *Id*. at 923-24, 926. For example, an officer's reliance on a warrant would be unreasonable, and the evidence subject to suppression, if the officer intentionally or recklessly submitted false information to the magistrate, or if the magistrate "wholly abandoned his judicial role" and served as part of the prosecution team. *Id*. at 923. Or, a warrant "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id*. The Court also concluded that suppression would be justified in situations where it would be preposterous for an officer to believe probable cause might exist – that is, where the warrant affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id*. (citation omitted).

In *Malley v. Briggs*, 475 U.S. 335 (1986), plaintiffs sued a police officer under 42 U.S.C. §1983 for procuring an arrest warrant without probable cause.[5]

[5] Although *Malley* involved an arrest warrant, the Court noted that the same analysis also applies to search warrants. *Malley*, 475 U.S. at 344 n.6.

Noting that qualified immunity turns on the "objective reasonableness" of an officer's conduct, the Court held that the same standard applied in *Leon* to suppression hearings also applies to determining whether an officer who procures a defective warrant is entitled to qualified immunity. *Id*. at 343-44. Thus, qualified immunity should be denied "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id*. at 344-45.

The Court again emphasized that this was a high standard to meet – that is, an officer could not be held liable simply because he or she was ultimately incorrect as to whether there was probable cause to arrest. The Court noted that it was not requiring "the police officer to assume a role even more skilled . . . than the magistrate." *Id*. at 346 n.9. As the Court explained, since magistrates obviously are "'more qualified than . . . police officer[s]'" to determine probable cause, "where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable." *Id*. The Court underscored that qualified immunity would be denied only in the most egregious cases and would provide "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id*. at 341.

Significantly, in concurring and dissenting, Justice Powell, joined by Justice Rehnquist, emphasized that in determining qualified immunity, the magistrate's finding of probable cause should be accorded

"substantial evidentiary weight." *Id*. at 346, 350-51, 353. They commented that "judicial evaluation of probable cause by a magistrate is the essential 'checkpoint between the Government and the citizen,'" and expressed concern that a more restrictive standard would "discourage police officers from seeking warrants out of fear of litigation and possible personal liability," causing them to "close [their] eyes to facts that should at least be brought to the [magistrate's] attention." *Id*. at 352-53.

In *Groh v. Ramirez*, 540 U.S. 551 (2004), plaintiffs sued federal agents under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), alleging the officers executed a facially invalid warrant against their property. Specifically, although the warrant application and affidavit specified the items to be searched and seized in plaintiffs' residence – a stockpile of firearms – the warrant itself did not list the items. *Id*. at 554-55.

The Court held the warrant was invalid on its face because it did not specify the evidence sought. *Id*. at 557. The Court also denied qualified immunity, noting the law was clearly established as to what was required on the face of the warrant and "even a cursory reading" would have revealed the deficiency. *Id*. at 563-65.

The Court acknowledged that in *Malley* it had suggested that something more than mere negligence by a police officer was required to impose liability on the officer for executing a warrant issued by a

magistrate. *Groh*, 540 U.S. at 565. But the Court noted that in *Leon* it had observed that a warrant failing to particularize the place to be searched or the things to be seized was "'so facially deficient'" that an executing officer could not reasonably presume it valid. *Id*. at 565 (citing *Leon*, 468 U.S. at 923).

In dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that since the warrant affidavit and application both specified the items to be seized, the omission from the warrant was nothing more than a "clerical error" and a reasonable "mistake of fact," given the numerous "serious responsibilities" an officer must fulfill in executing a search warrant for illegal weapons, including "difficult and important tasks" that "demand the officer's full attention in the heat of an ongoing and often dangerous criminal investigation." *Id*. at 567-68. As Justice Thomas, joined by Justice Scalia, similarly noted in dissent from the denial of qualified immunity, "[g]iven the sheer number of warrants prepared and executed by officers each year," including "detailed" and sometimes "comprehensive" supporting documents, "it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors." *Id*. at 579.

Justice Kennedy and Chief Justice Rehnquist further observed that unlike the typical case where a defective warrant has "led to an improper search," here plaintiffs claimed simply that they were injured by a technical defect in form of the warrant. *Id*. at 570-71; *see also id*. at 576 (Thomas, J., dissenting;

noting that the officers conducted the search "entirely within the scope" of the magistrate's authorization). The Justices suggested that "'the purpose of encouraging recourse to the warrant procedure' can be served best by rejecting overly technical standards" when reviewing warrants. *Id*. at 571. Similarly, Justices Thomas and Scalia observed that since the warrant application specified the items to be seized, plaintiffs had effectively received the benefit of a neutral magistrate's determination that probable cause existed for the search. *Id*. at 576.

Leon, *Malley* and *Groh*, viewed in the context of this Court's larger jurisprudence concerning qualified immunity and warrants, make it clear that special considerations apply when analyzing qualified immunity in the warrant context. In particular, where a police officer relies on a warrant, the policies underlying qualified immunity normally have been served; hence, liability should be reserved only for egregious cases where those policies patently have been defeated.

2. A warrant bespeaks the officer's good faith and substantially protects Fourth Amendment rights, thus fulfilling the policies underlying qualified immunity.

Qualified immunity and the exclusionary rule's good-faith exception attempt to balance similar concerns. Both seek to protect individual rights by deterring police misconduct, while at the same time

allowing effective functioning of government – in particular, effective investigation and prosecution of crime. As this Court reaffirmed last term, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs" in the form of "suppress[ing] the truth" in criminal proceedings. *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011); *see also Herring v. United States*, 555 U.S. 135, 140 (2009).

Similarly, qualified immunity balances "the importance of a damages remedy to protect the rights of citizens" by holding public officials accountable for their unlawful acts, against the need to protect those officials and "the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807. Both doctrines have struck the balance by determining that if an officer acts in good faith, as measured by objective criteria – in other words, if the officer's actions are "objectively reasonable" – there is effectively no misconduct to deter. *See Leon*, 468 U.S. at 918-21; *Malley*, 475 U.S. at 343-45.

But as the Court recognized in *Leon*, the mere fact that an officer has obtained a warrant – that he has submitted his facts and inferences to a neutral third party for consideration – in itself, is an act of objective good faith. *See Leon*, 468 U.S. at 922 ("a warrant issued by a magistrate normally suffices to establish" that an officer "'acted in good faith'"), 920 n.21; *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982) (same); *see also United States v. Bonner*, 874 F.2d 822, 825 (D.C. Cir. 1989) ("a warrant ensures that officers have had to support, articulate, and swear to

their assumptions”). As Justice White observed, in concurring in *Illinois v. Gates*, 462 U.S. 213, 262 (1983), “[t]he warrant is prima-facie proof that the officers acted reasonably.”

Accordingly, circuit courts have understood *Leon* to create a presumption of good faith where an officer relies on a warrant. *See*:

- *United States v. Corral-Corral*, 899 F.2d 927, 938-39 (10th Cir. 1990) (issuing judge’s probable cause finding is “not only a relevant factor, but a significant one . . . in the good-faith equation”; *Leon* created a “presumption . . . that when an officer relies upon a warrant, the officer is acting in good faith”);
- *United States v. Mitten*, 592 F.3d 767, 771 (7th Cir. 2010) (fact that officer sought a warrant is “prima facie evidence that he was acting in good faith” and gives rise to a “presumption of good faith”);
- *United States v. Tuter*, 240 F.3d 1292, 1300 (10th Cir. 2001) (“ ‘police officers should be entitled to rely upon [a magistrate’s] probable-cause determination . . . when defending an attack on their good faith’ ”);
- *United States v. Stearn*, 597 F.3d 540, 561 (3d Cir. 2010) (“[o]rdinarily, the ‘mere existence of a warrant . . . suffices to prove that an officer conducted a search

in good faith,' and will obviate the need for 'any deep inquiry into reasonableness'");

- *United States v. Campbell*, 603 F.3d 1218, 1230 (10th Cir. 2010) ("we generally presume officers executed a search warrant in objective good faith").

Moreover, the fact that a neutral third party has reviewed the warrant for probable cause substantially protects the individual's Fourth Amendment rights. *See Leon*, 468 U.S. at 913-14; *Malley*, 475 U.S. at 352-53 (Powell, J., concurring & dissenting); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (warrant represents "an independent assurance that a search and arrest will not proceed without probable cause"); *Ross*, 456 U.S. at 829 (White, J., dissenting; "the warrant requirement provides a number of protections that a *post hoc* judicial evaluation of a [police officer's] probable cause does not"); *al-Kidd*, 131 S.Ct. at 2082 (warrant grants significant "protection against the malevolent and the incompetent"); *see also United States v. Carpenter*, 341 F.3d 666, 669 (8th Cir. 2003) (*Leon* demonstrated that with few exceptions, "a neutral magistrate's intervention . . . provides adequate protection of Fourth Amendment rights"). Accordingly, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965); *see also Leon*, 468 U.S. at 913-14 (same).

In short, an officer who has obtained a warrant is presumptively entitled to qualified immunity absent

evidence that egregious misconduct by the officers has defeated the warrant process.

3. Qualified immunity should be denied only in egregious cases.

Since the policy concerns underlying qualified immunity typically have been addressed when an officer procures or relies on a warrant, this Court has recognized that qualified immunity should be denied in only the most egregious cases, where it is patently inappropriate to presume that an officer acted in good faith.

Review of *Leon* makes this clear. There, in discussing when an officer's reliance on a warrant would not be considered "objectively reasonable," the Court enumerated four situations where an officer could not be deemed to be acting in good faith. The *en banc* majority relied on the fourth – where the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" – to deny qualified immunity. *Leon*, 468 U.S. at 923. (App.31.) Yet, this Court intended all four situations to address only egregious conduct that flagrantly violates Fourth Amendment rights – conduct of the sort not present here.

1. *The officer submitted an affidavit he "knew was false or would have known was false except for his reckless disregard of the truth*." *Leon*, 468 U.S. at 923. The court cited *Franks v. Delaware*, 438 U.S. 154 (1978), which held that a criminal defendant would

be entitled to an evidentiary hearing if he could show an officer made false statements in an affidavit "deliberate[ly]" or with "reckless disregard for the truth." *Franks*, 438 U.S. at 171. The Court there expressly stated that it was not extending the exclusionary rule beyond such instances, and where the police were "merely negligent in checking or recording the facts relevant to a probable-cause determination," the magistrate remained "the sole protection of the citizen's Fourth Amendment rights." *Franks*, 438 U.S. at 170-71; *see also Herring*, 555 U.S. at 145 (discussing *Franks*; "allegations of negligence or innocent mistake are insufficient").

2. *The magistrate "wholly abandoned his judicial role in the manner condemned in* Lo-Ji Sales, Inc. v. New York." *Leon*, 468 U.S. at 923. In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the magistrate issued a warrant authorizing a search of an adult bookstore without specifying the items to be seized; at an officer's request, the magistrate then accompanied officers on the search, viewing films and magazines to determine, on the spot, whether they were obscene. The officers listed the seized items on the warrant *after* completing the search. *Id*. at 321-24. Not surprisingly, *Leon* commented that "in such circumstances, no reasonably well trained officer" would rely on the warrant. *Leon*, 468 U.S. at 923.

Dissenting from the denial of certiorari in *McCommon v. Mississippi*, 474 U.S. 984, 985-87 (1985) (mem.), Justice Brennan, joined by Justice Marshall, noted that an issuing judge also abandoned his

neutral role where he testified he relied on the mere fact that police officers had requested the warrant, rather than on the facts in the affidavit.[6]

3. *"[D]epending on the circumstances of the particular case, a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.* Cf. Massachusetts v. Sheppard*."* *Leon*, 468 U.S. at 923. As noted in *Groh*, the Fourth Amendment explicitly states that warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized." *Groh*, 540 U.S. at 557 (emphasis omitted). Nevertheless, in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), where a warrant listed the wrong items for seizure after the magistrate told the officer he would make the necessary changes but failed to do so, and officers conducted the search within the scope of the warrant affidavit, the Court held that the exclusionary rule should not apply because the officers reasonably, albeit mistakenly, believed the warrant was valid. *Id*. at 986-90. By contrasting *Sheppard*, the Court in *Leon* recognized that even if a warrant was facially deficient, the officers' reliance on it could be

[6] The Eighth Circuit similarly has held that an issuing judge abandoned his neutral role where he signed a warrant without reading it. *United States v. Decker*, 956 F.2d 773, 777-78 (8th Cir. 1992); *see also United States v. Martin*, 297 F.3d 1308, 1316-18 & n.10 (11th Cir. 2002) (discussing cases).

reasonable under the circumstances. *Leon*, 468 U.S. at 923.[7]

4. *The warrant affidavit is otherwise "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"* *Leon*, 468 U.S. at 923. As noted in the petition for certiorari, this final category of misconduct is hardly a model of clarity and, untethered to any specific standard, has led to an essentially ad hoc "I know it when I see it" approach among courts.

Given the premise of *Leon* and *Malley*, that an officer's seeking a warrant in the first instance bespeaks good faith, the standard for finding an application and warrant to be "so lacking in indicia of probable cause" was intended to be a high one. This is confirmed by *Leon*'s citation to concurring opinions in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Illinois v. Gates*, 462 U.S. 213 (1983), from which the standard is gleaned.

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[7] *Leon* also noted that courts should not defer to a magistrate's determination of probable cause based on a purely conclusory or "bare-bones" affidavit unsupported by facts, which obviously could not give the magistrate a "substantial basis" for determining probable cause. *See Leon*, 914-15 & n.13 (citing *Aguilar v. Texas*, 378 U.S. 108, 111, 114-15 (1964); *Giordenello v. United States*, 357 U.S. 480, 485-87 (1958); *Nathanson v. United States,* 290 U.S. 41, 46-47 (1933)). Concurring in *Gates*, Justice White suggested that suppression would be appropriate in such circumstances. *Gates*, 462 U.S. at 263-64 (citing *Aguilar* and *Nathanson*).

In *Brown*, the defendant was arrested for questioning, without a warrant or probable cause, and was given the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), before making inculpatory statements. *Brown*, 422 U.S. at 591. The Court held the *Miranda* warnings alone were insufficient to dissipate the taint of the unconstitutional arrest and render the statements admissible. *Id*. at 602-04.

Concurring in part, Justice Powell, joined by Justice Rehnquist, commented that whether the taint of the illegal arrest should be deemed purged depends on whether "the detrimental consequences of illegal police action [have] become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost," which in turn depends on the nature of the taint. *Id*. at 609. The Justices distinguished between two "extremes." *Id*. at 610.

Miranda warnings would be insufficient to dissipate the taint of conduct "flagrantly abusive of Fourth Amendment rights," including cases where "the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or where the arrest was pretextual. *Id*. at 610-11. It is not clear what was meant by "factors relied on by the police," but the phrasing suggests matters that are simply irrelevant or not logically connected to the question of whether probable cause exists – say, for example, where the police arrested someone solely because of race or sexual

orientation, or simply to procure information for an investigation.

Indeed, the officers' alleged conduct in *Brown* was egregious – an admission that they lacked probable cause and had arrested the defendant solely to glean information for their investigation – a point the majority believed was established, *id*. at 605, but the concurring Justices believed should be addressed on remand, *id*. at 613.

Significantly, Justices Powell and Rehnquist urged that *Miranda* warnings would generally suffice to purge the taint for " 'technical' violations of Fourth Amendment rights where, for example, officers *in good faith arrest an individual in reliance on a warrant later invalidated* or pursuant to a statute that subsequently is declared unconstitutional." *Id.* at 611-12 (emphasis added). In such cases, the exclusionary rule's deterrent purpose would be little served by requiring more. *Id.* at 612. The Justices noted that such a rule would have "the added benefit of encouraging the police to seek a warrant whenever possible." *Id.* at 612 n.3.

Leon also cited *Gates*, 462 U.S. at 263-64, where, in concurring in the judgment, Justice White urged the Court to adopt a good-faith exception to the exclusionary rule. *Leon*, 468 U.S. at 923. Justice White noted that such a good-faith exception would not apply where a warrant affidavit is "so clearly lacking in probable cause" that no officer could reasonably believe a warrant should issue. *Gates*, 462 U.S. at

264; *see also id.* at 260 (citing *Brown* for “so lacking” standard). But he explained that a warrant “‘normally suffices to establish[ ]’ that a law enforcement officer has ‘acted in good faith,’” and where a warrant is invalidated merely because of a “technical defect” or because “the judge issued a warrant on information later determined to fall short of probable cause,” excluding evidence “can have no possible deterrent effect” except “to make officers less willing to do their duty” and to apply for warrants rather than relying on exceptions to the warrant requirement. *Id.* at 263. In short, Justice White also intended the “so lacking in indicia of probable cause” standard to signify extreme circumstances, far beyond simply guessing wrong about whether facts establish probable cause.

To the extent the “so lacking in indicia of probable cause” standard is nothing more than a different manner of phrasing the general qualified immunity inquiry of whether a defendant’s conduct violated clearly established law, then as discussed, §II.B.1, *infra*, no such law would have put petitioners on notice that it was patently unreasonable even to seek a warrant here.

Yet, petitioners submit that it may be worthwhile to reconsider application of the “so lacking in indicia of probable cause” standard as a ground for rebutting the presumption that an officer has acted reasonably in procuring and relying on a warrant.

If an officer’s entitlement to qualified immunity for purposes of a search or arrest boils down to an

inquiry as to whether the officer should have known his or her conduct violated clearly established law regardless of whether he or she sought a warrant, procuring a warrant affords the officer no additional protection. If this is so, then an officer, in borderline situations, may opt to effect a warrantless arrest or search in lieu of taking the time to seek a magistrate's approval – a result at odds with this Court's repeated statement that officers should be encouraged to seek warrants.

To the extent the purpose of the "so lacking in indicia of probable cause" inquiry is to deter officers from applying for warrants without any reasonable basis for doing so, the burden of imposing this inquiry on the courts, and spawning endless challenges to warrants based upon amorphous principles as to whether the law is clearly established, is not justified by the minimal deterrent effect. Officers have little incentive to submit a patently inadequate warrant application because in most circumstances, a reasonable magistrate will refuse the warrant. Moreover, the other factors articulated in *Leon* as rebutting a presumption that the officers acted in an objectively reasonable manner in procuring a warrant act as a check on routine or intentional submission of patently inadequate applications. "Bare-bones" affidavits, *i.e.*, those without any facts, typically could not establish probable cause. Similarly, an officer would likely submit patently incompetent warrant applications only to a magistrate who he or she knew did not in fact review them, thus falling into another of *Leon*'s clear exceptions.

But regardless of the standard employed, as *Malley* and *Leon* make plain, denial of qualified immunity and exclusion of evidence should be reserved only for those cases where the officer's misconduct is obvious and egregious. As we discuss, this case involves no flagrant abuse or gross incompetence. The officers acted reasonably in obtaining a warrant, and the surrounding circumstances confirm that they acted in objective good faith.

II. THIS CASE DOES NOT PRESENT THE EGREGIOUS CONDUCT REQUIRED BY *LEON* AND *MALLEY* TO OVERCOME A PRESUMPTION THAT THE OFFICERS ACTED IN AN OBJECTIVELY REASONABLE MANNER IN PROCURING AND RELYING ON A WARRANT.

The Ninth Circuit *en banc* majority held the search warrant here was invalid in that it allowed a search and seizure of all firearms and not simply the sawed-off shotgun Bowen fired at Kelly. (App.24.) The majority also found the warrant invalid insofar as it allowed a search for evidence concerning gang affiliation because there was no indication the assault was gang-related. (App.28-29.) The majority further found the lack of probable cause was so clear that the officers were not entitled to qualified immunity – specifically, the warrant was "so lacking in indicia of probable cause" that no reasonable officer should apply for it. (App.3, 30, 35-36, 38.)

In short, in the language of *Malley*, the court essentially found that the officers were "plainly incompetent" or "knowingly violate[d] the law." *Malley*, 475 U.S. at 341. The majority so found even though two of its colleagues found probable cause to search for all firearms and three concluded the officers were entitled to qualified immunity. (App.41, 72-73.) As we show next, the majority erred. There was probable cause to search for both firearms and gang-related items, or at the very least, the officers could reasonably have believed so. Moreover, the circumstances surrounding procurement of the warrant, viewed objectively, confirm the officers acted in good faith. The officers therefore are entitled to qualified immunity.

A. Probable Cause Supported the Warrant, or at Least the Officers Could Have Believed So.

Probable cause exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This requires "less than evidence which would justify condemnation," but rather "circumstances which warrant suspicion." *Id.* at 235; *id.* at 231 (probable cause deals not with "hard certainties" but "probabilities"). Moreover, probable cause is a "'practical, nontechnical conception'" that permits law enforcement officers to formulate "common-sense conclusions about human behavior." *Id.* at 231. Put differently, the search for evidence "must be seen . . . not in terms

of library analysis by scholars, but as understood by those versed in . . . law enforcement." *Id*. at 232.

Reviewing courts should pay "great deference" to a magistrate's determination of probable cause. *Id*. at 236. "[D]oubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants," and "courts should not invalidate . . . warrants by interpreting affidavits in a hypertechnical, rather than a common sense, manner." *Id*. at 236, 237 n.10. Otherwise, "police might well resort to warrantless searches" with the hope of relying on an exception to the warrant requirement that might develop at the time of the search. *Id*. at 236.

1. There was probable cause to search for all firearms at plaintiffs' residence.

As the dissent observed, the real object of the search and accompanying arrest warrant was Bowen, who Messerschmidt believed was living or staying at plaintiffs' residence. (JA25-26, 55-61; App.41.) Bowen was reasonably considered armed and dangerous. He had recently threatened to kill his girlfriend, had attempted to do so by firing five rounds from a sawed-off shotgun at her in public, and was a member of a street gang, a group organized for criminal activity and known to use firearms illegally on people. (JA18-21, 24, 28-29, 56-59; App.41-42.)

Messerschmidt's affidavit recounted his extensive experience investigating gang activity, including

"concealment of weapon(s) used in [gang-related] assaults." (JA53-54.) Messerschmidt also knew Bowen had previous felony convictions and was a "third strike candidate" under California law. (JA21, 29; App.8, 41-42 & n.1.) Because of Bowen's dangerousness, the magistrate approved the warrant for night service, and the district court found such service justified. (JA49, 323-27; App.41.)

Given the circumstances, the officers had probable cause to search for and seize all firearms in plaintiffs' residence.

First, the officers could reasonably conclude there was a fair probability Bowen had other firearms besides the sawed-off shotgun he had fired at Kelly. Many people who own guns own more than one, and it was particularly reasonable to infer that Bowen did, given that he was a gang member, possessed a sawed-off shotgun – an illegal weapon associated with violent crime – and did not hesitate to fire it repeatedly at a person in public. (JA18-21, 24, 28-29, 56-59.) *See* Cal. Penal Code §12020(a)(1) & (c)(1) (criminalizing possession of a short-barreled shotgun); *People v. Stinson*, 87 Cal.Rptr. 537, 538-39 (Cal.Ct.App. 1970) (sawed-off shotguns are "weapons common to the 'criminal's arsenal'"); *People v. Favalora*, 117 Cal.Rptr. 291, 293 (Cal.Ct.App. 1974) (similar reasoning); *United States v. Roach*, 582 F.3d 1192, 1199 (10th Cir. 2009) (expert testified that firearms are "tools of the trade" that gang members "carry or maintain"); *Chicago Housing Authority v. Rose*, 560 N.E.2d 1131, 1133-34 (Ill.App.Ct. 1990) (gang-specialist officer opined that a person in

possession of a sawed-off shotgun is likely a gang member). Moreover, Bowen was an ex-felon with an extensive criminal background that included numerous assault and weapons charges. (JA21, 28, 70-80.) Given these circumstances, it would be surprising if he did *not* have other firearms.

Indeed, courts have repeatedly recognized the close nexus between guns and serious criminal activity. California courts have observed that persons involved in dealing illegal drugs almost invariably possess firearms. *E.g.*, *People v. Simpson*, 76 Cal.Rptr.2d 851, 856-57 (Cal.Ct.App. 1998) (experienced narcotics officer reasonably anticipated that suspect dealing illegal drugs would keep guns in home); *People v. Bland*, 898 P.2d 391, 400 (Cal. 1995) ("[d]rug dealers are known to keep guns"). Numerous circuit courts have held the same. *See United States v. Singer*, 943 F.2d 758, 762-63 (7th Cir. 1991) ("firearms are an integral part of the drug trade," justifying no-knock entry to execute search warrant); *United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989) (similar reasoning); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976) (narcotics dealers "keep firearms on their premises as tools of the trade").

Indeed, the Eighth Circuit has upheld a warrant to search for all "firearms and ammunition" based on an officer's sighting of a marijuana pipe and stem, because firearms are "commonly associated with drug trafficking activity." *United States v. Jansen*, 470 F.3d 762, 766 (8th Cir. 2006); *see also United States v. Perry*, 560 F.3d 246, 251 (4th Cir. 2009) (upholding

warrant to search for "firearms" based on cocaine sales); *People v. Zuccarini,* 431 N.W.2d 446, 449 (Mich.Ct.App. 1988) (upholding warrant to search for "[a]ll firearms" where affidavit indicated residence was drug trafficking site).

If firearms are tools of the drug trade so as to justify a search for them in connection with investigation of drug dealing, surely there is probable cause to search for all firearms in connection with a crime that actually involves use of a firearm. Moreover, it is particularly logical to assume that a gang member has guns, particularly when he already possesses a sawed-off shotgun and has shown a propensity to use it.

Second, the officers could reasonably infer there was a fair probability any guns Bowen possessed might be found at plaintiffs' residence, anywhere on the premises. The affidavit explained that Messerschmidt had extensive experience investigating gang activity, including "the concealment of weapon(s) used in [gang-related] assaults." (JA53-54, 16-18.) And as the district court found, Messerschmidt reasonably believed Bowen was living or "hiding out" at plaintiffs' residence. (JA21-23, 25-26, 307-11, 317-19.) It was logical to assume Bowen would keep his weapons there. Even if Bowen was only staying at plaintiffs' residence temporarily, as plaintiffs have asserted, he might keep his weapons there to protect himself, or to hide them from the authorities or other gang members.

Messerschmidt could also reasonably believe Bowen would have access to the entire premises and could hide his weapons anywhere on the premises, with or without other residents' assistance. *See Chicago Housing Authority,* 560 N.E.2d at 1133-34 (gang-specialist officer testified gang members often hide guns in homes of "unsuspecting family members" and "do not disclose the presence of these guns to their relatives").

Third, the officers could reasonably believe any such guns were subject to seizure for multiple other reasons.

California law allows issuance of a search warrant for items possessed "with the intent to use them as a means of committing a public offense." Cal. Penal Code §1524(a)(3); *see also People v. Enskat*, 109 Cal.Rptr. 433, 443-44 (Cal.Ct.App. 1973) (§1524 permitted seizure of object where affidavit contained facts suggesting suspect intended to use it to commit crime); *People v. Green*, 156 Cal.Rptr. 713, 717 (Cal.App. Dep't Super.Ct. 1979). The warrant recited this authorization. (JA48.) Thus, the officers could legitimately seize all firearms Bowen might use to carry out his threat to kill Kelly.

Moreover, numerous laws render it criminal for felons to possess firearms. *E.g.*, Cal. Penal Code §12021(a)(1); 18 U.S.C. §922(g); *see also People v. Pepper*, 48 Cal.Rptr.2d 877, 879-80 (Cal.Ct.App. 1996). Thus, as the dissent noted, there was at least a "fair probability" that firearms at plaintiffs' residence

would be "contraband or evidence of a crime." (App.42.) Significantly, other circuits have held that a warrant to search for all firearms at a convicted felon's residence is not overbroad even if the alleged crime involved a specific weapon, because felons cannot lawfully possess firearms. *United States v. Campbell*, 256 F.3d 381, 389 (6th Cir. 2001); *United States v. Sanders*, 351 F.App'x 137, 139 (7th Cir. 2009).

Finally, because firearms are inherently dangerous, as the dissent explained, the officers' and residents' safety required that "officers seeking the nighttime arrest of a dangerous felon be allowed to seize any firearm that they [might] come across in their search for that individual or for evidence . . . otherwise properly covered by the search warrant. Indeed, securing any weapons found during the search [was] justified to protect the officers executing the warrant from harm while doing so." (App.42-43.)

Courts have validated this reasoning in other contexts. For example, the Ninth Circuit has held that in conducting a warrantless inspection on a boat and learning that there were firearms below deck, Coast Guard officers were justified in securing those weapons to ensure the officers' safety. *United States v. Humphrey*, 759 F.2d 743, 748 (9th Cir. 1985). In enacting California Penal Code §12021(a)(1), which makes it a crime for convicted felons to possess firearms, the California Legislature recognized that felons are "more likely to use [firearms] for improper purposes" and attempted to "protect the public welfare" by

precluding those persons from possessing guns. *Pepper*, 48 Cal.Rptr.2d at 881-82.

California courts have also recognized that officers may reasonably anticipate and take precautions against firearms when searches involve gang or illegal drug activity. *See Simpson*, 76 Cal.Rptr.2d at 856-57 (officer executing search warrant for drugs reasonably questioned suspect about guns without *Miranda* warnings; officer could reasonably anticipate suspect and others present would possess and use weapons); *People v. Gallegos*, 117 Cal.Rptr.2d 375, 388 n.13 (Cal.Ct.App. 2002) (temporary seizure of firearms during search of gang member's residence was "'a reasonable precaution to assure the safety of all persons on the premises during the search'"); *People v. Glazer*, 902 P.2d 729, 735 (Cal. 1995) (recognizing police interest in protecting against violence during narcotics search because firearms are "'tools of the trade'"). Circuit courts have applied similar reasoning. *Bonner*, 874 F.2d at 824-25; *Singer*, 943 F.2d at 762-63.

In short, probable cause supported the warrant's authorization to search for all firearms and firearm-related materials at plaintiffs' residence. At the very least, as required for qualified immunity, a reasonable officer could believe the above facts established probable cause, and submit any doubt to a magistrate.

2. Any information inadvertently omitted from the warrant affidavit was unnecessary to establish probable cause, and in any event was a reasonable "mistake of fact" to which qualified immunity applies.

The *en banc* majority noted the warrant affidavit did not explicitly say Bowen was a convicted felon and a "third strike" candidate, nor enumerate Bowen's extensive criminal history, although Messerschmidt undisputedly knew these facts when he sought the warrant. (App.8, 25 & n.7; JA21, 28-29.) But these facts could reasonably be inferred from the affidavit's other facts – specifically, the nature of the crime, the type of weapon used, and Bowen's gang membership.[8] (JA55-59.) Even if the officers had not known Bowen was a felon and a "third strike" candidate, the affidavit's other facts are sufficient to support the magistrate's determination that probable cause existed to search for firearms and firearm-related materials – or, more important, a reasonable officer could believe so.

Even assuming the warrant was in fact deficient because the affidavit did not say Bowen was a felon and a "third strike" candidate, this omission was a reasonable "mistake of fact" to which qualified immunity applies. This Court has repeatedly stated that

[8] Moreover, the affidavit stated that Messerschmidt knew Bowen was a Mona Park Crip gang member based partly on information in "the cal-gang data base." (JA59; App.41 n.1.)

qualified immunity "applies regardless of whether [an officer's] error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting); *see also Butz v. Economou*, 438 U.S. 478, 507 (1978) (public officials "will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law").

For example, in *Groh*, Justice Kennedy and Chief Justice Rehnquist concluded that the officer's failure to notice he had made a clerical error in filling out the warrant was a reasonable mistake, given the numerous "serious responsibilities" he had to fulfill in executing a search warrant for illegal weapons, including "difficult and important tasks" that demanded his "full attention in the heat of an ongoing and often dangerous criminal investigation." *Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting). Justice Thomas similarly noted the officer's mistake was objectively reasonable "[g]iven the sheer number of warrants prepared and executed by officers each year," including "detailed" and often lengthy supporting documents. *Id*. at 579 (Thomas, J., dissenting).

Similarly, in the criminal context, this Court has repeatedly found that officers acted in objective good faith, and has refused to suppress evidence obtained, where officers have arrested suspects or conducted searches based on reasonable but mistaken assumptions. *Herring v. United States*, 555 U.S. 135, 146-47 (2009) (police mistakenly arrested suspect due to

police employee's negligent record-keeping error); *Maryland v. Garrison*, 480 U.S. 79, 87-88 (1987) (executing officers reasonably failed to recognize warrant was overbroad because premises contained two apartments rather than one); *Sheppard*, 468 U.S. at 988-90 (magistrate failed to make corrections to warrant form); *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995) (police reasonably relied on mistaken information in court's database). The Court has reasoned that where the mistake is at most negligent, suppressing the evidence would not serve the exclusionary rule's aim of deterring police misconduct. *Herring*, 555 U.S. at 147-48; *see Sheppard*, 468 U.S. at 991.

The circuit courts have applied similar reasoning. The Sixth Circuit has applied qualified immunity where officers acted reasonably in making cognitive mistakes. *Humphrey v. Mabry*, 482 F.3d 840, 849 (6th Cir. 2007) (officers stopped blue vehicle despite information that the wanted vehicle was gray). The Second, Fifth, Sixth and Eighth Circuits have found that officers acted reasonably, given the circumstances, in relying on warrants later determined invalid because of technical defects or clerical errors, and have distinguished *Groh* to apply the good-faith exception. *See United States v. Guzman*, 507 F.3d 681, 685-86 (8th Cir. 2007) (affidavit failed to establish probable cause, but officer presented incident report containing additional facts to magistrate); *United States v. Watson*, 498 F.3d 429, 432-33 (6th Cir. 2007) (warrant's grant-of-authority section omitted residence to be searched due to a "clerical error" but warrant

described premises); *United States v. Rosa*, 626 F.3d 56, 64-66 (2d Cir. 2010) (overbroad warrant failed to link items to suspected criminal activity, but supporting documents contained that information); *United States v. Allen*, 625 F.3d 830, 839-40 (5th Cir. 2010) (overbroad warrant insufficiently described items to be seized, but multiple officers and U.S. Attorney reviewed warrant documents and magistrate signed affidavit listing items); *see also United States v. Capozzi*, 347 F.3d 327, 332 (1st Cir. 2003) (minor errors in affidavit reflected "[m]ere negligence or inattention to detail").

Here, even if the warrant affidavit should have stated Bowen was a felon and a "third strike" candidate, the omission was a reasonable mistake given the circumstances. Unlike in *Groh*, where this Court noted that "even a cursory reading of the warrant . . . would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal," here the purported defect could not be detected without careful analysis. *See Groh*, 540 U.S. at 564. Moreover, the affidavit was not "barebones" and conclusory. *See Leon*, 468 U.S. at 915; *Gates*, 462 U.S. at 239. Rather, it detailed Bowen's attempt to kill Kelly, Messerschmidt's background search on Bowen, Messerschmidt's experience with gangs and their use of weapons, and why night service was necessary. (JA53-59.) In the course of investigating Bowen's crime and performing the numerous tasks surrounding obtaining and executing the warrant, Messerschmidt could reasonably fail to

recognize that he had omitted this information. *See Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

3. There was probable cause to search for gang-related items, or at least the officers could reasonably have submitted the issue to the magistrate.

The *en banc* majority also found that the warrant's authorization to search for gang-related items was overbroad and the officers were not entitled to qualified immunity for that aspect of the warrant. But as the dissent explained, when Messerschmidt prepared his affidavit, he knew Bowen had fired a sawed-off shotgun at a person in public, and was a felon and gang member. (JA20-21, 24, 28-29, 56-59; App.63.) The affidavit recounted Messerschmidt's extensive training and experience in crimes involving gang members, including the "manners in which gang-related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (JA53-54; App.64 n.17.) "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

Moreover, California law criminalizes possession of sawed-off shotguns, and Messerschmidt could reasonably have thought Bowen's possession of the gun might be related to his gang affiliation. *See* Cal. Penal Code §12020(a)(1); *see United States v. Roach*, 582

F.3d 1192, 1199 (10th Cir. 2009) (expert testified that firearms are "tools of the trade" for gang members); *Chicago Housing Authority v. Rose*, 560 N.E.2d 1131, 1133-34 (Ill.App.Ct. 1990) (gang-specialist officer opined that a person in possession of a sawed-off shotgun is likely a gang member). Or, that his connection to a gang was relevant to his procurement or concealment of such a weapon. (*See* App.64.)

In addition, as Judge Silverman explained in his dissent, "[h]ad Mona Park Crip paraphernalia been found in close proximity to guns during the search of [plaintiffs'] house – say, a gun concealed in Mona Park Crip clothing – such a discovery would have tended to prove that the guns were Bowen's" and not plaintiffs'. (App.75.) Since Bowen was not the only person at plaintiffs' residence, this evidence might be critical to connect Bowen to any firearms found there.

In short, there was probable cause to search for gang-related items. At the very least, for qualified immunity purposes, Messerschmidt could reasonably have thought there might be sufficient probable cause to submit the issue to a magistrate for determination.

B. The Circumstances Surrounding Procurement of the Warrant Confirm That the Officers Acted in Objective Good Faith.

As shown, even if this Court decides the warrant's authorization to search for firearms and gang-related items was overbroad, the officers are entitled

to qualified immunity because they could reasonably have believed probable cause supported the warrant. In *Leon*, this Court stated that in determining whether an officer's reliance on a warrant was "objectively reasonable," "all of the circumstances" should be considered. *Leon*, 468 U.S. at 922 & n.23; *see also United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005) (same); *United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir. 2002) (in determining whether a reasonable officer would have known a search was illegal despite a warrant, courts should consider the " 'totality of the circumstances' ").

Here, the circumstances surrounding procurement of the warrant manifest the officers' good faith and confirm that they acted reasonably in relying on the magistrate's finding of probable cause.

1. The law did not clearly establish that the warrant was overbroad.

As mentioned, an officer is entitled to qualified immunity if "a reasonable officer could have believed [his or her actions] lawful, in light of clearly established law and the information the officer[ ] possessed." *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 641. This Court has repeatedly admonished that whether the law is clearly established must be determined " 'in light of the specific context of the case, not as a broad general proposition.' " *Brosseau*, 543 U.S. at 198; *see also al-Kidd*, 131 S.Ct. at 2084 (admonishing courts "not to define clearly established

law at a high level of generality"); *Groh*, 540 U.S. at 578 (Thomas, J., dissenting).

For example, "[t]he general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment" does not help determine "whether the violative nature of particular conduct is clearly established." *al-Kidd*, 131 S.Ct. at 2084. Given "the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment," applying the standard at this level of generality would be inconsistent with the "objective reasonableness" standard and would allow plaintiffs "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging a violation of extremely abstract rights." *Anderson*, 483 U.S. at 639, 644; *Groh*, 540 U.S. at 578 (Thomas, J., dissenting). Accordingly, the right allegedly violated "must have been 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640; *see also Wilson*, 526 U.S. at 614-15 (same).

More specifically, this Court has said that an officer must have "fair notice that her conduct was unlawful." *Brosseau*, 543 U.S. at 198; *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). Although the Court "do[es] not require case directly on point, . . . existing precedent must place the . . . constitutional question beyond debate." *al-Kidd*, 131 S.Ct. at 2083. Absent "'controlling authority'" in the relevant jurisdiction,

"a robust 'consensus of cases of persuasive authority'" is required. *Id*. at 2084 (citing *Wilson*, 526 U.S. at 617).

Moreover, while not dispositive, the fact that judges "disagree[ ] about the contours of a right" suggests the relevant law was not clearly established. *See Safford Unified School Dist. v. Redding*, 129 S.Ct. 2633, 2644 (2009) (cases "viewing school strip searches differently . . . are numerous enough" to suggest law was not clearly established); *see also al-Kidd*, 131 S.Ct. at 2085 (government official was not plainly incompetent or knowingly violating the law, "not least because eight Court of Appeals judges agreed with his judgment in a case of first impression"); *Wilson*, 526 U.S. at 618 ("[i]f judges . . . disagree . . . , it is unfair to subject the police to money damages for picking the losing side of the controversy"); *Leon*, 468 U.S. at 926 (officers' reliance on warrant was "objectively reasonable" where "thoughtful and competent judges" disagreed whether probable cause existed).

Here, as the dissent noted, no case law would have put the officers on notice their conduct was improper, let alone so improper as to render them, in the language of *Malley*, "incompetent" or knowingly violating the law. *Malley*, 475 U.S. at 341. The Ninth Circuit had previously found warrants unconstitutionally overbroad and refused to apply the exclusionary rule's good-faith exception in two cases involving warrants that were obviously invalid on their faces. *See United States v. Kow*, 58 F.3d 423, 428-29 (9th Cir. 1995); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *see also KRL v. Estate of Moore*, 512

F.3d 1184, 1190 (9th Cir. 2008) (discussing *Kow* and *Stubbs*). (*See* App.65-66 [discussing *Kow* and *Stubbs*].) On the other hand, the Ninth Circuit had applied qualified immunity in *Ortiz v. Van Auken*, 887 F.2d 1366, 1367-68 (9th Cir. 1989), where officers sought a warrant to search a home for weapons and explosives based only on four anonymous telephone calls apparently by the same person. Although the warrant lacked probable cause, the court held the officers reasonably relied on it partly because a deputy district attorney as well as the issuing judge had approved the warrant, and the warrant was not facially overbroad. *Id*. at 1370. (*See* App.55-56 & n.11.)

Moreover, plaintiffs have never cited "a robust 'consensus of cases'" in other jurisdictions clearly establishing that given the circumstances, the warrant's authorization to search for firearms and gang-related items was overbroad, not to mention "so lacking in indicia of probable cause" that the officers could not reasonably have believed it was valid. *See al-Kidd,* 131 S.Ct. at 2084; *Malley*, 475 U.S. at 344-45.

Finally, two dissenting judges believed there was probable cause to search for firearms, and three believed the relationship between Bowen's gang affiliation, his crime, the presence of firearms, and the danger presented by the search would lead a reasonable officer to believe there might be probable cause to search for indicia of gang membership as well as firearms. (App.41-45, 63-64, 74-75.) This disagreement suggests the officers could not have been "incompetent" or knowingly violating the law by relying on the magistrate's determination of probable cause.

2. The warrant was facially valid.

As discussed, in *Groh*, this Court denied qualified immunity where officers executed a warrant that completely failed to list the items to be searched. *Groh*, 540 U.S. at 563-65. The Court reasoned that the Fourth Amendment's particularity requirement unambiguously requires that a warrant "particularly describ[e] . . . the things to be seized," and "even a cursory reading of the warrant" would have revealed the "glaring deficiency." *Id*. at 557-58, 564 (emphasis omitted). Thus, no "reasonable officer" could believe the warrant valid. *Id*. at 563. In dissent, four members of this Court concluded the officers nonetheless were entitled to qualified immunity because they made a reasonable "mistake" in overlooking this "clerical error." *Id*. at 567-68 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

Here, in contrast, no facial invalidity notified the officers the warrant was unconstitutionally overbroad. As the dissent noted, both the arrest warrant and the search warrant "adequately identified the location to be searched, the person to be arrested, and the items to be seized. Regardless of whether there was probable cause to search for firearms and indicia of gang membership, these limited items were properly identified on the face of the warrant." (App.61.) The officers would have had to analyze the warrant affidavit carefully to determine any deficiency.

3. The warrant was supported by a detailed, as opposed to "bare-bones" affidavit.

In *Leon*, the Court declined to suppress evidence obtained under a warrant based on an affidavit that failed to indicate the informants' reliability and basis for their statements. *Leon*, 468 U.S. at 904-05, 925-26. The Court held the officers' reliance on the magistrate's determination of probable cause was "objectively reasonable" because "much more than a 'bare bones' affidavit" supported the warrant. *Id*. at 926. The affidavit "related the results of an extensive investigation" and, indeed, "provided evidence sufficient to create disagreement among thoughtful and competent judges" (including the issuing judge) concerning probable cause. *Id*. at 926.

The Court explained that a "bare-bones" affidavit, in contrast, does not provide the magistrate with "a substantial basis for determining the existence of probable cause," so that in such situations, the magistrate obviously could not "perform his neutral and detached function" and must have served "merely as a rubber stamp for the police." *Leon*, 468 U.S. at 914-15 (internal quotation marks omitted).[9]

Following *Leon*, virtually every circuit has found that officers acted in objective good faith, and has

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[9] The Second Circuit has noted that this concern "is particularly acute when facts indicate that the 'bare-bones description . . . was almost calculated to mislead.' " *United States v. Clark*, 638 F.3d 89, 103 (2d Cir. 2011).

applied the good-faith exception, where an affidavit provided detailed factual allegations in support of a facially valid warrant.

See: *United States v. Clark*, 638 F.3d 89, 103-04 (2d Cir. 2011) (affidavits providing "detailed factual allegations" "almost invariably demonstrate reasonable reliance" on the magistrate); *United States v. Capozzi*, 347 F.3d 327, 334 (1st Cir. 2003) (detailed affidavit "supports [officer's] good faith in seeking the warrant"); *United States v. Maggitt*, 778 F.2d 1029, 1036 (5th Cir. 1985) (affidavit "disclosed in detail the results of a careful and thorough investigation"); *United States v. Michaelian*, 803 F.2d 1042, 1047 (9th Cir. 1986); *United States v. Stearn*, 597 F.3d 540, 562 (3d Cir. 2010); *United States v. Mitten*, 592 F.3d 767, 771-73 (7th Cir. 2010); *United States v. Grant*, 490 F.3d 627, 633 (8th Cir. 2007); *United States v. Nolan*, 199 F.3d 1180, 1185 (10th Cir. 1999); *United States v. Martin*, 297 F.3d 1308, 1314-15 (11th Cir. 2002); *United States v. DeQuasie*, 373 F.3d 509, 522, 524 (4th Cir. 2004).

Here, similarly, a detailed affidavit supported the warrant. Messerschmidt's seven-page affidavit recounted his extensive experience as a gang investigator, detailed the assault on Kelly and Messerschmidt's investigation of Bowen, and explained why night service was necessary. (JA53-59.) As in *Leon*, the affidavit provided "evidence sufficient to create disagreement among thoughtful and competent judges" – including not only the issuing magistrate but two Ninth Circuit judges – as to the existence of probable cause. *See*

Leon, 468 U.S. at 926. The concerns expressed in *Leon* about "bare-bones" warrants – an egregious situation patently demonstrating that the magistrate could not have performed his or her gatekeeping duty – are absent here. Rather, to notice any constitutional deficiency, the officers would have had to scour the affidavit with the mindset of legal technicians or lawyers preparing a case for trial, not officers "versed in . . . law enforcement" conducting a criminal investigation. *Gates*, 462 U.S. at 232.

4. The officers' supervisor and an attorney reviewed the warrant before the magistrate approved it.

In *Leon*, this Court held officers acted reasonably in relying on a magistrate's determination of probable cause where, among other things, several district attorneys reviewed the warrant application. *Leon*, 468 U.S. at 902, 926. In *Massachusetts v. Sheppard*, the Court noted that by preparing an affidavit that was reviewed and approved by the district attorney and then the judge who issued a search warrant, the officers "took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989 (applying good-faith exception).

Numerous circuit courts have also found in the suppression context that review of an affidavit by a supervisor or an attorney suggests that an officer has acted in objective good faith in seeking a warrant.

See: *United States v. Allen*, 625 F.3d 830, 837-38 (5th Cir. 2010) (agent who submitted warrant papers to colleagues and U.S. Attorney's office for review "clearly attempted to perform his duty" and had "good reason to believe in the warrant's validity"); *United States v. Bynum*, 293 F.3d 192, 198 (4th Cir. 2002) (officer's consultation with prosecutor before seeking warrant "provides additional evidence of his objective good faith"); *United States v. Capozzi*, 347 F.3d 327, 334 (1st Cir. 2003) (similar reasoning); *United States v. Tuter*, 240 F.3d 1292, 1299-1300 (10th Cir. 2001) (suggesting that contacting attorney for advice on probable cause evidences good faith); *United States v. Fama*, 758 F.2d 834, 837 (2d Cir. 1985) (AUSA's approval of affidavit "supported an objectively reasonable belief in probable cause"); *United States v. Freitas*, 856 F.2d 1425, 1431-32 (9th Cir. 1988) (officers "were not required to disbelieve" AUSA who approved warrant provisions).

Here, as the dissent noted, Messerschmidt "scrupulously followed the proper procedures in seeking the arrest and search warrants," including having the warrant and affidavit reviewed by Sergeant Lawrence, a lieutenant, and a deputy district attorney, before a magistrate approved them. (JA27-28; App.62.) These actions attest to the officers' good faith in procuring and relying on the warrants.

5. Probable cause supported the search, even if the affidavit omitted some facts establishing probable cause.

As discussed, there was probable cause to search for firearms and firearm-related materials at plaintiffs' residence because, among other things, Bowen was a convicted felon and was prohibited from possessing firearms. (*See* §II.A.1, *supra*.) The *en banc* majority refused to consider this information because the affidavit did not mention Bowen's prior felonies. (App.22-27 & n.7.)

But in determining whether an officer acted in objective good faith in relying on a warrant, a majority of circuits in the suppression context have considered facts known to the officer and inadvertently omitted from the affidavit. *See United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir. 2002) (collecting cases from First, Fourth, Sixth, Eighth, and Tenth Circuits).

Notably, the Eleventh Circuit has explained that in determining whether a reasonable officer would have known a search was illegal despite the magistrate's authorization, the "'totality of the circumstances'" should be considered, including facts not presented to the issuing judge. *Martin*, 297 F.3d at 1318-19. Moreover, the exclusionary rule (and civil liability) "is meant to guard against police officers who purposely leave critical facts out of search warrant affidavits because these facts would *not* support a finding of probable cause" – not officers acting in good faith who inadvertently fail to include facts that

would bolster their showing of probable cause. *Id*. at 1320. In short, no officer has any incentive to leave out facts that would help in obtaining a warrant.

Here, 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. He simply overlooked this point. The oversight was reasonable, considering that his affidavit described at length Bowen's explosive attempt to kill Kelly and his investigation of Bowen's background, stated that Bowen was a gang member, and explained why Messerschmidt believed night service was necessary. (JA55-59; see §II.B.2, *supra*.)

6. The warrant's purported overbreadth did not expand the scope of the search beyond areas properly searched even if the warrant were narrowly tailored.

In *Groh*, Justice Kennedy, joined by Chief Justice Rehnquist, noted in dissent that plaintiffs did not "make the usual claim that they were injured by a defect that led to an improper search," but rather claimed they were injured simply because the warrant form was improper. *Groh*, 540 U.S. at 570-71. These Justices reiterated the Court's admonition that " 'the purpose of encouraging recourse to the warrant procedure' can be served best by rejecting overly technical standards when courts review warrants," and that "qualified immunity 'provides ample protection

to all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 571. In light of these principles, the Justices concluded the officers were entitled to qualified immunity. *Id.*

Similarly, in dissent, Justice Thomas, joined by Justice Scalia, concluded the search was reasonable partly because the officers "conducted the search entirely . . . within the scope of what the Magistrate had authorized." *Id.* at 576.

The Court denied qualified immunity because the warrant was "plainly invalid" on its face. *Id.* at 557, 563-65. Had the warrant been facially valid (though otherwise defective), the Court might have agreed with the dissenting Justices.

In *Sheppard*, this Court found that officers acted reasonably in relying on a warrant that authorized a search for the wrong items, noting that "[t]he scope of the . . . search was limited to the items listed in the affidavit." *Sheppard*, 468 U.S. at 987-88. The Court found the exclusionary rule inapplicable. *Id.* at 987-91.

Similarly, in *United States v. Rosa*, 626 F.3d 56 (2d Cir. 2010), the Second Circuit declined to suppress evidence obtained under an overbroad warrant that authorized an uncircumscribed search of defendant's electronic equipment, rather than only electronic media relating to child pornography, for which the affidavit established probable cause. *Id.* at 61-62, 64-66. In finding that the officers acted reasonably, the court noted that the officers searched for and

seized only items for which probable cause had been shown. *Id*. at 64-66.

Here, the majority noted that a sawed-off shotgun can be broken down into separate pieces for easy concealment, but concluded the officers' probable cause extended only to the disassembled pieces of the sawed-off shotgun Bowen fired at Kelly. (App.20.) As the dissent noted, given that the officers had probable cause to search for disassembled parts of the shotgun, the officers were "entitled to search anywhere that any firearm might be hidden." (App.43 & n.4.) In other words, allowing the search for other firearms or gang-related items did not expand the areas the officers could search beyond those that might also contain part of a disassembled shotgun. (*Id*.) Accordingly, applying qualified immunity here is consistent with this Court's direction not to apply hypertechnical standards when reviewing warrants. *See Gates*, 462 U.S. at 231, 235-37 n.10; *Groh*, 540 U.S. at 571 (Kennedy, J., dissenting).

7. The totality of the circumstances confirms that the officers acted in objective good faith in relying on the magistrate's determination of probable cause.

This case presents none of the egregious circumstances enumerated in *Leon* that would show bad faith or incompetence: the district court found that Messerschmidt did not intentionally or recklessly

misrepresent the facts in his affidavit (JA311-19); the warrant was not facially invalid, nor was it based on a "bare-bones" affidavit; and there is no evidence the magistrate acted in other than a neutral, detached manner. *See Leon*, 468 U.S. at 923; *see also id*. at 914-15 & n.13. Nor is there any other evidence of bad faith. To the contrary, as shown, the affidavit contained facts supporting, if not probable cause, then at least a close call – enough to convince two Ninth Circuit judges that probable cause existed. Moreover, all of the circumstances surrounding procurement of the warrant, viewed objectively, demonstrate that the officers acted in good faith in submitting the issue to a magistrate.

In short, the officers "took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989; *see also United States v. Bynum*, 293 F.3d 192, 200 (4th Cir. 2002) (King, J., concurring; officers "did most everything right," where they prepared a detailed affidavit, had it reviewed and approved by the prosecutor and then a judge, and executed the warrant in good faith). Their seeking and relying on the magistrate's determination of probable cause was "objectively reasonable," and they are entitled to qualified immunity.

CONCLUSION

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

Respectfully submitted,

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