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No. 10-704

In The
Supreme Court of the United States

CURT MESSERSCHMIDT AND ROBERT J. LAWRENCE,
Petitioners,

v.

AUGUSTA MILLENDER, BRENDA MILLENDER,
AND WILLIAM JOHNSON,
Respondents.

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

BRIEF OF TEXAS, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, NEW MEXICO, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Many federal judges continue to adopt broad and atextual interpretations of the Fourth Amendment that hinder state law-enforcement efforts and allow guilty criminals to escape punishment. Amici curiae have an interest in ensuring that federal courts respect and enforce this Court's qualified-immunity doctrines as well as the good-faith exception to the exclusionary rule, both of which mitigate some of the unattractive features of modern Fourth Amendment jurisprudence.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. IV states:

> 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.

42 U.S.C. § 1983 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.

STATEMENT

Petitioners Curt Messerschmidt and Robert Lawrence executed a search warrant at the respondents' home. The respondents then sued Messerschmidt and Lawrence under 42 U.S.C. § 1983, accusing them of obtaining a defective search warrant and carrying out a search that violated the respondents' Fourth Amendment rights. The Ninth Circuit, sitting en banc, concluded that the search warrant was unsupported by probable cause, and denied the officers qualified immunity. Three judges dissented, arguing that Messerschmidt and Lawrence were entitled to qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986), and *United States v. Leon*, 468 U.S. 897 (1984).

SUMMARY OF ARGUMENT

Although this Court's precedents require federal courts to defer to law-enforcement officers who rely on warrants issued by magistrates, the Ninth Circuit effectively conducted a de novo review of the probable-cause issues in this case. After finding the search warrant defective and unsupported by probable cause, the Ninth Circuit simply declared the officers' contrary beliefs unreasonable and undeserving of qualified immunity. *Millender v. County of Los Angeles*, 620 F.3d 1016, 1028-29 (9th Cir. 2010). Although the Ninth Circuit gestures toward the deferential standards established in this Court's case law, it only quotes them and does not apply them. This approach to qualified immunity

resembles the Ninth Circuit's past treatment of the deferential provisions in the federal habeas corpus statute. *See, e.g.*, 28 U.S.C. § 2254(d). It should meet the same resounding demise. *See Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

The Court should use this case not simply to correct the Ninth Circuit's error, but also to prevent other appellate courts from using the Ninth Circuit's maneuver to gut the qualified-immunity defense and the good-faith exception to the exclusionary rule. First, we urge the Court to reiterate that the defense of qualified immunity is co-extensive with the good-faith exception to the exclusionary rule. *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004); *Malley v. Briggs*, 475 U.S. 335, 344 (1986). To the extent that this Court's recent pronouncements in *Herring v. United States*, 555 U.S. 135 (2009), and *Davis v. United States*, 131 S. Ct. 2419 (2011), curtail the scope of the exclusionary rule, they equally limit the ability of courts to mulct state officers who rely on defective search warrants. The Ninth Circuit erred by failing to apply *Herring* to this case, and although *Davis* post-dates the Ninth Circuit's ruling, this Court should make clear that both *Herring* and *Davis* apply when future courts consider qualified-immunity defenses.

Second, this Court should remind the lower courts that violations of the Fourth Amendment's Warrant Clause do not automatically violate the amendment's separate and distinct prohibition on "unreasonable" searches and seizures. The Ninth

Circuit proceeded as if every search conducted under a defective search warrant is "warrantless," and hence "unreasonable." *Millender*, 620 F.3d at 1032-33. This not only ignores the multitude of warrantless searches that this Court has approved as "reasonable," it also ignores the fact that *Groh* deemed a search with a defective warrant "unreasonable" because the search warrant "did not describe the items to be seized *at all*" and was "obviously deficient" for that reason. 540 U.S at 558. The warrant in this case, by contrast, *did* describe items to be seized; the Ninth Circuit simply disagreed with the magistrate's conclusions regarding probable cause. *Groh* does not establish that every search under an invalid warrant is *per se* "warrantless" or "unreasonable." At the very least, reasonable officers can conclude that *Groh*'s holding extends only to defective search warrants that fail to list *any* items to be seized, and that is all that Messerschmidt and Lawrence need to show to establish a qualified-immunity defense.

ARGUMENT

There are two questions presented in this case. The first is whether Messerschmidt and Lawrence can claim qualified immunity under the standards of *Malley v. Briggs*, 475 U.S. 335 (1986), and *United States v. Leon*, 468 U.S. 897 (1984). The petitioners' brief capably demonstrates that Messerschmidt and Lawrence are entitled to qualified immunity on that basis.

The second question presented is: "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?" Pet. Br. i. The answer to this question is "yes." The petitioners' brief focuses primarily on the error-correction issue. Rather than revisit that discussion, amici States write to explain how the Court might "clarify" the *Malley*/*Leon* regime to prevent other courts from emulating the Ninth Circuit's conduct in this litigation. We offer two ways for this Court to clarify the requirements of qualified immunity and the scope of the exclusionary rule when officers conduct searches under defective warrants.

I. An Officer's Qualified-Immunity Defense Is Coextensive With the Good-Faith Exception to the Exclusionary Rule.

This Court has repeatedly equated the scope of an officer's qualified-immunity defense with the good-faith exception to the exclusionary rule. *See Groh*, 540 U.S. at 565 n.8 ("[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.") (quoting *Malley*, 475 U.S. at 335). This longstanding principle has two important implications for the lower courts. First, all of this Court's pronouncements on the good-faith exception to the exclusionary rule necessarily

inform the scope of qualified immunity when litigants sue officers over defective search warrants. When *Herring* and *Davis* limit the exclusionary remedy to "deliberate, reckless, or grossly negligent" violations of Fourth Amendment rights, it logically follows that officers who violate the Fourth Amendment are entitled to qualified immunity absent a showing of "deliberate, reckless, or grossly negligent" conduct. *See Herring*, 555 U.S. at 144; *Davis*, 131 S. Ct. at 2427-28. Likewise, when *Herring* and *Davis* extend the good-faith exception to Fourth Amendment violations caused by simple, "isolated" negligence, it follows that qualified immunity must also attach to Fourth Amendment violations produced by an isolated negligent act. *See Herring*, 555 U.S. at 147-48; *Davis*, 131 S. Ct. at 2427-28.

Second, the standards from this Court's qualified-immunity jurisprudence must inform the scope of the good-faith exception to the exclusionary rule. Under the qualified-immunity doctrine, for example, officers who violate the Constitution are liable for damages only if they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Lower courts must therefore limit the exclusionary remedy to cases in which the Fourth Amendment contravenes "clearly established" law that a reasonable person should know. The exclusionary remedy stops where qualified immunity

begins, and the good-faith exception starts where liability for damages ends.

The Ninth Circuit's opinion purports to acknowledge this symmetrical relationship between qualified-immunity doctrine and the good-faith exception to the exclusionary rule. *See Millender*, 620 F.3d at 1032 ("[O]fficers would be entitled to qualified immunity in § 1983 actions only under the same facts that would allow the government to claim a good faith exception to the exclusionary rule in a suppression hearing."). Yet it never cites *Herring*, which limits the exclusionary remedy—and the prospect of money damages—to Fourth Amendment violations produced by "deliberate, reckless, or grossly negligent" conduct or "recurring or systemic negligence." 555 U.S. at 144. In denying qualified immunity, the Ninth Circuit instead asserts only that "a reasonably well-trained officer" in the position of Messerschmidt or Lawrence would have known that the search warrant failed to establish probable cause. *Millender*, 620 F.3d at 1031. This is nothing more than an accusation of simple, isolated negligence. After *Herring* and *Davis*, that is insufficient to trigger either the exclusionary rule or liability for money damages.

II. The Ninth Circuit Erred by Automatically Equating a Violation of the Warrant Clause With a Violation of an Individual's Fourth Amendment Rights.

The Fourth Amendment embodies two distinct constitutional rules. The first of these rules secures an individual right to be free from unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The second rule limits the circumstances in which a warrant may issue: "[N]o 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."

Only the first of these rules creates an individual right enforceable under 42 U.S.C. § 1983. The Warrant Clause, by contrast, represents a *restriction* on the issuance of warrants, not a requirement to obtain warrants before searches—and it certainly does not confer individual rights enforceable in section 1983 proceedings. Suppose an officer persuades a magistrate to issue a warrant that they both know to be unsupported by probable cause, but the officer never executes the warrant. The officer will have induced the magistrate to violate the Warrant Clause of the Fourth Amendment by "issuing" the defective warrant, and each of them will have violated any oaths of office that bind them to support and defend the Constitution. But they

have not deprived anyone of their constitutional *rights* until they contravene the Search and Seizure Clause. And only an *unreasonable* search or seizure can violate an individual's Fourth Amendment rights and trigger liability under section 1983.

Throughout its opinion, the Ninth Circuit asserts that officers who conduct searches with defective warrants automatically violate the subject's Fourth Amendment rights. *See Millender*, 620 F.3d at 1024 ("[A] search or seizure pursuant to an invalid warrant constitutes an invasion of the constitutional rights of the subject of that search at the time of [the] unreasonable governmental intrusion.") (internal quotation marks omitted); *id.* at 1031 ("[T]he *search warrant violated* the Millenders' constitutional rights.") (emphasis added). These careless assertions overlook the fact that even warrantless searches and seizures are deemed "reasonable" and "constitutional" in numerous settings, including searches incident to arrest, exigent circumstances, border searches, administrative searches, plain-view searches, and many other situations. *See, e.g.*, *Groh*, 540 U.S. at 572 (Thomas, J., dissenting) (cataloging examples); *see also* Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE 3-20 (1997) (denying that the Fourth Amendment imposes any "warrant requirement" on searches or seizures, and stressing that the Fourth Amendment is designed to limit warrants and not require them). The Ninth Circuit's assertions also ignore the possibility that an officer

might conduct a reasonable search notwithstanding his defective warrant, so long as he believes that the warrant is valid and conducts the search in a reasonable manner. The petitioner in *Groh*, for example, argued that "even though the warrant was invalid, the search nevertheless was 'reasonable' within the meaning of the Fourth Amendment." 540 U.S. at 558. The Ninth Circuit did not even entertain this possibility. Yet defective search warrants do not violate people's Fourth Amendment rights; only unreasonable searches do. If an unconstitutional warrant does not lead to an *unreasonable* search, then there can be no liability under section 1983.

The Ninth Circuit's efforts to equate violations of the Warrant Clause with violations of individual constitutional rights also caused it to misapply the qualified-immunity inquiry in this case. The test for qualified immunity is *not* whether a reasonable officer in Messerschmidt and Lawrence's position could believe that the search warrant complied with the Fourth Amendment's Warrant Clause. Rather, the test is whether a reasonable officer in their position could believe that the *search* of the respondents' house was reasonable notwithstanding the defective warrant. When *Groh* rejected this type of argument, it emphasized that the warrant in that case was so defective that it "did not describe the items to be seized *at all*" and declared it "obviously deficient" for that reason. 540 U.S. at 558. *Groh* then stated in dicta that less serious shortcomings in

a search warrant could enable officers to carry out "reasonable" searches under the Fourth Amendment. *Id.* The facts of this case are distinguishable from *Groh*; the search warrant *does* describe items to be seized. Reasonable officers in Messerschmidt and Lawrence's position could conclude that *Groh*'s holding applies only to defective search warrants that fail to list *any* items to be seized, and that is enough to establish a qualified-immunity defense in this case.[1]

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[1] Earlier Supreme Court rulings, such as *Massachusetts v. Sheppard*, contain passages suggesting that searches conducted with defective search warrants violate the Constitution. 468 U.S. 981, 988 n.5 (1984) ("The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."). This statement, however, leaves no room for the recognized categories of warrantless searches that satisfy the Fourth Amendment. And in all events, to the extent any tension exists between *Groh* and cases like *Sheppard*, the qualified-immunity doctrine requires courts to resolve this tension in favor of the defendant officers.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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