No. 02-811

IN THE
Supreme Court of the United States
OCTOBER TERM, 2003

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at the time he acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail?

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REPLY BRIEF FOR PETITIONER

This case poses three questions. Did petitioner violate respondents' constitutional rights? Can he be held personally liable for lack of due care? Is he entitled to qualified immunity? If petitioner prevails on any issue, he must be dismissed from this civil action; here, he rightfully should prevail on them all.

I. PETITIONER DID NOT VIOLATE THE FOURTH AMENDMENT IN THIS CASE.

Respondents' brief is notable for the points they either acknowledge or fail to contest. *First*, they do not deny that the record — taking as true the allegations in the complaint — is devoid of any indication of bad faith on petitioner's part in any respect pertinent to the issues raised before this Court. As the District Court correctly noted: (i) the particulars of the description provided in the warrant application were accurate and adequate; (ii) the officers participating in the search were well aware of the items they were looking for and looked only for those items; (iii) plaintiffs themselves knew what items the officers sought based on the officers' verbal description at the scene; and (iv) petitioner faxed them the relevant portions of the application "showing the correct description of items to be seized, when he was notified of the mistake." Pet. App. 21a. *Second*, respondents agree that a neutral, independent magistrate reviewed the application and supporting materials, expressly approved the warrant based on a finding of probable cause, issued a judicial order to that effect, and ordered the supporting materials to be sealed. *See* Resp. Br. 2. *Third*, respondents do not dispute that petitioner executed the search consistent with all the particulars presented to the magistrate in the application materials. What remains after these concessions is a few arguments aimed at persuading the Court that the ruling below was neither novel nor flawed. In fact, it was both.

A. The Purposes of the Particularity Requirement Were Fully Satisfied.

This case is based on an omission that occurred in the

specific wording of this warrant — a proofreading error, made in good faith, that escaped the attention of both the magistrate and the officers. *See, e.g.*, Pet. App. 23a. Yet, as the United States explains, *see* U.S. Br. 12-16, this defect in particularity does not rise to the level of a constitutional violation, which is judged under the standard of reasonableness in the totality of the circumstances, *see, e.g.*, *Segura v. United States*, 468 U.S. 796, 806 (1984). Although the warrant here did not list the items to be seized, at the time that petitioner and the other officers executed the warrant and entered the Ramirez home, they orally described to Mrs. Ramirez (in person) and to Mr. Ramirez (on the telephone) the specific items that were the objects of the search. *See* Pet. App. 15a. This description accorded with the particulars that petitioner had already specified to the court in the original warrant application and supporting affidavit. These facts are undisputed. *See id*. The officers also left the warrant with Mrs. Ramirez, and the next day, upon request from respondents' attorney, petitioner faxed him the page of the application that contained the full list of items to be seized. *See id.* at 15a-16a. In these circumstances — where the warrant was based on probable cause and was backed by an application containing a sufficient description of the specific items to be seized, where the property owners were fully appraised of the objects of the search, and where the officers were acting in good faith — petitioner's conduct was plainly reasonable and therefore did not violate the Fourth Amendment. *See, e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987) (officers acted reasonably in executing a warrant that appeared valid when issued, but turned out to be overbroad, so they did not violate Fourth Amendment); *cf. Hill v. California*, 401 U.S. 797, 803-04 (1971) (warrantless arrest of wrong man based on reasonable mistake of fact did not violate Fourth Amendment).

In addition, the purposes of the particularity requirement were fully satisfied in this case. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (particularity requirement protects persons against "a general, exploratory rummaging in a person's belongings"); *Stanford v. Texas*, 379

U.S. 476, 481 (1965) (general warrants were the "worst instrument of arbitrary power . . . because they placed the liberty of every man in the hands of every petty officer") (quotation omitted); *Garrison*, 480 U.S. at 84 ("The manifest purpose of this particularity requirement was to prevent general searches."). Petitioner completely and accurately documented the objects of the proposed search in the warrant application and affidavit he submitted to the court. *See* Pet. App. 28a-35a. The search was in fact limited to these parameters, and the courts were in a position to monitor and redress any variance from them in the actual search. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 564-66 (1976) (checkpoint stops are permissible even without judicial blessing because their reasonableness turns on factors like location that are available for "post-stop review").

Certainly it is important to avoid flaws in warrants wherever possible, but mistakes are made, and the constitutional question here is whether such mistakes inevitably render the ensuing conduct unreasonable *per se* under the Fourth Amendment. The Court has rejected that view. *See, e.g.*, *Garrison*, 480 U.S. at 84-89 (particularity defect did not cause ensuing search to violate Fourth Amendment); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 n.7 (1984) (particularity defect unimportant where, as here, "if the judge had crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid").

The court of appeals ignored these considerations, as well as longstanding circuit precedent on the purposes served by the particularity requirement. In *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982), then-Judge Kennedy explained that this requirement "guards the right to be free from unbounded general searches. The central protection has been stated as insuring that 'nothing is left to the discretion of the officer executing the warrant.'" *Id.* at 1339 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). This core point, entirely absent from the ruling below, underscores why petitioner's actions here in no way undermined the constitutional command.

It is undisputed that petitioner, far from undertaking a general search, hewed strictly to the parameters as determined by the magistrate and advised respondents of the specific items whose seizure had been authorized. *See* U.S. Br. 16 ("petitioner, in executing the warrant, was just as constrained by the magistrate judge's probable-cause determination as he would have been if the warrant form had been completed correctly"). As for respondents' suspicions to the contrary, the appropriate venue for testing them is later in a court of law, and the particularity requirement should not be construed as a means of achieving citizen control over officers at the scene. *See id.* ("Petitioner's execution of the warrant could be challenged in court on the basis of the information given in the warrant application."). In sum, the brand-new proofreading rule fashioned below in this case in no way serves the purposes behind the particularity requirement as explained in *Hillyard* and the Court's own prior decisions.

In this case, it was objectively reasonable for petitioner to assume, without stopping to reconfirm, that the judicial warrant issued by the court authorized the search in accordance with the terms of his application. The Court has explicitly addressed this issue elsewhere and held that it was reasonable for "the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and . . . had good reason to believe that the warrant authorized the seizure of those items" to act on that basis. *Sheppard*, 468 U.S. at 989 n.6. As the Court put the point: "We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.*

Respondents take a markedly different view of the constitutional directive, asserting that the particularity requirement is a theoretical absolute, and hence the Fourth Amendment can never be satisfied when a warrant is executed and later is shown to be erroneous on its face. Under this rigid approach, any material misnotation — such as a transposition of numbers in the homeowner's address — would violate the Constitution.

Similarly, the court below opined that if petitioner had rechecked the warrant after the magistrate had issued it, he "would surely have realized" the facial defect. Pet. App. 10a. But the court did not explain its certainty that petitioner would have discerned the problem when in fact the magistrate had not done so, nor had any other reviewing official within ATF. More importantly, the court's blithe presumption failed to heed this Court's repeated admonitions that the conduct of officers must be evaluated with a view to the actual constraints and demands that law enforcement officers face in the field. *See, e.g.*, *Elkins v. United States*, 364 U.S. 206, 222 (1960) ("it can fairly be said that, in applying the Fourth Amendment, this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement"). Petitioner had dozens of discrete responsibilities as leader of a federal-state-and-local search team to be sure that this search was carried out safely, effectively, and with a minimum of disruption to the homeowners. He had, moreover, to complete his own extensive affidavit and application, which actually supplied the basis for the magistrate's determination in this case, and which required him to testify under penalty of perjury. Given this long list of duties with respect to this single case (only one of many for which he was responsible at the time), it is ironic that the court of appeals transferred to petitioner alone the ultimate responsibility, on pain of personal liability in money damages, for seeing to it that the subsequent *judicial* order was issued error-free. *See, e.g.*, *Sheppard*, 468 U.S. at 989 (rejecting argument that the officer "should have examined [the warrant] to make sure that the necessary changes had been made").

Respondents attempt to bolster their position by citing an internal agency policy that they claim was violated in this case when petitioner failed to proofread the warrant again after the court had issued it. *See* Resp. Br. 1 (quoting ATF Order 0 3220.1); *id.* at 25-26. Yet that policy is useless to respondents, for four reasons. *First*, the Court has squarely held that no action will lie under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for alleged violations of a mere regulation or

policy. *See Davis v. Scherer*, 468 U.S. 183, 195-96 (1984) (it would be unfair and unwise to hold officials personally liable for possible violations of "a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively") (quotation omitted). *Second*, the ATF's internal policy "directive" is not intended to be enforceable in court, as it merely "provides basic information and procedures to be followed" that fall far short of constitutional imperatives. ATF Order 0 3220.1(1); *see also id.* (25)(c)(3) (directing the search team not to smoke, eat, or drink at the search premises).

Third, it is dubious whether petitioner even violated this ATF directive at all, since the "independent examination" of the warrant and affidavit described in paragraph 23 is directed not to petitioner but to his superiors, who were obliged to conduct a careful review of those materials before giving their approval to the operation. *See id.* (23)(a)-(b). It is also doubtful whether petitioner violated ATF Order 0 3220.1(7)(d), insofar as he did not exceed his authority in executing the warrant and sought to make sure that the search warrant was sufficient by personally filling out the warrant form and supporting materials, even though he knew it would ultimately be "issued by the magistrate" and reviewed by his superiors. *Id.*

Fourth, this provision of the policy actually undercuts respondents' arguments, because it shows a careful and realistic concern that officers who inevitably must labor amidst the bustle and confusion of everyday law enforcement will occasionally make mistakes. By providing a multi-layer review of the warrant for "any error or deficiency," *id.* (23)(b), the ATF sought to cull out improper warrants, including those with flawed transcriptions. As this case demonstrates, however, even the most elaborate procedures may not succeed in eliminating errors entirely. And although many defects seem obvious in hindsight, again the Court has "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Garrison*, 480 U.S. at 87; *see*

also Illinois v. Rodriguez, 497 U.S. 177, 184 (1990) ("we have not held that 'reasonableness' precludes error with respect to those factual judgments that law enforcement officials are expected to make."); *Hill*, 401 U.S. at 804-05 ("When judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,'" such conduct was "reasonable and valid under the Fourth Amendment.") (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (Rutledge, J.)).

It thus was inappropriate for the court of appeals to impose on petitioner the responsibility for ensuring the technical soundness of the work of the judicial officer. Of course it may often be sensible for an officer to scrutinize a warrant even after it has been approved, but it is neither sensible nor fair to saddle officers with personal liability for technical defects in the judicial orders they are empowered only to execute. *Cf. United States v. Bonner*, 808 F.2d 864, 867 (1st Cir. 1986) ("the responsibility for the inadvertent omission of the address on the warrant itself must be borne by the magistrate as the final reviewing authority."); *United States v. Curry*, 911 F.2d 72, 79 (8th Cir. 1990) (same).

B. The Fourth Amendment Requires Supervision of Officers by Courts, Not by Those Searched.

The court of appeals expressly grounded its interpretation of the particularity requirement on the importance of empowering citizens to "be on the lookout and to challenge officers who might have exceeded the limits imposed on them by the magistrate." Pet. App. 7a. Respondents champion the same theme, suggesting that the Fourth Amendment requires officers to provide a written (not oral) description of the items to be seized so that the property owner can be personally assured of the precise basis and scope of the magistrate's determination. *See, e.g.*, Resp. Br. 9-12.

Respondents seriously misconstrue this constitutional provision. The Fourth Amendment mandates that the initiation and execution of government searches and seizures are to be judged according to a "reasonableness" test and that judicial

oversight, even though not required in all instances, should be invoked whenever practicable as the fundamental supervisory check on such action. Indeed, as we discuss further below, the Constitution *does not* require that the target of the search be given a copy of the warrant before the search is executed, and in some instances the government is not even obliged to inform the target that a search ever occurred.

Accordingly, the court of appeals was simply incorrect when it asserted that the Fourth Amendment is designed to enable the target of a search to engage in contemporaneous self-help, acting to supervise officers who execute a warrant by "challeng[ing] them" and "policing the officers' conduct." Pet. App. 7a. To the contrary, the Fourth Amendment works through the judicial process, not through confrontations between citizens and law enforcement. It is designed to provide a prior neutral check on the officers' authority and a clear record that permits later recourse to the courts to redress any wrongdoing, policed in both instances by the independent judiciary.

Indeed, the approach urged by the court of appeals has no basis in the text of the Constitution or the precedents of this Court, and it promises to be disastrous as a policy prescription. It is of course vital for officers not to overstep the lawful limits of their authority, and desirable that citizens should zealously safeguard their constitutional rights. But the conscious design of our constitutional system is that citizens should do so by invoking legal processes, not in uncontrolled faceoffs with government officials in the frenetic and potentially hazardous flashpoint of an official search. In a healthy constitutional democracy, the tree of liberty should not be refreshed with the blood of patriots and tyrants, as Jefferson urged, but rather tended by the rule of law.

There are sound reasons for this approach. Performing a search of persons or premises for evidence of crime, contraband, or evidence material to a criminal investigation is unavoidably dangerous. Officers are given considerable discretion in deciding how to proceed in carrying out this task:

they can decide in many instances not to apply for a warrant at all, *see, e.g., Warden v. Hayden*, 387 U.S. 294 (1967); they can seize additional evidence of crime if it is exposed in plain view, *see, e.g., Coolidge*, *supra*; and they can make reasonable judgments about the amount of force that must be used to subdue individuals as needed, *see, e.g., Graham v. Connor*, 490 U.S. 386 (1989). Searches routinely involve the unwelcome entry of property, frequently in the dead of night, without any certainty or predictability about where armed criminals may be located and how they may react to the intrusion. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 606-07 (1999) (describing factual background of search); *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (discussing "legitimate law enforcement interest" in "minimizing the risk of harm to the officers" because "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence"). During the course of the search itself is not the time for lengthy give-and-take with the property owner about the precise details of how the search is to be implemented, because the distraction and disruption that would ensue could unreasonably interfere with the officers' safe and competent performance of their duties at the scene. As this Court has emphasized: "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03.

The court below recognized this key point in its earlier opinion in *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982). Explaining the appropriate remedy for a violation of the particularity requirement, then-Judge Kennedy wrote that "a search warrant authorizing inspection will not be a general warrant if such standards reasonably guide the officers in avoiding seizure of protected property, and if upon return of the warrant the magistrate may review the search to determine whether the instructions were followed and legitimate property and privacy interests were protected." *Id.* at 1340. By contrast, the vision of the court below in this case, echoed by respondents here, virtually invites Waco-like confrontations

with officials who are executing presumptively proper judicial commands.

Moreover, under respondents' extreme view, law enforcement officers' compliance with Fed. R. Crim. P. 41, which is routine, would be flatly unconstitutional. *See* U.S. Br. 17. Rule 41(f) concerns the execution and return of a warrant, and it specifies that the officer executing the warrant either must "give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken," or must "leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(3) & (4). This measure does not require that the officers provide a copy of the warrant to the target *before* or *during* the search. In fact, officers have evolved a common practice of providing a copy of the warrant at the *end* of the search, as they are preparing to leave the premises, which is the earliest point at which they are ready to produce a final receipt for all property taken. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 356 n.16 (1967) ("Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place."); *City of West Covina v. Perkins*, 525 U.S. 234, 236 (1999) ("*At the conclusion of the search*, the officers left respondents a form entitled 'Search Warrant: Notice of Service'") (emphasis added); *id.* at 242 (rejecting Ninth Circuit's "far-reaching notice requirement," which "not only lacks support in our precedent but also conflicts with the well established practice of the States and the Federal Government").

The courts also have refused to impose an immediate-notification requirement on law enforcement officers as a constitutional matter. As Justice Thomas recently noted, though this Court has "never addressed the issue, there is near unanimous agreement among the lower courts that the notice requirements imposed by Federal Rule of Criminal Procedure 41(d) . . . are not required by the Fourth Amendment." *Perkins*,

525 U.S. at 246 n.1 (1999) (Thomas, J., concurring); *see also Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment* § 4.12 (3d ed. 1996 & Supp.) (citing cases).

Indeed, in some instances of so-called "sneak and peek" warrants, the target of the search does not receive notification that any search has occurred for some time afterwards, if at all. The courts have upheld such warrants where a satisfactory showing is made that notice of the search would be likely to compromise an ongoing criminal investigation. *See, e.g.*, *United States v. Villega*, 899 F.2d 1324, 1337 (2d Cir. 1990). This Court has likewise upheld, for decades, the constitutionality of search warrants to conduct wiretaps and other forms of electronic surveillance, without notice to intended targets. *See, e.g.*, *Katz*, 389 U.S. 354-55 (stating that electronic surveillance can be conducted pursuant to a valid warrant without notice); *Dalia v. United States*, 441 U.S. 238, 246-48 (1979) (upholding covert entries to install electronic bugging equipment that is otherwise legal, pursuant to a warrant).

Respondents' complaints about the fact that the supporting documentation for the warrant was sealed in this case by order of the magistrate are similarly misplaced. Respondents contend that the sealing order undermines core values under the Fourth Amendment by preventing the homeowners from knowing at the time of the search, and thus being able to challenge at the scene, the authority of the agents and the specific limits on the search. *See* Resp. Br. 9-11. At the same time, respondents dismiss as constitutionally irrelevant the undisputed fact that petitioner in good faith gave respondents an accurate oral description of the nature of the search and the items to be seized. *See* Pet. App. 15a. Ultimately, respondents seek to leverage the sealing of the supporting materials to justify a rule of strict liability for errors discovered later on the face of the warrant.

Here again, respondents' argument rests on a fundamental misunderstanding of the realities of federal law enforcement. In fact, sealing of materials supporting judicial warrants is

routine. Typically, the application, affidavit, and warrant returns remain sealed at least until criminal charges are initiated and often even longer, unless they are requested and produced in discovery in subsequent civil litigation. This nearly universal practice is not a matter of official caprice, but of sound experience. First and foremost, making the materials public would invariably prejudice an ongoing criminal investigation, since the information set out in a well-prepared affidavit usually details the course of the entire investigation, including key witnesses and evidence that the government is seeking to develop. Second, the application and affidavit are sealed to protect witnesses and other third parties whose identities and divulgences may be revealed, which could place them in grave danger. Third, these materials are ordinarily sealed in order to protect the reputation of innocent persons, including the targets themselves, who may never be charged with a crime. Sealing also helps minimize the chances of an on-the-scene challenge to the nature and scope of the search, which would jeopardize the safety of homeowner and officer alike. In sum, the Fourth Amendment is designed to provide a before-and-after check on the officers' authority by the judiciary rather than a contemporaneous check by the target of the search, and the standard procedure of sealing the relevant documents is entirely consistent with that.

C. The Fourth Amendment Does Not Require Officers to Proofread Judicial Warrants Issued upon a Proper Finding of Probable Cause.

Respondents' brief fails completely to come to grips with the novel proofreading requirement that the court of appeals imposed on petitioner alone as the leader of the search team. Remarkably, respondents attempt to argue that the requirement was already well-established under the decisions of *this* Court. Accordingly, respondents do not dispute that the Ninth Circuit imposed a requirement to proofread the magistrate's work, but suggest that such a requirement is actually "mandate[d]" by this Court's opinion in *United States v. Leon*, 468 U.S. 897 (1984).

See Resp. Br. 25.[1]

Thus, respondents' argument is that the proofreading requirement exists in the Fourth Amendment and, moreover, is not at all "new." This is nonsense. As petitioner set out in his opening brief, *see* Pet. Br. 20-22, this Court in *Sheppard* plainly rejected the contention that officers have a general duty to go back to review a judicial warrant after the court had issued it, *see* 468 U.S. at 989 ("we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested"); *see also Illinois v. Krull*, 480 U.S. 340, 349 (1987) ("the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it"). That is particularly true where the officers involved in the search were the ones who had specified its scope to the magistrate, as was is true in both *Sheppard* and this case. *See Sheppard*, 468 U.S. at 989 n.6 (because the officer who directed the search "knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items" it was "not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested"). Of course, under the general reasonableness analysis of *Leon* and *Sheppard*, there may be unusual circumstances in which it would not be reasonable for an officer to simply assume the constitutionality of a judicial warrant, but that is a far cry from the general proofreading obligation that the court of appeals imposed in this case and would presumably impose in all other cases. Nonetheless, as explained above and in greater detail in our opening brief, neither petitioner's good faith nor the overall reasonableness of his conduct in executing the search warrant can fairly be called into question here.

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[1] Respondents immediately undercut this argument by invoking the ATF's internal policy directive, which – apart from creating no judicially enforceable remedy , much less any well-established constitutional right, *see supra* Part I.B – would have no force whatsoever if *Leon* actually established the proposition of constitutional law that respondents aver it does.

II. PUBLIC OFFICIALS ARE NOT LIABLE FOR CONSTITUTIONAL VIOLATIONS BASED ON AN ALLEGED LACK OF DUE CARE.

Respondents never even address petitioner's contention that the Court's precedents foreclose the imposition of civil liability on public officials based on an alleged lack of due care, as is asserted here. *See* Pet. Br. 22-25. This rule has been given general application in cases involving such diverse constitutional provisions as the Due Process Clause, *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986), the Equal Protection Clause, *see, e.g.*, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and the Eighth Amendment, *see, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976). Justice Brennan articulated the rule in general terms, noting that "to prevail in any *Bivens* action, recipients such as respondents must both prove a deliberate abuse of governmental power, rather than mere negligence." *Schweiker v. Chilicky*, 487 U.S. 412, 447 (1988) (Brennan, J., dissenting) (citing *Daniels*).

The Court has spoken in the same terms about the Fourth Amendment: "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). And the Court applied this approach in *Franks v. Delaware*, 438 U.S. 154 (1978), where it held that in any challenge to a falsehood or omission made by an officer applying for a warrant, "allegations of negligence or innocent mistake are insufficient." *Id.* at 171.

Franks is controlling here, for this lawsuit is premised most fundamentally on petitioner's inadvertent failure to proofread the warrant and thus is not a proper *Bivens* action at all. If officers cannot properly be held liable under the Fourth Amendment for a mere lack of due care, then this lawsuit cannot proceed and the *Bivens* claim brought against petitioner in his personal capacity must be dismissed.

III. PETITIONER IS ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY IN THIS CASE.

There are two distinct bases for qualified immunity in this case and on each the applicable legal test is dictated by the Court's precedents. First, government officials are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See*, *e.g.*, *Wilson*, 526 U.S. at 609-10; *Anderson*, 483 U.S. at 641. Second, officials are immune from suit if they have made a reasonable mistake of fact, unless their conduct "is outside the range of the professional competence expected of an officer." *Malley v. Briggs*, 475 U.S. 335, 343 n.9 (1986); *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001). Petitioner is entitled to qualified immunity here under either prong.

A. If Petitioner's Conduct Was Unlawful, It Was Not Apparent in the Light of Preexisting Law.

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. Respondents neatly circumvent this rule by arguing that the Fourth Amendment has been on the books since 1791, including the particularity requirement, and so any violation of this provision is necessarily a violation of "clearly established" law. *See* Resp. Br. 28-29.

The Court rejected essentially this same argument in *Anderson*. There, as here, the plaintiff claimed that the Fourth Amendment had been violated, and the Court noted that the operation of the qualified immunity doctrine "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." "For example," the Court continued, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation."

Anderson, 483 U.S. at 639. If this were the test, the Court noted, plaintiffs would be able to "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights," thereby destroying the doctrine of qualified immunity. *Id.*; *see also Saucier*, 533 U.S. at 201-07 (alleged right must be formulated "on a more specific level"); *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (same). The Court thus required much more precision in framing such claims.

The same deficiency exists here. Respondents essentially claim that petitioner violated the particularity requirement of the Fourth Amendment, without more. That position, however, fails to do justice to the real issues here. Certainly petitioner can be charged with knowledge and responsibility for compliance with something as fundamental as the Fourth Amendment. But to recognize that he would be violating the law in this particular situation would have required him to anticipate that the court of appeals would announce a new rule requiring all officers to proofread warrants after they had been approved and issued by a magistrate — a legal issue that remains far from clear to this day. He also would have had to foresee a court ruling someday that a defect found on the face of the warrant cannot be corrected on the spot by orally briefing the property owners about the precise details of the authorized search — a new regime not made clear until this case was decided below. And finally, he would have had to prefigure that a warrant which refers to the underlying affidavit information provided to the magistrate cannot be supplemented by reference to that documentation, still an issue that is hotly controverted among the circuit courts. *See, e.g.*, Pet. Br. 31-34. Only by coming to grips with these types of questions can the constitutional issue be made more concrete "in light of the specific circumstances that the official confronted at the time he or she acted." *See Anderson*, 483 U.S. at 640-41; *see also* Pet. Br. 28-29.

To arrive at an appropriate level of specificity, therefore, would have required petitioner to predict the future course of the law on three distinct constitutional issues, some or all of

which may be decided definitively for the first time in this case. In this procedural posture, an official such as petitioner "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Furthermore, the Ninth Circuit's ruling here relied on *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), to foreclose petitioner's defense of qualified immunity. The trouble is that Judge Reinhardt's opinion in *McGrew* was not issued until more than six months *after* this search warrant was executed, which disqualifies it as an available precedent on which to base a denial of qualified immunity. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 533-35 (1985); Pet. Br. 29-31.

Recognizing the difficulty, respondents claim that the timing of *McGrew* is immaterial because that subsequent decision "encapsulates, analyses, and is based upon over 14 years of precedent in the circuit together with precedent from this Court." Resp. Br. 30. But their rationale is problematic. First, if taken to its logical extreme, this view would eliminate entirely the "prior-subsequent" dichotomy that this Court has been so careful to build into the qualified immunity doctrine ever since the *Mitchell* case almost two decades ago. As Justice Holmes once observed, virtually every precedent can lay claim to having been based on some set of prior decisions, advancing in "molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Very few decisions represent undeniable leaps on the path of the law.

Moreover, if it were true that *McGrew* did not extend prior precedent, then it should be possible to cite other decisions, predating the events of this case, as a basis for identifying "clearly established" law. But the most pertinent decision in the Ninth Circuit prior to these events was the *District Court's* ruling in *McGrew*, which had *upheld the validity* of the challenged search in the course of upholding the defendant's

conviction, based on that court's most informed interpretation of the controlling Ninth Circuit precedents extant at the time. *See McGrew*, 122 F.3d at 848-49.

Respondents do make a vigorous attempt to repair the breach left by the court below, citing a half-dozen other Ninth Circuit rulings in an effort to forge a foundation of "clearly established" law here. But that pattern of decisions is no more than a patchwork quilt, at best. It is revealing, moreover, that respondents have sidestepped any discussion whatsoever of two other cases addressed in petitioner's opening brief — *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993), and *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988). Both of these cases were explicitly receptive to providing relief for officers in cases where warrants were found to be insufficiently particular but information from the underlying affidavits could be used to supply the deficiency. *See* Pet. Br. 31-32 (discussing the inconsistent pattern of the Ninth Circuit's decisions in this area, including its decisions in *Hillyard, Guerra, Luk, Towne, Kow*, and *McGrew*).[2]

In addition, as discussed in our opening brief, the circuit courts are divided over the issues raised by defective warrants, supporting documentation, and the good faith of officers executing warrants in varying circumstances. *See* Pet. Br. 32-34. And where the federal courts of appeals are split on the underlying constitutional issue, qualified immunity is proper: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.[3]

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[2] Respondents also cite *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1997), which further extends the crazyquilt pattern of the law here; *Marks* appears to favor respondents but on facts more egregious than those at issue here, since in *Marks* the officers commenced a wide-ranging search of properties and persons *before* they had received proper authorization by means of an actual warrant. *See id.* at 1019-23.

[3] Another supporting indicator of this legal uncertainty is the Court's decision to grant *certiorari* and decide the issue in this case. *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity

Finally, respondents repeatedly cite one passage of dictum from the *Leon* case, concerning facially deficient warrants, which suggests that the "good faith" exception might not apply in those circumstances. *See Leon*, 468 U.S. at 923. Yet it is unclear how much weight such dictum should receive in the calculus necessary to assess a claim for qualified immunity, particularly in a context where the other hypotheticals discussed by the Court all concern actions taken in bad faith, such as lying to or misleading the magistrate. *See id.* Moreover, the dictum from *Leon* must be weighed against the actual holding in *Sheppard*, its companion case, which is virtually identical to this case in certain key respects, and in which the Court reached a result that favors petitioner here. *See*Pet. Br. 31, 38-39 (discussing *Sheppard*). Respondents try to distinguish *Sheppard* on the grounds that the officers there had received "specific . . . assurances" from the magistrate that the magistrate would correct certain deficiencies that were known to exist in the warrant, Resp. Br. 15-16, but that fact may well cut the other way. Indeed, it would appear that *more* responsibility to take corrective action should lie with officers who *know* their warrant may be defective than with an officer, like petitioner here, who was unaware of *any* defect until afterwards, and who otherwise received "specific assurances" from the magistrate in the straightforward sense that the magistrate approved his application and issued the warrant. Therefore, qualified immunity is appropriate here.

B. Petitioner Is Not Subject to Personal Liability for Making Reasonable Mistakes of Fact.

In addition to judging public officials against the backdrop of clearly established law, the Court's precedents also indicate that officials do not lose the protection of qualified immunity unless their conduct was objectively unreasonable under the precise circumstances. "What this means in practice is that 'whether an official . . . may be held personally liable . . .

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that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to give it "the definitive answer that it demanded").

generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson*, 526 U.S., at 614 (quoting *Anderson*, 483 U.S. at 639).

For example, an officer can have a reasonable though mistaken belief that a warrant contains the necessary level of particularity, and the Court has found that such conduct does not violate the Constitution. *See, e.g.*, *Garrison*, 480 U.S. at 85-89. Even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable search, this Court's precedents still would grant the officers qualified immunity from personal liability for reasonable mistakes about such points as whether probable cause existed to justify their search. *See, e.g.*, *Anderson*, 483 U.S. at 643; *Malley*, 475 U.S. at 344-45. *See also* Pet. Br. 35-43.

Where an officer acts on the basis of a reasonable mistake of fact or, as in this case, makes an innocent proofreading error, the policies that animate the qualified immunity doctrine apply with full force. *See, e.g.*, *Malley*, 475 U.S. at 344-45 (equating threshold for qualified immunity with showing necessary to invoke the "good faith" rule courts apply in criminal cases). This point is reinforced by the Court's square holding in *Sheppard*, and the same principles apply here as well. In the context of the "rapidly evolving" process of applying for a warrant, *see Saucier*, 533 U.S. at 205, occasional mistakes of this kind are understandable and not unreasonable. *See, e.g.*, *Garrison*, 480 U.S. at 86-89; *Sheppard*, 468 U.S. at 988-990.

The record here shows that petitioner acted in good faith, in accordance with a judicial order issued by the proper authorities, which he believed to be valid and authoritative. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). His overall course of conduct was responsible, "objectively reasonable and largely error-free." *Sheppard*, 468 U.S. at 990. Because it would be unreasonably and unproductively harsh to subject him to personal liability for money damages merely because of his inadvertent failure to notice an error in a judicial order, qualified immunity should be

upheld.

CONCLUSION

For all of these reasons, the judgment below should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

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