No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

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

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

ELIZABETH A. OLSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

No. 04-1414

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-19a) is reported at 377 F.3d 1072. An order of the court of appeals amending its opinion and denying rehearing (Pet. App. 1a-2a) is reported at 389 F.3d 1306. The memoranda and orders of the district court denying respondent's motion to suppress (Pet. App. 29a-46a) and denying his motion for reconsideration (Pet. App. 20a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2004, and amended on December 6, 2004. A petition for rehearing was denied on December 6, 2004. On February 24, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari

to and including April 5, 2005, and on March 23, 2005, she further extended the time within which to file a petition for a writ of certiorari to and including May 5, 2005. The petition was filed on April 21, 2005, and was granted on September 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Fourth Amendment 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.

2. Rule 41 of the Federal Rules of Criminal Procedure is reproduced at Pet. App. 78a-83a.

STATEMENT

Following the denial of a suppression motion and a conditional guilty plea in the United States District Court for the Eastern District of California, respondent was convicted of receiving in the mail a visual depiction whose production involved the use of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release, and a fine of $3700. The court of appeals reversed, holding that the search of respondent's home violated the Fourth Amendment.

1. An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at

some future time (but not presently) certain evidence of crime will be located at a specified place." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 398 (4th ed. 2004). An anticipatory search warrant is most commonly issued in a case involving "the anticipated mail delivery to a certain address of a package known or reasonably believed to contain some form of contraband," and execution of the warrant ordinarily occurs "after the police determine * * * that the predicted delivery has actually occurred." *Id.* at 399-400. Anticipatory warrants obviate the need to choose between "allow[ing] the delivery of contraband to be completed before obtaining a search warrant, thus risking destruction or disbursement of evidence," and "seizing the contraband on its arrival without a warrant, thus risking suppression." *United States* v. *Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993). Such warrants "protect[] privacy rights by requiring advance judicial approval of a planned search while simultaneously satisfying legitimate law enforcement needs." *Ibid.* Because the Fourth Amendment requires probable cause to believe that evidence of a crime "can likely be found at the described locus *at the time of the search*," *ibid.*, the federal courts of appeals have uniformly concluded that anticipatory search warrants are constitutionally permissible, see, *e.g.*, *United States* v. *Santa*, 236 F.3d 662, 671-672 (11th Cir. 2000) (citing cases).

2. a. On December 20, 2001, respondent contacted a website that offered for sale videotapes depicting minors engaged in sex acts. Pet. App. 29a-30a, 59a-60a. The website was operated by an undercover United States Postal Inspector. *Ibid.* A week later, respondent placed an e-mail order for a videotape titled "Lolita

Mother and Daughter," which depicted (according to the website) "a lovely young girl"—"if she's over 10 I'd be shocked"—engaged in sex acts with "Mom." *Id.* at 4a, 30a, 63a-64a. On February 5, 2002, the postal inspector received an envelope in his undercover post office box. *Id.* at 30a, 67a. The envelope contained $45 in cash and a handwritten letter reading: "I hope this makes it to you please send film asap thanks Jeff Grubbs 1199 Park Tarrace [*sic*] Dr., Galt, CA 95632." *Id.* at 4a, 30a, 67a.

b. On April 17, 2002, Postal Inspector Gary Welsh applied to a magistrate judge in the Eastern District of California for an anticipatory warrant to search respondent's home after the delivery of the videotape. Pet. App. 4a, 30a, 52a-77a. The triggering condition for the search was described in two different places in the supporting affidavit. Paragraph 14 of the affidavit stated that the warrant would be executed if respondent "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 57a. Paragraph 61 stated that the warrant would not be executed "unless and until the parcel has been received by a person(s) and has been physically taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 72a. Paragraph 61 went on to say that the warrant would be executed "[a]t that time, and not before." *Ibid.* "Attachment A" to the affidavit was a detailed description of the property to be searched, and "Attachment B" was a detailed list of the items to be seized. *Id.* at 74a-77a.

On the basis of the affidavit, the magistrate judge issued the warrant. Pet. App. 4a, 30a, 47a-51a. The warrant had the same two attachments as the affidavit (describing the property to be searched and the items to

be seized), and directed that it be executed within 10 days (*i.e.*, on or before April 27, 2002). *Id.* at 7a-8a, 47a-51a. At the top of the warrant, the word "ANTICIPATORY" was handwritten above the pre-printed words "SEARCH WARRANT," but the warrant itself did not describe the triggering event. *Id.* at 5a, 30a-31a, 47a.

c. On April 19, 2002, at approximately 7:20 a.m., an undercover postal inspector delivered the videotape to respondent's house. Respondent's wife accepted delivery, signed for the package, and took it inside. A few minutes later, postal inspectors saw respondent leaving and told him to stay where he was. The warrant was then executed. Shortly after the search began, Inspector Welsh said to respondent, "You know why we're here." Respondent said that he did and told Inspector Welsh that the package was in the garage. Pet. App. 6a-7a, 31a.

At approximately 7:50 a.m., respondent went back into the house with Inspector Welsh, who gave respondent a copy of the warrant. Although the postal inspectors had a copy of the supporting affidavit with them, it was not presented to respondent and it was not left at his house. Pet. App. 7a-8a, 31a-32a.

After they went inside, Inspector Welsh advised respondent of his rights, and respondent agreed to be interviewed. Respondent also consented to a search of his computer, CD-ROMs, and diskettes. During the interview, respondent admitted that he had ordered the videotape and that he had other child pornography. Respondent was then placed under arrest. The postal inspectors seized the videotape and a number of other items. Pet. App. 8a, 32a.

3. A grand jury in the Eastern District of California returned a one-count indictment charging respondent

with receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2). Pet. App. 8a-9a, 32a; J.A. 17-18. Respondent filed a motion to suppress the physical evidence seized from his house and the statements he made to Inspector Welsh. Pet. App. 9a, 29a. One of the claims in respondent's motion was that "the agents' failure to present the affidavit to [him] or his wife rendered the warrant inoperative," because the warrant did not describe the triggering event. *Id.* at 9a.

After an evidentiary hearing, J.A. 19-115, the district court denied the motion to suppress, Pet. App. 29a-46a. In rejecting the claim that suppression was required because respondent had not been given a copy of the affidavit (*id.* at 36a-39a), the court applied the Ninth Circuit's decision in *United States* v. *Hotal*, 143 F.3d 1223 (1998). As the district court observed (Pet. App. 37a), that case held that "an anticipatory search warrant must either on its face or on the face of the accompanying affidavit[] clearly, expressly, and narrowly specify the triggering event," and that the document specifying the triggering event must be in the "immediate possession" of those conducting the search. 143 F.3d at 1227. The district court concluded that the requirements of *Hotal* were satisfied, because "the triggering event [wa]s specified in the affidavit," "[t]he warrant incorporated the affidavit," and "[t]he warrant and affidavit were * * * in the immediate possession of the officers while they searched [respondent's] residence." Pet. App. 37a. The court rejected respondent's contention that *Hotal* "requires the affidavit to be presented with

the warrant to the people whose property is being searched." *Id.* at 38a.[1]

Respondent filed a motion for reconsideration, which the district court denied. Pet. App. 20a-28a. Respondent then entered a conditional guilty plea, see Fed. R. Crim. P. 11(a)(2), to the sole charge in the indictment, reserving his right to appeal the denial of his suppression motion. Pet. App. 10a. The district court sentenced him to a prison term of 33 months. *Ibid.*; J.A. 177-192.

4. The court of appeals reversed the denial of respondent's suppression motion and remanded the case to give respondent an opportunity to withdraw his plea. Pet. App. 1a, 3a-19a.

In an opinion by Judge Reinhardt, the court first observed that the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched[] and the persons or things to be seized." Pet. App. 10a. The court went on to say that a warrant that violates this "particularity requirement," and is therefore "facially defective," can be "cured" by an affidavit that (a) is "sufficiently incorporated" into the warrant

---

[1] The district court also ruled that there was probable cause for the issuance of the warrant insofar as it authorized a search for the videotape (Pet. App. 32a-35a); that the postal inspectors' failure to provide a copy of the warrant at the outset of the search did not require suppression under Rule 41 of the Federal Rules of Criminal Procedure (*id.* at 39a-44a); and that respondent's statements were not obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (Pet. App. 44a-46a). In his suppression motion, respondent also contended that there was no probable cause for the issuance of the warrant insofar as it authorized a search for items other than the videotape and that he had not validly consented to the search of his computer, but the court ruled that those claims were moot, because the government did not intend to offer at trial any physical evidence other than the videotape. *Id.* at 35a-36a.

and (b) "accompanies" the warrant. *Id.* at 1a, 12a. But a defect in the warrant "is not cured," the court said, if the affidavit "is not shown to the persons being subjected to the search." *Id.* at 12a.

Relying on the Ninth Circuit's decision in *Hotal*, the court then explained that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." Pet. App. 13a. Thus, the rule in the Ninth Circuit is that, "when a warrant's execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226). The rationale for the rule, the court said, is that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *Ricciardelli*, 998 F.2d at 12). In the Ninth Circuit's view, application of the particularity requirement is "the only way effectively to safeguard against unreasonable and unbounded searches." *Ibid.* (quoting *Hotal*, 143 F.3d at 1227).

Combining these two principles—that the Fourth Amendment's particularity requirement is violated if the triggering condition is not described in an anticipatory search warrant, but that a warrant that violates the particularity requirement can be "cured" by an incorporated affidavit that "accompanies" the warrant—the court of appeals framed the question presented as "whether a curative affidavit that contains the condi-

tions precedent to an anticipatory search actually 'accompanies' the warrant when the affidavit is not shown to the person or persons being subjected to the search." Pet. App. 14a. The court answered that question no. It held that officers must "present any curative document—be it an affidavit, attachment, or other instrument that supplies the particularity and specificity demanded by the Fourth Amendment—to the persons whose property is to be subjected to the search." *Id.* at 15a. Unless the curative document is presented, the court said, "individuals w[ill] 'stand [no] real chance of policing the officers' conduct,'" because "they w[ill] have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred." *Ibid.* (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002), aff'd *sub nom. Groh* v. *Ramirez*, 540 U.S. 551 (2004)).

Applying that rule, the court concluded that the warrant in this case was "inoperative," and that the search was therefore "illegal," because "there is no dispute that the officers failed to present the affidavit—the only document in which the triggering conditions were listed—to [respondent] or [his wife]." Pet. App. 16a. Nor did it matter, the court said, that "the search ultimately may have been conducted in a manner consistent with the application for the warrant." *Ibid.* The court explained that, "[i]f a warrant fails for lack of particularity or specificity, it is simply unconstitutional—without regard to what actually occurred." *Ibid.* (quoting *Hotal*, 143 F.3d at 1227). The result, in the court's view, was that the officers in this case "in effect[] conducted a warrantless search." *Id.* at 17a. The court therefore held that all evidence, including the videotape and respon-

dent's statements, must be suppressed. *Id.* at 17a & n.10.[2]

SUMMARY OF ARGUMENT

The Fourth Amendment does not require suppression of evidence seized under an anticipatory search warrant whenever the triggering condition is not set forth in the warrant or in a supporting affidavit that is both incorporated into the warrant and shown to the person whose property is being searched. As long as the triggering condition is adequately described in the affidavit that establishes probable cause and the search is conducted after the triggering condition is satisfied, there is no Fourth Amendment violation warranting suppression. Because those requirements were satisfied here, the Ninth Circuit's judgment must be reversed.

A. The text of the Fourth Amendment makes clear that its particularity requirement does not apply to the triggering condition for an anticipatory search warrant. The only items that must be "particularly describ[ed]" in a warrant are "the place to be searched" and "the persons or things to be seized." U.S. Const. Amend. IV (Warrant Clause). The triggering condition does not fit into either of those categories; it relates neither to the place to be searched nor the object of the search, but instead describes the future event that triggers the search. Insofar as any aspect of the Warrant Clause addresses the triggering condition, it is the requirement that a warrant's issuance be "upon probable cause" and "supported by Oath or affirmation." For that reason,

---

[2] Respondent also raised in the court of appeals the Rule 41 and *Miranda* claims he had raised in the district court (Resp. C.A. Br. 17-18, 31-34), but the Ninth Circuit did not reach those claims (Pet. App. 4a n.1, 7a n.3, 16a n.9).

the Warrant Clause requires only that the triggering condition be described in the supporting affidavit. A warrant that omits the triggering condition does not violate the particularity requirement, and the Ninth Circuit thus erred in believing that the purported particularity "defect" in such a warrant is in need of being "cured" by including the triggering condition in an affidavit that is both incorporated into the warrant and left with the person whose property is being searched. Pet. App. 12a.

B. The policy considerations on which the Ninth Circuit relied cannot overcome the constitutional text. The Fourth Amendment requires a warrant to specify the place to be searched and the persons or things to be seized. The Ninth Circuit has expressed the view that it is "equally important" that the resident be advised of when the search may first take place and the condition whose occurrence authorizes it. *United States* v. *Hotal*, 143 F.3d 1223, 1227 (1998). That the text of the Fourth Amendment does not require warrants to describe matters of timing or conditions, however, is compelling evidence that those who framed and ratified the Bill of Rights did not share the Ninth Circuit's view, and the history of the Fourth Amendment is consistent with that conclusion.

The Ninth Circuit has also said that requiring the triggering condition to be described in the warrant is the only effective way to safeguard against unreasonable searches and that, if residents were not made aware of the triggering condition at the time of the search, they would stand little chance of policing the officers' conduct. The best safeguard against unreasonable searches, however, is a motion to suppress (in a criminal case) or a claim for damages (in a civil case), not confronting offi-

cers who are poised to execute a warrant. In any event, including the triggering condition in the warrant will rarely assist the property owner in policing the search, because there is no general requirement that the warrant be served at the outset of the search. See *Groh* v. *Ramirez*, 540 U.S. 551, 562 n.5 (2004).

The Ninth Circuit also sought to justify its rule on the ground that anticipatory warrants present a greater potential for abuse than traditional warrants, because the determination of whether the triggering event has occurred will be made by the executing officers. But anticipatory warrants may in fact "offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy." *United States* v. *Gendron*, 18 F.3d 955, 965 (1st Cir.) (Breyer, C.J.), cert. denied, 513 U.S. 1051 (1994). To safeguard against premature execution, moreover, courts need not write an additional requirement into the Warrant Clause. They need only ensure that the triggering condition described in the affidavit is "explicit, clear, and narrowly drawn." *E.g.*, *United States* v. *Brack*, 188 F.3d 748, 757 (7th Cir. 1999).

C. If there is any defect in an anticipatory warrant, like the one in this case, that authorizes a search from the date of issuance until ten days thereafter, see Fed. R. Crim. P. 41(e)(2)(A), but does not describe the triggering event, the defect is that the warrant is overbroad as to time. That is because the warrant, on its face, authorizes a search before the triggering event has occurred. In a case of that type, however, the warrant is not invalid on its face. The appropriate remedy, if there is any need for one, would be to sever and invalidate the portion of the warrant that authorized a search before the triggering event. But as long as the search *in fact* occurred *after* the triggering event, as it did here, no

evidence was improperly obtained and suppression is not required.

ARGUMENT

A SEARCH UNDER AN ANTICIPATORY WARRANT IS CONSTITUTIONAL IF IT TAKES PLACE *AFTER* THE WARRANT'S TRIGGERING CONDITION IS SATISFIED, EVEN IF THE TRIGGERING CONDITION IS NOT INCORPORATED INTO THE WARRANT AND SHOWN TO THE PERSON WHOSE PROPERTY IS BEING SEARCHED

The Ninth Circuit has interpreted the Fourth Amendment to require suppression whenever the triggering condition for an anticipatory search warrant is not specified either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. The Ninth Circuit's interpretation of the Fourth Amendment is mistaken.

A. The Text Of The Fourth Amendment Makes Clear That The Particularity Requirement Does Not Apply To The Triggering Condition For An Anticipatory Search Warrant

1. As this Court has observed, the Warrant Clause of the Fourth Amendment has "four[] requirement[s]." *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004). It provides that "no Warrants shall issue, but [1] upon probable cause, [2] supported by Oath or affirmation, and particularly describing [3] the place to be searched, and [4] the persons or things to be seized." U.S. Const. Amend. IV (Warrant Clause). The fundamental flaw in the Ninth Circuit's rule is that it adds a fifth requirement. The decision below holds that "the particularity requirement of the Fourth Amendment applies with full force to the

conditions precedent to an anticipatory search warrant." Pet. App. 13a. "The language of the Fourth Amendment * * * cannot sustain [that] contention." *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991).[3]

The only items that the Fourth Amendment requires to be "particularly describ[ed]" in a warrant are "the place to be searched" and "the persons or things to be seized." The triggering condition fits into neither category. Instead, the triggering condition is one aspect of the government's showing as to why there is probable cause for a search, once a contingency is satisfied. The Fourth Amendment requires that a warrant specify where the officers may search and what they may seize, but it does not require that a warrant specify the basis for the agents' authority to search—*e.g.*, the basis for believing that there is, or will be, evidence of a crime on the premises. Insofar as any aspect of the Warrant Clause addresses the triggering condition, it is the requirement that the warrant be based on probable cause and supported by sworn testimony. Accordingly, while the Fourth Amendment requires that the triggering condition be described in the supporting affidavit, which is made under "Oath" and submitted to the magistrate to establish "probable cause," it does not require that the triggering condition be described in the warrant, which must "particularly describ[e]" only the "place to be searched" and the "things to be seized." Since the affidavit in this case described the probable cause for

---

[3] Indeed, even a defender of the Ninth Circuit's rule forthrightly acknowledges that it "essentially writes a new particularity requirement into the Fourth Amendment." Brett R. Hamm, Note, United States v. Hotal: *Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants*, 1999 BYU L. Rev. 1005, 1017.

the search, including the triggering condition (Pet. App. 57a, 72a), and the warrant (and its attachments) described with particularity the place to be searched and the items to be seized (*id.* at 47a-51a), the requirements of the Warrant Clause were satisfied.

In *Oliver* v. *United States*, 466 U.S. 170 (1984), this Court relied on "the explicit language of the Fourth Amendment," *id.* at 176, in reaffirming the "open fields" doctrine, which permits law enforcement officers to enter and search a field without a warrant. The Court explained that the first clause of the Fourth Amendment "indicates with some precision the places and things encompassed by its protection[]"—namely, "persons, houses, papers, and effects"—and that the protection against "unreasonable searches and seizures" therefore "is not extended to the open fields." *Ibid.* (quoting *Hester* v. *United States*, 265 U.S. 57, 59 (1924)). The same interpretive principle applies to the second clause of the Fourth Amendment. That clause indicates with precision what a warrant must describe with particularity—namely, "the place to be searched[] and the persons or things to be seized"—and the particularity requirement therefore does not extend to the triggering condition for an anticipatory warrant. With the exception of the Ninth Circuit, every court of appeals to consider the question has so held.[4]

---

[4] See *United States* v. *Dennis*, 115 F.3d 524, 529 (7th Cir. 1997) ("the anticipatory warrant was valid even though it did not list the conditions precedent to execution on its face"); *United States* v. *Hugoboom*, 112 F.3d 1081, 1087 (10th Cir. 1997) (rejecting claim that warrant's failure to specify triggering condition "is constitutional error"); *United States* v. *Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995) ("an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution"); *United States* v. *Tagbering*, 985 F.2d 946,

2. Because the Ninth Circuit erred in holding that, under the particularity requirement of the Fourth Amendment, the triggering condition for an anticipatory search warrant must be described on the face of the warrant, it necessarily erred in holding that, if the triggering condition is *not* set forth in the warrant, it must be set forth in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. The court's "incorporated-and-provided affidavit" requirement is simply an application of the principle that "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh*, 540 U.S. at 557-558. Since, contrary to the Ninth Circuit's holding, a warrant that omits the triggering condition does not violate the particularity requirement, there is no "defect" in such a warrant in need of being "cured" by the affidavit. Pet. App. 12a.

B. There Is No Basis For Rewriting The Text Of The Fourth Amendment

1. The policy considerations on which the Ninth Circuit relied cannot overcome the constitutional text

a. The rule adopted by the Ninth Circuit is based, not on the text of the Fourth Amendment (or even its history), but on the policy views of that court. In *United States* v. *Hotal*, 143 F.3d 1223 (1998), the Ninth Circuit said that, insofar as it applies to the items to be seized, the Fourth Amendment's particularity requirement

---

950 (8th Cir. 1993) (Constitution does not require that triggering condition "be written into the warrant itself"); *United States* v. *Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) (fact that warrant did not specify triggering condition "does not render it void").

"serve[s] the purposes of, first, ensuring that the 'discretion of the officers executing the warrant is limited,' and second, informing the person subject to the search of what items are authorized to be seized." *Id.* at 1227 (quoting *United States* v. *Towne*, 997 F.2d 537, 548 (9th Cir. 1993)). That statement may be a correct description of the Particularity Clause's purposes.[5] But the Ninth Circuit erred in reasoning that those purposes justify extending the Particularity Clause to requirements not set forth in its text. The court stated that "[i]t is equally important to ensure that all parties be advised when the search may first take place, and the conditions upon the occurrence of which the search is authorized and may lawfully be instituted." *Ibid.* That the text of the Fourth Amendment does not require warrants to describe either of those things, however, is compelling evidence that those who framed and ratified the Bill of Rights did not believe that advising a person of those facts was "equally [as] important" (*ibid.*) as specifying what property may be searched and what things may be seized.

---

[5] This Court has stated that "[t]he manifest purpose of th[e] particularity requirement was to prevent general searches." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). By "limiting the authorization to search to the specific areas and things for which there is probable cause to search," the requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Ibid.* The Court has also stated that "the purpose of the particularity requirement is not *limited* to the prevention of general searches," and that the requirement also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh*, 540 U.S. at 561 (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)) (emphasis added).

The history of the Fourth Amendment confirms that the Particularity Clause addressed specific problems and was not intended to require that warrants contain information beyond that required by the explicit text. The central historical experience that prompted the Fourth Amendment's adoption is widely viewed as the Framers' aversion to general warrants—warrants that lacked specificity concerning the place to be searched or the person to be arrested and that often lacked an adequate showing of cause.[6] The American response to those concerns, first in the bills of rights contained in the state constitutions and then in the Fourth Amend-

---

[6] See, *e.g.*, *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965); *Marcus* v. *Search Warrant*, 367 U.S. 717, 728-729 (1961); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 & n.12 (1999); cf. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1799-1800 (2000) (describing several varieties of warrants that were found objectionable in cases that attracted widespread notice in the colonies). The specific form of general warrant that incited the colonists' ire was the "writ of assistance," a form of general warrant distinguished in part by its long duration: "they were good for the lifetime of the reigning sovereign plus six months." Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DePaul L. Rev. 817, 836 (1989). See also Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 53-54 (1937) ("The more dangerous element of the writ of assistance * * * was that it was not returnable at all after execution, but was good as a continuous license and authority during the whole lifetime of the reigning sovereign."). A key vice in a warrant of such indefinite duration is addressed by the constitutional requirement that probable cause to support a warrant must be found by the magistrate and that a search may be invalid if probable cause to support the warrant has ceased to exist at the time of the search. See 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.7(a), at 648-649 (4th ed. 2004) (noting that a search may be invalid if the probable cause for the warrant has become "stale"). See also *Sgro* v. *United States*, 287 U.S. 206 (1932).

ment itself, was to require probable cause for the issuance of the warrant; an oath or affirmation to support the warrant; and specificity in the warrant as to places that were to be searched and the things to be seized or persons to be arrested.[7] There is no reason to believe that the Framers intended the precisely drafted Particularity Clause to address other matters, such as triggering conditions relevant to probable cause. Indeed, the kind of investigations that now lead to the issuance of anticipatory warrants are highly unlikely to have existed at the time of the Framing.[8]

Respondent has suggested that, because anticipatory warrants "were unknown to those who framed and ratified the Bill of Rights," it is "unsurprising that the Fourth Amendment *[sic]* text does not address the issue." Br. in Opp. 8 n.5. But the text of the Fourth Amendment *does* address the issue. The triggering condition for an anticipatory warrant is an element of probable cause, and the Fourth Amendment provides that no warrant may issue except "upon probable cause, supported by Oath or affirmation." That is why the triggering condition must be set forth in the affidavit presented to the magistrate.

---

[7] See Bradley, *supra*, 38 DePaul L. Rev. at 836-838 (discussing state constitutions); Davies, *supra*, 98 Mich. L. Rev. at 560-570, 655-660, 693-724 (discussing background of the Fourth Amendment).

[8] As one commentator has noted, "[p]roactive criminal law enforcement had not yet developed by the framing of the Fourth Amendment; in fact, even post-crime investigation by officers was minimal. * * * There were no police departments in the colonies or early states. In fact, there were no professional law enforcement officers." Davies, *supra*, 98 Mich. L. Rev. at 620. Accord *United States* v. *Wade*, 388 U.S. 218, 224 (1967) ("When the [federal] Bill of Rights was adopted, there were no organized police forces as we know them today.").

b. The Ninth Circuit also said in *Hotal*, and in this case repeated, that applying the particularity requirement to the triggering condition for an anticipatory warrant is "the only way effectively to safeguard against unreasonable and unbounded searches." 143 F.3d at 1227; Pet. App. 13a. The decision in this case amplified that reasoning by suggesting that, if residents were not made aware of the triggering condition at the time of the search, they "would 'stand [no] real chance of policing the officers' conduct.'" *Id.* at 15a (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002), aff'd *sub nom. Groh* v. *Ramirez*, 540 U.S. 551 (2004)). This second policy argument likewise provides no basis for amending the text of the Warrant Clause, and in any event is based on a mistaken premise.

Informing a person whose property is being searched of the triggering condition is not the only (or even the most) effective way to prevent unreasonable searches. If a search took place before the occurrence of a triggering event described in an affidavit, probable cause to believe that the sought item could then be found at the searched location would be lacking and the search would likely be unreasonable (and therefore illegal). See, *e.g.*, *United States* v. *Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) ("If the warrant is executed before the controlled delivery occurs, then suppression may well be warranted for that reason."). The appropriate way to resolve a dispute about probable cause, however, is through litigation, not by confronting law enforcement agents who are poised to execute a warrant. Indeed, in no other context has it been suggested that the targets of a search are entitled to dispute on the scene whether probable cause actually exists. Rather, the legal remedy for a party who believes himself aggrieved by a search is a motion

to suppress (in a criminal case), see *Weeks* v. *United States*, 232 U.S. 383 (1914), or a claim for damages (in a civil case), see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). It is not, as the Ninth Circuit has put it, "challeng[ing] officers," at the time of the search, who are believed to have "exceeded the limits" of their authority. *Ramirez*, 298 F.3d at 1027.[9]

The Ninth Circuit's view that search targets are entitled to contest police authority rests on its belief that the property owner must be given a copy of the warrant "at the outset of the search." Pet. App. 16a n.9 (quoting *United States* v. *Gantt*, 194 F.3d 987, 994 (1999)). But "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search." *Groh*, 540 U.S. at 562 n.5.[10] As

[9] The imperative that officers "routinely exercise unquestioned command" over the place of a warrant-authorized search, *Michigan* v. *Summers*, 452 U.S. 692, 703 (1981), which may include detention in handcuffs of the occupants of the premises, see *Muehler* v. *Mena*, 125 S. Ct. 1465, 1468 (2005), underscores that the execution of a search warrant is not an appropriate occasion for the occupants to engage in debate over the scope of the officers' authority. Indeed, federal law makes it a crime whenever one "forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto." 18 U.S.C. 2231(a).

[10] Rule 41 merely requires that the officer executing the warrant "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 else "leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(3). In *Groh*, the Court reserved the question whether "it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when

Judge Posner has explained, "[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search" shows that even "the requirement of particular description" that actually appears in the Fourth Amendment "does not protect an interest in monitoring searches." *United States* v. *Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999), cert. denied, 528 U.S. 1162 (2000). A warrant "cannot enable the occupant to monitor the search if he doesn't see it until the search has been completed." *Ibid.*

c. The Ninth Circuit's rule may ultimately be based on its belief that an anticipatory warrant "presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event * * * has actually occurred." Pet. App. 13a (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *United States* v. *Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993)). As then Chief Judge Breyer observed in *United States* v. *Gendron*, 18 F.3d 955 (1st Cir.), cert. denied, 513 U.S. 1051 (1994), however, anticipatory warrants may in fact "offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy." *Id.* at 965. There are at least two respects in which that is true.

First, the likely alternative to the use of an anticipatory warrant is that law enforcement officers would "simply conduct the search (justified by 'exigent circumstances') without any warrant at all." *Ibid.* Outside of the context of consent searches, see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court has "ex-

* * * an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." 540 U.S. at 562 n.5. That issue is not presented in this case.

pressed a strong preference for warrants," because they provide "the detached scrutiny of a neutral magistrate," which is the most "reliable safeguard against improper searches," *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984) (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)).

Second, "the facts put forward to justify issuance of an anticipatory warrant are more likely to establish that probable cause will exist at the time of the search than the typical warrant based solely upon the known prior location of the items to be [seized] at the place to be searched." *Gendron*, 18 F.3d at 965 (quoting 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 97 (2d ed. 1987)). That is because "past and presumably current possession" may only be probative of a "likelihood of future possession," whereas the delivery of contraband as anticipated in the warrant application generally establishes a "certainty of future possession." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 402 (4th ed. 2004) (quoting *People* v. *Glen*, 282 N.E.2d 614, 617 (N.Y.), cert. denied, 409 U.S. 849 (1972)).

The Ninth Circuit's concern that agents executing an anticipatory warrant will have to "determine when and where the triggering event * * * has actually occurred," Pet. App. 13a, does not justify judicial amendment of the Warrant Clause. As numerous courts have recognized, the safeguard against "premature execution as a result of manipulation or misunderstanding by the police" is to ensure that "the conditions governing the execution of the warrant be explicit, clear, and narrowly drawn." *United States* v. *Brack*, 188 F.3d 748, 757 (7th Cir. 1999). Accord, *e.g.*, *United States* v. *Miggins*, 302

F.3d 384, 395 (6th Cir.), cert. denied, 537 U.S. 1097 (2002), 537 U.S. 1130, and 538 U.S. 971 (2003); *United States* v. *Rowland*, 145 F.3d 1194, 1202 (10th Cir. 1998); *United States* v. *Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995). Like the more general principle that an anticipatory search warrant may not be executed until the triggering condition occurs, the requirement that the condition be "explicit, clear, and narrowly drawn" does not stem from the particularity requirement. Instead, it assists in "maintain[ing] judicial control over the probable cause determination," *Rowland*, 145 F.3d at 1202, by assuring with clarity that the agents will not conduct the search until the triggering condition actually occurs. Because the triggering condition supports the magistrate's conclusion that there is probable cause to believe that a particular object will in fact be present on the premises to be searched, only the supporting affidavit, and not the warrant itself, must describe the triggering condition in "explicit, clear, and narrowly drawn" terms. See, *e.g.*, *id.* at 1201-1202 & n.2; *Moetamedi*, 46 F.3d at 228-229.[11]

---

[11] In *Groh*, a case in which a traditional search warrant failed to specify the items to be seized, the Court rejected the contention that the search was not unconstitutional "because the scope of the search did not exceed the limits set forth in the application." 540 U.S. at 560. The Court explained that, "unless the particular items described in the affidavit are also set forth in the warrant itself * * * , there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Ibid.* "The mere fact that the Magistrate issued a warrant," the Court said, "does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request." *Id.* at 561. No similar problem is presented here. Since an anticipatory search warrant has a single triggering condition, the issuance of the warrant necessarily reflects a finding by the magistrate that there is probable

2. The First Circuit decisions on which the Ninth Circuit relied do not support its rule

In adopting, in *Hotal*, the rule at issue here, the Ninth Circuit (143 F.3d at 1226-1227) acknowledged that five circuits had rejected the rule, and purported to follow the First Circuit's decisions in *Ricciardelli*, *supra*, and *Gendron*, *supra*. While it is possible to read those decisions as requiring that the triggering event be described in an anticipatory search warrant, the First Circuit cases involved a different issue.

In *Ricciardelli*, the triggering event *was* described in the anticipatory warrant, which authorized a search of the defendant's home after a package containing child pornography was received by the defendant (not after it was received at his home). 998 F.2d at 9. The warrant was executed after the defendant picked up the package at a post office and brought it home. *Id.* at 10. The court suppressed the evidence because there was not a sufficient connection between the triggering event and the place to be searched. *Id.* at 12-14. In particular, the court held that "the event that triggers the search must be the delivery of the contraband *to the premises to be searched*." *Id.* at 13. The court relied on the principle that contraband must be "on a sure and irreversible course to its destination"—a principle, the court said, that ensures that the contraband "will almost certainly be located there at the time of the search, thus fulfilling the requirement of future probable cause." *Id.* at 12-13. Accord, *e.g.*, *United States* v. *Leidner*, 99 F.3d 1423, 1427 (7th Cir. 1996) ("Several circuits agree that in or-

---

cause for a search and that the item to be seized will be present at the place to be searched when the triggering event described in the affidavit occurs.

der for an anticipatory warrant to satisfy the probable cause standard it must demonstrate that contraband is on a 'sure course' to the destination to be searched."), cert. denied, 520 U.S. 1169 (1997). The First Circuit also said that "it is the triggering condition of [the defendant's] receipt of the videotape at home" that eliminates the possibility that he was "a runner for some other person, or simply an internuncio," thereby "producing probable cause to believe that [he] is a collector of child pornography and, hence, that his residence likely contains evidence of his criminality." 998 F.2d at 14.

Ricciardelli therefore rested, not on the Fourth Amendment's particularity requirement, but on its requirement of probable cause. It is not clear from the opinion whether a more specific triggering condition, tied to the defendant's receipt of the contraband at his home, was set forth in the supporting affidavit, and even if it was, the search, in fact, did not take place after the defendant received the package at his home. Accordingly, *Ricciardelli* is consistent with the view, held by the five courts of appeals that reject the Ninth Circuit's rule, see note 15, *infra*, that suppression is not required when a proper triggering condition is set forth in the affidavit and the search occurs after the condition is satisfied.

In *Gendron*, too, the triggering event, which was "virtually identical" to the one at issue in *Ricciardelli*, 18 F.3d at 966, was described in the warrant itself. *Id.* at 965. Unlike the defendant in *Ricciardelli*, however, the defendant in *Gendron* apparently received the contraband at home. *Id.* at 967. And in contrast to its conclusion in *Ricciardelli*, the First Circuit in *Gendron* held that suppression was not appropriate, *id.* at 964-967, because the triggering event was described with "suffi-

cient clarity," *id.* at 965. Since the warrant itself in *Gendron* described the triggering event and the court held the description adequate, that case, like *Ricciardelli*, does not stand for the proposition, adopted by the Ninth Circuit, that suppression is required when it is only the supporting affidavit that contains an adequate description of the triggering condition and the affidavit is not incorporated into the warrant and shown to the person whose property is being searched.

3. The Ninth Circuit's rule cannot be justified on the ground that it imposes only a minimal burden on law enforcement

The Ninth Circuit's rule has been defended on the ground that the "burden on law enforcement" is "minimal."[12] While the burden of describing the triggering condition in an anticipatory warrant (or incorporating the supporting affidavit into the warrant and showing it to the person whose property is being searched) may be minimal, the consequences of an inadvertent failure to comply with the Ninth Circuit's rule are not.

"A law enforcement officer charged with leading a team to execute a search warrant * * * must fulfill a number of serious responsibilities." *Groh*, 540 U.S. at 567-568 (Kennedy, J., dissenting). In addition to preparing a warrant and affidavit that comply with the various requirements of the Fourth Amendment and any applicable statutes and rules, see, *e.g.*, Fed. R. Crim. P. 41, the officer must "obtain the warrant from a magistrate judge"; "instruct a search team" on the execution of the warrant; and oversee its execution "in a way that protects officer safety, directs a thorough and professional

[12] Hamm, *supra*, 1999 BYU L. Rev. at 1030-1031.

search for the evidence, and avoids unnecessary destruction of property." *Groh*, 540 U.S. at 568 (Kennedy, J., dissenting). The officer must perform these "difficult and important tasks," *ibid.*, in "the midst and haste of a criminal investigation," *Illinois* v. *Gates*, 462 U.S. 213, 235 (1983) (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)). As a consequence, even information that is indisputably required by the Fourth Amendment is sometimes omitted from a warrant through inadvertence. That was the case in *Groh*, where the warrant failed to specify the items to be seized. See 540 U.S. at 557; *id.* at 567-568 (Kennedy, J., dissenting).

The total omission from a search warrant of information required by the Fourth Amendment's particularity requirement—the place to be searched, or the things to be seized—will result in suppression. See *Groh*, 540 U.S. at 565 (warrant that "fail[s] to particularize the place to be searched or the things to be seized" is "so facially deficient" that "the executing officers cannot reasonably presume it to be valid") (quoting *Leon*, 468 U.S. at 923). When evidence is suppressed on that ground, the government will have to proceed to trial without evidence that is likely to be highly probative of the defendant's guilt, agree to a guilty plea on terms favorable to the defendant, or forgo prosecution altogether. The Ninth Circuit's rule extends those consequences to a new class of purported Particularity Clause errors—those involving the omission of the triggering condition for an anticipatory warrant. See *Hotal*, 143 F.3d at 1227 n.6 ("good faith" exception inapplicable to search based on anticipatory warrant that does not specify triggering event). The rule thus increases the risks involved in the search-warrant process, and magnifies the costs of an inadvertent error.

Indeed, if the court of appeals' decision is affirmed, the charges against respondent may have to be dismissed, since the court determined that both the videotape and respondent's statements must be suppressed. Pet. App. 17a. It is one thing to suppress evidence when, as in *Groh*, an officer fails to comply with a clear and textually "unambiguous[]" requirement of the Fourth Amendment, 540 U.S. at 557; it is quite another to do so when the rule on which the court relies has no basis in the Constitution. Obtaining and executing a search warrant is a complex enough undertaking as it is. Prosecutions should not be undermined by a law enforcement officer's failure to comply with additional rules found neither in the Constitution nor in applicable rules of criminal procedure.

C. Even If An Anticipatory Search Warrant That Does Not Describe The Triggering Condition Is Defective, It Is Not Invalid On Its Face And Suppression Is Not Appropriate If The Search In Fact Occurs After The Triggering Event

1. A federal search warrant must describe the time at which the search may take place. That requirement is not part of the particularity requirement of the Fourth Amendment, but instead is imposed by Rule 41 of the Federal Rules of Criminal Procedure. Subsection (e)(2) of Rule 41, titled "Contents of the Warrant," restates the Fourth Amendment's requirements that the warrant "identify the person or property to be searched" and "identify any person or property to be seized," and then recites the additional requirement that the warrant command the officer to "execute the warrant within a specified time no longer than 10 days,"

Fed. R. Crim. P. 41(e)(2)(A). The warrant in this case satisfied that requirement. See Pet. App. 47a.[13]

Like the Fourth Amendment's particularity requirement, Rule 41 does *not* require that the triggering condition for an anticipatory search warrant be set forth in the warrant. That is so even though Rule 41 clearly contemplates the use of anticipatory warrants. See Fed. R. Crim. P. 41 advisory committee note (1990 Amendments) (noting that rule "permits anticipatory warrants" by omitting word "is located," which "in the past required that in all instances the object of the search had to be located within the district at the time the warrant was issued").

2. If there is any defect in an anticipatory warrant that authorizes a search from the date of issuance until some future date but does not describe the triggering event, the defect is that the warrant is potentially overbroad—not with respect to the place to be searched or the items to be seized, but with respect to the time at which the search may occur. That is because the warrant, on its face, authorizes a search before the triggering event has occurred. In a case of that type, however, the warrant does not suffer from "facial invalidity," *Groh*, 540 U.S. at 557, and suppression is not an appro-

---

[13] Rule 41 also requires that the warrant command the officer to "execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time," Fed. R. Crim. P. 41(e)(2)(B); "designate the magistrate judge to whom it must be returned," Rule 41(e)(2); and command the officer to "return the warrant to the magistrate judge designated in the warrant," Rule 41(e)(2)(C). The warrant in this case also satisfied those requirements. See Pet. App. 47a.

priate remedy if the search in fact occurred after the triggering event.[14]

Separate and apart from the particularity requirement, "[t]he Fourth Amendment dictates that a magistrate may not issue a warrant authorizing a search and seizure which exceeds the ambit of the probable cause showing made to him." *United States* v. *Christine*, 687 F.2d 749, 753 (3d Cir. 1982). Accord, *e.g.*, *United States* v. *Leary*, 846 F.2d 592, 605 (10th Cir. 1988). As Judge Becker has explained, however, if such a warrant *is* issued, and a search is conducted under it, courts will sever the parts of the warrant "that are invalid for lack of probable cause" and suppress only the evidence "seized under the authority of those parts." *Christine*, 687 F.2d at 754. The Ninth Circuit itself has recognized that principle. See *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857-858 (1991). Professor LaFave has described the rationale for severance as follows:

---

[14] Indeed, it may be that the warrant contains no defect at all. Because the issuing magistrate cannot know precisely when (or if) delivery will take place, the warrant cannot be written to contain a specific time after which the search is authorized. Instead, it is reasonable for the issuing magistrate to rely on the discretion of officers inherent in the execution of warrants, see *Town of Castle Rock* v. *Gonzales*, 125 S. Ct. 2796, 2808 (2005), to execute the warrant within a fixed period after the triggering event takes place. Officers must also meet the Fourth Amendment's command of reasonableness in executing the warrant. Just as the discovery of new information can undermine the theory of probable cause presented to the magistrate and render a subsequent search unreasonable without rendering the warrant itself defective, a search conducted before the triggering event may be unreasonable without there being any defect in the warrant. See 2 LaFave, *supra*, § 3.7(c), at 408 (4th ed.) ("If a search warrant is purely an anticipatory warrant, then quite clearly if the critical future event never occurs the warrant may not be executed.").

> In the usual case, * * * all the evidence seized under a warrant tainted by some constitutional defect is suppressed simply because the seizure of every item is entirely attributable to the defect. When the warrant's fault is not so pervasive, however, the same objectives of deterrence and integrity may be served in the same way and to the same degree by limiting suppression to the fruits of the warrant's unconstitutional component.

2 LaFave, *supra*, § 4.6(f), at 643 (4th ed.). That explanation is consistent with the general exclusionary-rule principle that, if the constitutional error did not lead to the acquisition of the challenged evidence, the evidence cannot be viewed as a "product" of the violation and should not be suppressed. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 471 (1980).

In this respect, an anticipatory warrant without an express triggering condition can be analogized to a traditional warrant that authorizes the search of two apartments in a building—A and B—even though probable cause was shown only as to apartment B. If the officers in such a case searched both apartments, the remedy would be to sever the warrant insofar as it authorized a search of apartment A and to suppress the evidence obtained from apartment A. There would be no justification for suppressing the evidence obtained from apartment B. See, *e.g.*, *United States* v. *Pitts*, 173 F.3d 677, 679-681 (8th Cir. 1999) (where warrant authorized search of "713-715 East Lake Street," evidence seized from 715 East Lake Street was admissible "even if police lacked probable cause to search 713 East Lake Street," because "police clearly possessed probable cause to search" 715 East Lake Street); 2 LaFave, *su-*

pra, § 4.5(c) at 590 n.87 (4th ed.) ("If probable cause is present as to one place but not the other, the warrant will be upheld as to the place for which probable cause was shown."). If, instead, the officers in such a case searched only apartment B, no suppression of any evidence would be required, because the only apartment that was searched was the one as to which there was a showing of probable cause. The same is true in a case, like this one, where the anticipatory warrant, on its face, authorized a search at any time between the warrant's issuance and ten days thereafter; there was probable cause to search only after the triggering event occurred; and the search did not take place until after that occurrence. The court of appeals decisions that reject the Ninth Circuit's rule so hold.[15]

Accordingly, insofar as a warrant authorizes a search both (a) from the date of the warrant's issuance until the occurrence of the triggering event and (b) from the occurrence of the triggering event until ten days after the warrant's issuance, the appropriate remedy, if there is any defect in the warrant, is to sever the portion that authorized a search before the triggering event. Here,

---

[15] See, *e.g.*, *Dennis*, 115 F.3d at 529 (suppression not required when affidavit "contained satisfactory conditions," the magistrate "read and considered the affidavit in issuing the warrant," and "the officers complied with the conditions precedent in executing the warrant"); *Hugoboom*, 112 F.3d at 1087 (suppression not required when triggering event is "stated in the affidavit that solicits the warrant, accepted by the issuing magistrate, and actually satisfied in the execution of the warrant") (quoting *Moetamedi*, 46 F.3d at 229); *Moetamedi*, 46 F.3d at 229 (suppression not required when "'clear, explicit, and narrowly drawn' conditions for the execution of the warrant are contained in the affidavit" and "those conditions are actually satisfied before the warrant is executed") (quoting *United States* v. *Garcia*, 882 F.2d 699, 703-704 (2d Cir.), cert. denied, 493 U.S. 943 (1989)).

the warrant was issued on April 17, 2002, and stated that "YOU ARE HEREBY COMMANDED TO SEARCH ON OR BEFORE April 27, 2002." Pet. App. 47a. The triggering event, and then the search, occurred on April 19, 2002. *Id.* at 6a-8a, 31a-32a. Since no search occurred before the triggering event, no evidence was improperly obtained and suppression is not required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
ELIZABETH A. OLSON
Attorney

NOVEMBER 2005