No. 02-811

In the Supreme Court of the United States

JEFF GROH, PETITIONER

v.

JOSEPH R. RAMIREZ, *ET AL.*

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

BARBARA L. HERWIG
HOWARD S. SCHER
Attorneys

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

QUESTION PRESENTED

Whether a federal officer who applied for and executed a search warrant in the good-faith but mistaken belief that the warrant specified the items to be seized, is subject to suit under the Fourth Amendment and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when the search was conducted in accordance with the description of the items to be seized that was included in the officer's warrant application and supporting affidavit.

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INTEREST OF THE UNITED STATES

This case concerns the application of the Warrant Clause of the Fourth Amendment, the cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the law of qualified immunity to a search conducted by a federal officer pursuant to a search warrant approved by a magistrate judge. The United States has a substantial interest in this case because its law enforcement activities are subject to the requirements of the Warrant Clause. The United States also has an interest in the extent to which federal officers are subjected to trial and exposed to liability under *Bivens* for allegedly unconstitutional conduct, and in the application of immunity principles that protect government employees, including law

enforcement officers, from meritless and unduly burdensome litigation that may interfere with the exercise of lawful discretion in their official functions and deter qualified individuals from public service.

STATEMENT

1. Petitioner has been a Special Agent of the Bureau of Alcohol, Tobacco and Firearms (ATF) since 1989.[1] See Pet. App. 30a. In 1996, a contractor who was working at respondents' ranch in Montana reported to authorities that he had heard and seen automatic weapons on the ranch, and seen a hand grenade and handguns in respondents' residence. Other individuals also reported that automatic weapons had been fired on respondents' ranch. Petitioner visited the ranch with respondents' permission and confirmed the presence of firearms. *Id.* at 30a-32a.

In February 1997, petitioner spoke with another witness—a former United States Marine—who reported that he had seen approximately two dozen 40-millimeter grenades and a military grenade launcher, used for surface-to-air attacks, inside respondents' residence. Pet. App. 33a-34a. Another informant advised that respondents possessed a "rocket launcher." *Id.* at 35a. Petitioner's check of ATF records indicated that respondents lacked authorization to possess automatic weapons or grenades. *Ibid.*

Petitioner prepared an application for a warrant to search respondents' residence. Pet. App. 28a-29a. The sworn warrant application described the location and appearance of the residence and stated that the items to be seized were:

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, generally transferred the "authorities, functions, personnel, and assets" of ATF from the Department of the Treasury to the Department of Justice. The former ATF is now the Bureau of Alcohol, Tobacco, Firearms, and Explosives within the Department of Justice. See § 1111(a) and (c), 116 Stat. 2274-2275.

> any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.

Id. at 28a. Petitioner's accompanying affidavit recited the facts establishing probable cause and provided a similar description of the items to be seized. *Id.* at 30a-35a.

Petitioner also prepared a warrant for the magistrate judge's signature. The warrant described the location of respondents' residence. However, in the space reserved for a description of the property to be seized, petitioner mistakenly typed a description of the appearance of respondents' residence. Pet. App. 4a; see *id.* at 26a-27a. The property to be seized was not described on the warrant form and the warrant form did not expressly incorporate the application or supporting affidavit. *Id.* at 26a-27a.

On March 3, 1997, petitioner presented the warrant application and warrant form to a federal magistrate judge. See Pet. App. 15a. The magistrate judge signed the warrant application and the warrant form. *Id.* at 27a, 29a.

2. On March 4, 1997, petitioner executed the warrant as the leader of a team consisting of ATF agents and members of the local sheriff's department. Pet. 4; Pet. App. 4a. Petitioner advised the other officers of the object of the search, as stated in the warrant application and affidavit. Pet. App. 15a. When executing the warrant, petitioner spoke with respondents Julia Ramirez (who was at the residence) and Joseph Ramirez (by telephone) and described the object of the search. *Id.* at 4a, 15a. The officers photographed respondents' home and recorded the serial numbers of guns they found, but they discovered no illegal weapons or explosives. *Id.* at 4a. Upon departing, petitioner gave Julia Ramirez a copy of the warrant, without the application or affidavit.

Ibid. The next day, at the request of respondents' counsel, petitioner provided respondents' counsel the application's description of the items to be seized. *Ibid.*

3. Respondents sued members of the search party for money damages in the United States District Court for Montana, alleging constitutional violations. Pet. App. 4a, 14a. Before trial, the district court dismissed the First, Fifth, and Ninth Amendment claims that respondents had brought against petitioner and other federal agents under *Bivens*, concluding that they failed to state claims on which relief could be granted. *Id.* at 16a-17a. The court granted summary judgment for the federal defendants on respondents' Fourth Amendment *Bivens* claim. *Id.* at 18a-24a. The court concluded that there was no constitutional violation, *id.* at 20a-22a, and, in the alternative, that the federal defendants "are entitled to qualified immunity * * * because [petitioner] acted in an objectively reasonable manner," *id.* at 23a.

4. The court of appeals affirmed the dismissal of all claims against petitioner, except the Fourth Amendment claim based on the warrant's failure to describe the items to be seized. Pet. App. 1a-12a. In relevant part, the court stated that the warrant was "facially defective" under the Fourth Amendment and *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997), "because it provided no description of the evidence sought" and "didn't refer to or incorporate the application or affidavit." Pet. App. 6a; see *id.* at 5a. The court further reasoned that petitioner lacked any ability to overcome the warrant's "facial" deficiency at the scene of the search, because he "was empowered only to execute the warrant" and any changes to the warrant had to be made by the magistrate judge. *Id.* at 6a.

The court of appeals next addressed whether petitioner is immune from suit on respondents' Fourth Amendment claim under the law of qualified immunity. Pet. App. 7a-10a. The

court stated that "[t]he officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions." *Id.* at 8a. Therefore, the court said, the lead officer(s) must "read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way." *Ibid.*

The court of appeals deemed petitioner to be the sole leader of the search in this case. Pet. App. 9a. It accepted that the existence of an error in the warrant did "not automatically deprive [petitioner] of immunity." *Ibid.* Instead, the court said, "[t]he question is whether the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it." *Ibid.* The court determined that petitioner is not entitled to qualified immunity under that standard because "he did not read the warrant"—which he had prepared and the magistrate had approved—"after the magistrate issued it and before he began the search. Had he done so, he would surely have realized that it did not contain a list of items to be seized and was therefore facially defective." *Id.* at 10a.

SUMMARY OF ARGUMENT

This case arises from a good-faith clerical mistake in the drafting of a search warrant. The mistake did not constrain or compromise the magistrate judge's probable-cause determination, and it had no effect on the execution of the warrant at respondents' residence. The record indicates that respondents were unaware of the clerical mistake during the execution of the warrant, and petitioner promptly cured the mistake, by providing information from the warrant application, when respondents' counsel called the error to petitioner's attention. Under the circumstances, petitioner should not be subject to the burden of a trial and the possibility of personal liability under *Bivens* v. *Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

A. The Warrant Clause of the Fourth Amendment serves to circumscribe the discretion of law enforcement officers when they conduct a search. It ensures that a neutral magistrate will determine the existence of probable cause, and that the search will be tailored to the magistrate's probable-cause determination.

The Clause has been applied in a pragmatic fashion consistent with those purposes. For example, reasonable detail, not absolute exactitude, is required in the warrant's description of the place to be searched and the items to be seized. Similarly, errors or omissions in the warrant do not necessarily render a search unlawful, particularly when the officer executing the warrant has personal knowledge of the intended object of the search. The facts of this case—involving a clerical mistake that did not affect the magistrate's probable-cause determination, the execution of the warrant, or respondents' subjective perception of the search—illustrate the appropriateness of that pragmatic approach. Finding a violation of the Warrant Clause on these facts would do nothing to advance the underlying goals of the Fourth Amendment.

B. Even if petitioner's good-faith mistake rendered the warrant constitutionally defective, that defect should not give rise to a damages action under *Bivens*. The compensatory purpose of the *Bivens* remedy would not be served in this case, nor in the general run of cases alleging technical defects in descriptions of items to be seized, because—due to the nature of the alleged constitutional violation—there is no compensable injury. The alleged violation, *i.e.*, the deficiency of the warrant on its face, had no substantive effect on the search of respondents' ranch. Nor does the deterrence rationale justify the inference of a *Bivens* action. The deterrent effect of the *Bivens* remedy is not enough by itself

to support the inference of that remedy and, because petitioner acted in good faith, this is not a situation in which *Bivens* liability would serve to deter conscious wrongdoing.

C. Even if the Court were to find a constitutional violation that is actionable under *Bivens*, petitioner would be entitled to qualified immunity. The Ninth Circuit denied petitioner qualified immunity based on a new rule that the leader of a search must re-check the warrant after the magistrate approves it, even when the leader personally prepared the warrant. That new rule cannot properly be applied retroactively to condemn petitioner's conduct in this case.

The Fourth Amendment law that governed petitioner's execution of the warrant was not clearly established at the time of the search. Qualified immunity also should protect petitioner from suit because his conduct was objectively reasonable. The standard for qualified immunity is akin to the good-faith exception to the exclusionary rule, as established in *United States* v. *Leon*, 468 U.S. 897 (1984). Applying *Leon*, this Court and the courts of appeals have correctly deemed officers' conduct objectively reasonable, and therefore declined to suppress evidence under the exclusionary rule, on facts similar to the facts of this case. Similarly, no officer should be personally liable for executing the magistrate-approved warrant in this case. Petitioner is entitled to protection from suit because his conduct in obtaining and executing the warrant was reasonable under the totality of the circumstances.

ARGUMENT

PETITIONER SHOULD NOT BE SUBJECTED TO TRIAL OR LIABILITY FOR HIS EXECUTION OF THE SEARCH WARRANT IN THIS CASE

Petitioner acted in good faith when he applied for and executed the search warrant in this case. That is not disputed. See Pet. App. 6a n.2, 24a. Petitioner prepared a

warrant application and supporting affidavit that correctly specified the items to be seized in the search. *Id.* at 15a, 21a. The magistrate judge signed the warrant application and approved the warrant. See *id.* at 23a, 26a-29a. Petitioner correctly instructed the search team about the items to be seized. *Id.* at 9a, 21a. The search was conducted in accordance with the restrictions set out in the warrant *and* the warrant application and supporting affidavit. See *id.* at 4a, 23a. Respondents were told at the time of the search about the objects of the search, *id.* at 4a, 6a, 15a, 18a-19a, and petitioner promptly provided their counsel with the warrant application's written description of the items to be seized, *id.* at 16a, 21a.[2] Petitioner gave respondents a copy of the warrant at the conclusion of the search. *Id.* at 4a, 15a. Despite petitioner's mistake when filling in the warrant form, respondents received all of the substantive protections guaranteed by the Warrant Clause. Under all the circumstances, petitioner's good-faith conduct in obtaining judicial authorization for the search and executing the search should not subject him to the burden of a trial or the prospect of personal liability.

Most courts of appeals have concluded that clerical errors in the preparation of a search warrant, which do not have a substantial effect on the search, do not necessarily violate the Fourth Amendment. See pp. 13-15, *infra*. In addition, courts frequently have addressed the issue in the context of motions to suppress evidence in criminal trials, and have held that, under *United States* v. *Leon*, 468 U.S. 897 (1984),

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[2] In the court of appeals, respondents disputed that petitioner told them during the search every item listed in the warrant application. But even under respondents' version of the facts, petitioner advised them that he was searching for boxed explosives. Pet. App. 6a. The court of appeals deemed that factual dispute, which apparently was not preserved in the district court, "immaterial" and did not resolve it. *Ibid.*; see *id.* at 15a, 21a.

evidence acquired in good faith, but pursuant to a facially defective warrant, should not be excluded. See p. 28 & note 13, *infra*. In those cases the availability of the *Leon* good-faith exception has obviated the need for rigorous analysis of whether such good-faith mistakes violate the Fourth Amendment, and there has been no occasion to consider the officers' civil liability.

Because this case arises in the context of a damages action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the dispute cannot be resolved by the application of *Leon*. The constitutional issue must be addressed directly, if only as the threshold question in qualified-immunity analysis. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Under the step-by-step analysis that is appropriate in this situation, the judgment of the court of appeals should be reversed because: (1) there was no violation of the Fourth Amendment in this case; (2) a *Bivens* remedy should not be inferred in this context; and (3) petitioner is immune from suit under the law of qualified immunity.

A. Despite Petitioner's Clerical Mistake In Preparing The Warrant, The Purposes Of The Warrant Clause Were Satisfied And There Was No Constitutional Violation

1. "The basic purpose of [the Fourth] Amendment * * * is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara* v. *Municipal Ct.*, 387 U.S. 523, 528 (1967). The Amendment therefore provides that searches must be reasonable, which necessarily turns on "the facts of the case." *Terry* v. *Ohio*, 392 U.S. 1, 15 (1968); see *id.* at 9, 20-22; see also, *e.g.*, *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

When it applies, the Warrant Clause gives specific content to the Fourth Amendment's general reasonableness requirement. The Clause provides that "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." U.S. Const. Amend. IV. The central function of the Clause is to "circumscribe[]" "the discretion of the official in the field" when a search is conducted. *Camara*, 387 U.S. at 532.

That function is accomplished by two features of the Warrant Clause. First, when a warrant is required, the Clause ensures that the existence of probable cause will be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), thus "minimiz[ing] the risk of unreasonable assertions of executive authority." *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979); see *Illinois* v. *Gates*, 462 U.S. 213, 240 (1983) (magistrate's determination of probable cause is "[t]he essential protection of the warrant requirement"). The role of the magistrate is critical, and the Clause directs magistrates that "no Warrants shall issue" unless the Clause's requirements are satisfied. U.S. Const. Amend. IV. "[T]he very heart of" the requirement of a magistrate's approval is that, "where practicable, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *United States* v. *United States Dist. Ct.*, 407 U.S. 297, 316 (1972).

Second, the particularity requirements of the Clause "prevent general searches." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). They "ensur[e] 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.* In particular, the description of the "things to be seized," U.S. Const. Amend. IV, safeguards against "a general, exploratory rummaging in a person's belongings" and prevents the executing officer from substituting his own discretion about what to take under the warrant for the magistrate's determination. *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976) (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971)); see *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977) ("Once a lawful search has begun, it is * * * far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' "), overruled on other grounds, *California* v. *Acevedo*, 500 U.S. 565 (1991).

The Court has suggested that the Warrant Clause also serves to provide assurance to the individual whose property is being searched or seized. See *Chadwick*, 433 U.S. at 9 ("[A] warrant assures the individual * * * of the lawful authority of the executing officer, his need to search, and the limits of his power to search."). To the extent that function is served, but see pp. 17-18, *infra*, it can be viewed as an aspect of the general policy that the individual should not be entirely subject to the executing officer's discretion during the search. See *Camara*, 387 U.S. at 532.

2. The Court has stated that the Warrant Clause "categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' " *Garrison*, 480 U.S. at 84. But although the particularity language of the Clause may be "categorical" in its application to every warrant, this Court, as well as the courts of appeals, have resisted interpretations of this language that—contrary to the bedrock reasonableness principle of the Fourth Amendment

—would demand perfect formal compliance without regard to the surrounding facts. "The particularity requirement traditionally has been applied in a pragmatic manner designed both to protect the subject of the search from the abuses of a generalized search and, at the same time, to recognize realistically the needs of law enforcement." *United States* v. *Jones*, 54 F.3d 1285, 1291 (7th Cir.), cert. denied, 516 U.S. 902 (1995).

For example, the Warrant Clause does not require an *exact* description of the place to be searched or the property to be seized. Rather, the warrant should be "reasonably detailed." *Garrison*, 480 U.S. at 89 n.14; see *Steele* v. *United States No. 1*, 267 U.S. 498, 503 (1925) ("It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.").

Likewise, errors or omissions in the warrant do not necessarily render the ensuing search unlawful, particularly when the officer executing the warrant has personal knowledge of the intended object of the search. *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), illustrates the point. In *Sheppard*, a detective sought a warrant to search Sheppard's residence for evidence of a murder. The affidavit supporting the warrant application listed the items to be seized, but the only available warrant form was one used for drug searches. *Id.* at 985. The judge told the detective "that he would make the necessary changes so as to provide a proper search warrant." *Id.* at 986. However, the judge failed to make the appropriate changes. *Ibid.* The detective and two other police officers executed the warrant, limiting their search to the items listed in the supporting affidavit, and found incriminating evidence. *Id.* at 986-987.

The Massachusetts Supreme Court determined that the search violated the Constitution due to the facially defective warrant and that the evidence seized during the search

should have been suppressed at trial. 468 U.S. at 988; see *id.* at 987. The Commonwealth of Massachusetts sought review in this Court, on the issue whether—assuming a constitutional violation—the state court's application of the exclusionary rule was correct. Pet. at i, *Massachusetts* v. *Sheppard*, No. 82-963 (filed Dec. 8, 1982). The State accepted for purposes of this Court's review that the warrant was constitutionally defective despite the specification of the items to be seized in the warrant application. 468 U.S. at 988 & n.5.[3] However, this Court noted that the warrant clearly would have been valid "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." *Id.* at 990 n.7.

Sheppard demonstrates that the Warrant Clause does not require the warrant form *itself* to describe the items to be seized in the search. Some courts of appeals apply that principle only to the precise extent compelled by *Sheppard*, holding that a defective warrant can be cured by a supporting affidavit that is attached to the warrant *and* specifically referenced in the warrant. See Pet. App. 5a; *United States* v. *Dahlman*, 13 F.3d 1391 (10th Cir. 1993), cert. denied, 511 U.S. 1045 (1994). In other cases, circuit courts have deemed acceptable either a reference to an unattached affidavit *or* physical attachment of the affidavit. See, *e.g.*, *United States* v. *Thomas*, 263 F.3d 805, 808 (8th Cir. 2001) (incorporation by reference alone sufficient), cert. denied, 534 U.S. 1146 (2002); *United States* v. *Stefonek*, 179

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[3] After the petition was granted, the State argued in its brief that the search was not "unreasonable" under the general Fourth Amendment prohibition on "unreasonable searches and seizures," U.S. Const. Amend. IV, even though the warrant was assumed to be "constitutionally defective" under the Warrant Clause. *Sheppard*, 486 U.S. at 988 n.5. The Court did not accept that argument. *Ibid.*

F.3d 1030, 1033 (7th Cir. 1999) (either incorporation or attachment sufficient), cert. denied, 528 U.S. 1162 (2000); *United States* v. *Dale*, 991 F.2d 819, 847-848 (D.C. Cir.) (incorporation by reference alone sufficient), cert. denied, 510 U.S. 906 (1993). Still other decisions have held that a supporting affidavit can cure a warrant's over-broad description of the items to be seized, even if the warrant does not specifically incorporate the affidavit by reference, and the affidavit is not attached to the warrant. See, *e.g.*, *Jones*, 54 F.3d at 1289-1292 (affidavit provides serial numbers of currency being sought under warrant); *United States* v. *Bianco*, 998 F.2d 1112, 1116-1117 (2d Cir. 1993) (affidavit provides details about items listed in warrant), cert. denied, 511 U.S. 1069 (1994); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.) (same), cert. denied, 492 U.S. 918 (1989); *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982) (affidavit eliminates ambiguity in term "kickback funds"), cert. denied, 464 U.S. 814 (1983).[4]

In the same vein, this Court has rejected the proposition that it is illegal to execute "any warrant in which, due to a mistake in fact, the premises intended to be searched vary from their description in the warrant." *Garrison*, 480 U.S. at 89 n.14. Consistent with that statement, the courts of appeals—including the Ninth Circuit—have found that no Fourth Amendment violation occurred when officers executing a warrant were not misled by the warrant's incorrect description of the place to be searched. See, *e.g.*, *United*

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[4] This Court has required "the most scrupulous exactitude" in describing the items to be seized when the search directly implicates the First Amendment. *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); see *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565 (1978). However, that rule does not foreclose consideration of descriptions in the warrant application and supporting affidavit. Furthermore, the articulation of a "scrupulous exactitude" rule in that special context implies that the Warrant Clause's particularity requirements generally should be applied pragmatically.

States v. *Vega-Figueroa*, 234 F.3d 744, 756 (1st Cir. 2000) (warrant describes wrong apartment building); *United States* v. *Hutchings*, 127 F.3d 1255, 1257, 1259-1260 (10th Cir. 1997) (wrong location of mobile home); *United States* v. *Garza*, 980 F.2d 546, 551-552 (9th Cir. 1992) (wrong house number); *United States* v. *Burke*, 784 F.2d 1090, 1092-1093 (11th Cir.) (wrong street name and building number), cert. denied, 476 U.S. 1174 (1986); *United States* v. *Clement*, 747 F.2d 460, 461 (8th Cir. 1984) (wrong apartment number). Cf. *United States* v. *Rytman*, 475 F.2d 192 (5th Cir. 1973) (seizure of mechanical part upheld despite incorrect serial number in warrant). In *United States* v. *Bonner*, 808 F.2d 864 (1986), cert. denied, 481 U.S. 1006 (1987), the First Circuit determined that a warrant's failure to give *any* address did not establish a Fourth Amendment violation, when the correct address was stated in the affidavit, and an officer familiar with the location executed the search. *Id.* at 866-867.

Under the commonsense approach that runs through those decisions of this Court and the courts of appeals, the Ninth Circuit was wrong in this case when it refused to look beyond the face of the warrant to determine whether there was a violation of the Warrant Clause. See Pet. App. 5a-6a.

3. The facts of this case illustrate the sound logic of the rule that errors and omissions in a warrant can be cured by information not specifically incorporated into, or attached to, the warrant. Although the warrant form that the magistrate judge signed was "facially defective," Pet. App. 6a, the warrant procedure followed by petitioner ensured that the purposes of the Warrant Clause were fully satisfied. The warrant was "meaningful and enforceable," *Vernonia Sch. Dist. 47J*, 515 U.S. at 670 (O'Connor, J., dissenting), despite petitioner's clerical mistake.

First, the warrant application and supporting affidavit provided the magistrate judge with the information neces-

sary to determine whether probable cause existed to search for the items specifically identified in the affidavit and application. See Pet. App. 28a-35a. Thus, "[t]he essential protection of the warrant requirement" was satisfied. *Gates*, 462 U.S. at 240.

Second, 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. Petitioner's execution of the warrant could be challenged in court on the basis of the information given in the warrant application. Cf. *Dalia* v. *United States*, 441 U.S. 238, 258 (1979) (magistrate need not "set forth precisely the procedures to be followed by the executing officers," because "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness"). Likewise, the magistrate judge's probable-cause determination was fully reviewable based on petitioner's affidavit. See *Gates*, 462 U.S. at 239 ("In order to ensure that * * * an abdication of the magistrate's duty does not occur, courts [in suppression proceedings] must * * * conscientiously review the sufficiency of affidavits on which warrants are issued."); see also *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978) (discussing affidavit requirement).

The court of appeals was of the view that, in light of petitioner's failure to reference and attach the supporting affidavit, his clerical mistake: (i) "increased the likelihood and degree of confrontation between [respondents] and the police"; (ii) "deprived [respondents] of the means to be on the lookout and to challenge officers who might have exceeded the limits imposed by the magistrate"; and (iii) created factual questions about what was said during the search that "would broaden the area of dispute between the parties in subsequent litigation." Pet. App. 7a. The court of appeals was wrong on each point.

The Ninth Circuit's first two concerns—involving respondents' risk of confrontation with police and ability to monitor police conduct during the search—rest on the assumption that persons whose property is the subject of the search will become aware of defects in the warrant *during the search*. Otherwise, the defects could not affect those individuals' response to the executing officers.

Yet, contrary to the Ninth Circuit's view, see Pet. App. 8a n.4 (relying on *United States* v. *Gantt*, 194 F.3d 987, 1000-1005 (9th Cir. 1999)), there is no requirement that the executing officers must provide copies of their federal warrant to persons they encounter as they conduct a search. Federal Rule of Criminal Procedure 41, which "reflects" Fourth Amendment principles, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 558 (1978), provides only that, when executing officers seize property, they must leave a copy of the warrant and a receipt for the property being taken. Fed. R. Crim. P. 41(f)(3); see *Katz* v. *United States*, 389 U.S. 347, 355-356 n.16 (1967) ("Rule 41[] * * * does not invariably require [service of the warrant] before the search takes place."); *Frisby* v. *United States*, 79 F.3d 29, 32 (6th Cir. 1996) ("The Fourth Amendment does not necessarily require that government agents serve a warrant * * * prior to initiating a search or seizing property."); *Hulsey* v. *Texas*, 929 F.2d 168, 171-172 (5th Cir. 1991) ("[T]he fact that Hulsey did not see the warrant before the search does not invalidate the search."). Accordingly, in a case like this where no property is seized, a copy of the warrant need not be provided.

As a result, unless the executing officer voluntarily goes beyond Rule 41 and provides copies of the warrant before undertaking the search, technical defects in the warrant will be unknown, and therefore immaterial, to other persons on the scene during the search. As Judge Posner has explained, "[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed

until the search has ended, is further evidence that the requirement of a particular description does not protect an interest in monitoring searches." *Stefonek*, 179 F.3d at 1034.[5]

The Ninth Circuit also was mistaken insofar as it suggested that, absent the clerical error, the warrant would have provided respondents a definitive list of the items that could be seized. See Pet. App. 7a. When "the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character," they may seize the incriminating article under the "plain view" doctrine, notwithstanding that it was not listed in the warrant. *Coolidge*, 403 U.S. at 465 (plurality opinion); see *Horton* v. *California*, 496 U.S. 128 (1990). Therefore, individuals whose property is the subject of a search warrant do not have grounds to protest a seizure solely because the seized property was not specifically listed in the warrant.

The court of appeals' final concern—that technical defects in warrants will lead to disputes about what the officers did or did not say during the search, see Pet. App. 7a—is also unfounded. As the court of appeals itself recognized (*ibid.*), that concern would arise only if officers' oral statements could "expand the scope of the warrant" beyond what the magistrate authorized. But that issue does not appear to be implicated by the facts of this case. The issue here is whether precise descriptions of the property to be seized

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[5] It might be argued that defects in the warrant create a risk of conflict *after* the search, if property is seized and a copy of the warrant therefore is provided. That concern seems attenuated on its face. Furthermore, such a concern could be addressed by a requirement that the executing officers timely provide information curing any defects that are brought to their attention. As noted, that was done in this case when petitioner "immediately" faxed the warrant application's description of the items to be seized. Pet. App. 21a.

that were submitted to the magistrate sufficiently remedied petitioner's good-faith mistake in completing the warrant form. What the officers said during the search need not be considered when determining whether the particularity requirements of the Warrant Clause are satisfied.[6]

Finding a Fourth Amendment violation based on a clerical mistake in the warrant, when the substantive policies of the Warrant Clause have been satisfied, would be contrary to the "strong preference for warrants" and the associated rule "that 'in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fail.'" *Leon*, 468 U.S. at 914 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 106 (1965)). Furthermore, from the perspective of law enforcement officers, excessively rigid applications of the Warrant Clause could lessen the benefit of obtaining a warrant, and might discourage officers from utilizing the warrant process when a warrantless search would be permissible.[7] Cf. *Ventresca*, 380 U.S. at 108 ("A grudging or negative attitude by [courts reviewing magistrates' probable cause determinations] will tend to discourage police officers from submitting their evidence to a

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[6] Nevertheless, petitioner's statements to respondents, together with his prompt delivery of the application's list of items to be seized, does confirm the absence of any prejudice to respondents from petitioner's clerical error. Insofar as the record shows, petitioner addressed every concern about the scope of the warrant that arose during the search, as soon as it arose.

[7] For example, in a case involving the sort of highly dangerous weapons believed to be on respondents' ranch, an officer might reasonably believe that exigent circumstances exist. See, *e.g.*, *United States* v. *Al-Azzawy*, 784 F.2d 890, 895 (9th Cir. 1985) (finding exigent circumstances when police reasonably believed trailer contained explosives and they were unable to arrest all persons entitled to enter it), cert. denied, 476 U.S. 1144 (1986); *United States* v. *Herrera*, 711 F.2d 1546, 1556 (11th Cir. 1983) ("[E]xigent circumstances, if such were required, existed in the form of a vessel laden with arms and possibly explosives.").

judicial officer before acting."). The particularity provisions of the Clause do not compel that undesirable result. Rather, like the probable cause requirement, those provisions should be interpreted "in a commonsense and realistic fashion." *Ibid.*[8]

B. The Judicial Creation Of A *Bivens* Remedy Is Not Justified In This Context

Bivens recognized an implied damages action under the Fourth Amendment to redress the "unconstitutional invasion of [an individual's] rights by federal agents," 403 U.S. at 390, in a situation where it was apparent that "some form of damages [wa]s the only possible remedy" for the asserted injury, *id.* at 409 (Harlan, J., concurring in the judgment). See *id.* at 410 ("For people in Bivens' shoes, it is damages or nothing."). That remedial imperative does not exist in this case, because the alleged constitutional error resulted in no cognizable injury to respondents. More generally, technical defects in the particularity of a warrant's description of the items to be seized, which escape the magistrate's attention, are unlikely to lead to injuries in the general run of cases. Thus, even if petitioner's clerical mistake was not cured by the application and supporting affidavit, and the search was constitutionally defective, that error should not give rise to a damages action under *Bivens*.[9]

In *Bivens*, the Court acknowledged that neither a congressional enactment, nor the text of the Constitution, pro-

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[8] Federal magistrate judges preside over approximately 30,000 warrant proceedings each year. See *Sourcebook of Criminal Justice Statistics 2001* <http://www.albany.edu/sourcebook/1995/pdf/t162.pdf>. Therefore, even a small disincentive to apply for a warrant may affect a significant number of cases in the aggregate.

[9] Although this argument was not separately raised below, it involves a pure question of law that is logically intertwined with the Fourth Amendment and qualified immunity questions presented by the petition.

vides for enforcement of the Fourth Amendment by an award of money damages. See 403 U.S. at 396-397. Nonetheless, the Court concluded that it has authority to recognize such a remedy. *Id.* at 392 ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.") (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). In the decade following *Bivens*, the Court similarly recognized implied damages remedies under the Due Process Clause of the Fifth Amendment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, see *Carlson* v. *Green*, 446 U.S. 14 (1980). More recent decisions, however, "have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *id.* at 68-70 (discussing cases).

A *Bivens* remedy likewise should not be inferred here. Any distress experienced by respondents as a result of the search was caused by the search itself, not the flaw in the form of the warrant. Because the execution of the search was unaffected by the alleged constitutional error, respondents suffered no cognizable injury as a result of that error. Therefore, even if respondents could establish a violation of the Fourth Amendment, they would not be entitled to recover compensatory damages. See *Carey* v. *Piphus*, 435 U.S. 247, 263 (1978) (under 42 U.S.C. 1983, damages recoverable for procedural due process violation limited to those resulting from deficient procedures themselves); see also *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307-308 (1986) ("Where no injury [i]s present, no 'compensatory' damages [can] be awarded.").

The Court stated in *Carey* that the denial of certain "absolute" constitutional rights "should be actionable [under Section 1983] for nominal damages without proof of actual

injury." 435 U.S. at 266. But the availability of nominal damages under that *statutory* cause of action does not suggest the same result under the judicially created *Bivens* remedy. As noted, this Court has resisted extending *Bivens* when its central purpose of "compensating victims" for constitutional wrongs, *Carlson*, 446 U.S. at 21, would not be advanced.[10] See, *e.g.*, *Malesko*, 534 U.S. at 72-73 (no *Bivens* cause of action where claimants had other effective remedies). It follows that the *Bivens* remedy should not reach a case such as this, in which the alleged constitutional violation did not have substantive consequences for respondents and respondents have not made any specific allegation that they suffered compensable injury arising directly from that supposed violation. See 3/4/99 Compl. paras. 45-49 (J.A. 26-27) (damages allegations); see also *Butz* v. *Economou*, 438 U.S. 478, 504 (1978) (*Bivens* established cause of action for "a citizen suffering a compensable injury to a constitutionally protected interest"); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (opinion of Kennedy, J.) (*Bivens* cases "reflect a sensitivity to varying contexts, and the courts should consider whether there are 'special factors counseling hesitation,' [*Bivens*,] 403 U.S., at 396, before allowing a suit to proceed").[11]

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[10] That hesitation has existed even when alternative statutory remedies—which, in this case, potentially include a trespass action against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)—"provide[] a less than complete remedy for the wrong." *Bush* v. *Lucas*, 462 U.S. 367, 373 (1983); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 427-428 (1988). But cf. *Carlson*, 446 U.S. at 19 (FTCA does not "pre-empt a *Bivens* remedy").

[11] In contrast to the facts of this case, Bivens alleged that he had been subjected to a search that was conducted without probable cause and that unreasonable force was used. 403 U.S. at 389. It would be consistent with this Court's cases for there to be an implied damages remedy under the Fourth Amendment in that context, but not in this context. Cf. *FDIC* v.

More generally, technical mistakes in listing the items to be seized, which escape the magistrate's attention, are unlikely to give rise to damages. There is no need to recognize a damages action to remedy technical violations that will rarely produce any relevant injury. While it may be necessary in the context of a statutory cause of action to allow suits involving little or no damages to proceed, there is no necessity to justify inferring a damages remedy for good-faith mistakes that will result in damages only rarely, if at all. Moreover, as this Court has recognized, allowing suits like this to proceed to trial imposes substantial costs on federal officers, even if the ultimate damages awards routinely are minimal. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985).

Although deterrence is the other purpose of the *Bivens* remedy, *Carlson*, 446 U.S. at 21, this Court has never extended the remedy when no compensatory purpose would be served. See *Carlson*, 446 U.S. at 16 n.1, 21; *Davis*, 442 U.S. at 231, 245; *Bivens*, 403 U.S. at 396-397. Furthermore, deterrent purposes also underlie the Fourth Amendment exclusionary rule. See, *e.g.*, *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995). As explained below, see pp. 26-29, *infra*, the exclusionary rule would *not* have required suppression, in a criminal trial, of evidence seized during the search in this case, precisely because penalizing objectively reasonable, good-faith conduct "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 919-921. Neither the exclusionary rule nor a *Bivens* remedy is effective at deterring good-faith mistakes. Moreover, the need for magistrate review and approval of warrants will deter any intentional efforts to deviate from the require-

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Meyer, 510 U.S. 471, 484 n.9 (1994) ("[A] *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others.").

ments of the Warrant Clause. The deterrence rationale therefore does not justify the recognition of a *Bivens* remedy in this case. As in the exclusionary-rule context, a "marginal or nonexistent [deterrent] benefit[]," *Leon*, 468 U.S. at 922, does not justify the judicial implication of such a remedy.

C. Petitioner Is Protected Against Suit And Liability Under The Law Of Qualified Immunity

If, contrary to the foregoing discussion, the allegations of respondents' complaint do establish a Fourth Amendment violation that is actionable under *Bivens*, petitioner is immune from suit and liability unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Stated differently, petitioner is entitled to the protection of qualified immunity unless no "reasonable officer could have believed" that the search of respondents' residence was lawful, "in light of clearly established law and the information [petitioner] possessed." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Under that standard, petitioner would be entitled to qualified immunity because, despite his mistake in filling in the warrant form, he reasonably could have believed that his execution of the search warrant issued by the magistrate judge did not violate the Constitution. See *Butz*, 438 U.S. at 507 ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.").

1. The Ninth Circuit decided the qualified immunity issue in this case by conceiving a new, bright-line rule: that, even when a lead officer personally prepares a warrant and the magistrate judge approves it, the officer nevertheless acts unreasonably unless he then takes further steps to "satisfy [himself] that * * * it is not defective in some obvious way." Pet. App. 8a; see *id.* at 10a. That rule—which imposes a sort of strict liability for technical defects that the court of appeals deems particularly obvious, see Pet. App.

10a—was not stated in *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997), which the Ninth Circuit said "controls" this case. Pet. App. 6a. As the Ninth Circuit acknowledged in a recent unpublished opinion, its decision in this case "built upon" *McGrew*. *United States* v. *Hightower*, 42 Fed. Appx. 65, 67 (2002). Furthermore, because the search in this case occurred in March 1997 and *McGrew* was decided six months later in September 1997, *McGrew* could not have established petitioner's obligations at the time of the search. Accordingly, petitioner did not act unreasonably solely for failing to abide by a rule that did not exist at the time of the search.

2. The court of appeals believed that its determination of a Fourth Amendment violation was based on clearly established law, because of the Ninth Circuit's rule that an affidavit must be both attached to the warrant and incorporated by reference, in order to supplement the text of the warrant. See Pet. App. 5a-6a. As already discussed, that rule has been rejected by most other circuits and its strict application is inconsistent in principle with numerous cases of this Court and the courts of appeals, including the Ninth Circuit, that have applied the particularity requirements of the Warrant Clause pragmatically, with regard to their purposes. See pp. 11-15, *supra*. In light of those inconsistent decisions, the Fourth Amendment law that confronted petitioner in 1997 cannot be said to have been clearly established. See *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) ("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."); see also *Hanlon* v. *Berger*, 526 U.S. 808, 810 (1999) (officers entitled to qualified immunity even though Ninth Circuit had anticipated Court's

holding that media ride-alongs violate Fourth Amendment).[12]

3. Moreover, immunity would be appropriate even if the relevant Fourth Amendment law had been clearly established. This Court has emphasized the similarity of (i) the "objective reasonableness" inquiry that (along with the requirement of clearly established law) is part of the qualified-immunity test, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), and (ii) the "'objectively reasonable' conduct" test that is employed in deciding whether the good-faith exception to the Fourth Amendment exclusionary rule applies, *Leon*, 468 U.S. at 919-920. See *id.* at 922 n.23; *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986). On facts very much like these, the Court determined in *Sheppard* that the officers' actions were objectively reasonable and, under *Leon*, evidence should not be suppressed, even though the detective who applied for the warrant "knew" that the warrant form (which referenced controlled substances) "was defective," but took no steps to confirm that the magistrate corrected it. 468 U.S. at 989; see pp. 12-13, *supra* (discussing *Sheppard*). The Court emphasized that the officers reasonably "rel[ied] on the judge's assurances that the warrant authorized the search they had requested." 468 U.S. at 989 n.6. Moreover, and despite the obvious defect in the warrant form, the Court stated that *Sheppard* did not present facts under which "it [wa]s plainly evident that a magistrate or judge had no business issuing a warrant." *Id.* at 990 n.7 (citation and internal quotation marks omitted).

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[12] The application of the Warrant Clause to the facts of this case was particularly unclear because nothing was seized and, therefore, petitioner was not required to provide respondents with a copy of the warrant. See p. 17, *supra*. The Ninth Circuit, which imposed an (incorrect) warrant-service requirement in 1999, see *Gantt*, *supra*, had not established that rule in 1997.

The problem with the warrant here (a further description of respondents' residence, in lieu of a description of the items to be seized) is no more fundamental than the problem with the warrant in *Sheppard* (an entirely irrelevant description of items to be seized, see 468 U.S. at 986 n.2). And, just as the court of appeals found to be true in this case, the detective in *Sheppard* "would surely have realized" the problem if he had read the warrant before executing it. Pet. App. 10a. Nevertheless, this Court determined in *Sheppard* that "it was not unreasonable for the police * * * to rely on the judge's assurances that the warrant authorized the search they had requested." 468 U.S. at 989 n.6. For analogous reasons, petitioner's actions were objectively reasonable and petitioner should be entitled to qualified immunity.

The differences between *Sheppard* and this case do not support a different conclusion. In *Sheppard*, the judge rejected the draft warrant that the detective had presented for approval, but assured the detective, "by word and by action," that a valid warrant would issue. 468 U.S. at 986, 990. In this case, the magistrate judge did not reject the draft warrant, and he assured petitioner of the validity of the warrant by his action in signing the warrant, but without additional verbal confirmation. The differences are largely offsetting: Petitioner had less reason than the detective in *Sheppard* to doubt the constitutional sufficiency of the draft warrant, but also less assurance that the signed warrant was valid.

Furthermore, under *Leon*, a magistrate's approval and issuance of a warrant cannot be taken as conclusive proof of the warrant's validity in every situation. See 468 U.S. at 922-923. It therefore would be difficult to conclude that *Sheppard*, decided the same day as *Leon*, turned on the proposition that a magistrate's oral assurance can be deemed absolute proof of validity. But, by the same token, the Fourth Amendment's text appears to place on the magi-

strate the primary onus for ensuring that a warrant provides a sufficiently particular description of the items to be seized. Accordingly, except when "it is plainly evident that a magistrate or judge had no business issuing [any] warrant," *Sheppard*, 468 at 990 n.7 (citation and internal quotation marks omitted), courts should be hesitant to conclude that an officer acts objectively unreasonably when he or she conducts a search in good-faith reliance on a validly issued, but facially flawed, warrant.

When courts of appeals determine in the suppression context that an officer executed a constitutionally defective warrant, they routinely conclude that the officer nevertheless acted reasonably, and that the good-faith exception to the exclusionary rule applies.[13] The availability of the *Leon* exception in the suppression context reduces the need to consider the exact nature of the constitutional violation, and there is no occasion in that context to decide whether a *Bivens* action or qualified immunity would be available in a civil proceeding. Nevertheless, the effect of the Ninth Circuit's ruling here is to subject law-enforcement officers to personal liability in circumstances that, in most circuits, would not lead to the suppression of evidence under the exclusionary rule. The facts of this case, which reflect peti-

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[13] See, *e.g.*, *Thomas*, 263 F.3d at 808-809 (warrant gave wrong address); *United States* v. *Cherna*, 184 F.3d 403, 411-413 (5th Cir. 1999) (affidavit specifically describing items to be seized not attached to warrant), cert. denied, 529 U.S. 1065 (2000); *United States* v. *Blakeney*, 942 F.2d 1001, 1025-1026 (6th Cir.) (affidavit describing items not incorporated by reference), cert. denied, 502 U.S. 1008 (1991); *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990) (same); *United States* v. *Curry*, 911 F.2d 72, 77-78 (8th Cir. 1990) (warrant omits address), cert. denied, 498 U.S. 1094 (1991); *United States* v. *Bonner*, 808 F.2d at 867 (same). Cf. *Stefonek*, 179 F.3d at 1034-1036 (evidence not suppressed when warrant failed to describe items to be seized, because search was conducted within scope of detailed application and affidavit).

tioner's good-faith adherence to warrant procedures and complete compliance with the limitations contained in the warrant application and supporting affidavit, do not suggest a justification for that incongruous result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

BARBARA L. HERWIG
HOWARD S. SCHER
Attorneys

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