No. 10-704

In the Supreme Court of the United States

CURT MESSERSCHMIDT, ET AL., PETITIONERS

v.

AUGUSTA MILLENDER, 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 PETITIONERS

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QUESTION PRESENTED

Whether officers are entitled to qualified immunity for executing a facially valid warrant to search for all firearms and gang-related items at a suspect's residence, when the affidavit supporting the warrant established that the suspect had fired a sawed-off shotgun at his former girlfriend and was a known gang member, but a court concludes that the affidavit provided probable cause to seize only some but not all of the items the warrant covered.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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INTEREST OF THE UNITED STATES

This case presents the question whether a law enforcement officer who executes a facially valid search warrant is entitled to qualified immunity in a damages action under 42 U.S.C. 1983 when the affidavit supporting the warrant provides probable cause for some but not all of the items the warrant authorized officers to seize. The Court's resolution of that question could affect federal officials' entitlement to qualified immunity in similar actions filed pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, the Court's resolution of the question presented could affect the admissibility of evidence in federal criminal cases because this Court has held, in the context of warrant-authorized searches

and seizures, that "the same standard of objective reasonableness" governs both the good-faith exception to the exclusionary rule and the qualified immunity of officers. *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986). The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

1. a. On October 17, 2003, Shelly Kelly was moving her belongings out of the apartment she shared with her boyfriend Jerry Bowen on West 97th Street in Los Angeles, California. Pet. App. 109. Because Bowen had a violent temper and had physically assaulted Kelly in the past, Kelly requested that officers of the Sheriff's Department accompany her while she moved out of the apartment. *Id.* at 109-110. Two deputies stood by while she moved; but after 20 minutes, they were called away to an emergency. *Id.* at 110. As soon as the deputies left the scene, Bowen appeared. He screamed, "I told you to never call the cops on me bitch," physically assaulted Kelly, and attempted to throw her over the railing of the second-story landing of the apartment building. *Id.* at 4. Bowen grabbed Kelly, bit her, and attempted to drag her by her hair into the apartment. Kelly resisted, bracing herself against the door frame. When Bowen grabbed both of Kelly's arms, she was able to escape by wriggling out of her shirt. Kelly ran to her car, pursued within seconds by Bowen, who was holding a "black sawed off shotgun with a pistol grip." Bowen stood in front of Kelly's car, pointed the shotgun at her, and yelled, "[i]f you try to leave, I'll kill you bitch." *Ibid.* Kelly laid down on the front seat of her car and floored the gas peddle. *Id.* at 4, 110. Bowen jumped out of the way and fired one shot at Kelly, blowing out the front

left tire of her car. *Id.* at 4. Kelly kept driving and Bowen fired four more times in Kelly's direction, missing each time. *Ibid.*

Kelly located police officers, who recognized her immediately as the woman they had been protecting earlier. Pet. App. 4. Kelly described Bowen's assault on her and provided the officers with four photographs of Bowen. *Id.* at 4-5. Petitioner Curt Messerschmidt was the detective assigned to the case. After reviewing the incident reports, he met with Kelly on October 22 to verify the facts. *Id.* at 111. Kelly stated that Bowen no longer lived at the 97th Street address they had shared, but was instead staying (or "hiding out") at a residence on East 120th Street in Los Angeles. *Id.* at 5, 109, 111. Messerschmidt showed a "six pack" of photographs to Kelly, and she identified Bowen. *Id.* at 5.

Messerschmidt conducted what he described in his warrant application affidavit as an "extensive background search" on Bowen using "departmental records, state computer records, and other police agency records." Pet. App. 5. Those records confirmed that Bowen resided at the 120th Street address. *Ibid.* Relying on his experience and information from both Kelly and the "cal-gang database," Messerschmidt also confirmed that Bowen was "a known Mona Park Crip gang member." *Id.* at 6; J.A. 58.

b. Messerschmidt prepared a warrant application, including supporting affidavits, seeking an arrest warrant for Bowen, a search warrant for the 120th Street address, and permission to execute the warrants at night because of safety concerns. Pet. App. 3-8. Messerschmidt sought a warrant to search for gun evidence, specifically:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

Pet. App. 115; J.A. 52. He also sought permission to search for gang-affiliation and identity evidence, *i.e.*:

> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identi[t]y of [the] person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

J.A. 52; see Pet. App. 115.

Messerschmidt prepared two affidavits. The first detailed his extensive experience as a police officer, in-

cluding the training he had obtained, as well as his experience working in a "specialized unit, investigating gang related crimes and arresting gang members for various violations of the law." J.A. 53-54; Pet. App. 7. He noted that he had "attended hundreds of hours of instruction on the dynamics of gangs and gang trends," had "received in excess of forty hours of training pertaining to gang-related crimes, to include but not limited to the investigation of gang related shootings," and had been involved in "hundreds of gang related incidents, contacts, and[/]or arrests." *Ibid.* The second affidavit recounted the October 13 incident between Bowen and Kelly as well as Messerschmidt's investigation of Bowen's background and gang ties. J.A. 55-59; Pet. App. 3-6.

In the course of investigating Bowen's background, Messerschmidt learned that Bowen had several felony convictions and misdemeanor arrests, was on probation for spousal battery and driving without a license, and was a "third strike" candidate under California law. Messerschmidt did not, however, include that information in his affidavits. Pet. App. 8.

Two of Messerschmidt's supervisors—including petitioner Sergeant Robert Lawrence—reviewed and approved the affidavits and warrant application. Pet. App. 114. A deputy district attorney, Janet Wilson, also reviewed the materials and put a notation on the warrant stating: "Reviewed for PC by DDA Janet Wilson, 11-4-03." J.A. 47; Pet. App. 9. Messerschmidt then presented the proposed warrants and affidavits to a magistrate judge, who approved the warrants and authorized night service. Pet. App. 9.

At approximately 5 a.m. on November 6, 2003, police officers served the warrants and searched the 120th

Street address. Pet. App. 9. Officers ordered the ten occupants of the house to exit, which they did. The occupants included respondents Augusta Millender, Brenda Millender (Augusta's daughter), and William Johnson (Brenda's son). *Ibid.* Petitioners were present when the search warrant was executed, but did not participate in the search. *Ibid.* Police found and seized Augusta Millender's personal shotgun, a box of .45-caliber ammunition, and a letter from Social Services addressed to Bowen. They did not find Bowen or the black sawed-off shotgun with a pistol grip that Kelly had described. *Id.* at 9-10, 109, 122.

2. Respondents filed suit under 42 U.S.C. 1983 against petitioners and others alleging, *inter alia*, violations of their Fourth Amendment rights. As relevant here, the district court determined that the search warrant violated the Fourth Amendment because Messerschmidt's affidavits did not provide probable cause to seize all firearm- and gang-related items, as authorized in the warrant. Pet. App. 152-169.[1] The court reasoned that the affidavit did not mention any guns other than the specific (and specifically described) gun used in the assault on Kelly, and it did not mention any crimes other than that assault. *Id.* at 157-158. The district court found that the warrant properly authorized seizure of evidence tending to establish who controlled the premises. *Id.* at 159.[2] In addition, the court held that the individual defendants were not entitled to qualified im-

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[1] The district court also determined that the warrant to arrest Bowen and the request for nighttime service were supported by probable cause. Pet. App. 131-136, 148-160, 170.

[2] The district court also found probable cause to search the 120th Street address. Pet. App. 158-159. That ruling was not contested on appeal. *Id.* at 27.

munity, noting that they had "made no additional arguments as to why, even if the warrant was overbroad, the officers acted reasonably, without knowing that what they were doing was wrong." *Id.* at 171.

3. A panel of the court of appeals reversed. See Pet. App. 79-105. "[A]ccepting, but not ruling on, the district court's determination that the warrant was overbroad," the panel concluded that petitioners were nonetheless entitled to qualified immunity. *Id.* at 94. The court held that the affidavit's statements that "Bowen had engaged in an assault with a deadly weapon" and "had ties with a gang" supported a reasonable inference that Bowen had a criminal record. *Id.* at 92 & n.5. Taking together the affidavit's explicit statements and the reasonable inferences that followed from them, the court concluded that "an officer may reasonably have thought that the warrant could include the search for, and seizure of, firearms other than the sawed-off shotgun, as well as evidence relating to gang affiliation." *Id.* at 92. The court further emphasized that petitioners "could reasonably have expected" the deputy district attorney and magistrate who reviewed the warrant and affidavit "to limit the warrant if it sought items for which there was no probable cause." *Id.* at 93.

4. a. The Ninth Circuit voted to rehear the case en banc, and an en banc panel of the court affirmed the district court's judgment. Pet. App. 1-76. A majority of the en banc panel agreed with the district court that the search warrant violated the Fourth Amendment because it was not supported by probable cause as to the firearms (other than the sawed-off shotgun used in the assault on Kelly) and the gang-related items. *Id.* at 12-29; see *id.* at 21 ("In short, the deputies had probable cause to search for a single, identified weapon, whether assem-

bled or disassembled. They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant."); *id.* at 29 ("Because the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid."). The court held, therefore, that the warrant did not satisfy "the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* at 13 (internal citations and quotation marks omitted); see *id.* at 16 (referring to the "rule that police must have probable cause for every item searched").

The en banc panel also denied petitioners qualified immunity. Pet. App. 29-38. The court determined that the warrant suffered from a "glaring deficiency" because neither it nor Messerschmidt's affidavits "established probable cause that the broad categories of firearms, firearms-related material, and gang-related material described in the warrant were contraband or evidence of a crime." *Id.* at 35. Based on its view that the warrant was "plainly invalid," the en banc panel majority concluded that no officer could "reasonably but mistakenly believe that the search warrant established a colorable argument for probable cause" to search for firearms beyond the sawed-off shotgun or for evidence of gang affiliation. *Id.* at 36 (internal citations and quotation marks omitted). The court rejected the contention that petitioners reasonably relied on the review of their superiors, a deputy district attorney, and a magistrate judge to detect defects in the warrant. *Ibid.* The court reasoned that petitioners "had a responsibility to exercise their reasonable professional judgment" and, under the circumstances of the case, "a neutral magis-

trate's approval (and, a fortiori, a non-neutral prosecutor's) cannot absolve an officer of liability." *Id.* at 37-38 (internal citation omitted).

b. Three judges dissented from the en banc ruling. Judge Callahan, joined by Judge Tallman, would have held that the affidavit supported probable cause to search for all firearms and firearm-related items. Pet. App. 39-45. Judge Callahan also would have held that, to the extent the warrant was overbroad, petitioners are entitled to qualified immunity. *Id.* at 60-70. Considering the totality of the circumstances, she concluded, petitioners were not "plainly incompetent" and did not "knowingly violate the law." *Id.* at 70 (citing *Malley*, 475 U.S. at 341).

Judge Silverman, also joined by Judge Tallman, would have held that "[t]he judge issued a defective warrant and the deputies mistakenly relied on it, but their mistake was entirely in good faith." Pet. App. 74. Judge Silverman noted that "[t]he record is totally devoid of any evidence that the deputies acted other than in good faith," and he would have held that petitioners could not be deemed to be plainly incompetent or to have knowingly violated the law by relying on a judge-signed warrant authorizing seizure of all guns and gang paraphernalia. *Id.* at 74-75.

SUMMARY OF ARGUMENT

The court of appeals erred in denying petitioners qualified immunity for their role in the execution of a search warrant at respondents' home. A police officer is entitled to qualified immunity when executing a search warrant unless "no reasonably competent officer" would have relied on the magistrate's independent determination that the warrant was supported by probable cause.

Malley v. *Briggs*, 475 U.S. 335, 341 (1986). Here, petitioners had a reasonable basis for relying on the magistrate's finding of probable cause to search for firearms, firearm-related items, and gang-related material.

The affidavits submitted with the warrant application established that suspect Bowen had a history of physically assaulting his girlfriend, had fired a sawed-off shotgun at her in public in the middle of the day, and was a known member of a dangerous gang. The magistrate could have inferred from Bowen's violent history and gang ties that Bowen had a serious criminal history, which would make his possession of any firearm a crime. The magistrate could also authorize a search for gang-related material as evidence of Bowen's identity, his connection to the residence, and his tie to any evidence of criminal wrongdoing found in the residence. Whether or not a reviewing court would find adequate probable cause to search for these materials, competent law enforcement officers could reasonably rely on the magistrate's judgment in these respects.

The reasonableness of petitioners' reliance on the warrant and supporting affidavit should be judged by objective indicia of good faith. Those indicia demonstrate that petitioners did not know, and could not properly be charged with knowing, that the warrant was constitutionally lacking. The warrant itself was adequate on its face. The underlying affidavit was not the type of "bare bones" affidavit that would prevent a magistrate from making a neutral assessment of the existence of probable cause. And, to ensure the adequacy of the warrant application, petitioners submitted the warrant and affidavit to police supervisors and a deputy district attorney before submitting it to the magistrate. Messerschmidt's good faith is further confirmed by his

knowledge of Bowen's criminal history—knowledge that, although inadvertently omitted from the affidavit, would have put beyond debate the question of the existence of probable cause to search for all firearms. Finally, petitioners were executing not only a search warrant, but also a warrant to arrest an armed and dangerous person. Petitioners could have believed in good faith that a search of the premises for firearms was necessary to protect their safety in the process of seeking and apprehending Bowen or to protect Kelly's safety in the event they did not find him.

The Ninth Circuit purported to conduct a separate qualified-immunity analysis but in the end it denied qualified immunity based on nothing more than its conclusion that the warrant was not justified by probable cause. But an officer is entitled to immunity unless it was clearly established that his actions would violate the law. It is not enough to say that it was clearly established that the Fourth Amendment requires that the scope of the items authorized to be seized in a search warrant is supported by probable cause that the items are contraband or evidence of a crime. That is too high a level of generality for locating clearly established law. Petitioners should be immune unless it was clearly established that it would be a violation to execute a warrant in the circumstances presented here. The court of appeals identified no case with similar facts establishing that proposition, and it should not have denied petitioners immunity without doing so.

The court of appeals' undue restrictions on qualified immunity will chill police officers from performing important duties. But one purpose of qualified immunity is to protect officers' execution of their important functions by removing the fear of personal damages liability

for reasonable mistakes. And to the extent that personal liability, like the exclusionary rule, is designed to have a deterrent effect, the court of appeals' approach will reach much police conduct that is neither culpable nor grossly reckless and thus not amenable to appreciable deterrence. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Petitioners were not plainly incompetent and did not knowingly or intentionally violate the law. They should not be subject to a suit for damages in their personal capacity for a mistake (if any) that was the magistrate's, not theirs.

ARGUMENT

PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR EXECUTING A SEARCH WARRANT AT RESPONDENTS' RESIDENCE BECAUSE THEY REASONABLY RELIED ON THE WARRANT ISSUED BY A NEUTRAL MAGISTRATE

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). A court has discretion to determine whether an officer is entitled to qualified immunity without first determining whether there was a constitutional violation in a particular case. See *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009); see also *al-Kidd*, 131 S. Ct. at 2080 (rule permitting reviewing courts to exercise discretion to review either or both prongs of qualified-immunity analysis serves in part to

"ensure[] that courts do not * * * inadvertently undermine the values qualified immunity seeks to promote"). Although petitioners challenged both the constitutional ruling and the qualified-immunity ruling in the district court and court of appeals, the petition for a writ of certiorari presents only the qualified-immunity question. See Pet. i (asking whether officers are entitled to qualified immunity for "procur[ing] and execut[ing] warrants later determined invalid"). Petitioners are correct that the court of appeals erred in denying them qualified immunity.

A. Petitioners Reasonably Relied On The Magistrate's Issuance Of The Search Warrant Based On The Supporting Affidavits They Submitted

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 Court*, 387 U.S. 523, 528 (1967). The Amendment accomplishes that goal by requiring that searches be reasonable, a standard that necessarily turns on "the facts of the case." *Terry* v. *Ohio*, 392 U.S. 1, 15 (1968). In many situations, a search or arrest is reasonable even in the absence of a warrant. See, *e.g.*, *Brigham City, Utah* v. *Stuart*, 547 U.S. 398 (2006); *Michigan* v. *Long*, 463 U.S. 1032 (1983); *United States* v. *Ross*, 456 U.S. 798 (1982); *United States* v. *Watson*, 423 U.S. 411 (1976). But especially concerning searches of the home, this Court has "expressed a strong preference for warrants." *United States* v. *Leon*, 468 U.S. 897, 914 (1984). The central function of the Fourth Amendment's Warrant Clause is to "circumscribe[]" "the discretion of the official in the field." *Camara*, 387 U.S. at 532. As the Court has explained in

the context of the search of a home, "a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Leon*, 468 U.S. at 913-914 (internal quotation marks omitted).

The Warrant Clause requires that a search be supported by "probable cause," a standard that must be applied with a "totality-of-the-circumstances approach" that is "practical" and "nontechnical." *Illinois* v. *Gates*, 462 U.S. 213, 230-231 (1983). "[A]s the very name implies," "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 231, 232. In order to conclude that probable cause exists, a magistrate need find "only the probability, and not a prima facie showing, of criminal activity." *Id.* at 235; see *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) ("preponderance of the evidence" test "ha[s] no place in the [probable-cause] decision") (quoting *Gates*, 462 U.S. at 235) (second brackets added by Court); *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (finding of probable cause "does not demand any showing that such a belief be correct or more likely true than false"); Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* 477 (2008) (noting that probable cause standard is less stringent than a more-likely-than-not standard).

2. When a court determines that a search conducted pursuant to a warrant violated the Fourth Amendment because the warrant was not supported by probable cause, the court must then determine whether a judicial remedy (exclusion from a criminal trial of the evidence

obtained pursuant to the warrant or money damages against the proper officials) is appropriate. In *Leon*, the Court created a "good faith exception" to the exclusionary rule remedy that this Court has fashioned, *i.e.*, that evidence obtained in violation of the Fourth Amendment should be suppressed in a criminal trial. *Leon* held that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 468 U.S. at 900. Two years later, the Court made clear that the same reasonableness standard governs the question whether an officer who executed an arrest or search warrant later determined not to be supported by probable cause is entitled to qualified immunity. *Malley* v. *Briggs*, 475 U.S. 335, 344 & n.6 (1986); see *Groh* v. *Ramirez*, 540 U.S. 551, 565 n.8 (2004).[3]

In both contexts, an officer's reliance on a magistrate's decision to issue a warrant must be objectively reasonable. *Leon*, 468 U.S. at 922. But the Court has been careful to note that "[s]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness" because "'a warrant issued by a magistrate normally suffices to establish' that a law enforcement

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[3] The Court should reject respondents' invitation (Resp. Br. in Opp. 32-34) to overrule decades of precedent holding that the reasonableness standard governing the good-faith exception to the exclusionary rule in the context of warrant-authorized searches and seizures is the same as the test governing qualified immunity for Fourth Amendment violations. Because both doctrines aim to deter the same unconstitutional conduct without unduly infringing on competing interests, the same standard should apply in both contexts.

officer has 'acted in good faith in conducting the search." *Id.* at 922 (quoting *Gates*, 462 U.S. at 267 (White, J., concurring in judgment), and *Ross*, 456 U.S. at 823 n.32).

The Court has identified four situations in which reliance on a warrant is not objectively reasonable: (1) when the magistrate issuing the warrant is misled by information in an affidavit that the affiant knew or should have known was false; (2) when the magistrate wholly abandons the role of neutral arbiter and rubberstamps a warrant application; (3) when an affidavit supporting a warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) when the warrant is facially deficient, such as by failing to identify the place to search, the items to seize, or the individual to arrest. *Leon*, 468 U.S. at 923 (citation omitted). The question in this case is whether the third category applies, *i.e.*, whether "the warrant application [was] so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*, 475 U.S. at 344-345. Applying that standard, courts should find immunity unless, "on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

3. As the Court explained in *Leon*, "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." 468 U.S. at 914. The Court has therefore emphasized "that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Ibid.* (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969)). Accordingly, in close cases, a

search under warrant may be found valid even if a warrantless search on the same facts "would fall." *Ibid.*

The standard for finding objective good faith or qualified immunity requires even greater latitude for reasonable differences in judgment. Even when a reviewing court cannot find a "substantial basis for determining the existence of probable cause," *Leon*, 468 U.S. at 915 (quoting *Gates*, 462 U.S. at 239), a reasonable officer can still, in all but the most extraordinary cases, rely in objective good faith on the judgment of a neutral magistrate that the basis for suspicion is adequate to support the scope of the warrant. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.* at 917. Accordingly, officers can legitimately conclude that it is reasonable to trust the magistrate's judgment that a search is permissible absent clear-cut indications that it is not.

Here, petitioners were objectively reasonable in relying on the magistrate's determination that probable cause justified a search for firearms, firearm-related material, and gang-related material.[4] The warrant described with particularity the place to be searched and the items to seize, and it was therefore not facially deficient. And respondents have not alleged either that petitioners intentionally or recklessly supplied the magis-

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[4] It is no longer in dispute, see Pet. App. 60, that there was probable cause to search the 120th Street address. Bowen's recent live-in girlfriend had provided that address to Messerschmidt as Bowen's current address, and Messerschmidt had independently confirmed through law enforcement databases that Bowen had a connection to that address. *Id.* at 5. That was sufficient to establish probable cause to believe that police would find Bowen and his possessions at respondents' residence.

trate with false information or that the magistrate abdicated his role by rubber-stamping the warrant application.

The warrant application also contained sufficient information to justify a reasonable, even if mistaken, belief that probable cause supported the scope of the warrant. Contrary to the Ninth Circuit's view, petitioners reasonably could have believed that the affidavit established probable cause to search for all firearms (and related items) based on the facts alleged in the affidavits and inferences the magistrate could permissibly draw from those facts. It is undisputed, see Pet. App. 15, that there was probable cause to search for the black sawed-off shotgun Bowen allegedly fired five times at Kelly; that shotgun was evidence of the crime of assault with a dangerous weapon. It was also very likely to be evidence of illegal possession of an unregistered sawed-off shotgun. As one court of appeals has stated, "courts have found that, because of the very nature of the object and the fact that so few sawed-off shotguns are actually registered, just witnessing someone in possession of such a weapon provides probable cause that the firearm is unregistered." *United States* v. *Decoteau*, 932 F.2d 1205, 1207 n.* (7th Cir. 1991); see, *e.g.*, *United States* v. *Melvin*, 596 F.2d 492, 500-501 (1st Cir.), cert. denied, 444 U.S. 837 (1979); *United States* v. *Story*, 463 F.2d 326, 328 (8th Cir.), cert. denied, 409 U.S. 988 (1972); *Porter* v. *United States*, 335 F.2d 602, 607 (9th Cir. 1964), cert. denied, 379 U.S. 983 (1965).

But the officers could also reasonably believe that, in light of Bowen's history of violence, other weapons would be evidence of criminal conduct as well. Messerschmidt had discovered through his investigation that Bowen had several felony convictions—and that posses-

sion by Bowen of any firearm was therefore evidence of a crime. Although Messerschmidt did not state in the affidavits he submitted with the warrant application that Bowen had multiple felony convictions, the affidavits contained sufficient information for the magistrate to infer that Bowen had such a criminal history. Messerschmidt's first affidavit set out in detail his work and training history as a law enforcement officer, much of which was specifically related to gang activity. J.A. 53-54. His second affidavit set forth details of Bowen's assault and attempted shooting of Kelly; explained that Messerschmidt had "conducted an extensive background search on [Bowen] by utilizing departmental records, state computer records, and other police agency records"; and stated that Bowen was "a known Mona Park Crip gang member." J.A. 55-59.

Taken together, the information in the affidavits was sufficient for the magistrate to infer that Bowen had a criminal background, making his possession of firearms illegal. That would provide probable cause to search for any firearms and firearm-related items at the home where officers reasonably believed Bowen to be residing. Probable cause may be based on reasonable inferences drawn from facts stated in an affidavit, and a magistrate is free "to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant." *Gates*, 462 U.S. at 240. As two dissenting court of appeals judges concluded in this case, "there was at least a 'fair probability' not only that there might be firearms in the house in which Bowen was believed to be residing, but that such firearms would be 'contraband or evidence of a crime.'" Pet. App. 42 (Callahan, J., dissenting, joined by Tallman, J.) (quoting *Gates*, 462 U.S. at 238). It is reasonable to assume that the magistrate

appropriately performed his assigned task by "mak[ing] a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there [was] a fair probability that contraband or evidence of a crime [would] be found in a particular place." *Gates*, 462 U.S. at 238; see *United States* v. *Grubbs*, 547 U.S. 90, 95 (2006). Even if the facts alleged in the affidavits, combined with the reasonable inferences that followed from the facts, did not establish probable cause, a reasonably competent officer would have had a reasonable basis for believing that they did. Such a belief need not have been correct to entitle petitioners to qualified immunity, see *al-Kidd*, 131 S. Ct. at 2085; it need only have been *not* "entirely unreasonable," *Leon*, 468 U.S. at 923.

Petitioners also reasonably could have believed that the affidavits established probable cause to search for gang-related items, at least as part of a search for identity information. In the section listing the gang-related items to be seized, the warrant authorized officers to search for "any gang indicia that would establish the persons being sought in this warrant" and for "[a]rticles of personal property tending to establish the identity of [the] person in control of the premise or premises." J.A. 52. The warrant thereby made clear that evidence of Bowen's gang affiliation was relevant to establishing Bowen's identity in the event of his arrest, to showing that he resided at the 120th Street address, and to establishing that any contraband seized under the warrant was contraband in Bowen's possession. Regardless of whether the affidavits and warrant were in fact sufficient to establish probable cause to search for all gang-related items, petitioners are entitled to qualified immunity because their "official belief" in the existence of

probable cause to seize the items listed in the warrant was not "entirely unreasonable." *Leon*, 468 U.S. at 923 (internal quotation marks and citation omitted).[5]

4. As petitioner notes (Br. 36-38), some courts of appeals have been too quick to conclude that an officer's reliance on a magistrate's issuance of a warrant was unreasonable because the warrant affidavit was "so lacking in indicia of probable cause." It merits emphasis, therefore, that such an assessment should take into account objective indicia of good faith on the officer's part. See *Herring* v. *United States*, 555 U.S. 135, 143 (2009) (noting that, in applying the good-faith exception to the exclusionary rule, "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment") (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)) (internal quotation marks omitted).

Nothing on the face of the warrant or the supporting affidavit would have given petitioners reason to doubt the warrant's validity. The warrant described in sufficient detail the place to search and the items to seize. And the affidavit was not the type of "bare bones" affidavit that would prevent the magistrate from making a neutral and detached determination about the existence of probable cause to support the search. See *Leon*, 468 U.S. at 914-915. On the contrary, the affidavit contained a detailed account of Bowen's violent attack on Kelly as

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[5] In addition, to the extent the warrant's authorization to search for any firearms or firearm-related items was supported by probable cause, its authorization to search for gang-related items neither expanded the scope of the areas to be searched nor resulted in the seizure of any item.

well as information about his violent past and his gang ties. J.A. 55-59.

Petitioners' efforts to obtain approval of the warrant application from supervisors and a deputy district attorney further confirms their good faith. Although members of the prosecution team do not neutrally assess probable cause in the way that a magistrate does, they have no incentive to seek or execute a warrant that is not supported by probable cause. Petitioners' reliance on the collective judgment of different officers and a prosecuting attorney objectively indicates that they were attempting to follow the law and that they are therefore entitled to qualified immunity. See, *e.g.*, *Massachusetts* v. *Sheppard*, 468 U.S. 981, 989 (1984) (good-faith exception applies when officer had district attorney approve affidavit); *United States* v. *Capozzi*, 347 F.3d 327, 334 (1st Cir. 2003) (good-faith exception applies in part because officer sought advice of an assistant district attorney before submitting warrant application), cert. denied, 540 U.S. 1168 (2004); *Gomez* v. *Atkins*, 296 F.3d 253, 264 (4th Cir. 2002) (qualified immunity appropriate in part because officer "conducted himself, from a procedural standpoint, in a prudent and deliberate manner" in seeking search warrant by having warrant application reviewed by supervisors and legal advisor before submitting it to the magistrate), cert. denied, 537 U.S. 1159 (2003); *United States* v. *Freitas*, 856 F.2d 1425, 1431 (9th Cir. 1988) (good-faith exception applies in part because officers sought advice of Assistant United States Attorney before submitting warrant application to magistrate).

The court of appeals refused to consider Messerschmidt's knowledge of Bowen's criminal history because Messerschmidt failed to include that information

in the warrant application. But that knowledge is a further indication that Messerschmidt's reliance on the warrant was objectively reasonable. Respondents do not allege that Messerschmidt intentionally omitted the information from his affidavit—indeed, he had no reason to do so as the information was helpful to his cause. In considering the totality of the circumstances bearing on the objective reasonableness of the officers' actions, the court of appeals should have credited Messerschmidt's knowledge of Bowen's criminal history even though Messerschmidt inadvertently omitted that information from the warrant application. See, *e.g.*, *United States* v. *Clay*, No. 11–1177, 2011 WL 3188996, at *2 (8th Cir. July 28, 2011) (noting that a district court "must consider totality of circumstances, including information not presented to the judge issuing the search warrant but known to the police officers"); *United States* v. *Martin*, 297 F.3d 1308, 1319-1320 (11th Cir.) (in making good-faith determination, court considered information known to officer but not included in affidavit, noting that "a majority of circuits have taken into consideration facts outside the affidavit when determining whether the *Leon* good faith exception applies"), cert. denied, 537 U.S. 1076 (2002); *United States* v. *Bynum*, 293 F.3d 192, 198-199 (4th Cir. 2002) ("[A] court should not refuse to apply the *Leon* good faith exception just because the officer fails to include in [an affidavit supporting a warrant application] all of the information known to him *supporting* a finding of probable cause."); see also *Groh*, 540 U.S. at 566-567 (Kennedy, J., dissenting) (noting that qualified immunity applies when officer makes a mistake "regardless of whether the officer's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact").

Finally, it is undisputed that probable cause existed to arrest Bowen for violent acts—and that the magistrate's authorization of nighttime service of the warrant was justified by safety concerns. Petitioners had evidence that Bowen was armed and dangerous, had a history of violence, had both threatened to kill and attempted to kill Kelly, and was a member of a notorious gang. Given the danger involved in executing the arrest warrant, as well as the potential lingering danger to Kelly, petitioners reasonably could have believed that a search of the premises for firearms was justified to protect their safety incident to the process of searching for and ultimately seizing Bowen or to remove threats to Kelly in the event they could not locate Bowen. Cf. *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990) (protective sweep of premises incident to in-home arrest permissible based on reasonable suspicion that swept area harbored dangerous individuals); *Chimel* v. *California*, 395 U.S. 752, 762-764 (1969) (search of areas immediately accessible to arrestee is permissible to remove dangerous weapons).

B. The Ninth Circuit's Erroneous Decision Undermines Legitimate Law Enforcement Efforts And Is Unsuited To Deter Unlawful Government Action

The court of appeals' refusal to grant petitioners qualified immunity left insufficient daylight between its determination that the search warrant was not supported by probable cause and its consideration of whether petitioners reasonably believed that it was. Officers executing a warrant are entitled to qualified immunity unless their actions are objectively unreasonable as measured by reference to clearly established law. *Harlow*, 457 U.S. at 818. That standard strikes the

right balance between deterring officer misconduct and allowing officers to exercise their functions with appropriate independence and vigor. *Malley*, 475 U.S. at 343; *Harlow*, 457 U.S. at 818-819; see *Pearson*, 555 U.S. at 231 ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."). But law cannot be clearly established in the context of probable-cause determinations absent either case law particularizing Fourth Amendment requirements on closely analogous facts or a glaring gap between the facts in the affidavit and the scope of the warrant. The Ninth Circuit conducted the qualified immunity inquiry at too high a level of generality—an approach that will undermine, rather than advance, the purposes of that doctrine.

1. The court of appeals' strict interpretation of *Malley*'s objectively-reasonable standard will chill officers' legitimate exercise of their official duties. As this Court recently reiterated, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085; *Saucier* v. *Katz*, 533 U.S. 194, 205 (2001) ("If the officer's mistake as to what the law requires is reasonable, * * * the officer is entitled to the immunity defense."); *Malley*, 475 U.S. at 343 (qualified immunity "gives ample room for mistaken judgments"). Holding officers personally liable for money damages for executing a search warrant that they reasonably but mistakenly believed to be based on probable cause puts officers in a deeply unfair situation. It is not reasonable to expect an individual law enforce-

ment officer to be more skilled at interpreting relevant case law than a magistrate judge issuing a search warrant. If an officer is to be denied qualified immunity, it ordinarily must be because existing law clearly dictated that, in the factual situation the officer confronted, no reasonable official would have believed that probable cause supported the search warrant.

At the time the search warrant in this case was executed, it was no doubt clearly established that individuals have a right under the Fourth Amendment not to have their home searched pursuant to a warrant (when one is required) that is not supported by probable cause. But that is not the question a court should ask in deciding whether an officer who executes such a warrant is entitled to qualified immunity. A court must ask whether it was clearly established that, under the facts of a particular case or a closely analogous set of facts, it was unreasonable for an officer to believe that a warrant was supported by probable cause. See *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). As this Court recently explained in *al-Kidd*:

> We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.

131 S. Ct. at 2084 (internal citations omitted). In this context, an officer is entitled to qualified immunity unless "every 'reasonable official would have understood that what he is doing violates [a clearly established]

right.'" *Id.* at 2083 (quoting *Anderson*, 483 U.S. at 640). To be sure, a controlling case presenting exactly the same factual scenario is not always necessary in order for the law to be clearly established. For example, if the warrant in this case had authorized a search for stolen vehicles or drugs, the gap between the facts alleged in the affidavit and the scope of the warrant would be so obvious that any reasonable officer should have perceived it. But in the ordinary case, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ibid.*

It is particularly important in the Fourth Amendment context that courts be able to identify cases presenting closely analogous factual scenarios before denying police officers qualified immunity. As this Court has noted, "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task." *Camara*, 387 U.S. at 528. In part for that reason, this Court has directed appellate courts to conduct independent review of "ultimate determinations of reasonable suspicion and probable cause." *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996). Such rules "acquire content only through application," *ibid.*, and thus *de novo* review "potentially may guide police, unify precedent, and stabilize the law," *Id.* at 698 (quoting *Thompson* v. *Keohane*, 516 U.S 99, 115 (1995)).

The Court has also recognized that, because probable-cause determinations depend on particular constellations of facts, "one determination will seldom be a useful 'precedent' for another." *Ornelas*, 517 U.S. at 698 (quoting *Gates*, 462 U.S. at 238 n.11). That point has particular resonance here. The court of appeals identified *no* case with analogous facts that would have put

petitioners on notice that the search warrant was not supported by probable cause. Instead, the court of appeals relied almost exclusively (see Pet. App. 35-36) on this Court's decision in *Groh*. Although the Court in *Groh* upheld a denial of qualified immunity for execution of a deficient search warrant, that case was so different from this case that it cannot be said to clearly establish that petitioners' reliance on the search warrant in this case was objectively unreasonable. In particular, the court of appeals' assertion (Pet. App. 32) that "*Groh* offers an example of one of the rare cases described in *Malley* when a warrant is 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" is simply incorrect. The Court in *Groh* held that officers were objectively unreasonable in executing a search warrant that was "plainly invalid" on its face because it "did not describe the items to be seized *at all*." 540 U.S. at 558. But the Court agreed that the warrant in that case "was based on probable cause." *Id.* at 557.

The warrant's deficiency in *Groh* thus differed in kind from the alleged flaws in the warrant here. In *Groh*, the Court concluded that the warrant's deficiency was a total failure to comply with the Fourth Amendment's requirement that a warrant "particularize the * * * things to be seized." 540 U.S. at 565. That failure was so glaring that any reasonable officer who merely read—indeed gave "a simple glance" to—the warrant would have realized that it was facially deficient. *Id.* at 564. But a mere "glance" at the search warrant here, or even careful study, would have revealed no flaw at all. The inadequacy found by the court of appeals was not a violation of the Particularity Clause; it instead depended on comparing the scope of the warrant

to the affidavits' supporting facts and the reasonable inferences that could be drawn from those facts. The officers would then have had to judge under the totality of the circumstances whether such facts and inferences together established probable cause, giving deference to the magistrate's determination. If petitioners doubted that probable cause existed, they would have had to believe their own judgment on the matter to be superior to that of their supervisors, a deputy district attorney, and the magistrate. Cf. *Sheppard*, 468 U.S. at 989-990 ("[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."). It is certainly true that some affidavits will be so obviously lacking in any indicia of probable cause as to require officers to make such a judgment, but the decision in *Groh* provides officers with no guidance about when that will be the case.

In passing, the court of appeals cited three cases in which the Ninth Circuit found that the breadth of the relevant search warrant was not supported by probable cause. See Pet. App. 35-36 (citing *United States* v. *SDI Future Health, Inc.*, 568 F.3d 684, 702-703 (2009); *In re Grand Jury Subpoenas*, 926 F.2d 847, 857 (1991); *VonderAhe* v. *Howland*, 508 F.2d 364, 369-370 (1975)). But all of those cases involved warrants authorizing officers to search for business documents rather than firearms, firearm-related items, or gang-related material. And none posed the question whether there was probable cause to search for all firearms or gang-related items when executing a search warrant in conjunction with a valid arrest warrant for an individual officers knew to be dangerous, in possession of a likely illegal

firearm, and a member of a gang—or any situation even arguably analogous. Although each case reiterates in some form the general rule that the full breadth of a warrant must be supported by probable cause, that broad constitutional principle does little to put officers on notice of its contours. See *Anderson*, 483 U.S. at 641 ("It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable."); Pet. App. 65 (Callahan, J., dissenting) ("I can find no clear precedent that supports the majority's conclusion.").

The court of appeals' error in concluding that petitioners violated clearly established law is made more apparent by the differing opinions among the court of appeals judges themselves as to whether petitioners acted reasonably in relying on the warrants. Compare Pet. App. 30-39 (en banc panel majority) with *id.* at 60-70 (Callahan, J., dissenting), 73-76 (Silverman, J., dissenting). As was true in *Leon*, "the opinions of the divided panel of the Court of Appeals ma[d]e clear" that the affidavit "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." 468 U.S. at 926. It follows that qualified immunity for the officers is therefore appropriate.[6] "[I]f judges thus disagree on a

[6] Decisions from other courts of appeals also make clear that petitioners' execution of the search warrant did not violate clearly established law. See, *e.g.*, *United States* v. *Sanders*, 351 Fed. Appx. 137, 139 (7th Cir. 2009) (search warrant for "all firearms" supported by probable cause when officers had reason to search for a specific firearm and defendant was convicted felon); *United States* v. *Guzman*, 507 F.3d

constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Pearson*, 555 U.S. at 245 (quoting *Wilson*, 526 U.S. at 618).

2. To the extent that denial of qualified immunity from damages is designed to deter official misconduct, see *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) (Section 1983, as a tort remedy, serves the "important purpose" of "[d]eterrence" through "the mechanism of damages that are *compensatory*"); *Carlson* v. *Green*, 446 U.S. 14, 21 (1980) ("[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose."), the court of appeals' approach will reach far more police conduct than is appropriate for that purpose. This Court recently explained that, in the criminal context, "the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." *Davis* v. *United States*, 131 S. Ct. 2419, 2427 (2011) (alteration in original) (quoting *Herring*, 555 U.S. at 143). The same is true with respect to the deterrence benefits of denying immunity in the civil context. In either case, deterrence is "strong and tends to outweigh the resulting costs" only "[w]hen the police exhibit 'delib-

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681, 683-686 (8th Cir. 2007) (upholding district court's conclusion that good-faith exception applied when officers executed search warrant for "all firearms located in" a house after suspect's girlfriend reported domestic violence incidents including threats with specific firearms); *United States* v. *Smith*, 62 Fed. Appx. 419, 421-422 (3d Cir. 2003) (warrant to search for "any ammunition and firearms" supported by probable cause when defendant was suspected of stealing specific handgun and had a felony record); see also *Muehler* v. *Mena*, 544 U.S. 93, 95 (2005) (officers obtained warrant to search for deadly weapons and evidence of gang membership based on evidence that one occupant of house was suspected to be an armed and dangerous gang member).

erate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." *Ibid.*[7]

In this case, petitioner Messerschmidt prepared detailed affidavits describing both his experience as a law enforcement officer and the evidence he had unearthed in his investigation of Bowen; he then submitted the affidavits and warrant application to two of his supervisors, including petitioner Lawrence, for review; when his supervisors cleared the application packet, Messerschmidt submitted it to a deputy district attorney, who approved it and noted on its face that she had reviewed it for probable cause; finally, Messerschmidt submitted the application to a neutral magistrate, who reviewed the packet, found probable cause to search the identified premises for the identified items, and signed the warrant. Thus, "[t]he officers in this case took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989. As this Court has made clear, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 U.S. at 921. When, as in this case, a magistrate did that, "there is literally nothing more the policeman can do in seeking to comply with the law." *Stone* v. *Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring). "Penalizing [petitioners] for the magistrate's error, rather than [their] own, cannot

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[7] Deterrence, moreover, is the exclusive purpose of the exclusionary rule, *Herring*, 555 U.S. at 141, and the "basic insight" underlying the good-faith exception adopted in *Leon*, and later imported to the qualified-immunity context in *Malley*, is that deterrence cannot be achieved absent a sufficient degree of culpability. *Davis*, 131 S. Ct. at 2427-2428.

logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

Because petitioners were neither "plainly incompetent" nor "knowingly violat[ing] the law," *Malley*, 475 U.S. at 341, subjecting them to suit for money damages in their individual capacity for their execution of the warrant will do nothing to deter future Fourth Amendment violations by them or by other officers. It will, however, discourage police officers from zealously (but reasonably) exercising their investigative function and subject them to damages liability for the sort of reasonable mistakes in judgment that are "inevitable" in this context. *Anderson*, 483 U.S. at 641.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2011