No. 06-612

In the Supreme Court of the United States

KEITH B. BARANSKI, PETITIONER

v.

FIFTEEN UNKNOWN AGENTS OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether federal agents are 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 they conducted a warrant search in accordance with a description of the items to be seized that was included in an affidavit reviewed by the magistrate and expressly incorporated in the warrant, but the affidavit did not accompany the warrant at the time of the search.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-62a) is reported at 452 F.3d 433. The panel opinion of the court of appeals is reported at 401 F.3d 419. The memorandum opinion of the district court granting respondents' motion to dismiss (Pet. Supp. App. 1a-10a) is reported at 252 F. Supp. 2d 401.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2006. The petition for a writ of certiorari was filed on September 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As is relevant here, petitioner brought suit in the United States District Court for the Western District of Kentucky against the federal respondents, six named and fifteen unnamed agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the agents violated his Fourth Amendment rights by seizing his guns and other items. The district court granted the federal respondents' motion to dismiss on grounds of qualified immunity. Pet. Supp. App. 1a-10a. A panel of the court of appeals initially reversed in relevant part. 401 F.3d 419 (6th Cir. 2005). After granting rehearing en banc, the court of appeals affirmed. Pet. App. 1a-62a.

1. Petitioner was a licensed firearms dealer who imported guns from Eastern European countries. Petitioner stored the guns in a customs warehouse in Louisville, Kentucky, until he could sell them to eligible law enforcement agencies. ATF agents discovered that petitioner was using forged letters from a law enforcement official in order to sell the guns to other parties. On April 20, 2001, after a six-month investigation, ATF Agent Michael Johnson applied to a magistrate for a warrant to search the Louisville warehouse. In the location on the warrant form for describing the items to be seized, the warrant form stated, "See Attached Affidavit." An attached affidavit listed the items to be seized: *viz.*, "about 425" guns owned by petitioner and stored at the warehouse. The magistrate issued the warrant, signing both the draft warrant and the affidavit, but ordered the affidavit to be sealed in order to protect ATF's confidential sources. Pet. App. 3a-4a.

The following day, Agent Johnson and approximately 20 other ATF agents executed the warrant. Upon reaching the warehouse, the agents were met by the warehouse's manager, who asked to see the warrant. After reading the warrant, the manager asked to see the affidavit. The agents informed the manager that the affidavit was under seal, but told him that they were looking for guns owned by petitioner and stored at the warehouse. The manager (who was also an attorney) insisted that the warrant was defective because it did not describe the items to be seized, but permitted the agents into the warehouse (and directed the agents to the area in which petitioner's guns were stored). The agents seized 372 machine guns and 12 crates containing gun accessories. Upon leaving the warehouse, the agents gave the manager a copy of the search warrant and an inventory of the seized items. Pet. App. 4a-5a.

2. As is relevant here, petitioner brought a *Bivens* action in the Western District of Kentucky against the federal respondents, alleging that they violated his Fourth Amendment rights because the affidavit listing the items to be seized did not accompany the warrant at the time of the search. Pet. App. 5a. The district court denied petitioner's motion to unseal the affidavit and stayed the action pending the completion of criminal proceedings against petitioner. *Ibid.* Petitioner was subsequently convicted in the Eastern District of Missouri of conspiring to import machine guns by making knowingly false entries on applications and other records, in violation of 26 U.S.C. 5861(*l*), and sentenced to 60 months of imprisonment. Pet. App. 5a-6a. The Eighth Circuit affirmed, 75 Fed. Appx. 566 (2003), and this Court denied certiorari, 541 U.S. 1011 (2004). Both lower courts held that the seized items should not be

suppressed; the Eighth Circuit reasoned that "[t]he warrant should not have been suppressed for lack of particularity" because "the warrant referred to a sealed affidavit that described the weapons." 75 Fed. Appx. at 568.

3. After petitioner was convicted in the criminal proceedings, the district court unsealed the affidavit and lifted the stay. The federal respondents then moved to dismiss petitioner's Fourth Amendment claim on grounds of qualified immunity. The district court granted the motion to dismiss. Pet. Supp. App. 1a-10a. The court reasoned that "it appears as though no Fourth Amendment violation occurred," *id.* at 6a, and that, even if it had, the agents were entitled to qualified immunity on the ground that the Sixth Circuit's case law on the issue was "certainly far from clear." *Ibid.*[1]

4. A panel of the court of appeals initially reversed in relevant part. 401 F.3d 419 (2005). After granting rehearing en banc, however, the court of appeals affirmed. Pet. App. 1a-62a.

a. The en banc court of appeals first held that the ATF agents' conduct did not violate the Fourth Amendment. Pet. App. 7a-26a. At the outset, the court reasoned that the warrant complied with the Warrant Clause, despite the fact that the warrant itself did not describe with particularity the things to be seized, because it expressly incorporated an affidavit that did describe them. *Id.* at 9a-10a. The court explained that this case was therefore distinguishable from *Groh* v. *Ramirez*, 540 U.S. 551 (2004), because, in this case, "[the] warrant explicitly incorporated the supporting

[1] The district court held in the alternative that petitioner's *Bivens* action "amount[ed] to a collateral attack on [petitioner's] conviction and the various court rulings which led to it" and was therefore barred under *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Pet. App. 10a.

affidavit; the magistrate signed the affidavit and warrant; and the affidavit described with particularity the items to be seized." Pet. App. 11a. Accordingly, "this warrant made it clear that the magistrate understood and cabined the scope of the search he was authorizing." *Ibid.* The court noted that, by its terms, the requirements of the Warrant Clause need only be satisfied upon "issu[ance]" of the warrant. *Id.* at 13a. "Consistent with the language of the Warrant Clause and the historical purposes behind it," the court continued, "a search conducted in accordance with a valid warrant does not become warrantless, and therefore 'presumptively unreasonable,' due to the manner in which the officers conducted the search." *Id.* at 14a.

The court of appeals considered, and rejected, petitioner's contention that this Court's decision in *Groh* "establishes an incorporate-and-produce and an incorporate-and-accompany requirement with respect to supporting affidavits," under which "the affidavit also (1) must be given to an occupant who requests it at the outset of the search, (2) must accompany the agents during the search and (3) must be left at the scene of the search." Pet. App. 15a-16a.

As to the "incorporate-and-produce" argument, the court of appeals reasoned that *Groh* provided "scant support" for that argument, because "[t]he Court acknowledged that the Fourth Amendment does not compel officers to present a warrant before a search." Pet. App. 16a. At most, the court of appeals explained, "the Court left open only the possibility that it would be 'unreasonable' to decline such a request, not that the search would become warrantless if the agents decline such a request." *Ibid.* The court of appeals added that, in the wake of this Court's subsequent decision in *United*

States v. *Grubbs*, 126 S. Ct. 1494 (2006), "the possibility that the Warrant Clause requires officers to produce a copy of the warrant (and any affidavit) at the outset of the search seems even less plausible." Pet. App. 16a. The court of appeals noted that, in any event, such a rule would not "lend itself to sensible application," because "there doubtless will be times when officers could not reasonably be expected to comply with such a requirement." *Id.* at 17a.

As to the "incorporate-and-accompany" argument, the court of appeals acknowledged that *Groh* "contain[ed] some language in support of [that] argument." Pet. App. 17a. Insofar as *Groh* "refer[red] to an incorporated affidavit being 'present' at the search," however, the court suggested that one possible explanation was that "the reasoning of *Groh* (though perhaps not the result) might well have been different if the facially defective warrant had been attached to an affidavit signed by the magistrate that clearly corrected the omission and that accompanied the warrant during the search." *Id.* at 18a-19a. "Another possibility," the court hypothesized, "is that the Court was suggesting that officers generally should bring an incorporated affidavit * * * with them during the search and that the failure to do so may be a factor in determining whether the search was reasonable, two points with which we agree." *Id.* at 19a.

As to the "incorporate-and-leave-behind" argument, the court of appeals reasoned that, "[i]n some settings, such an unyielding requirement would make little sense." Pet. App. 19a. The court contended that *Groh* "never said that the failure to leave an incorporated affidavit (or authenticated summary) at the scene of the search renders the search presumptively unreasonable." *Id.* at 20a.

The court of appeals next concluded that the agents did not violate the Reasonableness Clause when they conducted the search without the accompanying affidavit. Pet. App. 21a-26a. At the outset, the court noted that, "[t]o satisfy the Reasonableness Clause, officers not only must obtain a valid warrant[,] but they also must conduct the search in a reasonable manner." *Id.* at 21a. Considering the totality of the circumstances, the court then determined that the search was reasonable. *Id.* at 22a. The court reasoned that, although Agent Johnson did not show the affidavit to the manager, he "proceeded to tell him orally what the warrant and affidavit authorized them to seize." *Id.* at 23a. The court added that "[t]here was nothing unduly complex about the object of the search that would have prevented agent Johnson from remembering precisely what he had authority to search for and to seize." *Ibid.* Moreover, the court observed, "[t]he record * * * shows that once [the manager] agreed to let the agents into the warehouse, the agents conducted the search in a reasonable manner." *Ibid.* While the court suggested that "the agents would have been wiser to bring a written summary of the items to be seized (presumably signed by the magistrate) or to list the items to be seized in the warrant itself," it concluded that no constitutional violation had occurred. *Id.* at 26a.

The court of appeals held in the alternative that, even if the search did violate the Fourth Amendment, the ATF agents were entitled to qualified immunity because the search "did not violate clearly established law." Pet. App. 26a (internal quotation marks omitted). The court noted that the Eighth Circuit had held (in petitioner's appeal from his criminal conviction) that the agents had "acted in good faith in executing *this* war-

rant," *id.* at 27a; that "the prevailing law in *this* circuit would have led reasonable agents to believe that their conduct was legal at the time they conducted the search," *ibid.*; and that "other appellate courts have rejected similar claims either because they did not state a constitutional violation or because they did not defeat a * * * good-faith defense." *Id.* at 28a. The court of appeals recognized that the Ninth Circuit had held that "an affidavit necessary to satisfy the particularity requirement not only must be incorporated into the warrant but also must accompany the warrant at the scene." *Id.* at 30a (citing *United States* v. *McGrew*, 122 F.3d 847 (1997)). The court concluded, however, that "this disagreement among the circuits at the time of the search * * * shows that the agents did not violate clearly established law." *Ibid.*

Finally, the court of appeals reasoned that this Court's decision in *Groh* "does not alter th[at] conclusion." Pet. App. 30a. Although the Court in *Groh* held that the agent in that case was not entitled to qualified immunity because the warrant at issue contained a "glaring deficiency," *ibid.* (quoting 540 U.S. at 564), the court of appeals reasoned that "[t]oday's facts offer a poor analogy," because, "[f]ar from invalidating incorporated affidavits, *Groh* recognized that they may satisfy the particularity requirement." *Id.* at 31a. According to the court of appeals, "[n]or did *Groh* say that it was clearly established that a warrant valid upon issuance becomes invalid upon execution if the incorporated affidavit does not accompany the search." *Ibid.* Instead, "[w]hether a particularized warrant at the time of issuance may become an unparticularized warrant when a cross-referenced affidavit does not accompany the search remains a matter of continued debate among the

circuits and remains an issue that neither the text of the Fourth Amendment nor *Groh* resolves." *Ibid.*

b. Judge Gilman, joined by Judge Daughtrey, concurred in the judgment. Pet. App. 32a. While he believed that petitioner's Fourth Amendment rights had been violated, he agreed that the agents were entitled to qualified immunity because they did not violate clearly established law. *Ibid.*

c. Judge Clay, joined by three other judges, dissented. Pet. App. 33a-62a. He first concluded that the ATF agents' conduct violated the Fourth Amendment. *Id.* at 35a-48a. According to Judge Clay, *Groh* "makes it inescapably clear that a warrant cannot satisfy the particularity clause of the Fourth Amendment by reference to an affidavit that is not present at the scene of the search." *Id.* at 37a. He explained that, "[w]ithout seeing a copy of the affidavit, the individual whose property is being searched or seized has no way to know the limits of the officer's authority." *Id.* at 38a. Judge Clay noted that this Court had "expressly reserved the question of whether an officer's refusal to present a warrant to the individual being searched when the individual expressly requests to see the warrant is 'reasonable' within the meaning of the Fourth Amendment." *Id.* at 41a (citing *Groh*, 540 U.S. at 562 n.5). He added that "a search warrant's presence at the scene of the search does more than simply inform the individual of the officer's authority; it also informs the officers of the limits of their authority." *Id.* at 42a. Judge Clay suggested that the federal respondents "could have easily avoided this entire suit * * * simply by transcribing the items listed in the affidavit onto the warrant or onto a list attached to the warrant." *Id.* at 47a. "This Court," Judge Clay added, "would hardly be imposing any great burden on law en-

forcement officers by holding that [the federal respondents'] conduct violated the Fourth Amendment." *Id.* at 48a.

Judge Clay also concluded that the ATF agents were not entitled to qualified immunity. Pet. App. 48a-51a. He explained that, as in *Groh*, the agents "violated [petitioner's] Fourth Amendment right to be searched only pursuant to a warrant describing with particularity the items to be seized." *Id.* at 49a. The warrant was "deficient on its face," in Judge Clay's view, because it "utterly failed to describe any items that the officers intended to seize" but instead "referred the reader to an affidavit that the executing officer intentionally had placed under seal." *Ibid.* He reasoned that the agents' "reliance on this Circuit's pre-*Groh* case law is unavailing" because, "[i]nasmuch as the *Groh* search occurred in 1997, it follows that *Groh* applies to all searches occurring after 1997," and "[t]he search in this case occurred in 2001." *Id.* at 50a-51a.[2]

ARGUMENT

Petitioner contends (Pet. 7-27) that, by holding both that the ATF agents' conduct did not violate the Fourth Amendment and that, even if it did, the agents were entitled to qualified immunity, the court of appeals' decision conflicts with this Court's decision in *Groh* v. *Ramirez*, 540 U.S. 551 (2004). The court of appeals' decision was correct, and further review is not warranted at this time.

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[2] Judge Clay would have held that petitioner's *Bivens* action was barred under *Heck*, except insofar as it sought compensatory damages for his injured reputation and mental anguish (and punitive damages). Pet. App. 51a-62a.

1. Petitioner first contends (Pet. 7-22) that this Court should grant review to determine whether, consistent with the Fourth Amendment, officers may conduct a warrant search in accordance with a description of the items to be seized that was included in an affidavit reviewed by the magistrate and expressly incorporated in the warrant, when the affidavit did not accompany the warrant at the time of the search. That contention lacks merit.

a. The court of appeals correctly held that, under the circumstances of this case, such a search does not violate the Fourth Amendment. The Warrant Clause of the Fourth Amendment 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 warrant in this case was validly "issue[d]" under the Warrant Clause because it expressly incorporated an affidavit that particularly described the items to be seized, thereby ensuring that "the magistrate understood and cabined the scope of the search he was authorizing." Pet. App. 11a.

The fact that the affidavit did not accompany the warrant *after* the warrant was issued did not retroactively render the issuance of the warrant invalid for purposes of the Warrant Clause. Nor did that fact render the search otherwise "unreasonable" under the Fourth Amendment, at least where, as here, the officers were evidently aware of the items that they had authority to search for and seize. Pet. App. 23a. Although the Fourth Amendment does not require an officer to present a property owner with a copy of the search warrant before conducting a search, see *United States* v. *Grubbs*, 126 S. Ct. 1494, 1501 (2006), the agents in this case did

present a copy of the warrant to the manager of the property and orally informed him of the items to be seized, thereby assuring the manager that a magistrate had passed on the existence of probable cause and enabling the manager to monitor the search. Pet. App. 22a-23a. Under those circumstances, the agents' conduct was reasonable and thus did not violate the Fourth Amendment.

b. Petitioner contends that, by upholding the constitutionality of the agents' conduct, the court of appeals' decision conflicts with this Court's decision in *Groh*. As petitioner concedes (Pet. 15), however, "the specific problem in *Groh* was not present in the case at bar." In *Groh*, the warrant at issue erroneously listed the place to be searched as the items to be seized. 540 U.S. at 554. Although the warrant application did list with particularity the items to be seized, the warrant itself in *Groh*—unlike the warrant in this case—did not expressly incorporate that document. *Id.* at 554-555. The Court held that the warrant was "plainly invalid." *Id.* at 557. The Court reasoned that the warrant "failed altogether" the Warrant Clause's requirement that it describe with particularity the things to be seized, and explained that "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." *Ibid.*

As petitioner notes (Pet. 9), the Court in *Groh* did assert that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, *and* if the supporting document accompanies the warrant." 540 U.S. at 557-558 (emphasis added) (citing decisions from the First, Sixth, Eighth, Ninth, Tenth, and District of Columbia

Circuits). Petitioner contends that, by citing those cases, the Court "tacitly" or "apparent[ly]" held that they were correct. See, *e.g.*, Pet. 11, 12, 14, 15. Immediately after citing those cases, however, the Court noted that "in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant." 540 U.S. at 558. For that reason, the Court concluded, "we need not further explore the matter of incorporation." *Ibid.*; see *id.* at 557 (noting that "[w]e do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents"). The Court therefore did not hold that those cases were correctly decided and, more to the point, did not decide the precise question presented by this case. As a result, the decision of the court of appeals in this case does not conflict with this Court's decision in *Groh*.

c. Petitioner does not contend that the Court should grant review on the ground that the court of appeals' decision in this case conflicts with the court of appeals decisions *cited* in *Groh*. To the extent that he did, however, such a contention would lack merit. As a preliminary matter, of the six courts of appeals whose decisions were cited in *Groh*, only two (the Ninth and Tenth Circuits) had unconditionally held that an affidavit may cure an otherwise deficient warrant only when the warrant specifically incorporates the affidavit *and* the affidavit accompanies the warrant during the search. See *United States* v. *McGrew*, 122 F.3d 847, 849-850 (9th Cir. 1997); *United States* v. *Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993). The remaining four courts of appeals had held (in decisions other than those cited in *Groh*) that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the

affidavit (and the executing officers were aware of the relevant contents of the affidavit), see *United States* v. *Dale*, 991 F.2d 819, 846-848 (D.C. Cir.), cert. denied, 510 U.S. 906 and 1030 (1993); *United States* v. *Bonner*, 808 F.2d 864, 866-867 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987), or, at most, if the warrant incorporates the affidavit and the affidavit is "present" at the scene when the search is conducted (even if it does not physically "accompany" the copy of the warrant possessed by the executing officers), see *United States* v. *Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989).[3]

To be sure, the court of appeals' decision in this case appears to conflict with the pre-*Groh* decisions of at least the Ninth and Tenth Circuits as to whether an incorporated affidavit must accompany the warrant at the time of the search. That apparent conflict, however, does not warrant the Court's review at this time because it is unclear whether the courts of appeals that have required accompaniment as well as incorporation will continue to apply the same rule in the wake of the Court's decisions in *Groh* and *Grubbs*. Those decisions indicate, first, that the validity of a warrant for purposes of the Warrant Clause is evaluated at the time of the warrant's issuance, see *Groh*, 540 U.S. at 557, and second, that the Fourth Amendment does not require an officer to present a property owner with a copy of the search warrant

[3] Although the district court disposed of this case on a motion to dismiss (and there was therefore no factual development beyond the allegations in the complaint), the government represented to the lower courts that a copy of the affidavit was in fact present at the scene (and thus available to agents) at the time of the search. See, *e.g.*, Federal Resps. C.A. Reh'g Br. 17-18 n.7.

before conducting a search, see *Grubbs*, 126 S. Ct. at 1501. Like the court of appeals in this case, the only other court of appeals to have addressed the issue after *Groh* and *Grubbs* has relied on those cases in rejecting the proposition that the Fourth Amendment requires that "an executing officer possess or exhibit the affidavit or any other document incorporated into the warrant at the time of the search *in order for the warrant to be valid*." *United States* v. *Hurwitz*, 459 F.3d 463, 472 (4th Cir. 2006). Because the courts of appeals that have required accompaniment may decide to reconsider that requirement in light of *Groh* and *Grubbs*, it would be premature to grant certiorari on the issue now.

2. Even if the ATF agents' conduct violated the Fourth Amendment, they were entitled to qualified immunity. Petitioner contends (Pet. 22-27) that the court of appeals erred by holding that, in light of clearly established law, the agents' conduct was reasonable. That contention lacks merit and also does not warrant further review.

a. The court of appeals correctly held that the ATF agents were entitled to qualified immunity. In determining whether an officer is entitled to qualified immunity, a court is required to judge the reasonableness of the officer's conduct "against the backdrop of the law at the time of the conduct." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). At the time of the search in this case (April 21, 2001), the Sixth Circuit had held that an affidavit may cure an otherwise deficient warrant if the warrant incorporates the affidavit and the affidavit is "present" at the scene at the time of the search, see *Gahagan*, 865 F.2d at 1497-1499, and had further suggested that the warrant need only incorporate the affidavit, see, *e.g.*, *Frisby* v. *United States*, 79

F.3d 29, 32 (6th Cir. 1996); *United States* v. *Brown*, 49 F.3d 1162, 1169 (6th Cir.), cert. denied, 516 U.S. 942 (1995); cf. *United States* v. *Pritchett*, 40 Fed. Appx. 901, 907 (6th Cir.) (rejecting challenge to a warrant incorporating an affidavit that was under seal, in decision postdating conduct at issue here), cert. denied, 537 U.S. 1023 (2002). In addition, as noted above, other courts of appeals had unambiguously held that mere incorporation was sufficient. See, *e.g.*, *United States* v. *Jones*, 54 F.3d 1285, 1292 (7th Cir.), cert. denied, 516 U.S. 902 (1995); *Dale*, 991 F.2d at 846-848; *Bonner*, 808 F.2d at 866-867. The fact that courts had reached different conclusions in other cases does not deprive the agents of qualified immunity. As this Court has explained, "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).[4]

b. Petitioner contends that the court of appeals' decision conflicts with the Court's decision in *Groh* in this respect as well. Unlike the dissenting opinion below

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[4] In addition, numerous courts of appeals (including the Sixth Circuit in an earlier case) had held that, where a search was invalid because an affidavit did not accompany the warrant or was otherwise not present at the time of the search, the fruits of the search nevertheless should not be suppressed because the officers were acting in good faith. See, *e.g.*, *United States* v. *Blakeney*, 942 F.2d 1001, 1026 (6th Cir. 1991), cert. denied, 502 U.S. 1035 (1992); *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990); *United States* v. *Curry*, 911 F.2d 72, 77-78 (8th Cir. 1990), cert. denied, 498 U.S. 1094 (1991). Indeed, in petitioner's appeal from his criminal conviction, the Eighth Circuit seemingly reached the same result. 75 Fed. Appx. 566, 568 (2003). As this Court has explained, "the same standard of objective reasonableness that we appl[y] [under the good-faith exception] defines the qualified immunity accorded an officer." *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986).

(Pet. App. 50a-51a), petitioner does not directly contend that *Groh* constitutes "clearly established law" for purposes of the qualified-immunity analysis—nor could he, because *Groh* was decided *after* the conduct at issue. See, *e.g.*, *Brousseau*, 543 U.S. at 200 n.4. Instead, petitioner contends only that the conduct at issue was *analogous* to the conduct in *Groh*, as to which, the Court held, the agent involved lacked qualified immunity. See 540 U.S. at 563-565. In *Groh*, however, the Court repeatedly made clear that the warrant at issue contained a "glaring deficiency," and that the ensuing search was therefore plainly unconstitutional, because the warrant erroneously listed the place to be searched as the items to be seized. *Id.* at 564; see, *e.g.*, *id.* at 557 (describing warrant as "plainly invalid").

In this case, by contrast, the warrant contained no such "glaring deficiency," because it expressly incorporated an affidavit listing with particularity the items to be seized—and, as the various decisions preceding the agents' conduct amply demonstrate, the ensuing search was far from plainly invalid. *Groh* therefore does not compel the conclusion, or even suggest, that the agents' conduct was unreasonable in light of clearly established law. Nor does the court of appeals' holding that the agents were entitled to qualified immunity present any question that independently warrants this Court's review.[5]

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[5] In the event that the Court grants review on the constitutional issue, it should also grant review on the issue whether the law was clearly established at the time of the alleged violation, consistent with the Court's usual practice in *Bivens* cases and cases under 42 U.S.C. 1983. See, *e.g.*, *Wilkie* v. *Robbins*, cert. granted, No. 06-219 (Dec. 1, 2006); *Scott* v. *Harris*, cert. granted, No. 05-1631 (Oct. 27, 2006); *Devenpeck* v. *Alford*, 543 U.S. 146 (2001); *Groh*, *supra*; *Wilson*, *supra*.

3. Finally, even if the agents were not entitled to qualified immunity on petitioner's Fourth Amendment claim, the court of appeals' decision could be affirmed on the alternative ground that petitioner's *Bivens* action constituted a collateral attack on his criminal conviction and was therefore barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Even the dissenting opinion below recognized that, at a minimum, *Heck* foreclosed a substantial portion of petitioner's action. See Pet. App. 51a-62a. The availability of that alternative ground for affirmance provides an additional reason to deny review on the questions presented.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Notably, after the Eighth Circuit affirmed petitioner's criminal conviction, petitioner filed a petition for a writ of certiorari in this Court, in which he contended that, insofar as the Eighth Circuit's upheld the district court's denial of his suppression motion, it "directly conflict[ed]" with the Court's decision in *Groh*. Pet. at 9, *Baranski* v. *United States*, No. 03-1351. The Court denied the petition. See 541 U.S. 1011 (2004).