No. 10-704

IN THE

Supreme Court of the United States

CURT MESSERSCHMIDT, ET AL.,

Petitioners,

—v.—

AUGUSTA MILLENDER, ET AL.,

Respondents.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including *Malley v. Briggs*, 475 U.S. 335 (1986), which is central to the issues presented in this case.

STATEMENT OF THE CASE

Before dawn on November 6, 2003, members of the Los Angeles County Sheriff's Department SWAT team descended upon the home of 73-year-old Augusta Millender.[2] Within seconds of their clandestine arrival, the SWAT officers shattered the large picture window at the front of the home, broke down the front door, and entered the premises. Mrs. Millender, her 47-year-old daughter, and her grandson, still asleep when the raid began, were forced to evacuate the house and spend the next four

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] The factual statement in this brief is based on the Ninth Circuit's *en banc* decision, *Millender v. County of Los Angeles*, 620 F.3d 1016, 1020 (9th Cir. 2010), and the submissions of the parties.

hours outside as sheriff's deputies conducted an exhaustive search of the home.

This search was the culmination of events that began several days earlier when Jerry Lee Bowen fired several shots at his girlfriend, Shelly Kelly, who was attempting to flee the apartment where they lived together in an effort to escape Bowen's domestic abuse. Upon reporting the attack to the Sheriff's Department, Kelly identified Bowen as the perpetrator, described the attack in detail, and told Petitioner Curt Messerschmidt, a 14-year veteran of the Sheriff's Department specializing in gang-related crimes, that Bowen used "a black sawed-off shotgun with a pistol grip" to shoot at her during the altercation. Kelly did not allege that Bowen owned any firearms other than the sawed-off shotgun. When asked if she knew of Bowen's whereabouts, Kelly indicated that she "believed" he was hiding out at a house located at 2234 East 120th Street. That house, apparently unbeknownst to Kelly, belonged to Mrs. Millender, who had once been Bowen's foster mother. Kelly did not state, and Petitioner did not ask, why she believed that Bowen was at the 120th Street address, how she had come upon such information, or whether she knew of other locations where they might find Bowen.[3]

On November 3rd and 4th, sheriff's deputies, including Messerschmidt, surveyed the home located at 2234 East 120th Street and took photos of the

[3] Bowen had apparently lived in several places during 2003. Earlier in the year, Mrs. Millender allowed him to stay in a detached carriage house on her property for approximately two months. The record also indicates, however, that he was living later that year with his wife at a different address in Los Angeles.

residence, but did not observe Bowen. On November 5th, deputies went to the door and spoke to Mrs. Millender and her daughter on the pretext that there were individuals gambling in front of their home. The deputies did not mention Bowen, nor did they see any trace of him.

Messerschmidt subsequently submitted an affidavit and warrant applications requesting permission to arrest Bowen and to search the 120th Street residence. In his affidavit, Messerschmidt included detailed information regarding the incident with Shelly Kelly, as well as specific information about Bowen, including the fact that Bowen used "a black sawed-off shotgun with a pistol grip" to fire multiple shots at Kelly, and that he was affiliated with a local street gang. The affidavit did not suggest that Bowen's alleged gang ties were connected to the assault on Kelly. The affidavit also failed to mention the three-day-long surveillance that Messerschmidt and his colleagues conducted prior to the search, the fact that they did not observe Bowen at Mrs. Millender's home, or that the residence belonged to Mrs. Millender.

The warrant application accompanying Messerschmidt's affidavit sought authorization to search the 120th Street residence for 1) items tending to establish the identity of persons in control of the premises, 2) all firearms and firearm-related items, and 3) articles of evidence showing, or relevant to, gang membership. J.A. 52. It also sought permission to serve the warrant at night in order to add an "element of safety to the community" and "the deputy personnel serving the warrant, based on the element of surprise" J.A. 59, thus setting the stage for the SWAT team raid that ensued.

The police succeeded in terrifying Mrs. Millender and her daughter (Mrs. Millender was hospitalized for high blood pressure later that day), but they did not find Bowen or the sawed-off shotgun. They did seize a different weapon, lawfully registered to Mrs. Millender, a box of .45 caliber ammunition, and a letter addressed to Bowen from Social Services in June 2003, five months prior to the raid. At that point, Messerschmidt placed the 97th Street apartment Bowen shared with Kelly under surveillance and contacted Kelly to inquire into other places Bowen could potentially be found. Kelly indicated that Bowen might be at a local motel. Less than half an hour later, Bowen was discovered hiding under the bed at the motel and taken into custody.

Mrs. Millender and her family filed suit under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. They prevailed in the district court, which found that the arrest warrant in this case was facially valid but that the search warrant was unconstitutionally overbroad insofar as it authorized a search of the Millender home for *all* firearms, firearm-related materials, and gang-related items. Having established that a Fourth Amendment violation occurred, the court went on to deny Petitioners' qualified immunity claim, noting that the officers' actions were not objectively reasonable. The district court's qualified immunity decision was affirmed by the court of appeals, *en banc*, on the ground that the warrant was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Millender v. County of Los Angeles*, 620 F.3d 1016, 1020 (9th Cir. 2010).

SUMMARY OF ARGUMENT

In *Malley v. Briggs*, 475 U.S. 335 (1986), the Supreme Court held that a police officer who obtains a warrant in an objectively unreasonable manner is not entitled to qualified immunity in a §1983 action. The Court's holding in *Malley* balanced society's interests in protecting the core constitutional right to be free from searches and seizures carried out in the absence of probable cause and allowing law enforcement officers to perform their duties in reasonable reliance on judicial warrants without fearing personal liability for the magistrate's errors.

Malley did not, however, confer absolute immunity on police officers executing warrants. Rather, *Malley* made clear that a police officer could be held liable for an unconstitutional search, notwithstanding a warrant, if a reasonably well-trained, reasonably competent officer in similar circumstances would have known that the affidavit submitted in support of the search warrant failed to establish probable cause to search for each item identified in the warrant.

Petitioners misconstrue this Court's decisions in *Malley*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *United States v. Leon*, 468 U.S. 897 (1984), as allowing a damages suit against the police only in instances in which the police conduct in procuring a warrant was egregious. This is a far cry from the "objectively reasonable" standard these cases establish. Moreover, since *Malley*, this Court has consistently reaffirmed the "objectively reasonable" standard, giving no indication that *Malley* needs to be reconsidered in any way.

Malley continues to serve a critical function by ensuring compensation for victims of constitutional violations caused by objectively unreasonable actions by law enforcement. While both the exclusionary rule and civil damages under § 1983 play an important role in deterring police transgressions of the Fourth Amendment, only money damages provide redress for the victims when such transgressions occur. Qualified immunity and the exclusionary rule thus serve complementary but not identical functions. While *Malley* rested in part on cases discussing the good faith exception to the exclusionary rule, this Court has never held that the two doctrines are inextricably bound to the same set of rules. In particular, the rationale for this Court's exclusionary rule holding in *Herring v. United States*, 555 U.S. 135 (2009), does not apply to qualified immunity and should not be used to dilute the holding of *Malley*.

Finally, any search not supported by probable cause is per se unconstitutional, regardless of whether a warrant has been issued or not. The Ninth Circuit correctly held that the warrant issued in this case was facially invalid, if viewed from the perspective of an objectively reasonable officer in the Petitioners' shoes, because it authorized what amounted to a general, exploratory search of Mrs. Millender's home for numerous items that the police lacked probable cause to seek. To suggest that an overbroad warrant such as this is permissible, or that Petitioners were reasonable in their belief that the warrant was supported by probable cause, would betray the Framers' longstanding and well-documented hostility toward general warrants and

their insistence that searches be conducted only with particularity and if supported by probable cause.

ARGUMENT

I. THE CRITICAL QUESTION UNDER *MALLEY* IS WHETHER A POLICE OFFICER'S RELIANCE ON A DEFECTIVE WARRANT TO CONDUCT AN UNCONSTITUTIONAL SEARCH WAS OBJECTIVELY REASONABLE.

As Respondents convincingly demonstrate, nothing that Petitioners knew at the time they sought a search warrant provided probable cause to search Mrs. Millender's home for any firearms other than the sawed-off shotgun that was used in the attack on Shelly Kelly, or for gang-related material that might be found in Mrs. Millender's home, particularly given Messerschmidt's testimony that he had no reason to believe that the attack on Kelly was gang-related. *See Millender*, 620 F.3d at 1031. The only issue in this case, therefore, is whether Petitioners are entitled to qualified immunity despite seeking and relying on an unconstitutionally overbroad search warrant.

A. Contrary To Petitioners' Assertion, *Malley* Does Not Extend Immunity To Police Officers In All But "Egregious" Cases Involving "Flagrant Violations" Of The Fourth Amendment.

This Court in *Malley* rejected a rule that would have granted police officers absolute immunity from suit for seeking a warrant without probable cause. Instead, the Court held that police officers "will not be immune if, on an objective basis, it is

obvious that no reasonably competent officer would have concluded that a warrant should issue." *Id.* at 341. Relying on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court explained that the qualified immunity inquiry is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley*, 475 U.S. at 345; *see also Harlow*, 457 U.S. at 818 (government officials are liable for civil damages when their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known"). As Justice Powell summarized in his concurrence, *Malley* stands for the proposition "that liability under § 1983 will attach when 'an officer is "constitutionally negligent,"' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause.'" *Malley*, 475 U.S. at 348 (Powell, J., concurring in part and dissenting in part) (quoting *Briggs v. Malley*, 748 F.2d 715, 721 (1984)).

Despite *Malley*'s plain language, Petitioners attempt to read a more expansive qualified immunity standard into *Malley* under which police officers can be held liable for applying for unconstitutional search warrants *only* if such violations can be characterized as "flagrant," Pet. Br. at 12, 30, 38, "egregious," Pet. Br. at 17, 19, 20, 23, 26, 30, 38, or demonstrative of "gross incompetence," Pet. Br. at 19, 38. *Malley* says no such thing.[4]

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[4] Notably, neither *Malley* nor *Harlow* contains the words "egregious" or "flagrant." The term "gross incompetence" is absent from *Harlow*, and appears only once in a footnote in

Under *Malley*, the actions of an officer whose request for a warrant caused an unconstitutional arrest are assessed according to their "objective reasonableness." *Malley*, 475 U.S. at 344. While egregious conduct is certainly objectively unreasonable under *Malley*, unreasonable conduct that causes a constitutional violation need not be egregious for a police officer to be subject to suit. Repeatedly, however, Petitioners attempt to reconfigure *Malley* as having delineated the qualified immunity boundary in the search warrant context at egregious conduct, suggesting that the Court should grant Petitioners immunity from suit in this case because it "involves no flagrant abuse or gross incompetence." Pet. Br. at 38. But *Malley*'s demarcation of the qualified immunity line occurs not at "gross incompetence" but "reasonable competence." *Malley* 475 U.S. at 341.

Petitioners rely on a similar misreading of *United States v. Leon*, 468 U.S. 897 (1984), arguing that under *Leon* evidence could be suppressed in "only the most extraordinary circumstances, where the officer's conduct in applying for or relying on the warrant bespoke bad faith." Pet. Br. at 22. Petitioners' conclusion that *Leon* required suppression of evidence only in the face of "egregious [police] conduct that flagrantly violates Fourth Amendment rights," Pet. Br. at 30, is belied by *Leon* itself. The Court in *Leon* clearly explained that the "good-faith inquiry is confined to the objectively

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Malley to describe a *magistrate's* conduct in approving a warrant that no officer of *reasonable* competence would have requested. *Malley*, 475 U.S. at 346 n.9 (explaining that an officer "cannot excuse his own default by pointing to the *greater* incompetence of the magistrate." (emphasis added)).

ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon* at 923 n.23.

Drawing from *Harlow*, the majority in *Leon* was careful to note: "[An] officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* at 922-23 (citation omitted). The Court further explained that "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit *or could not have harbored an objectively reasonable belief in the existence of probable cause." Id.* at 926 (emphasis added).

The United States similarly misreads *Malley* when it argues that an officer who "attempt[s] to follow the law," U.S. Br. at 22, by seeking the opinion of other officers and a prosecutor is entitled to qualified immunity by virtue of that fact alone. The objectively reasonable standard announced in *Malley* and *Harlow* is not met simply because a police officer attempts to comply with the Constitution. *See Harlow*, 457 U.S. at 818 (holding that qualified immunity does not depend on the officer's subjective, good faith belief that he was not violating clearly established federal law, but instead hinges on whether that belief was reasonable); *see also Saucier v. Katz*, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring in the judgment) ("Underlying intent or

motive are not relevant to the inquiry; rather, 'the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them.'" (*quoting Graham v. Connor*, 490 U.S. 386, 397 (1989))); *see also Bruning v. Pixler*, 949 F.2d 352, 356 (10th Cir.1991) ("The subjective component [of qualified immunity] focused on the good faith of the official and relieved him from liability if he did not actually know his conduct was unconstitutional and did not act with malicious intent. *Harlow* eliminated any consideration of the defendant's intent as it relates to his knowledge of the law . . . .").

As *Malley* states, "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Malley*, 475 U.S. at 345 n.7 (citation omitted). Accordingly, the Court found "it reasonable to require the officer applying for the warrant to minimize th[e] danger [of an unlawful arrest] by exercising reasonable professional judgment," *id.* at 346, as measured by "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant," *id*. at 345. Moreover, as this Court stated in *Groh v. Ramirez*, 540 U.S. 551 (2004), "[i]t is incumbent *on the officer executing a search* warrant to *ensure* the search is lawfully authorized and lawfully conducted," *id.* at 563 (emphases added), and to fulfill his "duty to *ensure* that the warrant conforms to constitutional requirements," *id*. at 563 n.6 (emphasis added). The fact that an officer merely gave it the old college (or constitutional) try does not mean that the *Malley* test has been satisfied.

In other words, a police officer's violation of constitutional rights may be objectively unreasonable even if done in good faith. As the Court stated in *Graham v. Connor*, 490 U.S. at 397, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." In the context of this case, an officer who seeks a warrant based on an affidavit that a reasonable officer would not view as sufficient to establish probable cause for every item sought, is not shielded from liability simply because he sought the warrant absent malice or deceit.

B. This Court Has Remained Faithful to *Malley*'s "Objectively Reasonable" Standard.

The unprecedented reading of *Malley* by Petitioners and their *amici* finds no support in this Court's post-*Malley* pronouncements. Specifically, there has been no indication by this Court since *Malley* that a plaintiff must show "egregious," "flagrant," or "grossly incompetent" conduct to overcome a defendant's assertion of qualified immunity. Instead, in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), this Court clarified and further cemented the *Malley* standard by establishing a similar qualified immunity formulation that is consistently relied upon: To be liable for damages an officer's actions must be "objectively legally unreasonable." According to *Anderson*, an officer sued under § 1983 is entitled to qualified immunity if, but only if, "a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at

641. By clarifying that the relevant inquiry is whether an officer should have known that his conduct was unconstitutional in light of then-current jurisprudence, *see id.* at 646, *Anderson* makes clear that an officer's actions can be unjustified without being "egregious," "flagrant," or "grossly incompetent."

Since *Anderson*, the Court has hewed closely to this conception of qualified immunity. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court held that qualified immunity is unavailable where the challenged action's "'unlawfulness [is] apparent,'" *id.* at 739 (quoting *Anderson*, 483 U.S. at 640), so that "'a reasonable person would have known'" that he was committing a constitutional violation in light of the state of the law at the time, *id.* at 744 (quoting *Harlow*, 475 U.S. at 818). In *Groh*, 540 U.S. 551, the Court held that a misstep resulting in an indisputable constitutional violation is actionable even where the violation resulted from what was, arguably, a simple oversight. In *Wilson v. Layne*, 526 U.S. 603, 614 (1999), and again in *Pearson v. Callahan*, 555 U.S. 223, 244 (2009), the Court applied an "objective legal reasonableness" standard. *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*." (emphases added)).

Nothing in any of this Court's post-*Malley* cases suggests that an officer who should have known that his conduct was unconstitutional may invoke qualified immunity if his conduct was not also egregious. *See Burns v. Reed*, 500 U.S. 478 (1991)

("'[W]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.'" (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 524 (1985)) (internal quotation marks omitted)). Petitioners' attempt to reconstruct *Malley* and its kin as extending qualified immunity to police officers in all but the most offensive cases of police misconduct cannot be reconciled with either *Malley*'s plain language or its subsequent treatment by this Court.

Furthermore, since *Malley*, this Court has not only reaffirmed the nature of the "objectively reasonable" standard, but has also made clear that the standard adequately shields officers from unjustified liability. *See, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978))); *McCleary v. Navarro*, 504 U.S. 966, 967 (1992) (White, J., dissenting from denial of cert.) (the standard, "whether a reasonable officer *could* have thought that he had acted in accordance with the Constitution . . . provides ample room for mistaken judgments" (quotation marks omitted) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991))).

In applying the *Malley* standard, the lower courts have understood that it represents a calibrated balance of interests, and have respected that balance whether granting or denying qualified immunity. *See, e.g., Zarnow v. City of Wichita Falls*, 500 F.3d 401, 409 (5th Cir. 2007) (noting that the *Malley* standard strikes a balance "between

compensating wronged individuals for deprivation of constitutional rights and frustrating officials in discharging their duties for fear of personal liability" (internal quotation marks omitted)); *Burke v. Town of Walpole*, 405 F.3d 66, 76-77 (1st Cir. 2005) (noting that qualified immunity doctrine "aims to balance the desire to compensate those whose rights are infringed by state actors with an equally compelling desire to shield public servants from undue interference with the performance of their duties and from threats of liability which, though unfounded, may nevertheless be unbearably disruptive" (internal quotation marks and brackets omitted)). The bald assertion by Petitioners' *amici* that "the *Malley/Leon* standards [should] be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct," States Br. at 6, is strikingly unsupported by any statistical evidence or legal citation.

II. *MALLEY*'S "OBJECTIVELY REASONABLE" STANDARD CONTINUES TO SERVE AN IMPORTANT AND UNIQUE REMEDIAL FUNCTION THAT WOULD BE JEOPARDIZED WERE QUALIFIED IMMUNITY FORCED TO WALK LOCKSTEP WITH THIS COURT'S EVERY PRONOUNCEMENT ON THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

In *Malley*, the Court borrowed from its then-recent decision in *Leon* establishing an "objective reasonableness" standard for the suppression of evidence in criminal cases and applied the same

standard to qualified immunity in the civil context for an officer whose request for a warrant resulted in an unconstitutional arrest. *Malley*, 475 U.S. at 344. Relying on *Leon*, the Court stated that immunity is unavailable where a "warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45 (citing *Leon*, 468 U.S. 897, 923 (1984)).

It is not surprising that the Court would hold that both the suppression of evidence in a criminal proceeding and money damages in a civil proceeding may be appropriate remedies when reliance on a warrant is objectively unreasonable because both share a common goal of deterring constitutional violations. *See Malley*, 475 U.S. at 343-44 (stating that an officer's reflection upon whether a reasonable basis exists for believing that an affidavit establishes probable cause before submitting a request for a warrant "is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (barring the use of evidence secured through an illegal search is a "deterrent safeguard without insistence upon which the Fourth Amendment would [be] reduced to a form of words" (internal quotation marks omitted)).

However, it is one thing to say that there is a relationship between the good faith exception to the exclusionary rule and the standard for qualified immunity in Fourth Amendment cases. It is quite another thing to say that "the standards from this Court's qualified immunity jurisprudence *must* inform the scope of the good-faith exception to the exclusionary rule." States Br. at 7 (emphasis added). This Court has never endorsed the latter proposition. To the contrary, it has expressly acknowledged that the good faith exception to the exclusionary rule and the standard for qualified immunity in Fourth Amendment cases "are not perfectly analogous." *Leon*, 468 U.S. at 923, n.23.

In fact, qualified immunity and the exclusionary rule differ in fundamental respects. First, they spring from different historical sources. The qualified immunity doctrine has its roots in the common law defense of good faith and probable cause dating back to the early 19th century. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967). The exclusionary rule, on the other hand, was crafted by the Court less than a century ago specifically to confront violations of the Fourth Amendment.

Second, the scope of the two doctrines is different. Qualified immunity attempts to balance the ability of individuals to recover damages for a wide array of constitutional violations with the need for officials to exercise discretion in a variety of contexts. The exclusionary rule was created specifically to deter encroachments on the Fourth Amendment.

Third, the two doctrines implicate different interests. Qualified immunity is a defense to

constitutional tort claims, most typically arising under § 1983. Section 1983, in turn, was intended not only "to serve as a deterrent against future constitutional deprivations" but "to provide compensation to the victims of past abuses." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)*; see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights *and to provide relief to victims if such deterrence fails*." (emphasis added)); *Harlow*, 457 U.S. at 819 ("The public interest in deterrence of unlawful conduct *and in compensation of victims* remains protected by a test that focuses on the objective legal reasonableness of an official's acts." (emphasis added) (footnote omitted)).

Indeed, "[d]amages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate *even if no substantial deterrent effects on future official lawlessness might be thought to result*." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 408 (1971) (Harlan, J., concurring) (emphasis added). By contrast, this Court has stated that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011). As critical as that function is in our criminal justice system, it "is not calculated to redress the injury to the privacy of the victim of the search or seizure." *Stone v. Powell*, 428 U.S. 465, 486 (1976).

Fourth, and relatedly, denying a motion for qualified immunity does not result in what this Court has determined to be the "harsh sanction of exclusion," *Davis v. United States*, 131 S.Ct. at 2428,

or come at a "high cost to both the truth and the public safety." *Id.* at 2423. Rather, as the Court stressed in *Malley*, a civil damages remedy imposes "a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution . . . [, and often will benefit] the most deserving of a remedy—the person who in fact has done no wrong." *Malley*, 475 U.S. at 344. In other words, the exclusionary rule focuses on the admission in a criminal case of inculpating *evidence* obtained through unconstitutional means, while civil damages under § 1983 (which qualified immunity forecloses) are concerned with repairing injuries to *individuals* caused by unconstitutional government conduct.

Any argument that *Malley* should be reinterpreted in light of this Court's exclusionary rule holding in *Herring v. United States*, 555 U.S. 135 (2009), is therefore misplaced and should be rejected. In weighing the costs and benefits of the exclusionary rule under the particular facts presented in *Herring,* the Court concluded that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." The "price" referred to in *Herring*—namely, the inadmissibility of probative evidence in a criminal prosecution—has no relevance in the civil litigation context, where the "price" of applying the *Herring* standard will be the loss of any compensatory remedy for innocent victims of objectively unreasonable police misconduct.[5] That

[5] Such an outcome cannot be reconciled with the fundamental principle that those who suffer a violation of their constitutional rights should normally be entitled to an appropriate judicial

cost would be especially inappropriate because this Court's recent decisions have relied on the availability of civil damages as a partial justification for limiting the scope of the exclusionary rule. *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here[.]"). As this Court has further recognized, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814.[6]

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remedy. As Chief Justice Marshall has famously declared: "[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* 3 William Blackstone, Commentaries *23 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); James Madison, The Federalist No. 43, at 274 (Clinton Rossiter ed. 1961) ("[A] right implies a remedy.").

[6] [R]emedies [such as exclusion of evidence or declaratory or injunctive relief] are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation: in such cases, 'it is damages or nothing.'" *Mitchell*, 472 U.S. at 523 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (rejecting standing for injunctive relief where plaintiff is not "likely to suffer future injury from the use of chokeholds by police officers"); *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978) (holding that municipalities can only be sued under § 1983 for an unconstitutional policy or practice).

III. THE WARRANT CLAUSE IS CRITICAL TO THE FOURTH AMENDMENT, ESPECIALLY WHEN SEARCHING A HOME, AND A SEARCH THAT VIOLATES THE WARRANT CLAUSE BECAUSE THE WARRANT LACKS PROBABLE CAUSE IS PER SE UNCONSTITUTIONAL.

A. *Amici* States' Brief Mischaracterizes The Ninth Circuit's Rationale For Finding That Both The Search Warrant And Actual Search Violated Respondents' Fourth Amendment Rights.

Amici States mischaracterize the Ninth Circuit's rationale as to why the search warrant in this case, as well as the corresponding search itself, violated Respondents' Fourth Amendment rights. While it is true, of course, that not all warrantless searches are necessarily unconstitutional, it is equally true that any search conducted without probable cause—whether or not a warrant issues—is per se unconstitutional.

As an initial matter, the *amici* States ignore, or misinterpret, the Ninth Circuit's determination that the warrant at issue in this case was facially *invalid*. *See Millender*, 620 F.3d at 1035 ("Where, as here, the warrant was so facially invalid that no reasonable officer could have relied on it, the deputies are not entitled to qualified immunity . . . ."). The court arrived at that decision based on its conclusion that the warrant suffered from a "glaring deficiency," namely that "[n]either it nor the affidavit established probable cause that the broad categories of firearms, firearm-related material, and gang-related material described in the warrant were contraband or evidence of a crime." *Id.* at 1033.

Importantly, the court of appeals began from the premise that its analysis of the qualified immunity question turns on what a reasonable officer "in the deputies' position" would have believed. *Id.* As such, the court concluded that "[t]he affidavit indicated exactly what item was evidence of a crime, the black sawed-off shot-gun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items." *Id.* Hence, to the extent that the *amici* States are suggesting implicitly that the warrant would have appeared to be facially valid to a reasonable officer unaware of the background facts, they employ the wrong standard and misrepresent the Ninth Circuit's findings.[7]

In outlining the contours of the Fourth Amendment in its decision below, the Ninth Circuit makes clear that the law requires both that a warrant describe with sufficient particularity the items to be searched and/or seized, and that "the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* at 1024. The court further noted that the probable cause requirement "encapsulates the overarching Fourth

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[7] *See, e.g.*, *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007) ("If officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer."); *Storck v. City of Coral Springs*, 354 F.3d 1307, 1317 n.5 (11th Cir. 2003) ("The analysis of arguable probable cause is not concerned with what [the plaintiff] thought or knew, but rather, what a reasonable officer knowing what [the defendant officer] knew could have thought.").

Amendment principle that police must have probable cause to search for and seize 'all the items of a particular type described in the warrant.'" *Id.* (quoting *In re Grand Jury Subpoenas*, 926 F.2d 847, 857 (9th Cir. 1991)).

Contrary to the *amici* States' assertions, nowhere does the court suggest that all warrantless searches, no matter the context, are per se unreasonable. Indeed, the notion that police may carry out warrantless searches and/or seizures under certain limited circumstances is undisputed and unremarkable. As the court of appeals appropriately acknowledged, "officers may make a warrantless entry into a residence under certain exigent circumstances, such as when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury . . . ." *Millender*, 620 F.3d at 1033 (internal quotation marks omitted). But "the exigent circumstances doctrine is an exception to the warrant requirement, not an authorization for the deputies to apply for a warrant that is not supported by probable cause." *Id.*

B. The Fourth Amendment Reflects The Framers' Antipathy Toward General Warrants, Particularly Those Involving Searches Of The Home, And Seeks To Ensure That Searches Are Conducted With Particularity And Only Where Probable Cause Exists.

The Fourth Amendment has long been understood as a "reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies," and as an effort to "protect against invasions of the sanctity of a man's

home and the privacies of life from searches under indiscriminate, general authority." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (internal quotation marks and citation omitted).

Two distinct functions are served by the Fourth Amendments warrant requirement. "First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Second, the warrant requirement ensures that "those searches deemed necessary [are] as limited as possible," as the evil of unrestrained searches "is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." *Id.* The necessity of a warrant achieves this latter goal by enforcing the particularity requirement of the Fourth Amendment's text, *i.e.*, that "no Warrants shall issue, but . . . particularly describing the place to be searched, and the persons or things to be seized." "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)*; see also Marron v. United States*, 275 U.S. 192, 196 (1927) (stating that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

Accordingly, courts have routinely invalidated warrants whose "description. . . of the place to be searched is so vague that it fails reasonably to alert

executing officers to the limits of their search authority." *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011); *see also Davis v. Gracey*, 111 F.3d 1472, 1479 (10th Cir. 1997) (explaining that warrants are invalid "where the language of the warrants authorized the seizure of virtually every document that one might expect to find in a . . . company's office, including those with no connection to the criminal activity providing the probable cause for the search" (internal quotation marks omitted)); *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (same where warrant "contained no limitations on what documents within each category could be seized or suggested how they related to specific criminal activity").

Here, much like in *Gracey* and *Kow*, the language of the warrant authorized seizure of all firearms and firearm-related materials, without limitation and including those "with no connection to the criminal activity providing the probable cause for the search," *Gracey*, 11 F.3d at 1479, notwithstanding the fact that the deputies possessed specific information regarding the weapon used by Bowen during the assault, including a photograph provided by Kelly. Hence, the deputies were well aware of precisely what they were searching for and should have known that they did not possess probable cause to expand the search to encompass all firearms—let alone all gang-related materials, particularly since Messerschmidt acknowledged that he had no reason to believe that Bowen's assault on Kelly was gang-related. *See supra* p. 7.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: October 21, 2011