No. 10-704

In The Supreme Court of the United States

CURT MESSERSCHMIDT and
ROBERT J. LAWRENCE,

Petitioners,

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER,
and WILLIAM JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

TIMOTHY T. COATES, ESQ.
Counsel of Record
LILLIE HSU, ESQ.
GREINES, MARTIN, STEIN
& RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

EUGENE P. RAMIREZ, ESQ.
JULIE M. FLEMING, ESQ.
MANNING & MARDER, KASS,
ELLROD, RAMIREZ LLP
15th Floor at 801 Tower
801 South Figueroa Street
Los Angeles, California 90017
Telephone: (213) 624-6900
Facsimile: (213) 624-6999
E-Mail: epr@mmker.com

Counsel for Petitioners
Curt Messerschmidt and Robert J. Lawrence

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The Brief in Opposition ("BOP") underscores why review is necessary in this case. It is emblematic of the sort of obfuscation, nitpicking and second-guessing that plagues civil and criminal proceedings challenging a magistrate's issuance of a warrant after the fact.

Respondents devote much of their argument, and indeed 14 pages of a 19-page Statement of Facts, to attacking the propriety of issuing a third-party warrant to search their premises at all, even though respondents lost these issues in the district court and did not resurrect them on appeal—a fact noted by the dissent. (App.60-61 & n.15.)

In fact, respondents utterly ignore the two dissents, and indeed the bulk of the *en banc* majority opinion, all of which discuss petitioners' contentions at length and give the lie to respondents' assertion that petitioners' substantive challenges have somehow been "waived."

More astoundingly, although the fundamental dispute between the majority and the two dissents was whether under *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986) and *United States v. Leon*, 468 U.S. 897, 923 (1984) the warrant application was "so lacking in indicia of probable cause" as to indicate petitioners were "plainly incompetent" or "knowingly violat[ing] the law," respondents do not even mention the pertinent standard.

In *Malley* and *Leon*, this Court made it clear that an officer's seeking a warrant bespeaks good faith and that civil liability should be imposed or evidence excluded in a criminal proceeding based upon an erroneous warrant only where it could be said that the officer's actions were plainly incompetent or knowingly in violation of the law. *Malley*, 475 U.S. at 345. Yet, this case amply illustrates the wholesale departure from that stringent standard. Can it be said that the two dissenting Ninth Circuit judges who found that there was probable cause to search for any weapon are "plainly incompetent" or condone the knowing violation of the law? Can an officer rationally be deemed to be "plainly incompetent" or "knowingly violat[ing] the law" in seeking a warrant for indicia of gang membership when, as the three dissenting judges note, there are plenty of logical reasons why an officer might reasonably, but erroneously, conclude that searching for such material was proper and the majority itself had to engage in close and extensive analysis in order to conclude otherwise?

This goes well beyond a conflict between circuits. It is a dispute played out in federal and state civil and criminal proceedings across the country, where, as noted in the petition, appellate justices disagree not simply on whether an officer has acted in good faith, but on the underlying issue of probable cause in the first instance. If, as the court held in *Malley* and *Leon*, the standard for civil liability or suppression of evidence following a magistrate's determination of

probable cause is a high one, limited to those circumstances where the officer is "plainly incompetent" or "knowingly violate[s] the law," then there should not be such sharp disagreement on fundamental issues. Such disagreement, and indeed the wholesale litigation of a magistrate's determination of probable cause by way of both criminal and civil proceedings, is made possible only because of the amorphous nature of the "so lacking in indicia of probable cause" standard.

It is essential that this Court grant review to provide clear standards for imposition of civil liability or exclusion of evidence in a criminal proceeding arising from a magistrate's erroneous issuance of a warrant, in order to vastly reduce the ubiquitous challenges to such determinations in civil and criminal proceedings. The Court could make it clear that where an officer seeks a warrant, good faith is presumed and the evidence admissible in a criminal proceeding, and the officer is shielded from civil liability, except where the party challenging the warrant submits evidence to rebut that presumption. Such evidence might include deliberately false or misleading statements, deliberate omission of exculpatory facts from a warrant application, or evidence that the officer knew that the magistrate was impaired and unable to perform the functions of his or her office. Alternatively, at the very least, good faith should be presumed where an officer submits an application for review by superiors or prosecutors before submitting it to a magistrate, or possessed facts establishing probable cause even though the

facts might have been omitted from the final application, or submits an extensive as opposed to "barebones" application.

Application of such standards will assure that warrants are challenged only in those circumstances where officers are indeed "plainly incompetent" or "knowingly violate the law"—precisely the sort of core police misconduct that imposition of civil liability under section 1983 and exclusion of evidence under the Fourth Amendment was designed to deter.

Finally, respondents offer no proper additional issues for review. They assert that the standard for civil liability should be lower than the standard for excluding evidence arising from a magistrate's erroneous issuance of a warrant. (BOP32-34.) Yet, this Court has repeatedly recognized that qualified immunity is necessary to assure that officers will vigorously perform their duties. Respondents also ask the Court to reconsider its decision in *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658 (1978). However, the County of Los Angeles is not a party to this proceeding, the underlying appeal was from the denial of qualified immunity to petitioners, and no *Monell* claim was litigated in the Ninth Circuit, nor could it be. Further, just this term, the Court unanimously reaffirmed the *Monell* standard. *Los Angeles County v. Humphries*, 131 S.Ct. 447, 453-54 (2010); *Connick v. Thompson*, 131 S.Ct. 1350, 1365 n.12 (2011).

ARGUMENT

I. THE ABSENCE OF CLEAR STANDARDS FOR IMPOSING CIVIL LIABILITY OR EXCLUDING EVIDENCE IN CRIMINAL PROCEEDINGS BASED ON A MAGISTRATE'S ERRONEOUS DETERMINATION OF PROBABLE CAUSE REQUIRES REVIEW BY THIS COURT.

The Ninth Circuit's decision in this case illustrates the continuing mischief wrought by the amorphous "so lacking in indicia of probable cause" standard. If *Malley* means what it says and in fact civil liability should be imposed or evidence excluded in a criminal proceeding only where the officers' actions in securing a warrant can be described as "plainly incompetent" or "knowingly violat[ing] the law," then the clear implication is that two judges in the Ninth Circuit similarly are "plainly incompetent" or knowingly support violation of the law. That one intuitively balks at such a characterization underscores the *en banc* majority's departure from *Malley*'s clear standard, a departure made possible only because of the standardless nature of the "so lacking in indicia of probable cause" inquiry. There is a conflict not simply among circuits as to what the phrase means, but as between individual judges.

This disagreement is not confined to a single circuit, nor even to federal courts. As noted in the petition, there are numerous state and federal appellate decisions in such cases where courts divide not simply on the question of whether qualified immunity

exists, but on the more fundamental issue of whether there was probable cause in the first instance. Can it be said in all of those cases that dissenting justices are "plainly incompetent" or knowingly condone the violation of law? This is precisely the "common thread" running through those cases that respondents simply ignore—the wholesale *ad hoc* application of the "so lacking in indicia of probable cause" standard so as to make every inquiry into a warrant's validity not so much whether the officer was "plainly incompetent" or "knowingly violat[ing] the law," but whether a majority of judges believe there was probable cause to issue the warrant.

As the dissent notes, the price paid for such amorphous standards is the expenditure of scarce judicial resources in litigating such claims in civil and criminal proceedings, as any aggrieved party has an incentive to seize upon any error in the warrant application or transgression by the officer, no matter how minor, to seek redress for an imagined injury, or exclusion of relevant evidence in a criminal proceeding. Indeed, respondents inadvertently underscore the ubiquity of such challenges when they cite the numerous invocations of *Malley*, *Leon*, and their progeny in courts across the nation. (BOP19.)

As this Court recognized in *Malley* and *Leon*, the standard governing civil liability and exclusion of evidence as the result of a magistrate's erroneous determination of probable cause is a significant issue that affects the day-to-day operation of the criminal

justice system. The lack of clear guidance has resulted in the routine challenge of warrants in civil and criminal proceedings. It is essential this Court provide clear guidelines to curtail this endless loop of litigation.

II. PETITIONERS' QUALIFIED IMMUNITY CLAIMS WERE PROPERLY RAISED IN, AND ADDRESSED BY, THE NINTH CIRCUIT.

Respondents contend that petitioners' arguments concerning probable cause and application of qualified immunity have somehow been waived. (BOP30-37.) Review of the *en banc* majority and dissenting opinions belies this characterization.

Respondents essentially contend that the arguments petitioners presented in the Ninth Circuit were more articulate and expansive than those presented in the district court. (BOP21-27.) As illustrated by both the *en banc* majority decision and the dissents, however, petitioners raised, and the court squarely addressed, the various contentions concerning the existence of probable cause to search for weapons or indicia of gang membership, as well as the applicable authority making clear that qualified immunity should apply to these claims. (App.11-76.) It is simply absurd to suggest, as respondents do, that the issues were not properly preserved for review by this Court—the issues form the entire substance of the *en banc* and dissenting opinions in the Ninth Circuit.

Nor, contrary to respondents' contention, are there any arguments with respect to qualified immunity that required presentation of additional evidence in the district court. (BOP21-27.) As review of the *en banc* majority and two dissenting opinions reveals, with one minor exception relegated to a footnote, the differences between the majority and dissenters were not that a triable issue of fact existed. Rather, they differed on application of the law to the undisputed facts—the warrant affidavit, the warrant itself, and the information possessed by the officers. While the majority suggested that invocation of the plain view doctrine to justify seizure of the shotgun from the Millender residence would have required additional factual material in the district court (App.23-24 & n.5), the dissent believed no additional factual inquiry was necessary as the plain view doctrine was not necessary to providing probable cause to seize the shotgun, given the officers' knowledge that Bowen had assaulted his girlfriend with a shotgun and was an ex-felon (App.41-45 & nn.4-6).

The issues raised in the petition were properly presented to, but erroneously resolved by, the Ninth Circuit.

III. THE COURT SHOULD GRANT REVIEW TO PROVIDE CLEAR STANDARDS LIMITING CIVIL LIABILITY OR THE EXCLUSION OF EVIDENCE BASED UPON A MAGISTRATE'S ERRONEOUS DETERMINATION OF PROBABLE CAUSE.

This Court has stated that "a magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Yet, as this case amply illustrates, in fact magistrates' determinations of probable cause are challenged routinely, with parties seizing on every factual omission or defect in form to second-guess determinations of probable cause.

As this Court recognized in *Malley* and *Leon*, when officers seek a warrant, their actions bespeak good faith in that they are willing to submit the evidence they possess to review by a neutral magistrate. To impose liability or exclude evidence in a criminal case based upon after-the-fact second-guessing of the warrant determination discourages officers from seeking warrants, and encourages them in close cases to rely instead upon exigent circumstances or some other basis to justify a warrantless search or arrest. Thus, exclusion of evidence or imposition of civil liability should be limited to those circumstances where an officer clearly engages in misconduct, i.e., where his or her conduct is "plainly

incompetent" or "knowingly violate[s] the law." *Malley*, 475 U.S. at 341.

To this end, petitioners submit the Court should make it clear that when an officer seeks a warrant, it is presumed that the officer acted in good faith for purposes of qualified immunity in a civil proceeding or exclusion of evidence in a criminal trial. That presumption may be rebutted only by objective evidence showing that the warrant was procured by misconduct. Such instances would include the officer's knowing presentation of false evidence in support of the application, or his or her deliberate omission of material exculpatory facts from the warrant material.[1] It would also include evidence that the officer knew that the magistrate in fact was not neutral or was incapable of providing independent review of the warrant application.

These are admittedly extremely narrow circumstances. Yet, as noted, the Court has made it clear that civil liability and exclusion of evidence should be limited to the rarest of cases, i.e., the most egregious cases of police misconduct, and not invoked simply upon a mere negligent act or omission by an

[1] Contrary to respondents' assertion (BOP22-23 & n.10), there was no claim of concealment or omission of facts before the Ninth Circuit. As the dissent notes, respondents lost that claim in the district court, it was not renewed in the appellate court, and the majority opinion is not premised on any such claim. (App.63.)

officer. Application of such stringent guidelines would sharply limit after-the-fact challenges to warrants and terminate the endless litigation that accompanies such questions in the context of suppression hearings or civil suits.

At the very least, even if the Court does not impose such stringent standards, it should require courts to take into account specific facts in determining whether an officer's actions were "plainly incompetent" or "knowingly violate[d] the law." These would include the question of whether there was probable cause for the search, even if specific facts were omitted from the affidavit, whether the officers had the warrant application reviewed by a superior or by a prosecutor, and whether the officer presented substantial information in the warrant affidavit and not simply a "bare-bones" recitation of facts.

Respondents take petitioners to task for suggesting such criteria, employing the very nitpicking that has reduced suppression hearings to elaborate games of "gotcha." They feign ignorance as to what it would mean for a judicial officer to be so impaired as to be unable to perform his or her duties as a neutral magistrate. Obviously, when an officer knows a magistrate has already agreed to issue a warrant regardless of its contents, the officer cannot be said to know that the magistrate was acting in neutral fashion. Similarly, a magistrate who is physically or mentally

impaired so as to be unable to actually review the substance of an affidavit could not properly be relied upon by an officer seeking a neutral determination of probable cause.

Respondents also assert that no interest is served in having a warrant application reviewed by a police supervisor or a prosecutor, yet neither the police nor the prosecutor has an incentive to submit a defective warrant application knowing that a reasonable magistrate would likely deny it. And, as the dissent notes, even the Ninth Circuit has recognized that review by a prosecutor bolsters an officer's good faith in seeking a warrant. (App.55, 58-59, 64-65 [discussing *Ortiz v. Van Auhen*, 887 F.2d 1366 (9th Cir. 1989) and *KRL v. Estate of Moore*, 512 F.3d 1184 (9th Cir. 2008)].)

Respondents' suggestion that application of such standards would encourage officers to submit "bare-bones" affidavits misconstrues petitioners' argument and indeed is absurd. A warrant application that contains no substantive information at all is flatly incompetent. The notion that officers would have an incentive to submit bare-bones applications because the less said, the less there would be to challenge, is nonsensical. The point is that in routine circumstances, magistrates would reject such applications; hence, no officer, let alone an entire police agency

would have an incentive to submit such applications only to have them routinely rejected by a magistrate.

In *Malley* and *Leon*, this Court recognized that while magistrates may err in determining probable cause, the circumstances in which police officers should be held liable for such errors are rare indeed. Yet, because of the open-ended and amorphous "so lacking in indicia of probable cause" standard, litigation of such claims is the rule and not the exception. It is essential that this Court grant review to provide clear standards for imposition of civil liability and exclusion of evidence in criminal proceedings arising from a magistrate's erroneous determination of probable cause.

IV. RESPONDENTS' ADDITIONAL ISSUES DO NOT MERIT REVIEW.

Respondents offer no proper additional issues for review. In a backhanded attempt to eliminate qualified immunity, they assert that the Court should consider whether the standard for civil liability should be lower than the standard for excluding evidence arising from a magistrate's erroneous issuance of a warrant. (BOP32-34.) Yet, as this Court noted in *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984), qualified immunity is necessary to insulate police officers from the threat of personal

liability so that they can "execute [their] office with the decisiveness and the judgment required by the public good." Imposing blanket liability on police officers for reasonable mistakes would, as the Court has repeatedly recognized, result in officers electing not to vigorously enforce the law. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Elder v. Holloway*, 510 U.S. 510, 514 (1994).

Respondents also contend that this Court should reconsider its decision in *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658 (1978), and impose *respondeat superior* liability on municipalities. However, the County of Los Angeles is not a party to this proceeding, the underlying appeal was limited to the denial of qualified immunity to petitioners, and no *Monell* claim was litigated in the Ninth Circuit. Further, just this term, the Court unanimously reaffirmed the *Monell* standard. *Los Angeles County v. Humphries*, 131 S.Ct. 447, 453-54 (2010); *Connick v. Thompson*, 131 S.Ct. 1350, 1365 n.12 (2011).

CONCLUSION

Petitioners urge that the petition for certiorari be granted.

Respectfully submitted,

TIMOTHY T. COATES, ESQ.
Counsel of Record
LILLIE HSU, ESQ.
GREINES, MARTIN, STEIN
& RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

EUGENE P. RAMIREZ, ESQ.
JULIE M. FLEMING, ESQ.
MANNING & MARDER, KASS,
ELLROD, RAMIREZ LLP
15th Floor at 801 Tower
801 South Figueroa Street
Los Angeles, California 90017
Telephone: (213) 624-6900
Facsimile: (213) 624-6999

Counsel for Petitioners
Curt Messerschmidt and Robert J. Lawrence