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 AMICI CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AND CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether law enforcement officers are entitled to qualified immunity where they had probable cause to search for a specifically-identified firearm from a suspect whose whereabouts they were unsure of, but obtained and executed what was facially a general warrant to search the residence of innocent third parties for any and all firearms, knowingly misrepresented the house to be searched as the "residence" of the suspect, and seized the firearm of an occupant which bore no resemblance to the suspect's firearm.

2. Whether this Court should overrule *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986), and other established precedents subjecting law enforcement officers to liability under civil rights legislation for obtaining a search warrant "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

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STATEMENT OF INTEREST OF AMICI CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871.[1] NRA has approximately four million individual members and 10,700 affiliated members (clubs and associations) nationwide. NRA's purposes, as set forth in its Bylaws, include the following:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common

[1]No counsel for any party to this case authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties.

> defense of the Republic and the individual liberty of its citizens . . . .

NRA's interest in this case stems from the fact that NRA members nationwide will be affected by any ruling this Court may make, which will define their rights and the rights of millions of gun owners under the Second, Fourth, and Fourteenth Amendments to the United States Constitution.

The California Rifle and Pistol Association (CRPA) Foundation is a non-profit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law, with headquarters in Fullerton, California. It is affiliated with the California Rifle and Pistol Association, Inc., which has roughly 65,000 members.

The CRPA Foundation seeks to raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA Foundation also supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

The Amici Curiae have considerable experience litigating constitutional rights in relation to firearms before this Court and elsewhere and wish to bring their unique perspective to this Court's attention.

SUMMARY OF ARGUMENT

The deputies here had probable cause to seize a specific firearm from a suspect whose whereabouts they were unsure of. Instead they secured a general warrant to seize all firearms from all persons in a house where the suspect's foster mother lived. A reasonable officer would not have sought or executed such a warrant, which violated clearly-established rights, precluding the defense of qualified immunity. No reason exists to disturb the standards on this score set forth in *United States v. Leon,* 468 U.S. 897 (1984), and *Malley v. Briggs,* 475 U.S. 335 (1986).

General warrants to search for and seize firearms were a long-standing oppression imposed by the Crown. The rights against unreasonable searches and seizures and to keep and bear arms were in the forefront of rights demanded to be recognized and later adopted in the Bill of Rights. Protection of these rights from State infringement would become an impetus for adoption of the Fourteenth Amendment and enforcement legislation, particularly § 1983.

The need to avoid general warrants is enhanced regarding lawful or constitutionally-protected property. Millions of Americans lawfully possess firearms. A warrant to seize all firearms in a house resided in by persons who were not suspects and where the suspect was not confirmed to be hiding clearly violated the Fourth Amendment. Warrants to search for arms which may be protected by the Second Amendment must be scrutinized with scrupulous exactitude.

Both from the text of the Fourth Amendment and from caselaw going back for centuries, the unlawfulness of general warrants is clearly established, and the warrant here was facially a general warrant. It is not required that a precedent exist with the same exact details. It is not a defense that a magistrate signed the warrant, especially where the officer made misleading allegations in the affidavit, and probable cause to seize all items of a kind was lacking.

Groh v. Ramirez, 540 U.S. 551 (2004), rejected qualified immunity involving a general warrant to search for unregistered firearms which contained no list of firearms to seize. This case is more egregious than *Groh*, because there the officer listed the firearms to seize in the affidavit but mistakenly failed to make it a part of the warrant. Here, the officer procuring the warrant misled the magistrate, but even then the warrant was facially unconstitutional. He cannot now rely on the defense that he persuaded others up the chain to approve his general warrant.

ARGUMENT

Introduction

This case may be resolved by well-established principles that have stood the test of time and should not be disturbed. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, . . . will the

shield of immunity be lost." *Malley v. Briggs,* 475 U.S. 335, 344-45 (1986), citing *United States v. Leon,* 468 U.S. 897, 923 (1984). The issue here 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*, at 345. A magistrate may be "working under docket pressures" and approve a bad warrant, *id.* at 345-46 n.8, in which case "[t]he officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n.9.

Put otherwise, the magistrate must "not serve merely as a rubber stamp for the police." *Leon*, at 914 (citation omitted). A court must resolve "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. Suppression is appropriate if the magistrate "was misled by information in an affidavit that the affiant knew" or should have known was false, the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or the warrant is "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id.* at 923 (citations omitted). All three of these deficiencies may be found in the warrant here.

In this case, officers had probable cause to believe that a suspect used a black, short-barreled shotgun with a pistol grip in an assault. However, they secured a general warrant to search in the nighttime a house where ten other persons resided for all firearms, accessories, and related documents. In doing so, they

violated the clearly-established rights of the Millenders and other occupants against unreasonable search and seizure, and are not entitled to the defense of qualified immunity.

When Shelly Kelly sought to break off her relationship with Jerry Ray Bowen, the latter pointed a "black sawed off shotgun with a pistol grip" at her, firing it as she sped off in a vehicle. *Millender v. County of Los Angeles*, 620 F.3d 1016, 1020 (9th Cir. 2010) (*en banc*). Kelly was familiar with the shotgun, described it to Detective Messerschmidt, and even gave him photographs of the suspect with the shotgun. *Id.* at 1021, 1027.

The officer then obtained a warrant to search the house of Augusta Millender, a 73-year-old lady who had been Bowen's foster mother 15 years earlier. His affidavit failed to disclose that Ms. Millender, her daughter, and her grandson resided at the house; Bowen did not reside there.[2] Kelly suggested that he could be hiding there, an allegation the officer failed to confirm. Instead of obtaining a search warrant for the black sawed-off shotgun with a pistol grip, Messerschmidt obtained a warrant for, *inter alia*:

> All handguns, rifles or shotguns of any caliber, or any firearms capable of firing ammunition or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning

[2]The Search Warrant, Attachment 1, stated: "Location to be Searched: 2234 E. 120th Street, Los Angeles." After a physical description, it concluded simply: "Residence of Jerry Ray Bowen."

> kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.[3]

Millender, 620 F.3d at 1022.

The affidavit did not allege that any of the above items were unlawfully possessed or articulate how they might be connected to the investigation. It did say that Bowen was a gang member, but did not say that he had a disabling criminal record. Persons who are "gang" members are not among the lists of persons prohibited from firearm possession. 18 U.S.C. § 922(g); Ca. Penal Code §§ 12021, 12021.1.[4]

A SWAT team served the warrant at 5:00 a.m. Bowen was not there, but officers threw the Millenders out on the street and ransacked the house. Officers

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[3]In addition, the Search Warrant, Attachment 1, stated: "The search additionally to include, any person(s) therein who could upon their person, conceal weapons, or ammunition, all safes and locked containers."

[4]*See Lanzetta v. New Jersey*, 306 U.S. 451, 452-53 (1939) (invalidating prohibition on "gang" membership as vague). By some definitions, "the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking." *Id.* at 457. *See also City of Chicago v. Morales*, 527 U.S. 41, 45-46 (1999) (invalidating ordinance making it a crime to loiter after police have ordered dispersal where one of the persons is a "criminal street gang member").

seized Ms. Millender's personal shotgun (a black 12-gauge Mossberg with a wooden stock) and a box of .45 caliber American Eagle ammunition. 620 F.3d at 1023. The court *en banc* held that probable cause existed to search for the described shotgun, but not "the generic class of firearms and firearm-related materials listed in the search warrant." *Id.* at 1025. Officers had "a precise description of the firearm" used by the suspect, and Ms. Millender's shotgun "did not resemble" it. *Id.* at 1027.

No "dangerousness" exception exists to the probable cause requirement, and thus it was irrelevant that the search involved a violent suspect or firearms. "Nor is there a per se rule that police have probable cause to search the residences of ex-felons for firearms and firearm-related items." *Id.* at 1028. The court rejected the argument "that any caliber of shotgun or receipts would show the possession and purchase of guns," in that "the possession and purchase of guns by itself does not constitute contraband or evidence of a crime." *Id.* at 1030. No basis existed "for probable cause to search and seize the broad category of firearm and firearm-related materials set forth in the warrant," and thus "the magistrate lacked a substantial basis for issuing the warrant for this broad range of items." *Id.* at 1030.

The *en banc* court next considered whether the rights at issue were clearly established so as to confer qualified immunity on the officers, which raised the issue of whether a reasonably well-trained officer would have known that his affidavit lacked probable cause and that he should not have applied for it. *Id.* at 1032. Where a warrant is so lacking in probable cause, the officer may not rely on the magistrate's approval of

the warrant. *Id.* The court held that "the warrant was so facially invalid that no reasonable officer could have relied on it, the deputies are not entitled to qualified immunity, and the Millenders can proceed with their § 1983 claim." *Id.* at 1035.

The issue in *Millender* is significant far beyond civil rights actions, for often in criminal cases involving just one or more identifiable firearms, law enforcement officers obtain search warrants with the same broad scope of seizing all firearms, parts, and related papers on the premises. This Court should send a firm message disapproving of such general warrants.

Both Petitioners and amicus curiae United States pile inference upon inference, leap-frogging from probable cause to seize one gun from one suspect at an unclear location to improbable cause to seize all guns from all persons residing at a house where someone suggested the suspect "might" be hiding. They imply that probable cause always exists to suspect that a "gang member" or a felon (even though not identified as such in the affidavit here) unlawfully possesses firearms. By that logic, without anything more, probable cause exists at any time or place to obtain search warrants for firearms for any and every person who is a "gang member" or has a felony record.

Petitioners well knew that multiple persons resided in the Millender home but failed to disclose that to the magistrate. These residents had a Fourth Amendment right "to be secure in their . . . house[] . . . against unreasonable searches and seizures . . . ." They also had a Second Amendment right "to keep and bear arms . . . ." Petitioners obtained and executed the warrant in total and reckless disregard of the clearly-established

rights of Respondents, and are not entitled to qualified immunity.

I. A WARRANT TO SEIZE ALL FIREARMS IN THE HOME OF PERSONS WHO ARE NOT SUSPECTS VIOLATES SECOND AND FOURTH AMENDMENT RIGHTS

A general warrant to confiscate all firearms in a house where several persons reside makes a mockery of the security of person and home protected by the Fourth Amendment. Such a warrant is all the more insidious given that the Second Amendment guarantees the right of the victims of such an intrusion to keep and bear arms.

General warrants to search for and seize firearms were a long-standing oppression imposed by the Crown. General warrants and deprivation of the right to have arms were related grievances of the American colonists. The rights against unreasonable searches and seizures and to keep and bear arms were in the forefront of rights demanded to be recognized and later adopted in the Bill of Rights. Protection of these rights against State infringement would later become a strong impetus for adoption of the Fourteenth Amendment.

A. The Text

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched and the person or thing to be seized."

This right to security in one's person, house, and property plainly precludes an officer from securing a search warrant to seize property from all residents of a house in the context here. Moreover, there must be probable cause to search the place that is particularly described – not just a suggestion that a suspect "might" be hiding there – as well as to seize the thing that is particularly described – not all things of a given kind from anyone residing at the house.

That is all the more the case when those things are firearms, given that the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." This right, which the text clearly establishes, surely precludes an officer from securing a warrant to seize all firearms from all persons in a house, when he well knows that he should be seeking to seize one firearm from one suspect whose whereabouts he does not know and whose nexus with that house is dubious.

Since firearms are lawful to possess and are constitutionally protected, no basis exists for a search warrant to seize them absent rigorous fulfillment of the Fourth Amendment's probable cause and particularity requirements. The general warrant here to seize all firearms from all persons at the dwelling, and the seizure of Ms. Millender's shotgun, both violated the Fourth Amendment and infringed on her Second Amendment right to keep arms.

B. A Purpose of the Fourth Amendment, Buttressed by the Second Amendment, Was to Preclude General Warrants to Seize Firearms

It would be an understatement to say that the Fourth Amendment right against general warrants is "clearly established." "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). The following demonstrates that historically, a primary purpose of the Fourth Amendment was to prevent general warrants to seize firearms.

1. English and Pre-Revolutionary Background

The historical oppressions giving rise to the Second and Fourth Amendments – and the First as well, for that matter – are intertwined. In 1662, Charles II passed a militia bill which empowered Lords Lieutenants and their deputies to issue warrants "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom . . . ." 13 & 14 Car. 2, c. 3, § 13 (1662). While "no such search [may] be made in any house" between sundown and sunup, in cities and towns "it shall be lawful to search in the night time by Warrant as aforesaid if the Warrant shall so direct . . . ." *Id.* Constables and officers who assisted in such searches and seizures

were "saved harmless and indemnified." *Id.* § 14.[5] In other words, they were immunized from common-law actions for damages.[6]

General warrants were also authorized to search for unlicensed printed matter[7] and for uncustomed goods through writs of assistance.[8] These were among the laws the Stuart Kings, Charles II and James II, used "to suppress political dissidents, in part by disarming their opponents," and "what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists." *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008). That explains why, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Id.* at 593. The First, Second, and Fourth Amendments were designed to prevent these very abuses.

The use of general warrants to search for uncustomed goods prompted the famous arguments by James Otis in *Petition of Lechmere* (1761), which John Adams recorded. Otis averred:

> I will to my dying day oppose . . . all such instruments of slavery on the one hand,

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[5]A previous enactment, noting ongoing searches and seizures against the Crown's enemies, provided that magistrates involved in "seizing of Armes or searching of Houses for Armes or for suspected persons shall be and are hereby saved harmelesse and indempnified in that behalfe." 13 Car. 2, ch. 6, § 2 (1661).

[6]*See Payton*, 445 U.S. at 591-98 (discussion of common-law action in trespass for unlawful searches).

[7]13 & 14 Car. 2, c. 33, §§15, 19 (1662).

[8]13 & 14 Car. 2, c. 2, §5(2) (1662).

> and villainy on the other, as this writ of assistance is. It appears to me . . . the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book.[9]

General warrants were particularly insidious, Otis continued, because "one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. Now this writ, if it should be declared legal, would totally annihilate this privilege."[10] The writ originated "in the zenith of arbitrary power, viz. in the reign of Car. II. when Star-chamber powers were pushed in extremity . . . ."[11]

Lord Camden's opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B.1765), was the classic statement against general warrants which influenced the framers of the Fourth Amendment. After a search of his house and seizure of all of his papers under a general warrant seeking evidence of seditious libel, the

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[9] 2 *Legal Papers of John Adams* 139-40 (1965). Otis referred to Hawkins, *Pleas of the Crown* 82, which stated: "But it seems to be very questionable whether a Constable can justify the Execution of a general Warrant to search for Felons or stolen Goods, because such Warrant seems to be illegal in the very face of it . . . ." *Id.* at 126 n.65.

[10] *Id.* at 142.

[11] *Id.* at 143-44.

plaintiff sued and was awarded damages against a member of the search party and the official who issued the warrant. Similarly, a general warrant to search for any firearms, such as that here, would involve a fishing expedition to see if any violations of law could be found unrelated to the crime for which the warrant was secured. One may substitute the term "arms" for "papers" in *Entick* and have a description of what happened in this very case:

> In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer.
>
> This power, so assumed by the secretary of state, is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted . . . .

Entick, 19 How. St. Tr. at 1064.

In *Boyd v. United States*, 116 U.S. 616, 630 (1886), *overruled on other grounds*, *Warden v. Hayden*, 387 U.S. 294 (1967), Justice Bradley famously observed about the principles in the *Entick* opinion:

> [T]hey apply to all invasions on the part of the government and its employees of

> the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.[12]

In his notes of the 1765 trial in *Bassett v. Mayhew*, John Adams stated the law clearly: "Constable liable in executing General Warrant."[13] And in the 1774 case of *King v. Stewart*, Adams wrote: "An Englishman's dwelling House is his Castle. . . . [E]very Member of Society has entered into a solemn Covenant with every other that shall enjoy in his own dwelling House as compleat a security, safety and

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[12]This Court has repeatedly recalled *Entick*'s condemnation of general warrants. *E.g.*, *Berger v. New York*, 388 U.S. 41, 58 (1967) (invalidating statute authorizing eavesdropping warrants "for evidence of crime" without any particularity requirement). As if to respond to Petitioners' arguments here, this Court stated that "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Id.* at 63.

[13]1 *Legal Papers of John Adams* 102.

Peace and Tranquility as if it was . . . defended with a Garrison and Artillery."[14]

The conflict that escalated in the colonies during 1774-75 was prompted in great part by the increased resort by General Thomas Gage to searches and seizures of firearms from the colonists – first from ships importing them, then from individuals carrying or transporting them, and finally from their houses. See Stephen P. Halbrook, *The Founders' Second Amendment* chs. 3-4 (2008).

To guard against these violations, the new states enacted guarantees. For instance, Pennsylvania declared: "That the people have a right to bear arms for the defence of themselves and the state . . . ." Pa. Dec. of Rights, Art. XIII (1776). Moreover, Art. X provided:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

Not surprisingly, when the Constitution was proposed in 1787 without mention of such rights, an outcry arose that would culminate in adoption of the Bill of Rights.

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[14] *Id.* at 137.

2. The Interrelated Demands for and Adoption of the Second and Fourth Amendments

Insight into the fundamental character of the rights to have arms and against unreasonable searches and seizures may be gleaned from the demands for a bill of rights by the State conventions which ratified the Constitution. The first conventions made no such demand, but minorities therein did. The Dissent of the Minority in Pennsylvania declared:

> 5. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.
>
> 7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .[15]

Reading the above provisions together, arms could be seized, but only for crime and the like, and

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[15] 2 *Documentary History of the Ratification of the Constitution* 623-24 (1976).

only if supported by evidence and particularly described in a search warrant.

In the Massachusetts convention, Samuel Adams proposed a declaration of rights which stated in part:

> And that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; . . . or to subject the people to unreasonable searches & seizures of their persons, papers, or possessions.[16]

In the Virginia ratification convention, Patrick Henry warned that "general warrants . . . ought to be prohibited. . . . [A]ny property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power."[17] The convention demanded a federal bill of rights that would state in part:

> 14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or

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[16]6 *Documentary History of the Ratification of the Constitution* 1453 (2000).

[17]3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 588 (1836).

> affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.
> . . .
> 17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state . . .[18]

The North Carolina convention demanded a declaration concerning search warrants and the right to bear arms identical with that of Virginia.[19] New York's declaration on searches was virtually identical, its final clause differing slightly by stating "that all general warrants (or such in which the place or person suspected are not particularly described) are dangerous, and ought not to be granted."[20] Its clause on the arms right was identical, other than its reference to "the body of the people *capable of bearing*

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[18] *Id.* at 658-59.

[19] 18 *Documentary History of the Ratification of the Constitution* 316 (1995).

[20] *Id.* at 299.

arms . . . ."[21] Rhode Island copied New York's language.[22]

On June 8, 1789, James Madison introduced his bill with a draft bill of rights in the House of Representatives. It included the following:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country . . . .
>
> . . .
>
> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[23]

Madison described the latter provision as "the article of general warrants."[24] The House Select

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[21]18 *Documentary History of the Ratification of the Constitution* 298 (1995).

[22]1 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 335 (1836).

[23]4 *Documentary History of the First Federal Congress of the United States of America* 10-11 (1986).

[24]Helen E. Veit *et al.* eds, *Creating the Bill of Rights* 67 (1991).

Committee revised Madison's proposals in relevant part as follows:

> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed . . . .
>
> . . .
>
> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, or the persons or things to be seized.[25]

The House then revised the language on searches to what would become, after the Senate agreed, the Fourth Amendment. Veit, *Creating the Bill of Rights* 39, 48. The Senate revised the House language of the arms guarantee to what would become the Second Amendment. *Journal of the First Session of the Senate of the United States of America* 71, 77 (1820).

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[25] 4 *Documentary History of the First Federal Congress of the United States of America* 28-29 (1986).

C. A Central Concern of the Fourteenth Amendment Was to Prevent Seizure of Firearms from the Houses of Innocent Citizens

After the Civil War, the Southern States enacted the Black Codes, which prohibited freed slaves from firearm possession and prompted massive search-and-seizure operations to confiscate firearms. Primary objectives of the Fourteenth Amendment were to protect the right to keep firearms and to preserve the sanctity of the home from searches and seizures. *See Heller,* 554 U.S. at 614-15; *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3038-40 (2010).

Congress heard numerous reports from the Southern States about the routine search and seizure of firearms from freedmen, particularly in their homes. From Mississippi, it was reported that militias typically would "hang some freedman or search negro houses for arms." Cong. Globe, 39th Cong., 1st Sess. 941 (Feb. 20, 1866). In Alabama, militias "were ordered to disarm the freedmen, and undertook to search in their houses for this purpose." *Journal of the Joint Committee of Fifteen on Reconstruction*, pt. 3, at 140 (1914). And from Wilmington, North Carolina, it was reported:

> Some of the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and seize arms. . . . Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken.

Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 272 (1866).

As Senator Henry Wilson summarized: "There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." *McDonald*, 130 S.Ct. at 3039, citing 39th Cong. Globe 915 (1866). In fact, the disarming of African Americans persisted throughout the entire period of Reconstruction. *See generally* Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* (1998).

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, today's 42 U.S.C. § 1983, was intended to remedy such infringements by providing that any person who, under color of State law, subjects a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution" is civilly liable.

"[I]n passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982). *Patsy* then quoted Rep. Henry Dawes' explanation of how the federal courts would protect "these rights, privileges, and immunities . . . ." *Id.*, citing Cong. Globe, 42d Cong., 1st Sess., 476 (1871). Dawes had just explained that the citizen "has secured to him the right to keep and bear arms in his defense," and "his house, his papers, and his effects were protected against unreasonable seizure. . . . [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House." Cong.

Globe, *supra*, at 475-76. *See McDonald*, 130 S.Ct. at 3075 (Thomas, J., concurring).

"Opponents of the bill also recognized this purpose . . . ." *Patsy*, 457 U.S. at 504 n.6 (citing remarks of Rep. Washington Whitthorne). On the same page of his speech cited by the Court, Whitthorne objected that "if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution . . . ." Cong. Globe at 337. To the contrary, supporters of the bill were concerned that police would arrest a law-abiding African American who was carrying a pistol for self defense – or just keeping it in his or her home – and they wished to provide a legal remedy for such deprivation.

In sum, the Fourteenth Amendment was designed in part to prevent unreasonable searches for and seizures of firearms from law-abiding persons, and § 1983 was designed to remedy such deprivations of rights.

II. THE NEED TO AVOID GENERAL WARRANTS IS HEIGHTENED REGARDING LAWFUL OR CONSTITUTIONALLY-PROTECTED PROPERTY

A. The Right Was Clearly Established at the Time of the Search in 2003

When the search took place in 2003, it was clearly established that possession of firearms by residents of a house gave rise to no enhanced probable cause that would loosen the particularity requirement. No "firearm exception" to the Fourth Amendment has ever been accepted: "Our decisions recognize the serious threat that armed criminals pose to public safety . . . But an automatic firearm exception to our established reliability analysis would rove too far." *Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) (holding warrantless search unlawful).

Authorization to seize all firearms, as did the warrant here, flies in the face of the fact that "owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort . . . ." *Staples v. United States*, 511 U.S. 600, 613-14 (1994). "[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. "Common sense tells us that millions of Americans possess these items [revolvers, pistols, rifles, and shotguns] with perfect innocence." *United States v. Anderson,* 885 F.2d 1248, 1254 (5th Cir. 1989).

The warrant here authorized a night search, similar to typical no-knock warrants. The precedents

on no-knock warrants reinforce that the warrant violated clearly-established rights. *Gould v. Davis,* 165 F.3d 265, 272 (4th Cir. 1998), rejected a qualified-immunity defense for obtaining a no-knock warrant based on the mere presence of firearms in a house:

> If the officers are correct, then the knock and announcement requirement would never apply in the search of anyone's home who legally owned a firearm. This clearly was not and is not the law, and no reasonable officer could have believed it to be so.

"Evidence that firearms are within a residence, by itself, is not sufficient to create an exigency to officers when executing a warrant." *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996). "The reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient." *United States v. Marts,* 986 F.2d 1216, 1218 (8th Cir. 1993) (citation omitted).

Bellotte v. Edwards, 629 F.3d 415, 419-20 (4th Cir. 2011), rejected qualified immunity regarding a no-knock warrant based on the residents of a house having permits to carry concealed firearms. "It should go without saying that carrying a concealed weapon pursuant to a valid concealed carry permit is a lawful act." *Id.* at 423 (noting further that the officers admitted that "most people in West Virginia have guns").

In sum, many Americans lawfully own firearms, which does not give rise to any presumption that they are unlawful. In obtaining the warrant here to seize all firearms in what they knew to be the residence of Ms. Millender and other non-suspects, and without

taking reasonable steps to verify that the suspect might actually be there, the officers violated clearly-established rights.

B. Warrants to Search for Constitutionally-Protected Items Must Be Scrutinized With Scrupulous Exactitude

The Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), invalidated a handgun ban with the explanation:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.

General warrants are particularly to be condemned regarding constitutionally-protected property, mere possession of which cannot give rise to probable cause to search. "Where presumptively

protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). As applied in that case, this meant: "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Id.*, citing *Stanford v. Texas,* 379 U.S. 476, 485 (1965).[26]

In *Stanford*, the warrant specifically described the premises to be searched and authorized the seizure of all writings on the Communist Party, and the affidavit was signed by two state assistant attorneys general. *Id.* at 478-79. Given that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books," the Court held it to be an invalid general warrant. *Id.* at 485. In so doing, the Court noted that the First, Fourth, and Fifth Amendments are "closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Id.*

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[26] *Stanford* was cited as authority in two of the precedents relevant here. "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004), citing *Stanford* at 476. "The principal evil of the general warrant was addressed by the Fourth Amendment's particularity requirement . . . ." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011), citing *Stanford* at 485.

A similar statement could be made about the First, Second, and Fourth Amendments, in that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." *Heller,* 554 U.S. at 592. "Like the First, it [the Second Amendment] is the very product of an interest-balancing by the people . . . ." *Id.* at 635.

Given that the search here took place before this Court's 2008 decision in *Heller*, Petitioners might suggest that the right to keep and bear arms, with attendant restrictions on search warrants, would be clearly established only in post-*Heller* cases.[27] But this would ignore the clear text of the Second Amendment as well as prior decisions of this Court recognizing the rights therein.[28] Even without any constitutional

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[27] *See Bellotte*, 629 F.3d at 428 (Wynn, J., dissenting in part) ("I join the majority in concluding that the no-knock entry here was unlawful. As a result of this case, the law will be clearly established as to any similar entries in the future.").

[28] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explained:

> The Second Amendment protects "the right of the people to keep and bear Arms" . . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community . . . .

"The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of

recognition, lawful firearms are and have always been widely possessed in American homes, rendering a general warrant to seize all of them from all residents, none of which was a suspect in anything, violative of clearly established rights.

III. THE GENERAL WARRANT HERE VIOLATED CLEARLY ESTABLISHED RIGHTS

"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819 (1982). Both from the text of the Fourth Amendment and from caselaw going back for centuries, the unlawfulness of general warrants is clearly established, and the warrant here was facially a general warrant.

The fact that the exact details in this case may not be the subject of a prior opinion is not pertinent. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), explains:

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held

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Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution [such as] . . . the right to keep and bear arms").

> unlawful . . .; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Id., quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

Moreover, "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful' . . . ." *United States v. Lanier*, 520 U.S. 259, 270-71 (1997),[29] quoting *Anderson,* 483 U.S. at 640. This "makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

Groh v. Ramirez, 540 U.S. 551 (2004), involved a general warrant to search for unregistered firearms which contained no list of firearms to seize. A list of

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[29]"The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Id.* at 271 (citation omitted). Citing *Lanier*, qualified immunity was rejected in a case regarding a no-knock warrant based on the mere presence in the house of persons with permits to carry concealed firearms. *Bellotte*, 629 F.3d 415. "The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct." *Id.* at 424 (citation omitted). *See also Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir. 2005) (where officer held an infant at gunpoint, "notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established").

firearms was included in the affidavit, but not attached to the warrant. Only lawful firearms were found. The homeowners later filed a civil rights action for damages. This Court held that the search was unlawful and that the agent who secured the warrant and led the search could not rely on the defense of qualified immunity.

Groh began: "The warrant was plainly invalid. The Fourth Amendment states unambiguously 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.*'" *Id.* at 557 (emphasis in original). The warrant met the test of being "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Id.* at 565, quoting *Leon,* 468 U.S. at 923.

Noting that "the Magistrate might have believed that some of the weapons mentioned in the affidavit could have been lawfully possessed and therefore should not be seized," *id.* at 560-61, *Groh* rejected the defense that the magistrate had signed the warrant in reliance on the affidavit with a list of the firearms suspected to be illegal: "Nor would it have been reasonable for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.* at 560 n.4. The following directly applies here:

> Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . Moreover, because petitioner himself

> prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.

Id. at 563-64.

In *Groh*, the affidavit specifically alleged that unregistered firearms were on the premises, but that was not included in the warrant. Here, probable cause existed only to seize one specific firearm, but the warrant authorized the seizure of all firearms on the premises. "Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception." *Id.* at 564-65. This Court declined to do so in *Groh*, and it should do so here. Indeed, this case is more egregious than *Groh*, in which the officer simply forgot to make the description of the firearms a part of the warrant. Here, the officer procuring the warrant misled the magistrate, but even then the warrant was facially unconstitutional. He cannot now rely on the defense that he persuaded others up the chain to approve his general warrant.

It makes no difference here that a deputy district attorney approved the warrant and a magistrate signed it. *Millender*, 620 F.3d at 1022. The deputies had an independent duty not to seek or serve a general warrant. Applying for a warrant should not be a game in which officers see how far they can push the envelope and still get approvals from prosecutors and signatures from judges.

Besides failing to disclose who really resided at the house, the affidavit here implied that there was a gang connection to illegal firearms. "It is clearly established that judicial deception may not be employed to obtain a search warrant." *KRL v. Moore,* 384 F.3d 1105, 1117 (9th Cir. 2004). "The use of deliberately falsified information is not the only way by which police officers can mislead a magistrate when making a probable cause determination. By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw." *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

United States v. Kow, 58 F.3d 423, 426-27 (9th Cir.1995), rejected a good faith argument regarding a general warrant authorizing seizure of every document and computer file on the premises. Its facial invalidity was not saved by "[t]he mere fact that the warrant was reviewed by two AUSA's and signed by a magistrate . . . ." *Id.* at 428-29 (citation omitted).

In re Search Warrant for K-Sports Imports, Inc., 163 F.R.D. 594, 595 (C.D. Cal. 1995), involved a warrant authorizing the seizure not just of certain machineguns, documents, and computer records at issue, but *all* such items. "The phrase 'including but not limited to' in the search warrant converts the search warrant into a general warrant, allowing the seizure of any, and all, weapons, documents, and computer records/data . . . ." *Id.* at 596-97. Since "nothing in [the] affidavit supports the seizure of any firearm . . . unrelated to the purported machine guns," the search was unlawful. *Id.* at 597. The parallel with the facts here is evident.

Finally, it was clearly established that "the critical element in a reasonable search is . . . that there

is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property." *Zurcher*, 436 U.S. at 556. Here, it was pure speculation that the suspect was at the house with his firearm, that there were other firearms on the premises, and that they belonged to the suspect instead of any of the ten actual residents. *See United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997) ("it is pure speculation whether [defendant], though a resident of the apartment, ever had possession or dominion of any of the firearms"); *United States v. Reese*, 775 F.2d 1066, 1074 (9th Cir. 1985) ("it is 'pure speculation' as to which of the house's occupants possessed the guns.").[30] "[J]oint occupancy of a residence is not enough to show possession," *United States v. Frushon*, 10 F.3d 663, 665 (9th Cir. 1993) (citation omitted), but in that case "[t]he photograph . . . identifies [defendant] as the person whose gun it was." Here, when they seized Ms. Millender's shotgun, the officers knew it was *not* the one shown in the photograph of the suspect.

In sum, in *Groh* the law was clearly established in the very text of the Fourth Amendment. Caselaw condemning general warrants in England dates back to 1765 in *Entick*, and in the United States to 1886 in *Boyd*. The general warrant here – to search for all firearms and related items, when only a black, short-barreled shotgun with a pistol grip was at issue, and it had no connection to the house to be searched – clearly violated the Fourth Amendment, would be known to do

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[30]"[A]ccess to premises does not equate to possession." *United States v. Ruiz*, 462 F.3d 1082, 1089 (9th Cir. 2006).

so by any competent officer, and was not sanctified by being rubber stamped by higher ups.

CONCLUSION

This Court should hold that the qualified immunity defense may not be asserted in this case, and affirm the judgment of the court below.

Respectfully submitted,

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