NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RACHEL E. GARDNER AND JOHN SAGER, WASHINGTON STATE PATROL OFFICERS,

Petitioners,

v.

TODD M. CHISM AND NICOLE E. CHISM,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents claim a Fourth Amendment violation arising from a search and arrest conducted pursuant to warrants based on petitioners' affidavit of probable cause. The Ninth Circuit applied a blanket rule that qualified immunity is never available if a court concludes that the contested inaccuracies and omissions in an affidavit of probable cause would have eliminated probable cause, and the plaintiff has shown a triable question of fact regarding whether the officers recklessly or intentionally included or omitted the information.

1. Is the qualified immunity question of whether an officer reasonably could have believed that an affidavit provided probable cause barred whenever a court concludes that (a) correction of affidavit inaccuracies and omissions would eliminate probable cause, and (b) the plaintiff has a triable question whether the officer recklessly or intentionally included or omitted the information?

2. In concluding that the affidavit in this case contained misstatements and omissions and did not demonstrate probable cause when the misstatements and omissions were accounted for, did the Ninth Circuit fail to heed *Illinois v. Gates* in that probable cause is a commonsense practical, not hypertechnical, inquiry that is concerned with reasonable probability, not certainty?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding below were:

Petitioners: Rachel E. Gardner and John Sager, Officers of the Washington State Patrol. Petitioners were aligned as defendants/appellees below.

The State of Washington, by and through the Washington State Patrol, was a named defendant below but is not a petitioner in this 42 U.S.C. § 1983 action. The State remains a defendant to the Chisms' related claims made under Washington law.

Respondents: Todd M. Chism and Nicole C. Chism, individually and as husband and wife. Respondents were aligned as plaintiffs/appellants below.

There are no corporations involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Rachel E. Gardner and John Sager, officers of the Washington State Patrol, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court's order denying the petition for rehearing and for rehearing en banc and the amended opinion, withdrawing and replacing the initial opinion, is published at 661 F.3d 380. App. 1a-39a. The initial opinion is reported at 655 F.3d 1106. App. 40a-42a. The order of the United States District Court for the Eastern District of Washington is published at 683 F. Supp. 2d 1145. App. 43a-79a.

JURISDICTION

The judgment of the Ninth Circuit was entered August 25, 2011. App. 40a-42a. On November 7, 2011, the Court of Appeals issued an order denying the timely petition for rehearing and petition for rehearing en banc and issued an amended opinion. App. 1a-39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought pursuant to 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

App. 109a.

The Chisms allege that Rachel Gardner and John Sager violated their rights under the Fourth Amendment to the United States Constitution. 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 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." App. 109a.

Other statutes are set out in the Appendix, including: Wash. Rev. Code §§ 9.68A.050, .060, and .070 (prohibitions against sexual exploitation of children, formerly child pornography). App. 110a-14a.

STATEMENT OF THE CASE

A. The Investigation And Affidavit Of Probable Cause

This case arose out of CyberTipline reports from the National Center for Missing and Exploited Children (Center) regarding child pornography on two internet websites hosted by the internet service provider Yahoo!.[1] App. 6a-7a. As explained more fully below, Yahoo! records identified the subscriber associated with the user account for each website as "Mr. Nicole Chism," and subsequent investigation revealed that, for a period, a credit card belonging to Todd Chism was used to pay domain service fees for each website. App. 7a-8a, 9a-10a. Todd and Nicole Chism are husband and wife. App. 1a.

1. The Two Tips About Websites With Child Pornography

The first CyberTipline report from the Center was received July 3, 2007, and assigned to petitioner Rachel Gardner, a detective in the Washington State Patrol's Missing and Exploited Children Task Force (Task Force). App. 6a. The tip stated that on June 23, 2007, the Yahoo! internet company archived material containing images of child pornography on a website it hosted on its system. App. 6a. Yahoo! charges domain service fees for creation of internet websites, allowing website creators to upload,

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[1] The Center is a private, nonprofit organization working in partnership with the U.S. Department of Justice to find missing children, reduce the incidence of child sexual exploitation, and prevent child victimization. *See* 42 U.S.C. § 5773(b)(1)(P)-(R).

download, and view website content. App. 8a n.6, 28a. A Yahoo! user account (or internet screen name) "qek" paid Yahoo! for the domain services needed to create the "foel" website.[2] App. 28a, 102a-04a. Gardner confirmed that the website showed fourteen images of child pornography. As more fully explained below, Yahoo! records identified the subscriber associated with the "qek" user account as "Mr. Nicole Chism," and subsequent investigation revealed that, for a period, a credit card belonging to Todd Chism was used to pay domain service fees for the "foel" website. App. 28a, 105a-06a.

The first tip also stated that on May 11, 2007, IP address 68.113.11.49 was used to open the "qek" user account. App. 6a. An Internet Protocol (IP) number, also known as an IP address, is a number assigned to computers and devices connected to the internet; each such device has a unique IP while it is connected to the Internet.[3] App. 67a, 99a. This first IP address was not subsequently used to log into the "foel" child pornography website. App. 46a. The tip indicated that Charter Communications owned the IP address. App. 46a.

The Task Force received a second tip on July 17, 2007. App. 46a. This tip indicated that on July 3, 2007, Yahoo! archived material on a website, labeled as the "qem" website, that contained images

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[2] The circuit court labeled this the "foel" website based on its address, http://foelonipwincmezixecvom.us/. App. 45a. The user account was labeled "qek" as shorthand for its screen name: qek9pj8z9ec@yahoo.com. App. 6a.

[3] The term "IP address" is defined in Gardner's affidavit for search warrant. App. 99a.

of child pornography.[4] App. 6a. The tip identified "qaag" as the Yahoo! user account associated with the website.[5] App. 28a. Yahoo! records identified the subscriber for the Yahoo! "qaag" user account as "Mr. Nicole Chism," and subsequent investigation revealed that, for a period, a credit card belonging to Todd Chism was used to pay domain service fees for hosting the website. App. 28a, 49a, 71a, 87a, 106a. The tip also specified that IP address 67.160.71.115, owned by Comcast, was used to open the "qaag" user account on June 19, 2007, but that IP address was not used thereafter to log into the "qem" website. App. 7a, 46a.

2. The Task Force Investigation

The Task Force obtained Yahoo! records related to the user accounts connected to the child pornography websites. App. 7a. From the records for the "foel" website, the Task Force learned: (1) the internet subscriber for the "qek" user account was listed as "Mr. Nicole Chism," of Chile, a male, with a birth date of May 20, 1966 (App. 7a); (2) the "qek" user logged in June 18, 2007, from IP address 69.147.83.181[6] (App. 7a); (3) the subscriber's residential address was listed as 5835 Walnut Springs Way in Nine Mile Falls, WA, and the subscriber information included the Chisms' zip code and residential phone number (App. 7a); (4) the "qek" user account purchased domain services with an

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[4] http://qemtudawyownufiseip.com. App. 6a, 28a.

[5] qaagwcy19ab@yahoo.com. App. 6a, 28a.

[6] The owner of IP Address 69.147.83.181 was not identified in the CyberTipline Report. App. 13a, 65a-66a.

identified credit card (the "6907 card")[7] (App. 7a); and (5) the billing information specified that the credit card had paid for two months of domain service fees for the "foel" website, from May 11, 2007, when the user account was created, to July 11, 2007 (App. 7a-8a).

The Task Force received similar information from Yahoo! records concerning the "qem" website: (1) the subscriber identified with the "qaag" user account was "Mr. Nicole Chism," a male, from Bolivia, born March 11, 1977 (App. 8a); (2) the Yahoo! tracker tool showed that "qaag" had logged into the "qem" website on three occasions: once on June 19, 2007, and twice on July 3, 2007 (App. 47a-48a); (3) on one of the July 3, 2007, log-ins, the IP address 69.147.83.181 was used (App. 47a); and (4) the Yahoo! subscriber information specified that the "qaag" user account created the "qem" website on June 19, 2007. App. 48a.

By September 2007, the Task Force identified the overlapping information for the two tips, including the Chism information and that both websites had been accessed with a computer or device using IP address 69.147.83.181, suggesting one suspect was potentially responsible for both websites. App. 9a.[8] Gardner investigated the name

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[7] Yahoo! provided the full credit card number and it was used throughout Gardner's investigation. App. 7a, 9a-10a.

[8] The Task Force also checked records from Charter Communications and Comcast Corporation for IP addresses 68.113.11.49 and 67.160.71.115 listed in the original tips. Charter records indicated the first address was then associated with Cheryl Corn of Walla Walla, Washington; Comcast indicated that the second address had been associated with

Nicole Chism and determined that the address and phone number for the "qek" user account were the correct address and phone number for Nicole and Todd Chism. App. 105a. Gardner also knew, through Yahoo! records, that credit card 6907 paid for two months of the domain service on "foel" for the "qek" user account. App. 7a-8a.

Gardner learned that the credit card 6907 paying to host the website was issued by Bank of America (BOA), and inquired regarding fraudulent credit card use. App. 48a-50a. A BOA representative told Gardner that card 6907 belonged to the Chisms, Todd was the primary holder, and Nicole an authorized user. App. 48a-49a. BOA also told Gardner that card 6907 replaced a card the Chisms reported lost in 2006, and there was no fraudulent activity relating to the 6907 card. App. 48a-49a. The April through July 2007 statements for card 6907 confirmed this information and showed that eight charges for Yahoo! domain services, totaling $309.61, were paid with the 6907 card—one for the "qem" website, two for the "foel" website, and five for other websites with similar names. App. 88a. Furthermore, Gardner learned the Chisms had not contested the Yahoo! domain service fees for the "foel" and "qem" websites on their May and June

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Vitinia Pleasant of Federal Way, Washington, but that was not a permanent assignment. App. 48a. Later, the FBI determined that proxy software had been installed on Corn's computer, allowing an unknown person to log onto the internet, but show her IP address. App. 36a. The Task Force did not obtain records for the third IP address, 69.147.83.181, because Yahoo! did not identify the internet provider issuing that address. App. 13a, 65a-66a.

2007 statements, coinciding with the time the user accounts for both websites were created. App. 74a n.10, 76a.

3. Gardner Files An Affidavit Of Probable Cause For A Search Warrant And A Deputy Prosecutor Seeks An Arrest Warrant

On January 24, 2008, Gardner filed an affidavit for a search warrant for the Chisms' house and Todd Chism's real estate office. App. 92a. The affidavit described probable cause to search for evidence of violations of the penal laws of the State of Washington, and, in particular, evidence of violation of Wash. Rev. Code §§ 9.68A.050, .060, and .070. App. 92a-93a, 107a-08a. Wash. Rev. Code § 9.68A.050 makes it a felony to "finance[], attempt[] to finance, or sell[] . . . visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct." App. 111a. Wash. Rev. Code § 9.68A.060 makes it a felony to send or bring into the state depictions of a minor engaged in sexually explicit conduct, and .070 prohibits possession of the same. App. 112a-14a.

The affidavit sets forth information that Gardner and other Task Force members discovered from Yahoo! and BOA. App. 102a-06a. Gardner also stated that training and experience allowed her to "know that individuals involved with trading and collecting child pornography are need driven, and their behavior is predictable and long term. The images collected by these individuals are of significant value to them. The collection is protected and safeguarded at any cost, and will only be

discarded in extreme situations of being exposed or detected." App. 96a.

The affidavit described the evidence of the tips, the Task Force investigation, and the details connecting Todd M. Chism to the credit card that had paid uncontested charges for the child pornography website. App. 102a-06a. The affidavit concluded that the evidence indicated that "records pertaining to distribution of depictions of minor[s] engaged in sexually explicit conduct" will be maintained on Todd Chism's private electronic mail and it could be possible to "identify those to whom Todd M. Chism has transferred depictions of minors engaged in sexually explicit conduct." App. 107a.

In the thirteenth and sixteenth paragraphs of the affidavit, Gardner described the "purchases" paid for by the 6907 card as "images downloaded" rather than the purchase of website domain services for hosting the website. App. 106a. The affidavit omitted some information Gardner learned in the investigation. App. 13a, 36a, 65a-69a. For example, the affidavit described IP addresses and how computers, when connecting to the internet, rely on an IP address; and accurately stated that the "qek" and "qaag" sites had been associated with specific (and different) IP addresses. App. 65a-69a, 99a, 103a. The affidavit, however, did not disclose that two internet service providers had identified customers associated with those IP addresses. *See supra* note 8. App. 13a, 36a, 38a. [9]

[9] Later, in a declaration filed in the district court, Gardner stated that she had not included the IP address information because "unlike a credit card charge, which is

A state judge issued a search warrant January 24, 2008. App. 108a. On the same day, a deputy prosecuting attorney sought and obtained an arrest warrant for Todd Chism. App. 4a. The deputy prosecutor's certification of probable cause summarized some of the information established during the Task Force's child pornography investigation as the basis for two felonies: Wash. Rev. Code §§ 9.68A.060 and .070, but for reasons unknown did not allege violation of .050. App. 4a.

The warrants were executed January 29, 2008. App. 51a. The search recovered billing records for the 6907 credit card, but did not uncover child pornography, and no criminal charges were filed. App. 10a, 70a.

B. The District Court Ruling Granting Qualified Immunity

The Chisms filed a damages action in state court against the State of Washington, acting through the Washington State Patrol (WSP), Rachel Gardner, and John Sager. The complaint asserted civil rights violations under 42 U.S.C. §§ 1983 and 1985, and state law tort claims. App. 10a. The civil rights claims alleged that the search and arrest violated the Fourth Amendment, asserting that the information relied upon was inadequate to establish probable cause and that the officers were deliberately indifferent, wanton, and willful, and reflected a complete disregard for the Chisms' well

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called to the cardholder's attention on the monthly bill, an IP address can be taken over without the authorized user ever knowing." App. 90a.

being. App. 44a. The defendants removed the case to federal court, where the parties filed cross motions for summary judgment on qualified immunity. App. 44a-45a. The district court ruled that Gardner and Sager were entitled to qualified immunity on the Chisms' Fourth Amendment claims. App. 79a.

The district court explained that a claim of qualified immunity requires examining both whether the facts alleged would make out a violation of a federal statutory or constitutional right, and whether the alleged violation is contrary to clearly established constitutional rights of which a reasonable person would have known. App. 51a. Citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004), the court observed that qualified immunity applies regardless of whether an official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." App. 51a-52a. Qualified immunity is a second layer of protection for an officer because an "officer may 'reasonably, but mistakenly, conclude that probable cause is present.'" App. 54a (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The district court "declined to make a determination as a matter of law whether there was probable cause to support the search and arrest warrants (i.e. whether there was a federal constitutional violation)." App. 74a. Instead, the district court concluded the facts and applicable case law showed "there was not 'clearly established' federal law which rendered unreasonable the belief of Defendants Gardner and Sager that they had probable cause to seek a search warrant for the Chism residence and business, and a warrant for the

arrest of Mr. Chism." App. 75a. The district court relied on this Court's probable cause test for a search warrant, "whether, using common sense and considering the totality of the circumstances, a magistrate issuing a search warrant can reasonably conclude there is a 'fair probability' that evidence of a crime will be found in the place to be searched." App. 55a-57a, 63a (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

The district court compared this case to *United States v. Gourde*, 440 F.3d 1065, 1072-73 (9th Cir. 2006) (en banc), where an affidavit allowed a magistrate to find probable cause in part because the defendant paid "for multi-month access to a child pornography site, [making] it . . . a 'near certainty that his computer would contain evidence of a crime had he received or downloaded images . . . .'" App. 58a (quoting *Gourde*, 440 F.3d at 1071). The district court recognized that the Chisms' credit card, like Gourde's, had been used over a multi-month period to make payments to web sites known to contain child pornography. App. 63a.

The district court rejected the Chisms' argument that probable cause would have been lacking if the affidavit included the subscriber account information listing Chile or Bolivia as the address for Mr. Chism, or noted that it did not list Todd Chism's actual birthdate. App. 62a. The court rejected this because the "Subscriber Information" disclosed was "nearly identical" to the Chisms' address, zip code, and billing phone numbers. App. 61a. Plus, a magistrate could see that the user accounts gave different birthdates. App. 62a-63a.

The district court also rejected the Chisms' argument that probable cause would have been absent if the affidavit identified the two persons associated with the IP addresses used when registering the user accounts. App. 65a-66a; *see supra* note 8. The district court recognized, from Gardner's supplemental declaration and from the Chisms' expert, that those IP addresses could not be associated with specific computers or locations. App. 66a. The opinion explained the nature of an IP address, how it can be "dynamic" or "static," and how the omitted information did not alter probable cause "[b]ecause the registration IP addresses could not be used to link" anyone "to uploading the child pornography, and because the log-in IP addresses could not be associated with a specific computer location[.]" App. 66a-67a. The district court concluded that "the critical information turned out to be the use of the Chisms' [6907] credit card" at times "corresponding to when there had been log-ins to those web sites." App. 68a. The district court found it was "undisputed" that Gardner had been told by BOA that "no fraud had been reported with regard to that particular card or to their account in general." App. 76a. Furthermore, the Chisms had not challenged the multiple webhosting charges on their 6907 card. App. 76a.

The district court concluded that "[b]ecause of *Gourde* and considering the totality of the information available to them, it would have been reasonable for [Gardner and Sager] to believe there was a 'fair probability' child pornography would be found on the computer to which the Chisms had access." App. 75a. Therefore, the Chisms could not

show violation of a clearly established right "in the context of an Internet child pornography investigation." App. 78a.

C. The Ninth Circuit Decision Reversing

The Chisms appealed dismissal of their civil rights claims, and the Ninth Circuit reversed in a 2-1 decision. Judge Richard A. Paez wrote the majority opinion, joined by Judge Betty Fletcher, while Judge Sandra S. Ikuta dissented. App. 42a.

The Ninth Circuit majority framed the issue as whether Gardner and Sager violated the Chisms' Fourth and Fourteenth Amendment rights by securing a search and arrest warrant with an affidavit that deliberately or recklessly contained material omissions and false statements. App. 5a. The opinion examined the challenged mistakes and omissions in the affidavit to evaluate if there was an issue of fact regarding the officers' knowledge or intent needed for what the majority called a "judicial deception" claim.[10] App. 5a-6a.

The majority found Gardner's "allusion" to "images downloaded by Todd M. Chism" and "her assertion that the Chisms' credit card was 'used to purchase images of child pornography from the website'" were inaccurate. App. 12a-13a. Instead, "the Chisms' card was used to pay hosting fees for the sites[.]" App. 12a-13a. The majority also identified four "serious omissions" in the affidavit: (1) Gardner's "discovery that the IP addresses used

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[10] The "judicial deception" civil claim is premised on the Fourth Amendment violation recognized by *Franks v. Delaware*, 438 U.S. 154 (1978). App. 11a-16a, 24a-25a.

to open the offending Yahoo! user accounts and websites were traced to people other than the Chisms"; (2) a third IP address—69.147.83.18—used to log into both pornographic websites was never traced; (3) Nicole shared the 6907 account with Todd so her name was linked to both websites; and (4) the subscriber account applications included some nonsensical information. App. 13a-14a.

The majority found a triable issue of fact on whether these omissions and misstatements were done deliberately or with reckless disregard for the truth. App. 14a-15a. The majority then concluded that the contested omissions and misstatements were material to probable cause for the search and arrest, and that the affidavit, once corrected and supplemented, would not have provided a magistrate judge with probable cause. App. 17a.

The majority ended by reciting the standards for qualified immunity, but then holding that "governmental employees are not entitled to qualified immunity on judicial deception claims." App. 25a-26a. Rather, "[i]n judicial deception cases, our qualified immunity analysis at the summary judgment stage is swallowed by the question of reckless or intentional disregard for the truth." App. 26a n.15.

Gardner and Sager made a timely request for rehearing and rehearing en banc, pointing out among other matters the majority's failure to consider probable cause for a violation of Wash. Rev. Code § 9.68A.050, the crime involving financing of child pornography. App. 111a. The Ninth Circuit denied the requests and amended the original

opinion. App. 1a-3a. The amended opinion did not alter the analysis of probable cause, instead amending the first footnote to add a reference to Wash. Rev. Code § 9.68A.050 and noting that the arrest warrant had not referenced this statute. App. 1a-3a. The revised footnote simply added that the court's "Fourth Amendment judicial deception claim, however, relates to all three statutes." App. 3a.

D. The Dissent Finding Probable Cause

Judge Ikuta concluded that there was no showing of a Fourth Amendment violation. "[T]he majority tramples on controlling precedent and defies common sense" because "this case involved a direct connection between the Chisms' credit card and two websites populated with child pornography[.]" App. 27a, 29a.

The dissent concluded that the tips from Yahoo! and the investigation of BOA records showing payments for the websites allowed the officers to "reasonably conclude that a person using the name Chism, providing the Chisms' home address and phone number, and paying with the Chisms' credit card, had created two websites, populated them with child pornography, and logged on to the sites several times." App. 29a. This created a "fair probability" that child pornography would be found on the Chisms' computers under the "commonsense, practical question" of probable cause. App. 29a. Under this Court's probable cause cases, "it is reasonable to 'follow the money' from the child pornography website, to the fees paying to host that website, to a credit card owned by the Chisms, to the

address for the payee (which is the same address as the website's subscriber), and from there to the Chisms' computer." App. 29a.

The dissent explained that the probable cause in this case was comparable to that found in *Gourde*, where "Gourde's credit card had been used to pay subscription fees to a site that contained child pornography" which created "a 'fair probability' that 'Gourde's computer contained evidence that he violated' federal child pornography laws." App. 30a (quoting *Gourde*, 440 F.3d at 1069). As in *Gourde*, it was reasonable to infer that the computer of the person who paid for access "'would contain evidence of a crime'" and that "'[i]t neither strains logic nor defies common sense to conclude . . . that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer.'" App. 31a (first alteration in original) (quoting *Gourde*, 440 F.3d at 1071).

Judge Ikuta observed a "triad of solid facts" present in this case that was indistinguishable from *Gourde*:

> (1) the foel and qem websites contained images of child pornography, (2) the Chisms' credit card paid to host both sites, raising the inference that the Chisms intended to have and wanted access to these images, and therefore (3) images of child pornography "were almost certainly retrievable from [the Chisms'] computer if [the Chisms] had ever received or downloaded them."

App. 32a (quoting *Gourde*, 440 F.3d at 1071) (alterations in original). Based on these facts, the dissent found it was "eminently reasonable" to infer that the Chisms' computer contained child pornography "given that they paid multi-month fees to host a child pornography website[.]" App. 32a.

The dissent rejected the majority's conclusion that the "alleged misrepresentations or omissions" were material to probable cause. App. 34a. The first allegedly false statement described the credit "'card the suspect used to purchase the images of child pornography from the website [foel].'" App. 34a (quoting affidavit at App. 106a). The dissent recognized that the credit card did not, in a literal sense, "buy images[.]" App. 34a-35a. This point was "immaterial given that the Chisms' credit card was used to buy the website itself, that is, to pay hosting fees for a website populated with child pornography." App. 35a. The second allegedly false statement refers to information "from NCMEC [Center] about the images downloaded by Todd M. Chism[.]" App. 34a (quoting affidavit at App. 106a). The NCMEC [Center] tip was not about downloading, but this misstatement was immaterial. "*Gourde* instructs that we can infer that a person who pays for access to images of child pornography has downloaded them." App. 35a (citing *Gourde*, 440 F.3d at 1071).

The dissent described the contested omissions as "either immaterial, or not really an omission at all." App. 35a. First, the "affidavit's failure to state that the IP addresses used to register the foel and qem websites were traced to Cheryl Corn and Vitina Pleasant . . . carries little weight[.]" App. 35a. This

additional fact would not undermine evidence showing that "the credit card used to pay the hosting fees for the sites and the usernames used to log in to both sites were registered to the name 'Chism.'" App. 35a. The dissent explained that "proxy software . . . allows an unknown individual to log on to the internet under another person's IP address" so that "the *lack* of a match between the IP addresses used for registration and the Chisms' IP address has no probative value." App. 35a (citing case law). Moreover, "no case" shows that "the *lack* of a match between an IP address associated with such images and the IP address of the defendant's computer *reduces* probable cause of the defendant's involvement." App. 36a.

Judge Ikuta also rejected the majority's point that the affidavit did not "disclose the fact that the police never traced the IP address that was used to log in to both the foel and qem websites[.]" App. 36a. The dissent concluded that this was not a material omission because the police are not obligated to turn a "'fair probability' into a 'near certainty' by conducting such an additional investigation." App. 36a (quoting *Gourde,* 440 F.3d at 1071).

The dissent described the majority's third and fourth omissions as "baffling" and having "no weight." App. 37a. The dissent noted that a magistrate surely did not need to be told "that husbands and wives often use the same credit card." App. 37a. With regard to the omitted nonsensical information about the subscriber's country or zip codes, that omission had no weight and would not affect the "indicia of probable cause as to render

official belief in its existence unreasonable." App. 37a.

The dissent summarizes the majority's error as requiring "'a physical link between the illegal images and the locations to be searched.'" App. 37a-38a (quoting Majority Op. at App. 21a). This requirement conflicted with *Illinois v. Gates*, 462 U.S. 213 (1983), and with a practical view of the totality of evidence. It also conflicted with *Gourde*, which rejected the need for that additional link. The dissent concluded that because "phony IP addresses abound in cyberspace, the majority's 'physical link' rule will baffle many an investigation into child pornography and its users and peddlers." App. 38a.

REASONS THE WRIT SHOULD BE GRANTED

The Ninth Circuit has eliminated qualified immunity at the summary judgment stage through a blanket rule that defies this Court's decisions in *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In *Anderson*, this Court granted certiorari to consider if Anderson, an FBI agent, "was entitled to summary judgment on qualified immunity grounds if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful." *Anderson*, 483 U.S. at 638. The Court answered this question affirmatively, reversing the Eighth Circuit and reaffirming that "government officials performing discretionary functions" are generally provided "with a qualified immunity, shielding them from civil damages liability as long as

their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638.

As in *Anderson*, the officers in this case are entitled to examination of qualified immunity that considers whether "a reasonable officer could have believed the search to be lawful." *Id.* The Ninth Circuit's rule, however, forecloses any consideration of qualified immunity on the basis recognized in *Anderson*, because, according to the Ninth Circuit, "governmental employees are not entitled to qualified immunity on judicial deception claims." App. 24a-25a. The Ninth Circuit's blanket rule bars consideration of the same qualified immunity question that *Anderson* requires—whether a reasonable officer could have believed that the affidavit provided probable cause.

The Ninth Circuit decision also fails to heed the teaching of *Saucier* that qualified immunity can be based on reasonable, but mistaken, belief with respect to law or fact. The *Saucier* Court rejected a Ninth Circuit rule that foreclosed qualified immunity at the summary judgment stage whenever the plaintiff presented a triable question on a Fourth Amendment excessive force claim. This Court held that the rule failed to consider the proper qualified immunity question—whether an officer reasonably, but mistakenly, could have believed that the amount of force used was necessary. The Court explained "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." *Saucier*, 533 U.S. at 205. In this respect, the Court observed that "[t]he concern of the

qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the constraints on particular police conduct." *Saucier*, 533 U.S. at 205. Accordingly, a qualified immunity inquiry was not "merely duplicative in an excessive force case." *Id*. at 203.

Similarly, a patent error underlies the blanket rule the Ninth Circuit applied in this context. A triable issue with respect to whether inaccuracies or omissions in a probable cause affidavit were intentional or reckless does not duplicate the *Anderson* inquiry whether the officer reasonably could have believed that the affidavit contained sufficient accurate information to establish probable cause. Thus the Ninth Circuit's explanation, that its "qualified immunity analysis at the summary judgment stage is swallowed by the question of reckless or intentional disregard for the truth" (App. 26a n.15) simply is inaccurate. It no more answers the necessary qualified immunity inquiry than did the rule rejected in *Saucier*.[11]

The case at hand shows why officers should have an opportunity to seek qualified immunity under the correct standard at the summary

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[11] The Ninth Circuit's "blanket rule" was not based on the clarity of its determination that, purged of its alleged inaccuracies and omissions, the affidavit did not establish probable cause. App. 17a. The majority merely concluded "that a corrected version of Gardner's affidavit would not have provided the magistrate with a substantial basis for finding probable cause." App. 17a. Nowhere did the court ask, nor did the blanket rule answer, whether "a reasonable officer could have believed that the search was lawful." *Anderson v. Creighton*, 438 U.S. at 638.

judgment stage. The district court opinion, the Ninth Circuit majority, and Judge Ikuta's well-reasoned dissent confirm that learned judges disagree whether an officer could reasonably believe the affidavit in question demonstrated probable cause, regardless of the contested mistakes and omissions. A triable fact over the officers' state of mind is, therefore, immaterial in this case to the question of qualified immunity under *Anderson*. The opinions by these judges demonstrate that a reasonable officer could believe that the affidavit was supported by probable cause, but the Ninth Circuit's blanket rule precluded qualified immunity on this basis.

The Ninth Circuit also was demonstrably wrong in concluding that the contested inaccuracies and omissions were material to probable cause. A commonsense evaluation of the uncontested evidence demonstrated probable cause for the officers to believe, at minimum, that Todd and Nicole Chism were connected with financing child pornography internet websites, a crime under state law. In concluding that the affidavit would not support probable cause where it accurately demonstrated payment for child pornography websites associated with the Chisms, using a credit card belonging to the Chisms, the Ninth Circuit applied the "grudging or negative attitude" and "hypertechnical" view of probable cause that this Court has long rejected. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). The Ninth Circuit's rejection of probable cause will, therefore, make it unjustifiably more difficult for police officers to ferret out perpetrators of internet child pornography

crimes, and nearly impossible for law enforcement officers to predict what must be demonstrated to establish probable cause and avoid civil liability for damages in the complex technical arena of internet child pornography.

A. The Ninth Circuit Rule Conflicts With *Anderson v. Creighton* and *Saucier v. Katz* By Barring Consideration Of The Required Test For Qualified Immunity

1. The Ninth Circuit Refused To Apply The "Clearly Established Law" Inquiry Essential To Analysis Of Qualified Immunity

The majority opinion correctly recited the standards for qualified immunity, but then applied a blanket rule that bars application of those standards. "Qualified immunity shields the officers from liability 'insofar as their conduct d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" App. 25a (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A qualified immunity analysis "must consider whether the Chisms' constitutional rights were clearly established[.]" App. 25a. The standard for determining if a right is clearly established is "whether the contours of the Chisms' rights were so clear that 'every "reasonable official would have understood that what he is doing violates that right."'" App. 25a (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))); *see also* App. 25a ("'existing precedent must have placed the statutory or constitutional question beyond debate'").

The Ninth Circuit concluded it could bypass these established qualified immunity questions because it identified a question of fact regarding the petitioners' state of mind related to the contested information in the affidavit. It applied its own rule, where "summary judgment on the ground of qualified immunity is not appropriate once a plaintiff has made out a judicial deception claim." App. 26a.[12] The Ninth Circuit explained that a question of fact on an officer's recklessness or intent precludes the qualified immunity analysis for this Fourth Amendment claim.

> [I]f an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, . . . *he cannot be said to have acted in a reasonable manner*, and the shield of qualified immunity is lost.

App. 26a (emphasis added).

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[12] As noted by the Ninth Circuit, the claim in this case is premised on the Fourth Amendment violation recognized by *Franks v. Delaware*, 438 U.S. 154 (1978). App. 24a-25a. In *Franks*, this Court held that in a criminal prosecution, a search warrant is voided and the fruits of a search are excluded if a defendant establishes (1) that a false statement made "knowingly and intentionally or with reckless disregard for the truth" was included in the warrant affidavit, *and* (2) the allegedly false statement is necessary to the finding of probable cause. *Franks*. 438 U.S. at 155-56.

The Ninth Circuit's explanation fails on its face. It recognizes that *two* elements make up this § 1983 claim: (1) inaccurate or omitted information meeting the state of mind required by *Franks v. Delaware*, 438 U.S. 154 (1978); and (2) "no accurate information sufficient to constitute probable cause attended the false statements." App. 26a. But the Ninth Circuit's blanket rule declines to recognize that a reasonableness qualified immunity inquiry attends each element. The Ninth Circuit rule refuses to consider whether in these circumstances, an officer could reasonably conclude that the affidavit contained adequate accurate information to demonstrate probable cause.

In contrast, the district court applied the Court's clearly established law test. App. 52a. The district court concluded that "there was enough information in Gardner's affidavit to render reasonable, her belief that there was probable cause." App. 77a. The district court (like Judge Ikuta in her dissenting opinion) recognized that qualified immunity and the underlying claims did not turn solely on the officer's state of mind, and were measured against an objective standard of reasonableness. Applying this standard, the district court considered the fact that "Gardner's affidavit was not a bare bones affidavit. It established at least a colorable argument for probable cause, in that thoughtful and competent judges might disagree about the existence of probable cause." App. 75a. (internal quotation marks omitted). It was "undisputed" that Gardner had investigated the card and "that no fraud had been reported with regard to that particular card or to their account in

general." App. 76a. "Furthermore, the Chisms never specifically reported fraud with regard to purchases made on the 6907 card and instead, in August 2007, challenged certain purchases on the 9626 card." App. 76a.

Applying the qualified immunity test would have protected petitioners from having to go forward in this suit. The Ninth Circuit's blanket rule, however, prevents consideration of qualified immunity in *any* civil case with facts triggering a *Franks* suppression hearing. The rule is flawed, because it wrongly assumes that no officer whose affidavit triggers a *Franks* suppression hearing could reasonably have believed that the resulting search was consistent with the Fourth Amendment.

2. The Ninth Circuit's Barrier To Examining Qualified Immunity Is A Rule That Conflicts Squarely With *Anderson* And *Saucier*

Anderson was a civil rights action against an FBI agent alleging that the agent violated the Fourth Amendment by conducting an unlawful warrantless search. The plaintiffs in *Anderson* argued that qualified immunity should have "exceptions" that varied by "the precise character of the particular rights alleged to have been violated." *Anderson*, 483 U.S. at 643. The plaintiffs argued that because the Fourth Amendment is violated by an unreasonable search, qualified immunity must be denied if there is a triable issue over the reasonableness of a search. The Court rejected this argument. "An immunity that has as many variants as there are modes of official action and types of

rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson*, 483 U.S. at 643. The Court extended qualified immunity to persons who violate reasonableness requirements of the Fourth Amendment because of the "difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Id.* at 644. "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.*

The *Saucier* Court reaffirmed these principles from *Anderson* by reversing a Ninth Circuit rule where government employees could not obtain qualified immunity at the summary judgment stage if there was a question of fact going to the reasonableness of the use of force. The Ninth Circuit had "concluded that the second step of the qualified immunity inquiry and the merits of the Fourth Amendment excessive force claim are identical, since both concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene." *Saucier*, 533 U.S. at 199-200 (citing *Katz*, 194 F.3d at 968-69 (1999)). This Court rejected a "view that the qualified immunity inquiry is the same as the constitutional inquiry and so becomes superfluous or duplicative when excessive force is alleged." *Saucier*, 533 U.S. at 200.

The *Saucier* Court recognized that *Anderson* precluded exceptions to qualified immunity, where a court "need not consider aspects of qualified

immunity, leaving the whole matter to the jury." *Saucier*, 533 U.S. at 200. The clearly established law inquiry of qualified immunity required a "more specific" examination than the underlying constitutional claim. *Id.* Eliminating qualified immunity because of a dispute over the reasonableness of force, alone, misapplied *Anderson* because it did not determine that a legal right was clearly established at the appropriate level of specificity. The Court emphasized that even with a dispute over the reasonableness of force, "'[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson*, 483 U.S. at 640). Immunity is appropriately decided in the officer's favor on summary judgment if "the law did not put the officer on notice that his conduct would be clearly unlawful[.]" *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Therefore, "qualified immunity applied in the Fourth Amendment context just as it would for any other claim of official misconduct." *Id.* at 203 (citing *Anderson*, 483 U.S. at 644).[13]

The reasons for applying qualified immunity discussed in *Saucier* apply with equal strength to this case. Factors governing an excessive force claim are complex, but the qualified immunity inquiry "has a further dimension." *Saucier*, 533 U.S. at 205 (citing *Graham v. Connor*, 490 U.S. 386, 396

[13] The Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), rejected a subjective test for qualified immunity precisely because it was too easy to claim a genuine issue of material fact over an officer's state of mind, triggering a trial and defeating the purposes of the immunity.

(1989)). The test for probable cause similarly "does not always give a clear answer," which is "the nature of a test which must accommodate limitless factual circumstances." *Saucier*, 533 U.S. at 205. "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* "If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.*

The Ninth Circuit's blanket rule erroneously bars the qualified immunity reasonableness inquiry and review should be granted to resolve the direct conflict with *Anderson* and *Saucier*.

3. The Ninth Circuit Rule Conflicts With The Qualified Immunity Analysis Of Other Circuits

Contrary to the Ninth Circuit, the Seventh, Fifth, Second, and Sixth Circuits hold that qualified immunity in civil cases alleging a Fourth Amendment violation based on *Franks* must also consider whether an officer reasonably could believe that an affidavit established probable cause.

In *Whitlock v. Brown*, 596 F.3d 406 (7th Cir. 2010), the court examined an officer's failure to include information that "may well have been a material omission[,]" but concluded that the information was "at least of such questionable relevance that Brown is entitled to qualified immunity[.]" *Id.* at 413. The court relied on the fact that the criminal law at issue was "undeveloped" and that "[q]ualified immunity *tolerates*

reasonable mistakes regarding probable cause." *Whitlock*, 596 F.3d at 413 (emphasis added) (citing *Malley,* 475 U.S. at 343).

In *Freeman v. County of Bexar*, 210 F.3d 550 (5th Cir. 2000), the Fifth Circuit addressed a § 1983 case based on *Franks*. To overcome an officer's qualified immunity, the burden was to show that the officer was unreasonable in concluding that a warrant should issue. *Id*. (citing *Malley,* 475 U.S. at 341). Referencing the examination of probable cause under *Illinois v. Gates*, the court recognized that officers could be entitled to qualified immunity for reasonably believing that probable cause existed. *Id.*

In *Walczyk v. Rio,* 496 F.3d 139 (2d Cir. 2007), the Second Circuit concluded that where a warrant lacked probable cause for failing to disclose certain information, the qualified immunity test must still examine whether it was "objectively reasonable for the officer to believe that probable cause existed[.]" *Id.* at 163.

In *Vakilian v. Shaw*, 335 F.3d 509 (6th Cir. 2003), the Sixth Circuit "assume[d] that Vakilian ha[d] made the required showing" for the first step in a Fourth Amendment claim based on *Franks* and that there was evidence of reckless disregard of the truth. *Id.* at 518. The court then tested the officer's reasonable view of what the law had required for probable cause at the time the officer made the charges, and determined that the officer was entitled to qualified immunity on the plaintiff's Fourth Amendment claim. *Id.*

In addition, while not determining the issue, the Eighth Circuit in *Bagby v. Brondhaver*, 98 F.3d

1096 (8th Cir. 1996), expressed "doubts" about an approach where a "defendant is never entitled to qualified immunity if the corrected affidavit is insufficient—because that rule may in some cases fail to serve the qualified immunity purpose of sparing all but the plainly incompetent from § 1983 damage liability." *Id.* at 1099.

4. The Ninth Circuit's Blanket Rule Denying Qualified Immunity Presents An Important Question That Should Be Resolved By This Court

"Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier*, 533 U.S. at 200 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). It is "'effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 201 (quoting *Mitchell*, 472 U.S. at 526).

If allowed to stand, the Ninth Circuit's decision will, of course, continue to visit upon the officers in this case the burden of alleged wrongdoing, without benefit of an inquiry into the reasonableness of their actions under the law. It also will require these officers to devote considerable time and resources to trial, and to that extent, divert needed resources from law enforcement. But that is not all, because the Ninth Circuit decision is not just one "bad call" in one case. Its decision is the product of a broadly applicable rule denying consideration of the proper qualified immunity standard in a whole class of

cases, and not only on summary judgment, but also at trial.[14]

For this reason, there will be many more Detective Gardners and Sergeant Sagers harmed by the Ninth Circuit's rule. Additionally, as discussed in Section B, this is all the more true given the Ninth Circuit's cramped and hypertechnical view of probable cause requirements in the context of internet child pornography investigations. The Court should grant the petition to ensure that officials in the Ninth Circuit have the opportunity to show that they are entitled to qualified immunity as set forth in *Anderson*, and as available in other circuits on similar Fourth Amendment claims.

B. The Ninth Circuit Opinion Ignored Uncontested Evidence Of Probable Cause And Failed To Apply A Common-Sense Examination Of Evidence Required By *Illinois V. Gates*

In *Illinois v. Gates*, 462 U.S. at 231, this Court explained that "the central teaching of our decisions bearing on the probable cause standard is that it is a practical, non-technical conception." (Internal quotation marks omitted.) "[C]ourts should not invalidate . . . warrants by interpreting affidavit[s] in a hypertechnical rather than a commonsense manner." *Id.* at 236 (citation omitted). If there is a "substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth

[14] The Ninth Circuit effectively concluded that the only question of fact affecting qualified immunity at trial is the state of mind with respect to alleged mistakes and omissions.

Amendment requires no more." *Illinois v. Gates*, 462 U.S. at 236 (citation omitted). The Ninth Circuit decision departs from these principles.

1. The Credit Card Payments For The Websites Provided Uncontested Evidence Of Probable Cause

As described by Judge Ikuta's dissent applying *Illinois v. Gates*, Gardner's affidavit provided probable cause for the search and arrest, even after addressing the mistakes and omissions asserted by the Chisms. App. 29a-30a. Additionally, the affidavit included uncontested and substantial evidence establishing probable cause that, at a minimum, the Chisms violated Wash. Rev. Code § 9.68A.050 by financing two child pornography websites. Wash. Rev. Code § 9.68A.050 does not depend on downloading, transmission, or possession of images—it is committed by financing a child pornography website.

The majority essentially acknowledged probable cause for violating Wash. Rev. Code § 9.68A.050 when it recognized that the affidavit included "evidence connecting Todd Chism to the child pornographic images" because "the credit card he shared with Nicole was charged three times for hosting the websites that contained the child pornographic images." App. 27a-39a. Commonsense consideration of this evidence established the "fair probability" that the "financing" statute had been violated by the Chisms, and that evidence would be found in their residence and on their computers. Moreover, in light of the elements of the financing crime, there can be no merit to the majority's

conclusion that the misusing the words "downloading" or "purchasing images" affect probable cause.[15]

The majority, however, did not examine the elements of Wash. Rev. Code § 9.68A.050. When the statute was called to their attention, the majority described it only as prohibiting "dealing in depictions of a minor engaged in sexually explicit conduct." App. 4a. But under the plain language of the statute, this crime is committed when a person knowingly finances visual matter that depicts a minor engaged in sexually explicit conduct. Wash. Rev. Code § 9.68A.050(1)(a)(i). App. 111a-12a. When petitioners moved for reconsideration and alerted the majority to this failure, the majority simply added a footnote with an inadequate description of the statute.

2. The Ninth Circuit's Probable Cause Requirements Will Unjustifiably Interfere With Police Investigations Concerning Internet Child Pornography

As explained by the dissent, the Ninth Circuit adopts a requirement for "a physical link between the illegal images and the locations to be searched." App. 37a. Not only is this "physical link" rule contrary to *Illinois v. Gates* and numerous cases considering similar internet crimes, it also will hinder legitimate law enforcement

[15] Additionally, for the reasons stated by the dissent, those phrases did not impair the probable cause that the officers had for the "possession" and "transmission" crimes defined by Wash. Rev. Code §§ 9.68A.060 and .070. App. 30a-33a.

investigations. "Given the government's evidence that phony IP addresses abound in cyberspace, the majority's 'physical link' rule will baffle many an investigation into child pornography and its users and peddlers." App. 38a.

The Ninth Circuit seemingly instructs police that a sound basis from which to infer that a person has downloaded illegal images is not sufficient to establish probable cause. Instead, under the Ninth Circuit decision, police must produce direct evidence that a suspect retrieved electronic images from a website before probable cause can be established for possession of child pornography. Such a requirement will hinder legitimate investigations and it will create a potential liability and prosecution trap that police officers, who rely on commonsense reasonable inferences, will have no reason to anticipate.

The Ninth Circuit creates similarly unjustified hurdles for law enforcement by concluding that to avoid a Fourth Amendment claim of an unreasonable search or arrest, an officer's probable cause affidavit must (1) identify persons connected through any IP address to a child pornography website subscriber who is the subject of a request for a search or arrest warrant, and (2) demonstrate investigation of any other IP addresses used to log into a child pornography website. A fair inference from the decision is that where such other IP addresses have a connection to a child pornography website, that information undercuts probable cause that otherwise would exist. As explained by both the district court and dissent, the absence of such information does not undermine a "fair probability" that a person who is identified as a subscriber and financier of a child

pornography website has violated child pornography laws. The Ninth Circuit has created a standard that will require further investigation to include such IP information in affidavits relating to internet child pornography to establish probable cause, and lead to fewer circumstances where probable cause can be established.

For these reasons, the Court also should accept review of the second question presented and address the Ninth Circuit's erroneous and harmful tests for probable cause in the context of internet child pornography.

CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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APPENDIX