No. 11-987

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

PETITIONERS' REPLY BRIEF

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THE WRIT SHOULD BE GRANTED

A. Respondents Do Not Dispel The Conflict Between This Court's Decisions In *Anderson* and *Saucier* And The Ninth Circuit's Blanket Rule Declining To Consider Qualified Immunity

Respondents claim the Ninth Circuit analyzed the facts known to petitioners in a manner that meets the test for qualified immunity in *Anderson v. Creighton*, 483 U.S. 635 (1987). Br. Opp. 23. This is not accurate. Respondents nowhere show that the Ninth Circuit addressed the qualified immunity inquiry mandated by *Anderson*.

The *Anderson* inquiry asks "whether a reasonable officer could have believed [the] search to be lawful, in light of clearly established law and the information the searching officers possessed." *Anderson*, 483 U.S. at 641. The inquiry is fact-specific and objective. *Id.* "We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.*

Respondents' failure to show that the Ninth Circuit considered the *Anderson* question is not surprising. The Ninth Circuit held that it need not consider this qualified immunity inquiry whenever a plaintiff presents a triable issue on what it labels as a "judicial deception" claim. Pet. App. 25a-27a. This is the conflict with *Anderson*—the Ninth Circuit's blanket rule does not ask whether a reasonable officer could have concluded that probable cause

was present. Respondents' brief does nothing to dispel this conflict.

Respondents also deny the conflict between the blanket rule applied below (which collapses the qualified immunity inquiry into the merits inquiry of probable cause) and *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Respondents, however, similarly fail to dispose of this conflict. Respondents argue that *Saucier* does not "requir[e] courts to always keep the relevant legal doctrine analysis separate and distinct from the qualified immunity analysis." Br. Opp. 23. This is an unsupportable reading of *Saucier*. The language respondents quote from *Saucier* (Br. Opp. 23-24) simply recognizes that courts may articulate general standards of conduct that would violate clearly established constitutional or statutory law of which every reasonable officer would have known. *Saucier*, however, does not sanction failure to consider the qualified immunity question in the first instance—as the Ninth Circuit's blanket rule does in a broad class of cases without regard to particularized facts.

Having failed to show the Ninth Circuit considered the fact-specific, objective, qualified immunity inquiry mandated by *Anderson* and *Saucier*, respondents seek to substitute a different, inapposite question. Respondents recast the qualified immunity inquiry in this Fourth Amendment context as: "Whether a reasonable officer could believe that deceiving a magistrate in order to obtain probable cause that otherwise would not exist, is lawful in light of clearly established law and the information the officer possesses." Br. Opp. 21. This is not the qualified immunity question required by

Anderson. Neither respondents' question nor the Ninth Circuit's blanket rule considers the circumstances faced by the officers and the facts known to them, and asks whether, in light of those facts and circumstances, a reasonable officer could have concluded there was probable cause.[1]

Moreover, respondents' would-be qualified immunity inquiry, and the blanket rule applied below, turn on finding a triable issue with respect to the alleged state of mind of the officers (intent or recklessness) and a legal conclusion that a corrected affidavit would not establish probable cause.[2] However, these circumstances fail to demonstrate categorically that every reasonable officer would know the search or arrest lacked probable cause. Respondents' reliance on *Franks v. Delaware*, 438 U.S. 154 (1978), to convert these circumstances into a rule precluding consideration of qualified immunity is misplaced for the same reason. The general rule from *Franks* does not foreclose the

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[1] The question respondents pose is derived from *Franks v. Delaware*, 438 U.S. 154 (1978), but this use of *Franks* is misplaced. Among other things, *Franks* makes it clear that "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no [suppression] hearing is required." *Id.* at 171. *Franks* thus confirms that the gravamen of an alleged Fourth Amendment violation—and the focus of a Fourth Amendment inquiry—is probable cause, not the subjective state of mind of the government official. The Ninth Circuit's rule, by contrast, forecloses consideration of whether there was an objectively reasonable basis to believe that probable cause existed, by categorically barring consideration of qualified immunity.

[2] Respondents' brief repeatedly treats the question of the officers' state of mind in this case as established fact. Br. Opp. 21, 24, 25, 28. This, of course, is not correct.

possibility that, under the facts and circumstances of a particular case, a reasonable officer could conclude that probable cause existed for a search or arrest.

In addition, having failed to show that the Ninth Circuit considered the appropriate qualified immunity inquiry, respondents' brief assumes a favorable answer to the question the Ninth Circuit never asked. Respondents assert "no factual scenario . . . ever permits an officer to obtain a warrant through false statements and material omissions when the information available to the officer *makes it clear probable cause would not exist* absent the falsehoods and omissions." Br. Opp. 24 (emphasis added). This purported justification for the blanket rule assumes it will always be clear that probable cause would not exist in any case where probable cause is reevaluated in the absence of the challenged misstatement or omission. Notably, the absence of probable cause was not clear to the district court or dissenting Judge Ikuta. Indeed, discounting allegedly inaccurate statements and considering allegedly material omissions from the probable cause affidavit, the district court and dissenting judge determined it would be reasonable to find probable cause. The Ninth Circuit majority did not conclude otherwise. Rather, the Ninth Circuit majority interjected its blanket rule and foreclosed examining whether the information available to the officers *makes it clear* probable cause would not exist.

The petition shows that qualified immunity under *Anderson* and *Saucier* requires asking whether a reasonable officer could have believed that probable cause existed based upon the circumstances

of this case. The Ninth Circuit's blanket rule forecloses that question. Respondents sidestep, but do not dispel, how the Ninth Circuit blanket rule conflicts with both *Anderson* and *Saucier*.

B. There Is A Clear Conflict Between The Ninth Circuit's Blanket Rule Declining To Consider Qualified Immunity And Other Circuits' Consideration Of The Qualified Immunity Inquiry

Respondents deny a circuit conflict by claiming that the circuit cases cited by petitioners use the "same two-part test" as the Ninth Circuit. Br. Opp. 16. But, in fact, those circuits examine qualified immunity by asking whether there was a reasonable basis to believe that probable cause was present in the circumstances of the case. None of these circuits concludes, as the Ninth Circuit has, that qualified immunity analysis is "swallowed" by a finding of misrepresentation or omission. Pet. App. 26a n.15.

The Second Circuit, for example, held that qualified immunity depended on whether it was "objectively reasonable for the officer to believe that probable cause existed[.]" *Walczyk v. Rio*, 496 F.3d 139, 163 (2nd. Cir. 2007). The Second Circuit described this test as looking for "arguable probable cause." *Id. Cf.* District Court, Pet. App. 54a. ("The qualified immunity question becomes whether the officer had arguable probable cause."). Respondents claim that *Walczyk* holds only that the alleged omissions were immaterial, but that claim fails because it ignores the "arguable probable cause" test

articulated in that opinion and in the other Second Circuit cases cited in *Walczyk*.

The Fifth Circuit approved a rule where courts "examined *the overall reasonableness* of the officers' respective probable cause determinations" after correcting an affidavit based on a *Franks* argument. *Freeman v. Cnty. of Bexar*, 210 F.3d 550, 554 n.2 (5th Cir. 2000) (emphasis added). The court noted that probable cause looks to the "totality of the circumstances," and therefore "if officers of reasonable competence could disagree on [probable cause], the [officers] are still entitled to qualified immunity." *Id.* at 553-54. The court then relied on this approach to qualified immunity when it held that the plaintiff had only shown that "reasonable officers disagreed." *Id.* at 555.

Similarly, in *Vakilian v. Shaw*, 335 F.3d 509 (6th Cir. 2003), the Sixth Circuit held that qualified immunity applied notwithstanding an officer's mistaken interpretation of the controlling criminal statute. The court explained that if the affidavit was corrected, it was "insufficient to bring charges under the current interpretation of the statute[.]" *Id.* at 518. But the court found qualified immunity because a belief in probable cause was reasonable in light of how the statute had been interpreted "at the time charges were filed[.]" *Id.*

In *Whitlock v. Brown*, 596 F.3d 406 (7th Cir. 2010), the Seventh Circuit also makes it clear that it will examine arguable probable cause. There is no merit to respondents' claim that *Whitlock* involves only an omission that did not affect probable cause. Br. Opp. 17. The Seventh Circuit describes the

omission as "irrelevant to the probable-cause determination—*or at least of such questionable relevance that Brown is entitled to qualified immunity*." *Whitlock*, 596 F.3d at 413 (emphasis added). "Under the circumstances here, a reasonable officer would not have known" that the information omitted in the affidavit "was material to the probable cause determination[.]" *Id.*

Nor is there merit to respondents' argument that *Bagby v. Brondhaver*, 98 F.3d 1096, 1099 (8th Cir. 1996), is distinguishable because the affidavit in that case provided probable cause. Br. Opp. 18. Petitioners acknowledged this distinction and pointed out that the Eighth Circuit in *Bagby* doubted the soundness of the blanket rule at issue in this case. Pet. 31-32.

In an effort to rebut the circuit conflict and justify the Ninth Circuit's categorical refusal to consider qualified immunity, respondents quote extensively from *Olson v. Tyler*, 771 F.2d 277 (7th Cir. 1985). Br. Opp. 14, 15, 25, 28. They recognize the Ninth Circuit itself quoted *Olson* to justify its rule. Br. Opp. 15 (citing Pet. App. 26a). But *Olson* does not support the Ninth Circuit's blanket rule. The plaintiff in *Olson* sued a sheriff for arresting him based on an allegation that he sold illegal drugs to an informant. The alleged sale took place in a bar, and occurred on a day when Olson was in jail. The sheriff conceded this evidence showed that he knew or should have known that Olson was incarcerated on the date of the alleged sale. Under these facts, the *Olson* court had no reason to ask whether the sheriff could reasonably believe that probable cause supported the arrest. Therefore, neither the facts

nor the opinion suggest that *Olson* should be expanded into a categorical rule for denying qualified immunity. Not every case involves simple facts like *Olson*, where a triable question of fact regarding an officer's state of mind for a material omission or misstatement foreclosed any objectively reasonable belief that probable cause existed.[3]

The circuit cases offered by respondents prove nothing with regard to the circuit conflict because none of the cases involve arguments or facts where there was an arguable basis for probable cause, such that a reasonable officer would have known that the probable cause was absent. *See Moody v. St. Charles Cnty.*, 23 F.3d 1410, 1412 (8th Cir. 1994); *Burke v. Beene*, 948 F.2d 489 (8th Cir. 1991); *Holmes v. Kucynda*, 321 F.3d 1068 (11th Cir. 2003); *Miller v. Prince George's Cnty.*, 475 F.3d 621 (4th Cir. 2007); *Manganiello v. City of New York*, 612 F.3d 149, 164-65 (2d Cir. 2010).

Respondents' claims notwithstanding, there is a clear conflict between the Ninth Circuit blanket rule declining to consider qualified immunity,

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[3] The ruling in *Olson* is unambiguously rooted in the absence of any arguable probable cause. "An officer's conduct in preparing a warrant affidavit that contains *only inaccurate statements* that are untruthful as that term is defined in *Franks* violates the arrestee's Fourth Amendment rights. In such a case, a reasonably well-trained police officer would have known that the arrest was illegal." *Olson*, 771 F.2d at 281 (emphasis added); *see also id.* at 282 ("Where the judicial finding of probable cause *is based solely* on information the officer knew to be false or would have known was false . . . the officer will not be entitled to good faith immunity." (Emphasis added.)).

and the qualified immunity inquiry applied in other circuits.

C. Respondents Offer No Serious Argument Contesting That Probable Cause Existed In The Circumstances Of This Case

In addition to challenging the Ninth Circuit's blanket rule, petitioners have challenged its ruling that uncontested statements in the affidavit failed to establish probable cause, and have demonstrated in this respect that the court below did not apply the commonsense, practical test for probable cause articulated in *Illinois v. Gates*, 462 U.S. 213 (1983). Pet. i, 23-24, 33-37. Respondents largely do not address this challenge.

Respondents do deny there was probable cause for the crime defined by Wash. Rev. Code § 9.68A.050, arguing that this statute requires "printed" material. Br. Opp. 32-33. Respondents' brief selectively edits the words of the statute to make this argument. The statute prohibits "knowingly . . . financ[ing], or attempt[ing] to finance . . . *visual or* printed matter that depicts a minor engaged in an act of sexually explicit conduct[.]" Pet. App. 111a (emphasis added). Respondents' argument that section 9.68A.050 requires evidence of "printed" materials fails because it avoids the elements of the crime. By arguing that there was no printed material, respondents do not rebut the evidence that provided probable cause to believe the Chisms knowingly financed "visual" child pornography materials by making repeat payments to Yahoo! for the costs of the websites that depicted child pornography.

D. Respondents' Claimed Factual Disputes Are Unsound And Pose No Barrier To Reaching The Questions Presented

Respondents argue that a letter from Bank of America (BOA) dated August 19, 2007, would have alerted petitioners to the possibility of fraudulent usage for the credit card used to pay Yahoo! for the fees connected to the child pornography websites. Br. Opp. 1, 6 (citing Br. Opp. App. 8-9). The letter is immaterial because it is undisputed that petitioner Gardner investigated the possibility of fraud before submitting her affidavit, and that BOA told Gardner there had been no fraud connected to the card. Pet. App. 49a-50a, 69a-70a, 76a. It is also undisputed that "the officers were not aware of this reported fraud at the time Gardner drafted her affidavit[.]" Pet. App. 9a n.7, 69a, 76a. The fact that this bank letter was found *during* the search of the Chisms' home (Pet. App. 69a) does not undermine probable cause or consideration of qualified immunity because there is no basis for claiming petitioners were aware of the letter prior to the search.

Respondents dispute the assertion in the petition that the Chisms paid $309.61 for fees connected to eight Yahoo! websites. Br. Opp. 7. On a related note, they dispute that Gardner learned the Chisms had not contested the credit card charges for the hosting fees for the "foel" and "qem" child pornography websites before drafting the affidavit. Br. Opp. 6-7 (citing Pet. 7-8). But the record indisputably shows that, prior to drafting the affidavit, Gardner obtained the statements for the 6907 card, that the bank statements showed eight

payments to Yahoo! for website related fees totaling $309.61 (with no credits or adjustments), and that BOA informed Gardner no fraud had been reported on the card. Pet. App. 50a, 76a, 88a.

Finally, respondents claim petitioners "knew at all times there were no purchases of pornography ever made by means of the Chisms' bank card." Br. Opp. 7. Petitioners dispute this claim. The dispute over the petitioners' subjective knowledge, however, in no way impairs this Court's ability to address the questions presented in the petition because both probable cause and qualified immunity depend ultimately on objective standards, not subjective intent.

CONCLUSION

The writ should be granted.

RESPECTFULLY SUBMITTED.

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