IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 07 – 55518
DC# CV 05-2298 DDP (RZx)

AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,
Plaintiffs-Appellants

v.

COUNTY OF LOS ANGELS, *et al.*,
Defendants-Appellees

AMICI CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA AND THE CALIFORNIA RIFLE & PISTOL ASSOCIATION

En Banc Review Granted October 2, 2009

Appeal from the U. S. District Court
for the Central District of California
The Honorable Dean D. Pregerson
D.C. No. CV 05-2298 DDP (RZx)

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CORPORATE DISCLOSURE STATEMENT

NATIONAL RIFLE ASSOCIATION

The National Rifle Association of America, Inc., has no parent corporations.

Because it has no stock, no publicly held company owns 10% or more of its stock.

CALIFORNIA RIFLE & PISTOL ASSOCIATION

The California Rifle & Pistol Association has no parent corporations.

Because it has no stock, no publicly held company owns 10% or more of its stock.

Date: October 22, 2009

Respectfully Submitted,
National Rifle Association of America, Inc., and California Rifle & Pistol Association
Amici Curiae

/S/
By Counsel C. D. Michel

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IDENTITY OF THE *AMICI CURIAE*

National Rifle Association

Amicus NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. (hereinafter NRA) is a non-profit membership organization founded in 1871 and incorporated under the laws of New York, with headquarters in Fairfax, Virginia and an office in Sacramento, California. The NRA represents over four million members and 10,700 affiliated organizational members (clubs and associations) nationwide, with hundreds of thousands of individual members and roughly 1000 affiliated clubs and associations in California.

Among their other activities, NRA works to preserve and protect constitutional and statutory rights of gun ownership, including the right to self-defense and the right to keep and bear arms. In this amicus brief NRA represent the interests of their respective members.

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

NRA's interest in this case stems from the fact that a large number of NRA members reside in the states within the Ninth Circuit's Jurisdiction and those members will be affected by any ruling this Court issues that affects their rights against search and seizure based on firearm ownership.

California Rifle and Pistol Association

The California Rifle and Pistol Association (hereinafter CRPA) is a non-profit association dedicated to representing the interests of all sportsmen, sportswomen, and firearm owners in California. CRPA is incorporated under the laws of California, with headquarters in Fullerton. CRPA sponsors legislation on behalf of its almost 60,000 members to guarantee defensive firearms ownership and use as well as wildlife preservation and management. Emphasis is also placed on conducting outreach programs on Second Amendment and self-defense rights and providing educational material to the public regarding the safe and proper use of firearms. The CRPA actively promotes the shooting sports, providing education, training, and organized competition in adult and junior venues. It also sponsors local and state adult and junior shooting teams which compete in national competitions each year. Among its other activities, CRPA also works to preserve constitutional and statutory rights of gun ownership, including the right to self-defense and the right to keep and bear arms. The CRPA and its members have an interest in and will impacted by a decision of this Court in this case.

Consent to File

Appellants have consented to the filing of this amici curiae brief.

Date: October 22, 2009

Respectfully Submitted,
National Rifle Association of America, Inc., California Rifle & Pistol Association
Amici Curiae

/S/
By Counsel C. D. Michel

ARGUMENT

I. Introduction and Summary

No right is more clearly established under the Fourth Amendment than the right to be free from search and seizure under a "general" warrant. A general warrant is one that does not particularly describe both the place to be searched and the person or thing to be seized, or is a warrant not based on probable cause. In this case, the police had probable cause to believe that a suspect used a black, pistol-gripped, short-barreled shotgun in an assault. But rather than seeking a warrant for that particular firearm where it was likely to be found, the police secured a general warrant to search a third-party's house for *all* firearms, *any* accessories, and related documents.

In doing so, the police violated the right of the occupants' against unreasonable search and seizure. Accordingly, the police are not entitled to the defense of qualified immunity in this instance.

The facts are simple. Ms. Kelly attempted to end her relationship with Mr. Bowen. Mr. Bowen then shot at her with a black, pistol-gripped, short-barreled shotgun while she sped off in a vehicle. Ms. Kelly was familiar with the specific shotgun, described it to Detective Messerschmidt, and even gave him photographs of the suspect with the shotgun. *Millender v. County of Los Angeles*, 564 F.3d 1143, 1145 (9th Cir. 2009).

Thereafter, Detective Messerschmidt obtained a warrant to search the house of Augusta Millender, a seventy-three-year-old woman who had been Bowen's foster mother fifteen years before the warrant was issued. Detective Messerschmidt's affidavit, upon which the warrant was based, did not disclose who currently resided at the house (Ms. Millender, her daughter, and her grandson) and who did not (Bowen). Ms. Kelly suggested that Bowen could be hiding there, an allegation Detective Messerschmidt failed to confirm. (*See* Appellees' Pet. for Rehearing at 4-8, Appellees' Answering Brief at 4).

Instead of obtaining a search warrant for the black, pistol-gripped, short-barreled shotgun, Messerschmidt sought and 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 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.

Millender, 564 F.3d at 1146 n.1.

The affidavit did *not* allege that any of the items generally listed therein were unlawfully possessed, nor did it articulate how firearms (other than the previously identified shotgun) or paperwork might be even remotely connected to the investigation. The warrant did state that Bowen was a gang member, but it did

not state he had a criminal record or other legal disability that would prohibit him from possessing a firearm. (Persons who are "gang" members are not among those catabolically prohibited from firearm possession. 18 U.S.C. § 922(g); Cal. Penal Code §§ 12021, 12021.1). As noted, the affidavit failed to disclose that the residents of the house were an elderly woman, her daughter, and her grandson. The panel stated, however, that

> Messerschmidt's affidavit stated that Bowen had engaged in an assault with a deadly weapon, had ties with a gang, and probably had a criminal record. Accordingly, an officer may reasonably have thought that the warrant could include the search for, and seizure of, firearms other than the sawed-off shotgun, as well as evidence relating to gang affiliation.

564 F.3d at 1150.

It is difficult to grasp a logical link between the above two sentences. The first sentence does not allege probable cause existed to believe that "firearms other than the short-barreled shotgun" were possessed by anyone at the house. In fact, it ignores the specific shotgun at issue, the only firearm used in the assault with a deadly weapon described above.

Nor does the affidavit allege that any occupant of the house possessed a firearm unlawfully. Indeed, it does not even reveal who the occupants of Ms. Millender's house were at the time the affidavit was executed. As Justice Fernandez wrote,

> we are at the outer limits of our tolerance in that respect. When I read and reread the warrant and the affidavit that supports it, I come away with the feeling that there is extremely little support for the search of a third person's home for all firearms and ammunition. The weapon involved in the offense in question was identified with precision and the officers even had photographs of it.

564 F.3d at 1151-52 (Fernandez, J., concurring)

Similarly, Justice Ikuta wrote that

> [t]he affidavit established probable cause to search for a "black sawed off shotgun with a pistol grip" because it recounted Bowen's attack on Kelly with that weapon. But the affidavit did not recite any facts indicating that the broad array of other items sought (including "[a]ll 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") were used in, or were evidence of, the crime under investigation.

Id. at 1154 (Ikuta, J., dissenting).

Despite these flaws, the warrant was served at Ms. Millender's home at 5:00 a.m. in the morning. Bowen was not there, but officers spent several hours searching the house while the occupants were forced to wait outside. Officers seized Mrs. Millender's shotgun (a black Mossberg 12 gauge with a wood stock and standard length barrel) and a box of .45-caliber ammunition. *Millender*, 564 F.3d at 1146.

This civil rights action by the occupants against the officers followed.

II. Possession of Firearms, Which Are Lawful to Possess and Constitutionally Protected, Does Not Give Rise to Any Presumption of Probable Cause

The Fourth Amendment provides "[t]he 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." U.S. Const. amend. IV.

The United States Supreme Court has noted that there is no "firearm exception" to the Fourth Amendment's requirements, stating the Court's "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 a warrantless search unlawful).

Authorization to seize all firearms, as did the warrant here, contradicts the truism recognized by the United States Supreme Court, 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). Further, the Supreme Court has acknowledged "[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).

Indeed, the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817-18 (2008), invalidated a handgun ban with the following explanation:

> the 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.

The historical reasons for the Second and Fourth Amendments 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. II c.3 (1662). This was one of 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." *Heller*, 128 S. Ct. at 2798-99. That explains why, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Id*. at 2798. The Second and Fourth Amendments were designed to prevent these very abuses.

As firearms are lawful to possess and their possession is constitutionally protected, no basis exists for a search warrant to search for or seize them absent fulfillment of the Fourth Amendment's probable cause requirements. Here, a search warrant was justified only for a black, pistol-gripped, short-barreled shotgun, and only at a place that a firearm might reasonably have been found. Instead, based on little if any evidence that the suspect's firearm might be found at Millender's home, the warrant authorized seizure of *all* firearms and related items there.

This general warrant to seize *all* firearms from *all* persons at the dwelling, and the seizure of Mrs. Millender's shotgun, infringed on her Second Amendment right to keep arms in addition to her Fourth Amendment rights.

III. The Right of The People to be Secure From Searches Authorized by General Warrants is Clearly Established

It would be an understatement to say 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).

Lord Camden's opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B.1765), was the classic statement against general warrants that influenced the framers of the Fourth Amendment. *See United States v. Seljan*, 547 F.3d 993, 1017 (9th Cir. 2008). After a search of Entick's house and seizure of all of his papers under a general warrant seeking evidence of seditious libel, Entick sued and was awarded damages against one of the members of the search party and the official who issued the warrant. Similarly, a general warrant to search for any firearms, such as the warrant in this case, would amount to authorization for a fishing expedition to determine if any violations of law could be found unrelated to the crime for which the warrant was secured. Substitute the term "arms" for "papers" in the following language from *Entick* and one has an accurate 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, 95 Eng. Rep. 807.[1]

Two cases, *Boyd v. United States*, 116 U.S. 616, 625-30 (1886), *overruled on other grounds as stated in United States v. Haimowitz,* 706 F.2d 1549, 1547 (11th Cir. 1983) and *Warden v. Hayden*, 387 U.S. 294 (1967), trace the condemnation of general warrants in English and American history. *Boyd* commented about the *Entick* opinion as follows.

> As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

116 U.S. at 626-27.

Describing how "these general warrants for search and seizure of papers originated with the Star Chamber" (*id*. at 629), *Boyd* rendered the following classic statement.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they 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

[1] See http://www.constitution.org/trials/entick/entick_v_carrington.htm.

> 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.

Id. at 630.

This Circuit has looked back to *Entick* and *Boyd* in denouncing general warrants comparable to the one here. *E.g.*, *United States v. Bridges*, 344 F.3d 1010, 1014-16 (9th Cir. 2003).[2] In *Bridges*, a warrant authorized "the seizure of all records relating to clients or victims 'including *but not limited to*' the ones listed on the warrant." *Id*. at 1017 (emphasis added). That language parallels the warrant here authorizing seizure of all firearms, which would have included not only the one at issue any and all firearms. "In light of the expansive and open-ended language used in the search warrant to describe its purpose and scope, we hold that this warrant's failure to specify what criminal activity was being investigated, or suspected of having been perpetrated, renders its legitimacy constitutionally defective." *Id*. at 1016.

Groh v. Ramirez, 540 U.S. 551 (2004), *aff'g Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9 th Cir. 2002), involved a general warrant obtained to

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[2] *See Seljan*, 547 F.3d at 1017-18 (Kozinski, C.J., dissenting, citing scholarship on general warrants and *the Entick* line of cases); *accord United States v. Martinez-Fuerte*, 514 F.2d 308, 321 & n.17 (9th Cir. 1975).

search for unregistered firearms, but the warrant contained no list of firearms to seize. *Id.* at 554. A list of firearms was included in the affidavit, but not attached to the warrant. *Id.* Only lawful firearms were found. *Id.* at 555. The homeowners later filed a civil rights action for damages. *Id.* The Supreme Court upheld the Ninth Circuit's conclusion in *Groh* 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. *Id.* at 563-566.

Groh's legal analysis commences with the statement: "[t]he 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.*'" *Groh*, 540 U.S. at 557 (emphasis in *Groh*). The Court found the following rule applicable: "a warrant may be 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 565 (quoting *United States v. Leon,* 468 U.S. 897, 923 (1984)).

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[,]" *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. *Id.* at 558-61. "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. As *Groh* further noted, "[I]t is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted." *Id*. at 563. 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. See *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ("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"). 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 alleged specifically that unregistered firearms were on the premises, but that was not included in the warrant. *Groh*, 540 U.S. at 554. Here, probable cause existed only to seize one specific firearm, but the warrant authorized the seizure of all firearms on the premises. *Groh* applies to both scenarios: "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." *Id.* at 564-65 (citing *Mass v. Shepard*, 468 U.S. 981, 988 (1984)). "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. The Court declined to do so. *Id.*

This Circuit's decision in the same case (*Ramirez*, 297 F.3d 1022) also explains further why qualified immunity did not apply therein; the same principles apply here.

> The officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions. A key aspect of this responsibility is making sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct. The leaders of the expedition may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way.

Ramirez, 298 F.3d at 1027.

Here, Detective Messerschmidt knew that the only firearm involved in the crime was a black, pistol-gripped, short barreled shotgun. He nonetheless drafted a general warrant authorizing search and seizure of all firearms and firearm parts from the home of an elderly woman, her daughter, and her grandson, knowing that the suspect (Bowen) did not even live in that home. Messerschmidt cannot now rely on the defense that he persuaded others up the chain to approve his general warrant.

The panel here states "the deputies could reasonably have expected the

deputy attorney general and the state judge to limit the warrant if it sought items for which there was no probable cause." *Millender*, 564 F.3d at 1150. But the police had an independent duty not to seek or serve a general warrant. Applying for and swearing out an affidavit in support of a warrant should not be a game in which police see how far they can "push the envelope" and still get approvals from prosecutors and signatures from judges.

It bears repeating that the affidavit failed to disclose that the residence was that of an elderly lady and her relatives, not that of the suspect. Further, the affidavit wove the allegations together in a confusing manner to make it appear 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), concerns a warrant authorizing seizure of every document and computer file at a business location. "By failing to describe with any particularity the items to be seized, the warrant is indistinguishable from the general warrants repeatedly held by this

court to be unconstitutional." *Id*. at 427. As the warrant was a general warrant, the *Kow* Court rejected a good faith defense. "Because the warrant in this case was facially invalid, no reasonable agent could have relied on it 'absent some exceptional circumstance.[citation] The mere fact that the warrant was reviewed by two AUSA's and signed by a magistrate does not amount to 'exceptional circumstances.'" *Id*. at 428-29.

A general warrant similar to that in *Kow* was the issue in *In re Search Warrant for K-Sports Imports, Inc.,* 163 F.R.D. 594, 597 (C.D. Cal. 1995). The warrant in that case authorized seizure of machineguns and machinegun parts as well as documents and computer records. *Id*. at 595. The court noted

> [t]he other items seized are weapons (other than the purported machine guns); documents and other records, both related and unrelated to machine guns and machine gun parts; and all computer records and data. 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 on the premises; similarly, the word "all" allows the seizure of all computer records/data, without regard to the date of origin or subject matter.

Id. at 596-97.

Finding the warrant to be overbroad, the *K-Sports Imports* court ruled that "nothing in Dolan's affidavit supports the seizure of any firearm ... unrelated to the purported machine guns. Thus, firearms ... unrelated to the purported machine guns have been unlawfully seized . . . ." 163 F.R.D. at 597. The parallel with the

facts here is evident.

IV. To Be Recognized As a Clearly Established Right, a Precedent With Identical Facts Need Not Exist

"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*, 457 U.S. at 818-19. Both from the text of the Fourth Amendment and the well-defined body of case law beginning before the United States itself, 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 that,

> [f]or 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 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)[3] (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.[4]

An officer "is not entitled to qualified immunity 'simply because there [is] no case on all fours prohibiting [a] particular manifestation of unconstitutional conduct.'" *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974-75 (9th Cir. 2005) (no qualified immunity where warrant specified seizure of "any" gang membership and officers seized all possible such evidence).

In *Groh*, the law was clearly established in the very text of the Fourth Amendment. Case law condemning general warrants in England dates back to at least 1765 in *Entick*, and in the United States, to 1886 in *Boyd*. The general

[3] "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). As this Circuit held in a case involving an officer who held an infant at gunpoint: "[a]lthough there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle [Officer Kading] to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established." *Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir. 2005) (citation omitted).

[4] "If the good faith defense was merely a subjective standard, this would essentially create an 'ignorance of the law' defense, which is widely disapproved." *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1117 n.17 (C.D. Cal. 2006).

warrant here–to search for all firearms and related items, when only a black, pistol-gripped, short-barreled shotgun was at issue, and it had little or no connection to the house to be searched–clearly violated the Fourth Amendment, would be known to do so by any competent officer, and was not sanctified by being rubber stamped by higher ups.

In sum, clearly established rights were violated here and the defense of qualified immunity fails in this case. This Court sitting en banc should continue the tradition classically expressed by Lord Camden in *Entick* and Justice Bradley in *Boyd*, and uphold the fundamental values of the Fourth Amendment.

CONCLUSION

This Court should hold that the qualified immunity defense may not be asserted in this case and remand the case for further proceedings.

Date: October 22, 2009

Respectfully Submitted,
National Rifle Association of America, Inc.,
& California Rifle & Pistol Association
Amici Curiae

/S/
By Counsel C. D. Michel

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points and contains 4496 words.

Date: October 22, 2009

Respectfully Submitted,
National Rifle Association of America, Inc.,
& California Rifle & Pistol Association
Amici Curiae

/S/
By Counsel C. D. Michel

CERTIFICATE OF SERVICE

U. S. Court of Appeals Docket Number(s): 07-55518

I hereby certify that on October 22, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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C. D. Michel