Calabresi, *Circuit Judge*:

Despite the fact that they reach opposite conclusions, my colleagues' opinions both find strong support in our Court's case law. This is because our precedents in this area are as divided as our panel.

Judge Pooler would send this case to a jury, having identified a question of fact: the weight a neutral magistrate would give to evidence omitted from Investigator Michael Riley's warrant affidavit. The existence of such a fact question strips us of jurisdiction over this interlocutory appeal.

Judge Raggi would instead dismiss Plaintiff Ronita McColley's Fourth Amendment claim against Riley. She would do so either because an affidavit, even without the omissions, would still have established probable cause for the search of McColley's home, or, alternatively, because *some* reasonable people might find that such probable cause would have been established. This would, in turn, suffice to give rise to "arguable probable cause," which, she asserts, would result in qualified immunity for Riley. This latter scenario, in which some would and others would not find probable cause on the basis of the corrected affidavit, is, of course, precisely what Judge Pooler describes as a factual dispute about the weight of the omitted evidence. But while Judge Pooler concludes that such a

dispute strips us of jurisdiction, Judge Raggi sees it as a basis for granting Riley qualified immunity as a matter of law.

I write separately in part to underscore the divided precedents that give rise to this dispute. I also write, however, because I believe that the particular question to be asked in the case before us is not simply whether the warrant would have been issued, but rather whether the magistrate would have issued the precise *kind* of warrant Riley sought and obtained: namely, a "no-knock" warrant to be executed at any time of the day or night.[1] The question we must ask, in other words, is not just whether the facts known to Riley established probable cause to search for drugs at 396 First Street. The determinative question in the instant case is whether those facts gave rise to a reasonable suspicion that a normal, "knock-and-announce" search of McColley's home would have been dangerous or futile, *see Richards v. Wisconsin*, 520 U.S. 385, 394 (1997), and hence that a no-knock intrusion—which allowed police to throw a stun grenade

[1] As I explain in Part II, because of the privacy and property interests implicated in no-knock searches, the Supreme Court has held that they are only justified when the police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

through an apartment window, break down its door, and burst in with automatic weapons drawn—was justified in an apartment where a woman and child with no criminal history lived and where no ongoing criminal activity had been observed.

It may well be the case that, *as a matter of law*, the no-knock warrant Riley sought would not have issued had Riley shared all the relevant information that he knew. I am inclined to think so. But I need not go that far, however, as I conclude that there is, manifestly, at least a question of fact as to whether such a warrant would have issued. This is so because there is, at most, conflicting evidence as to whether the officers had information that the suspects were armed. Since a question of fact exists, I join Judge Pooler's judgment that we lack jurisdiction to hear this qualified immunity appeal. In other words: because the issue of whether a warrant for an *unannounced* invasion of McColley's apartment would have issued had Riley provided in his warrant affidavit all the information he had requires the resolution of factual questions, I join Judge Pooler in concluding we do not have jurisdiction, and that this case ought to be returned to the district court for a jury trial.

I.

The issue this case presents is whether a police officer should be held liable for obtaining a warrant based on an affidavit that lacked relevant information known to the officer.[2] All of us agree that, to answer this question, we are to imagine a corrected affidavit which included the omitted facts and then consider whether, on the basis of such an affidavit, a magistrate would still have issued the warrant. Where my colleagues—and previous panels of this Court—part ways is on the question of whether this can be determined as a matter of law, or whether the weight a magistrate would have given the omitted information is instead a question of fact which must be decided by a jury. If it is the latter, the factual nature of the dispute would strip us of jurisdiction over this interlocutory appeal.

Troublingly, our Court's precedents provide support for both conclusions.

A.

More than two decades ago, this Court stated that "[w]hether an item of information is material or not [to a probable cause determination] is, in the

[2] My colleagues dispute whether a *general* warrant could issue. As indicated above, I believe that the more germane question to be whether a *no-knock* warrant—the kind of warrant that was actually issued in this case—was justified.

context of a motion for summary judgment, a mixed question of law and fact. The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. The factual component requires an inference as to whether the information would likely be given weight by a person considering that question." *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991) (citations omitted).[3] In *Golino*, we upheld then-District Court Judge Cabranes's decision to send the probable cause determination to a jury. "The weight that a neutral magistrate would likely have given the [omitted or misrepresented] information," we said, "is not a legal question but rather is a question to be resolved by the finder of fact." *Id.* at 872.

In *Velardi v. Walsh*, 40 F.3d 569 (2d Cir. 1994), we explained further that applying the corrected affidavit doctrine does not involve "review[ing] a magistrate's prior determination of probable cause, but rather try[ing] to predict whether a magistrate would have found probable cause if he had been presented with truthful information." *Id.* at 574 n.1. Since "the weight that a neutral

[3] Importantly, we have jurisdiction over an interlocutory order denying qualified immunity *only* where the questions to be determined are legal, rather than factual. *See, e.g., Locurto v. Safir*, 264 F.3d 154, 163 (2d Cir. 2001); *Johnson v. Jones*, 515 U.S. 304, 314, 319-20 (1995); *accord Rodriguez v. Phillips*, 66 F.3d 470, 475 (2d Cir. 1995).

magistrate would likely have given such information is a question for the finder of fact," we held that "summary judgment is inappropriate in doubtful cases." *Id.* at 574.[4]

We have restated this holding recently. *See Southerland v. City of New York*, 680 F.3d 127, 144 (2d Cir. 2012). As the *Southerland* Court said, quoting an earlier opinion by Judge Raggi: "[A] court may grant summary judgment to a defendant based on qualified immunity *only if* 'the evidence, viewed in the light most favorable to the plaintiffs, discloses no genuine dispute that a magistrate would have issued the warrant on the basis of the corrected affidavits.'" *Southerland*, 680 F.3d at 144 (quoting *Walczyk v. Rio*, 496 F.3d 139, 158 (2d Cir. 2007)) (emphasis added).

B.

Alongside these cases, however, runs another line of precedents that treat determinations of probable cause as questions of law, to be made by the court

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[4] This, of course, left room for cases which were *not* doubtful. A factual dispute might be so lopsided that it could be decided as a matter of law, as *Velardi* recognized. *See id.* ("[I]f the evidence, viewed in the light most favorable to the plaintiffs, discloses no *genuine* dispute that a magistrate would have issued the warrant on the basis of the 'corrected affidavits,' then under the ordinary standard for summary judgment, a qualified immunity defense must be upheld." (citation omitted)). Judge Raggi—in her first ground for decision—indicates that she thinks that this is just such a lopsided case. *See* Dissenting Op., *post* at 3-21.

rather than a jury. For example, in *Cartier v. Lussier*, 955 F.2d 841, 845 (2d Cir. 1992), we said that "after the affidavit ha[d] been corrected in a light most favorable to the plaintiffs, the district court should then have determined whether as a matter of law it did or did not support probable cause." Qualified immunity should be granted at the summary judgment stage, *Cartier* instructed, "if the affidavit accompanying the warrant is sufficient, after correcting for material misstatements or omissions, to support a reasonable officer's belief that probable cause existed."[5] *Id.* (internal quotation marks omitted).

This standard was quoted, and restated, in *Escalera v. Lunn*, 361 F.3d 737, 743-44 (2d Cir. 2004). As Judge Raggi notes, Dissenting Op., *post* at 2, *Escalera* held that "summary judgment should be granted to the defendant on the basis of qualified immunity" whenever a corrected affidavit provides "an objective basis

[5] *Cartier*'s instruction was cited in *Smith v. Edwards*, 175 F.3d 99 (2d Cir. 1999) (Sotomayor, J.), which called for courts, in material omission cases, first to correct the warrant affidavit and "then determine whether as a matter of law the corrected affidavit did or did not support probable cause." *Id.* at 105 (quotation marks and brackets omitted). *Smith* is ambiguous, however, as to whether probable cause can always be determined as a matter of law once the facts in a corrected affidavit are stipulated; the case could instead be read to mean no more than that courts should employ the ordinary summary judgment test in regard to the corrected affidavit, and ask whether all reasonable factfinders would come out the same way on the question of probable cause.

to support arguable probable cause."[6] We wrote there—optimistically, I believe—"Our case law is clear," that when considering a qualified immunity claim, "'a court should put aside allegedly false material, supply any omitted information, and then determine whether the contents of the 'corrected affidavit' would have supported a finding of [arguable] probable cause." *Id.* (quoting *Martinez v. City of Schenectady*, 115 F.3d 111, 115 (2d Cir. 1997)). Notably, the bracketed addition—"[arguable]"—was *Escalera*'s. The case it quoted, *Martinez* (like the case *Martinez* itself quoted, *Soares v. Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993)), had, instead, instructed courts to "determine whether the contents of the 'corrected affidavit' would have supported a finding of probable cause"—not *arguable* probable cause. *Escalera* is important, therefore, for having first made "arguable probable cause" part of the corrected affidavits doctrine in our Circuit.

Judge Raggi's opinion for the Court in *Walczyk v. Rio* followed *Escalera* in this regard, observing that while probable cause for one of the searches at issue in that case was lacking, due to stale information in the warrant affidavit,

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[6] Quoting *Golino*, *Escalera* says that "arguable probable cause" exists "'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'" *Escalera*, 361 F.3d at 743 (quoting *Golino*, 950 F.3d at 870).

"defendants might still be entitled to claim qualified immunity from liability for damages if the search was supported by 'arguable probable cause.'" 496 F.3d at 163. Notably, however, in *Walczyk,* the Court found that arguable probable cause might obtain not because of some hypothetical disagreement among reasonable officers about probable cause, but rather because it was unclear which of the defendants in that case knew or should have known that the information in their affidavit was stale. *See Walczyk*, 496 F.3d at 163.

This understanding of arguable probable cause is an eminently sensible one. But it is not the understanding used in *Escalera*, and it is not the understanding Judge Raggi employs in her opinion in the case now before us. In these two instances, unlike in *Walczyk*, arguable probable cause is not used to shield officers who may have been unaware of whatever evidence negated probable cause. Instead, here, arguable probable cause is made to encompass warrant affidavits which, though unable to establish probable cause, can be excused as "close enough for government work." This, I take it, is what Judge Raggi means in the instant case when she asserts that, even if probable cause is not established by the corrected affidavit, arguable probable cause still obtains because "officers of reasonable competence could disagree" as to whether the

probable cause test was met. Dissenting Op., *post* at 36 (quoting *Escalera*, 361 F.3d at 743). Or, to put it still more generously for qualified immunity: arguable probable cause obtains whenever it would not have been "plainly incompetent" for an officer to find probable cause on the basis of the corrected affidavit. *Id.* at 23 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) .[7]

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[7] Then-Judge Sotomayor took issue with this understanding of arguable probable cause in her concurring opinion in *Walczyk*. As she explained:

> Whether reasonably competent officers could disagree about the lawfulness of the conduct at issue, however, is not the same question the Supreme Court has repeatedly instructed us to consider: whether it would be clear to *a reasonable officer* that his or her conduct was unlawful in the situation he or she confronted. . . . [O]ur requirement of consensus among all reasonable officers departs from Supreme Court dictates and unjustifiably raises the bar to liability for violations of constitutional rights.
>
> Asking whether "officers of reasonable competence could disagree" shifts this inquiry subtly but significantly. Instead of asking whether the defendant's conduct was beyond the threshold of permissible error, as the reasonable officer standard does, this inquiry affords a defendant immunity unless a court is confident that a range of hypothetical reasonably competent officers *could not disagree* as to whether the defendant's conduct was lawful. This standard is not only more permissive of defendants seeking to justify their conduct; it also takes courts outside their traditional domain, asking them to speculate as to the range of views that reasonable law enforcement officers might hold, rather than engaging in the objective reasonableness determination that courts are well-equipped to make.

496 F.3d at 169-70 (Sotomayor, J., concurring) (quotation marks, citations, and alterations omitted).

By distinguishing this from the other understanding of arguable probable cause, I do not mean to suggest that the understanding of probable cause that Judge Raggi employs in the present case lacks precedential support. In fact, it can be derived from *Golino*'s two-pronged description of qualified immunity, which protects officers if "either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." 950 F.2d at 870 (citing *Malley*, 475 U.S. at 341). *Walczyk* turned on the "objectively reasonable" prong; *Escalera* and this case both implicate the "reasonable disagreement" prong. The latter adds, however, a nimbus of protection around probable cause, which allows officers to make objectively unreasonable probable cause determinations so long as the officers themselves are reasonably competent.

To be clear: my objection to Judge Raggi's understanding of arguable probable cause is not that it lacks precedential support. Rather, the ample support it has cannot be reconciled with the equally extensive precedents cited in Judge Pooler's opinion. It is to this conflict that I now turn.

C.

If corrected affidavits always established, or failed to establish, probable cause so clearly that no reasonable judge or juror could find otherwise, our Court's precedents would cause no confusion. The confusion arises in the middle: in cases where some reasonable judges or jurors would, and others would not, find probable cause on the basis of the corrected affidavit. To put it another way, confusion arises when reasonable people disagree about the weight a magistrate would give the corrected affidavit.

Importantly, these two formulations describe the same underlying questions. Disagreements about whether a corrected affidavit establishes probable cause are identical to disputes over how much weight a magistrate would have given to the omitted evidence. Such evidence, after all, is deemed weighty enough to be material only if it would have altered the magistrate's probable cause determination. But this can only be decided by asking whether probable cause actually remains once the evidence is considered. To call the question of weight a genuine question of fact is merely to say that reasonable people could disagree about whether probable cause would still obtain.

And therein lies the problem. On the one hand, some of our cases do say that determining the weight a magistrate would give omitted evidence is a question of fact. And that question eludes summary judgment if, but only if, reasonable factfinders could disagree about the answer—that is, about whether probable cause would still be found. Yet, if reasonable people disagree about the existence of probable cause, then *arguable* probable cause has, by definition, been established under others of our cases! Since *arguable* probable cause exists whenever reasonable people disagree about the existence of *actual* probable cause, no case of this sort should ever go to a jury. Either a court will decide probable cause (one way or the other) as a matter of law, or the court will find that probable cause is open to reasonable dispute and will on that basis dismiss the case, again as a matter of law, on qualified immunity grounds. But, to continue around the circle of our cases, this, of course, conflicts with the clear holding of *Velardi* that "doubtful cases" must be sent to a jury. 40 F.3d at 574.

Judge Raggi is well aware of *Velardi*'s holding; she refers to it, in fact, both in *Walczyk*, *see* 496 F.3d at 158, and her opinion here, Dissenting Op., *post* at 6 ("To the extent *Velardi* observed that the weight a judicial officer would give omitted information is a question of fact, disputes as to that question might

require a jury trial in 'doubtful cases' of probable cause . . . .").[8] She does not explain, however, how "doubtful cases of probable cause" can ever be anything other than "cases of arguable probable cause." It would follow that in such circumstances, unless defendants somehow fail to raise a qualified immunity defense, a jury trial would *never* be required.

By identifying, as I believe I have, this conflict in our cases, I do not mean to suggest that one side, rather than the other, is the "correct" one. It is only to say that we are dealing with two confusing, and at times confused, lines of cases. Our Court would do well to provide clarity in this area. But the task is not an easy one, and, in any event, this case does not require us—and thus does not allow us—to undertake it. We need not resolve the tension I have described because the only question this case *requires* us to confront—whether the particular warrant that was granted still would have issued had the affidavit

[8] In the preceding sentence, Judge Raggi states, citing *Walczyk*, 496 F.3d at 157, that "the existence of probable cause is *generally* a matter of law for the court." Dissenting Op., *post* at 6 (citing *Walczyk*, 496 F.3d at 157) (emphasis added). "Generally" here would seem to suggest that sometimes, at least—presumably in those "doubtful cases" mentioned in the next sentence—a jury might be needed. But what Judge Raggi does not acknowledge, even as she cites *Velardi*, is that her notion of arguable probable cause swallows all such doubtful cases, ensuring that *Velardi*'s promise—sometimes—of a jury trial will in fact never be realized.

been more complete—can be easily answered, I believe, under either line of our case law.

II.

Although my colleagues disagree about whether the information Riley omitted from his affidavit might have changed a magistrate's mind about the existence of probable cause to search McColley's apartment for drugs, the question in this case, and hence in their dispute, is whether Riley violated McColley's Fourth Amendment right to be free from unreasonable searches and seizures. Significantly, our Court has said that "[t]he *method* of an officer's entry into a dwelling is among the factors to be considered in assessing the reasonableness of a search under the Fourth Amendment." *United States v. Tisdale*, 195 F.3d 70, 72 (2d Cir. 1999) (per curiam) (emphasis added).

Here, the method of entry was more akin to a military invasion than the knocking and entering envisioned, and generally required, by our law. *See Wilson v. Arkansas*, 514 U.S. 927, 931-32 (1995). As Judge Pooler describes in her opinion, members of Troy's Emergency Response Team, at six o'clock one morning, shattered the window of McColley's living room and threw a flash-bang grenade inside before breaking down the door and storming in, brandishing automatic

weapons. Because McColley was given no warning before their entry, she was wearing only a t-shirt and underwear when the officers burst in. Thus attired, she was handcuffed and forced to lie face-down on her bed while an officer guarded her, weapon drawn, and a dog searched her room. By the time the police had left—having discovered only an electric bill and McColley's college course schedule—McColley's furniture had been overturned, her rug and wall bore burn marks, her bookshelf, window, and doors had been broken, and her toiletries and clothes, along with her daughter's, had been strewn across the floor.

The trauma caused by a search of this sort was well described by a unanimous Supreme Court in *Richards v. Wisconsin*:

> While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. . . . [T]he common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential. Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. . . . The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

520 U.S. at 393 n.5 (citations omitted).

Because no-knock searches impinge so seriously upon both privacy and property interests, they are justified only if police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[9] *Id.* at 394; *Tisdale*, 195 F.3d at 72. In *Richards*, the Supreme Court specifically disallowed blanket exceptions to the common law knock-and-announce requirement; in particular, the Court struck down the Wisconsin Supreme Court's rule "that police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation." *Id.* at 387-88 (emphasis in original).

In his application to search McColley's apartment, Riley requested a warrant that could be "executed at any time of the day or night" and that authorized officers "to enter the premises to be searched without giving notice of his [*sic*] authority and purpose." J.A. 188. These requests were based on (what Riley described as) his reasonable cause to believe (1) that "[t]he property sought

[9] We note that, as Judge Raggi states in her dissent, the police need only reasonable suspicion, and not probable cause, that knocking and announcing would be dangerous or futile. As we will demonstrate below, there exists an issue of fact that must be resolved before even this standard is met.

may be easily and quickly destroyed or disposed of" and (2) that giving notice "may endanger the life or safety of the executing Police Officers." *Id.* According to Riley's affidavit, these beliefs were based on "the physical properties of [the] contraband"; the "common practice of persons who are involved in the illicit use and trafficking of controlled substances to attempt to remove, destroy or dispose of said controlled substances if notice . . . is given"; and Riley's personal experience that giving notice allows suspects "time to prepare themselves," thereby endangering officers' safety. *Id.*

In addition to this boilerplate, Riley included in his application that 396 First Street was under the custody and control of "Stink," a drug dealer and "soldier" for another dealer, "Chuck." "Stink" was also said to sell marijuana and crack cocaine out of 396 First Street. Although Riley described the residents of the other apartments for which he obtained a search warrant, he failed to tell the magistrate that McColley and her then four-year-old daughter lived at 396 First Street. And although Riley described the female resident of *another* targeted apartment as someone who "deals approximately one hundred grams of marijuana a week," J.A. 177, he did not tell the magistrate that the *known residents* of 396 First Street had no criminal history. Riley, finally, failed to tell the

magistrate that police surveillance had failed to observe any criminal activity at all during surveillance of McColley's apartment carried out over the course of three days.

Each of these omissions is legally relevant, and highly so, to the decision of whether to issue a *no-knock* warrant. Given that the apartment to be searched was home to a woman and child with no criminal record and, moreover, did not appear to be a hub of ongoing criminal activity, it would certainly seem possible for the search to have been "conducted at a time when the only individuals present in a residence ha[d] no connection with the drug activity and thus [would] be unlikely to threaten officers or destroy evidence." *Richards*, 520 U.S. at 393. Riley's justification for the inactivity at McColley's apartment—his stated belief that it was a "stash house," J.A. 312—itself weighed against the no-knock warrant, since large quantities of stashed narcotics would be difficult to dispose of quickly. *See id.* ("The police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly."). As the *Richards* Court said of such situations, "the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry." *Id.*

Judge Raggi's argument, in her dissent, that the "readily disposable form" of the drugs "in zip-loc baggies," Dissenting Op., *post* at 28, justified the no-knock warrant therefore not only goes a long way toward creating the kind of blanket justification for no-knock searches in narcotics investigations that the Supreme Court specifically disapproved of in *Richards*—for when are drugs, by their nature compact in size, not in small packages?—but it also ignores the record evidence that it was in *this* case quite *unlikely* that *all* of the drugs could have been disposed of had a knock-and-announce warrant been issued. That evidence includes the very fact that 396 First Street was allegedly a "stash" house (which Officer Riley defined generally as a location where the traffickers "would keep money, drugs, and weapons," J.A. 312); that the CI's recollection was that 7 grams of cocaine were being cut with a playing card in open view on an ironing board at 396 First Street; that 100 grams or more of marijuana were allegedly being sold each week from at least one of the residences; and that every time the CI had visited the apartments, "Stink" had made crack cocaine sales. Evidence like this shows that narcotics were out in the open, and that *enough* drugs were present (given the fact that they were "stash[ed]" there, J.A. 312) to make it most

unlikely that the time it takes to knock and announce would be so harmful to the finding of drugs as to justify an unannounced military-style invasion.

In light of the facts known to Riley when he submitted his warrant affidavit, it therefore appears possible, as a matter of law, that the governmental interests Riley asserted here did *not* outweigh the privacy and property interests his no-knock entry infringed. If police were able to invade the quiet home of a law-abiding woman and her child without knocking and identifying themselves, simply because they believed that the home contained drugs, then it is unclear when the police *could ever not* enter unannounced, at least when drugs were being investigated. Yet we know from *Richards* that blanket exceptions to the knock-and-announce requirement are unconstitutional, even in regard to drug searches. To search without first knocking, the government must reasonably suspect that something more than drugs awaits inside. A woman with no known criminal ties and her small child hardly strike me as that "something more."

III.

Thus far, I have argued that each potential argument supporting a "no-knock warrant" was lacking, because there was no convincing record evidence that the drugs, sold daily and warehoused in the residence, were easily

disposable and because there would be no reason to believe that a mother and a child with no criminal record posed a danger justifying a "no-knock" warrant. However, one remaining argument requires special consideration.

Judge Raggi asserts that a corrected affidavit would support a reasonable suspicion of danger—and therefore justify a no-knock warrant—based on the officers' belief that Sport, Stink, and Chuck might have been present and *armed* at 396 First Street. *See* Dissenting Op., *post* at 31-33. Judge Raggi admits that the original affidavit only included as justification for a no-knock warrant Riley's general knowledge that drug dealers often possess firearms—precisely the kind of general knowledge that, the Supreme Court has told us, *cannot* support a no-knock warrant. *See Richards*, 520 U.S. at 387-88. She then, however, expands the universe to be considered and, based on other record evidence, concludes that a corrected affidavit would indicate, from the CI's communications, "case-specific" knowledge that "Sport, Stink, and Chuck all had access to and possession of firearms." Dissenting Op., *post* at 31-32.[10] On this basis, Judge Raggi determines

[10] I do not here dispute Judge Raggi's trek into the record. It is worth noting that in *Walczyk*, Judge Raggi and the panel were comfortable deciding the issue of probable cause as a matter of law because *they could do so on the face of the affidavits*. *See* 496 F.3d at 157 ("In this case, there can be no dispute as to what facts the defendants relied on to establish probable cause for the challenged arrest and searches; they are memorialized in warrant affidavits. Thus, whether

that the more specific requirement that the Supreme Court has held was needed to justify a no-knock intrusion would be present in a corrected affidavit. Judge Raggi rightly does not contend that the officers gleaned this information from the written "voluntary statement" of the CI, but instead from an "operational plan" drafted by Riley, in which he makes passing reference to the notion that the traffickers had access to firearms. *See id.* at 33.

Significantly, however, in testimony Riley makes no such assertion that he believed there would be armed persons at 396 First Street. When asked in his deposition whether there was anything that made him think in particular that there would be weapons in *this* apartment, Riley responded, "Nothing specific." J.A. 411. He then went on to explain—as he had in the operational plan—that the confidential informant knew some of the persons involved in the drug trade here to possess firearms. *Id.*

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the affidavits, on their face, demonstrate probable cause, is a question of law."). Here, the affidavit does *not* include information about the traffickers being armed, on its face or otherwise, and Judge Raggi's foray into the record in a quest to decide the issue as a matter of law seems to stretch beyond the bounds of *Walczyk.* Indeed, here it is both the case that the fact cannot be gleaned from the affidavit *and* that the fact is disputed by the officers themselves, as I explore below, which makes deciding it as a matter of law all the more troubling . . . to put it mildly.

But the record then becomes more complicated: for even this statement by Riley is contradicted. During Officer Rosney's deposition, he said that the officers had no "specific information from the [confidential] informant that [the persons within the residences] were armed." J.A. 259. He attributed the officers' belief that Sport, Stink, and Chuck may have been armed to the fact that 396 First Street was a "stash house," which made the officers therefore think that the persons within it "would be armed and dangerous" (*i.e.*, based on the kind of generic data held to be insufficient by the Supreme Court!). J.A. 140.

The record evidence is therefore mixed on the key—and for me, fundamental—question of whether or not the officers had a general or specific belief that Sport, Stink, and Chuck had firearms, and therefore whether knocking and announcing would have been dangerous. This is a constitutionally-determinative issue, precisely because, as the Court explained in *Richards*, a general belief that drug traffickers are armed because drug traffickers *typically* are armed cannot support a no-knock warrant. *See* 520 U.S. at 394. Just what the officers knew therefore becomes a critical question of fact. Whether they had, as Rosney says, only a general belief that the persons would be armed simply because they were involved in narcotics trade or whether they had, as Riley says,

a particularized belief based on the confidential informant's statements or other evidence, is crucial and cannot be concluded *as a matter of law* based on the record before us.

I therefore think there is a critical issue of material fact for the jury and that we must return the case to the district court on that ground. That said, I want to make clear that it may well be the case, even apart from the factual dispute, that the officers would have had no reason to think that these drug traffickers—even if they had access to firearms—would be at McColley's residence armed in the wee hours of the morning. There may have been, in short, no *particular*—or, to use Riley's word, "specific"—reason to suspect that knocking and announcing at the home of a mother without a criminal record in the early morning hours, when it would be likely that "the only individuals present in [the] residence have no connection with the drug activity," *Richards*, 520 U.S. at 393, would have been dangerous. In light of this and the other circumstances suggesting that a military-like invasion into a the home of a mother without a criminal record was unjustified, one could reasonably be disposed to conclude as a matter of law, regardless of how the factual dispute about firearms is resolved, that a magistrate would not have properly issued a "no-knock" warrant for the search

of McColley's apartment, and on that basis one might be well inclined to affirm the district court's denial of Riley's motion for summary judgment.

But we need not, and hence should not, go that far. In light of the fact that there is conflicting evidence on whether the officers had a particularized belief—as against only the generalized conjecture that drug traffickers typically have firearms—that Sport, Stink, and Chuck were armed, there is indisputably a question of fact on an important issue. And that question precludes summary judgment and deprives us of jurisdiction over this interlocutory appeal.

This conclusion, moreover, seems to me to be required even under Judge Raggi's more capacious standard of "arguable reasonable suspicion." *See Escalera*, 361 F.3d at 743. That is, the question of fact as to whether the officers had a particularized belief that the drug traffickers were likely to be armed bears directly upon whether the officers could have held an "objectively reasonable" belief they would be in danger if they knocked and announced at 396 First Street. *See id.*; *see also Holeman v. City of New London*, 425 F.3d 184, 191 (2d Cir. 2005). We cannot here decide what, under the Supreme Court's standard, the officers reasonably suspected until we resolve the essentially and unavoidably factual conflict reflected in their inconsistent statements as to whether or not they

thought the drug traffickers had firearms and would be armed. Because there is a "dispute as to what facts [the officers] relied on," *Walcyk*, 496 F.3d at 157, we cannot conclude "as a matter of law, that [a] corrected affidavit would have been sufficient," *Smith*, 175 F.3d at 105-106 n.5, to support a no-knock warrant. And this is so regardless of whether one follows Judge Raggi's or Judge Pooler's line of cases as to "arguable" probable cause; indeed, it must be resolved before we can find that reasonable suspicion existed.

This disputed and material question of fact is enough for me to conclude that summary judgment was inappropriate under *either* line of this Circuit's cases and, therefore, to join Judge Pooler's holding that we have no jurisdiction over the issue of qualified immunity at this time, and that this case must return to the district court for further proceedings, and possibly proceed to trial.