No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Metropolitan Police Department officers were called to the scene of a party at a vacant home at 1:30 a.m. The partiers scattered and hid, then gave inconsistent explanations for their presence. After learning that the partiers lacked the homeowner's permission to be there, the officers arrested them for trespassing. The court of appeals found that the officers should have accepted the claim of some of the partiers that they had been invited by someone named "Peaches," and should have rejected considerable circumstantial evidence that the partiers, instead of being innocent dupes, knew or should have known that their entry was unauthorized. In so holding, the court of appeals departed from this Court's well-established probable-cause precedent by requiring police to credit questionable claims of an innocent mental state absent direct evidence to the contrary.

But the errors go deeper. In holding that the officers were not at least entitled to qualified immunity, the court of appeals ignored this Court's numerous decisions reversing, sometimes summarily, denials of qualified immunity given the lack of a clearly established right. No less in the District of Columbia than elsewhere, this Court's protection of the doctrine of qualified immunity is necessary to ensure that police officers can enforce the law and protect the public.

I. The District Of Columbia Circuit's Heightened Probable Cause Standard Cannot Be Reconciled With Precedents Of This Court Or Other Courts.

1. In their brief in opposition, respondents make the same mistake as the court of appeals and apply an

elevated probable cause standard that fails to account for the totality of the circumstances observed by the officers. Respondents contend that the court considered three pieces of information in finding no probable cause—that "(1) Respondents uniformly stated that they had been invited to a party at the house; (2) the officers had uncontroverted statements from both Peaches and another attendee that Peaches told Respondents they could be there; and (3) the owner of the home [had been unsuccessful in] negotiating a lease with Peaches." (Opp. Br. 10 (citing App. 10a).) But tellingly, respondents do not mention here the other, incriminating facts known to the officers, including that the partiers scattered and hid when police arrived; the officers found scantily clad women with money in their garter belts and smelled marijuana in the home; the explanations for the partiers' presence in the empty home were neither uniform nor uncontroverted; and the homeowner informed the officers that the partiers lacked permission to be there.

Without mentioning the incriminating circumstances, respondents then argue that the cases cited in the petition do not conflict with the decision here because those cases involved incriminating evidence and such evidence supposedly was lacking here. (*See* Opp. Br. 11-15.) Respondents' denial of any conflict thus relies on a characterization of the "totality-of-the-circumstances test" that ignores the observations of the trained and experienced police officers on the scene.

Only later, after arguing against any conflict with those other decisions, do respondents mention the incriminating circumstances that suggest that the officers were reasonable in concluding that the partiers acted with the requisite culpability. But even

then, like the court of appeals below, respondents do not engage in the proper "totality of the circumstances" inquiry. Instead, respondents view each incriminating circumstance separately, in artificial isolation from each other and all of the other circumstances known to officers at the time of the arrest. (Opp. Br. 19-24.) They reject, one-by-one, each incriminating circumstance as insufficient on its own to establish probable cause. But, as this Court has recognized, such a "divide-and-conquer analysis" turns the "totality of the circumstances" test on its head. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

Respondents' contortions serve to highlight how they cannot justify what the court of appeals did here: establish a rigid and far too demanding standard for probable cause when a suspect claims an innocent mental state to deny having committed a crime. Under this heightened standard, circumstantial evidence giving rise to reasonable doubts about the credibility of the suspect's claim are not sufficient grounds for probable cause to arrest. (App. 12a; *see* App. 125a-126a.) Instead, what is required by the court of appeals' ruling is direct, affirmative evidence akin to a witness statement that the suspect had the requisite mental state. (App. 12a; *see* App. 34a-35a.) Absent such direct, affirmative evidence, any reasonable grounds to question the suspect's credibility do not, according to the court, "carry weight." (App. 12a n.4.) But the standard for probable cause is far below that required for an ultimate conviction. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). The question, instead, is whether police have sufficient basis to believe that a crime has occurred. *Id.* at 1055-56. The officers' observations were plainly sufficient here.

2. Regarding the incriminating evidence, the court of appeals first explained that the partiers' act of scattering and hiding upon noticing uniformed officers at the front door is "not sufficient *standing alone* to create probable cause." (App. 16a (emphasis added).) Unable to deny what the court said, respondents adopt its approach as their own: "unprovoked flight, *without more*," cannot establish probable cause to arrest. (Opp. Br. 24 (emphasis added).) This Court, however, recognizes that flight or similar evasive behavior, while "not necessarily indicative of wrongdoing," is "certainly suggestive of such," and thus an obvious factor in the probable-cause analysis. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). It provides a reason to discredit a suspect's innocent state-of-mind explanation for otherwise unlawful conduct.

The court of appeals found that the partiers' presence in a vacant house late at night was not a factor either, because the "condition of the house, *on its own*," did not suggest that the entry was unauthorized. (App. 16a (emphasis added).) Respondents say the condition of the house was irrelevant since it was not "completely empty": it had a bare mattress, folding chairs, and working electricity. (Opp. Br. 19.) But in the totality of the circumstances, it is still relevant that the house was essentially unfurnished and in "disarray," and also that a neighbor told police it had been vacant for several months. (App. 119a.) That condition suggested that the partiers had some notice that their entry might be unauthorized. A court should weigh these facts in conjunction with all of the other circumstances, but the court of appeals did not.

Having previously relied on the purportedly "uncontroverted" statement from "Peaches" to police that she had invited the partiers, respondents argue

that her evasiveness and untruthfulness when making those statements does not matter. (Opp. Br. 22-23.) "Peaches" repeatedly hung up the phone on police, refused their request to return to the scene because she said she would be arrested, and misled police by stating that she had authority to use the home before admitting that she did not. (App. 50a, 54a.) Under the correct standard, these facts should be taken into account in assessing probable cause and, specifically, whether officers had to credit her claim of a bona fide invitation. The court of appeals' failure to give these facts any weight—because "Peaches" did not tell police that the partiers knew their entry was unauthorized—violated that standard. (*See* App. 11a-12a & n.4.) Such direct, affirmative evidence of a suspect's mental state is not required for probable cause to arrest.

Respondents take the same flawed approach to the partiers' inconsistent statements to police. After trumpeting the purported uniformity of those statements (Opp. Br. 10), they argue that the fact that those statements were not really uniform should not have given the officers reason to doubt the partiers' stories (Opp. Br. 22). Like the court of appeals, respondents give no weight to the fact that some partiers told police they were there for a bachelor party, that others said it was a birthday party, and that no one knew an essential detail of either story: who was the guest of honor? (*See* App. 119a.) Like the court of appeals, respondents believed it enough to consider only the partiers' claim that they had been invited to a party of some sort (Opp. Br. 22; App. 15a-16a); their "inconsistent and conflicting statements" about the details of the purported invitation simply do not matter, even if it suggested the partiers were lying

to the officers (App. 10a). Again, the totality of the circumstances test dictates otherwise.[1]

And there is more. Like the court of appeals, respondents casually dismiss the fact that officers smelled marijuana and observed activities consistent with a for-profit strip club. (App. 15a-16a & n.5; Opp. Br. 19-20.) The issue is not one of "moral sensibilities." (Opp. Br. 20.) Rather, it is common sense that a typical homeowner or resident, absent from the scene, would be reluctant to surrender the premises to a crowd of people to party with illegal drugs and strippers. *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (probable cause deals with "the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act"). Knowing as much, the partiers should have been more skeptical of any assurance by "Peaches" that their presence was welcome. And, of course, the homeowner told the police officers that it was *not* authorized. The police could reasonably conclude in light of the totality of suspicious circumstances that the partiers knew or should have known as much.

3. Under their improper, divide-and-conquer approach, respondents conclude that probable cause was lacking because the claim of invitation was "corroborated by the available evidence" and unimpeached by any "contrary evidence." (Opp. Br. 15.) This conclusion flies in the face of the totality-of-the-circumstances

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[1] While respondents object now to consideration of this point because it mostly arises from the trial testimony (Opp. Br. 20-22), they did not object in the court below; indeed their briefing below also relied on the trial testimony (Appellees' Br. 35-37). In any event, the court of appeals considered the point, without any suggestion that it had been improperly presented. (App. 10a, 36a.)

inquiry. First, the "corroboration" was hardly independent: "Peaches" had been acting in concert with the partiers and was far from disinterested. The police did not have to take her word as the end of the matter even if she took blame upon herself; conspirators sometimes try to protect co-conspirators. Her "corroboration" also need not have been credited because she was evasive, uncooperative, and admittedly untruthful with the police about her own authority to use the house. (App. 50a, 54a.) Second, as just discussed, police had considerable, though circumstantial, "contrary evidence." This evidence would permit an officer to reasonably conclude that, despite the partiers' claim that they had been invited, they knew, or at least had reason to know, that their entry was unauthorized.

Thus, respondents' arguments fail to dispel the direct conflict between the court of appeals' decision here and those of other courts, which hold that police officers are not required to credit a suspect's claim of an innocent mental state where reasonable grounds exist to disbelieve the suspect. These other courts have so held when an apparent trespasser claims a good-faith belief in the right to enter, *see, e.g.*, *Finigan v. Marshall*, 574 F.3d 57, 61-63 (2d Cir. 2009), and when a suspect similarly asserts an innocent state of mind for other apparent offenses, *see, e.g.*, *Criss v. Kent*, 867 F.2d 259, 263 (6th Cir. 1988).

There is no merit to respondents' assertion that petitioners seek to impose their own rigid, "bright-line" rule. (Opp. Br. 16.) Petitioners are not arguing that police "may always discredit suspects' innocent explanations even when those explanations are corroborated." (Opp. Br. 16 (emphasis omitted).) Instead, petitioners argue that a court should assess the

totality of the circumstances, including the nature of any corroboration, to discern if reasonable grounds exist to discredit those explanations. It is respondents who try to justify the court of appeals' rigid rule: circumstantial evidence and reasonable credibility doubts cannot overcome a suspect's innocent state-of-mind explanation.

Nor should this Court credit respondents' argument that the danger of the decision "chilling" law enforcement is "overblown" and that this issue "is unlikely to recur often." (Opp. Br. 25-26.) Four judges below would have reheard this case en banc, as officers "often hear a variety of mens rea-related excuses" from suspects and, at the same time, lack direct evidence of a culpable mental state. (App. 126a.) As amicus notes, circumstantial evidence of culpability is frequently considered in many contexts, such as in investigation of property crimes, like theft and receiving stolen property; drug crimes; and sex crimes. (Int'l Mun. Lawyers Ass'n Amicus Br. 8-12.) The court of appeals has created a new rule, broadly applicable to these situations, that critically affects the ability of police to do their job and protect the public. That warrants this Court's review.

II. Even Assuming A Lack Of Probable Cause, This Court's Precedents Clearly Warrant Application Of Qualified Immunity.

The court of appeals reasoned that the law was clearly established in the relevant sense because (1) probable cause requires "some evidence" of each offense element, and (2) an element of trespassing is that the accused "knew or should have known that his entry was unwanted." (App. 23a.) Respondents devote much of their qualified-immunity discussion to showing that these two generalized propositions were

clearly established. (Opp. Br. 27-30.) But this discussion simply does not address petitioners' argument: these propositions are just too general to have provided the petitioner officers fair notice that their actions were unlawful in the particular situation they confronted. *See Mullenix v. Luna*, 136 S. Ct. 305, 308-09 (2015).

Respondents incorrectly argue that petitioners "frame the question far too narrowly." (Opp. Br. 31.) Petitioners frame it as whether probable cause exists to arrest when officers find "persons behaving suspiciously inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim they were invited by someone who is not present and is uncooperative and untruthful with police." (Pet. 25-26.) This Court has recently applied a similar level of specificity in granting qualified immunity, recognizing that such specificity is "especially important in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 308-09. Having defined the clearly established law at a high level of generality, respondents notably offer no alternative formulation that approaches the requisite degree of specificity. That is because there is no alternative formulation that would justify the denial of qualified immunity to the two petitioner officers, who have been held personally liable for nearly $1 million in damages and attorneys' fees.

Like the court of appeals, respondents do not identify a single case finding probable cause lacking under remotely analogous facts. There is no such case, certainly not under District of Columbia law. In fact, the District of Columbia Court of Appeals has affirmed trespassing *convictions* despite suspects' innocent explanations for their presence. *See, e.g.*,

McGloin v. United States, 232 A.2d 90, 91 (D.C. 1967). Respondents fruitlessly attempt to distinguish these cases since none involved an explanation that "was corroborated by independent evidence." (Opp. Br. 32.) Even setting aside the much higher standard for a conviction than for probable cause, the "corroboration" from "Peaches" was not independent, and other objective reasons existed to discredit it, as discussed. In any event, "one thing is crystal clear: No decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." (App. 136a.)

Claiming that the constitutional violation was nevertheless "obvious," respondents improperly rely on some other officers' subjective assessments of the trespassing charge. (Opp. Br. 34-35.) But these officers were not at the scene or did not possess all of the relevant information. (App. 51a-52a, 58a-59a.) Moreover, it is telling that respondents have to depart from the proper analysis, relying on subjective beliefs where qualified immunity "generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted). In light of pre-existing law, the unlawfulness of the arrests was not "apparent" to the petitioner officers. *Id.* at 640. The constitutional question they faced was not "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Respondents insist that the lack of probable cause was "obvious" even though four judges of the District of Columbia Circuit, dissenting from the denial of rehearing, found that probable cause existed. (Opp. Br. 35.) This is flatly contrary to this Court's qualified immunity jurisprudence: "If judges thus disagree on a constitutional question, it is unfair to subject police to

money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Whatever may be an "obvious" case justifying the denial of qualified immunity, this is not it.

This Court should reverse the court of appeals, just as in recent cases arising from the Third, Fifth, Sixth, Ninth, and Tenth Circuits. Respondents claim that the denial of qualified immunity does not warrant review because it merely reflects "factbound disagreement" between the judges below. (Opp. Br. 35.) But a "factbound disagreement" could be said to characterize almost all qualified immunity cases, especially in the Fourth Amendment context. Nevertheless, because of the societal importance of qualified immunity, this Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *see Mullenix*, 136 S. Ct. 305 (summary reversal); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (summary reversal); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (summary reversal); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088 (2012); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). This Court should not hesitate to do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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