No. 15-1485

In the
Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

THEODORE WESBY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* *THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS AND REVERSAL*

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INTEREST OF AMICI CURIAE[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

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[1] This brief was prepared by counsel for amici and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National Sheriffs' Association (Association), a 26 U.S.C. § 501(c)(4) non-profit organization, was formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States and to promote, to protect, and to preserve our nation's Departments/Offices of Sheriff. The Association has more than 21,000 members and is a strong advocate for more than 3,000 individual sheriffs located throughout the United States. More than 99% of our Nation's Departments/Offices of Sheriff are directly elected by the people in their local counties, cities, or parishes. The Association promotes the public interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

Police officers encounter numerous situations that require split-second decision-making. This Court has consistently assessed police officers' decisions to search and arrest under a flexible probable cause standard that gives deference to the officers' experience and expertise. The majority below deviated from this standard by applying a rigid rule that officers must believe a suspect's statements, even when circumstantial evidence indicates otherwise. This heightened probable cause standard sharply contrasts with the public interest in deferring to police officers on-the-spot judgment calls. In particular, this standard denies police officers the discretion to weigh the circumstantial evidence at a crime scene, including how much credence to give a suspect's statement. Ultimately, the court below's heightened probable cause standard would create a chilling effect on officers' willingness to make necessary arrests both within and beyond the context of trespassing.

Further, the court below's highly generalized framing of Respondents' right is exactly the type of construction this Court forbids in analyses of the clearly established prong of qualified immunity. Under an appropriate framing, there was no clearly established law that an officer must believe suspects' statements alleging innocence. To hold otherwise would run contrary to this Court's prohibition against retroactively punishing police officers and would place a heavy financial burden on local governments.

ARGUMENT

I. THE COURT BELOW'S HEIGHTENED PROBABLE CAUSE STANDARD WILL IMPEDE POLICE OFFICERS' ABILITIES TO DO THEIR JOBS.

Rather than following this Court's case-by-case, flexible probable cause standard, the majority below applied a heightened standard that does not give deference to police officers' expertise and judgment. This new standard fails to strike the appropriate balance between ensuring public safety and protecting individuals' privacy rights, and it should therefore be reversed.

A. Probable cause requires deference to police officers when they have made on-the-scene judgment calls.

Probable cause deals with probabilities that "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *see also Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983). Probable cause is not a standard that courts should compact into specific, rigid legal rules. *See Gates*, 462 U.S. at 231-32.

Viewed from this practical standpoint, probable cause permits police officers to "formulate[] certain common-sense conclusions about human behavior." *United States v. Cortez*, 449 U.S. 411, 418 (1981). Police officers are allowed, and encouraged, "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might

well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *see also Cox v. Hainey*, 391 F.3d 25, 32 (1st Cir. 2004) (deferring to the officer's reasonable decision to arrest despite the availability of "alternative inferences" that cut against the suspect's guilt). Officers confront many situations—some incredibly dangerous—far removed from the day-to-day encounters of the average layperson. Probable cause grants officers the necessary latitude to make on-the-spot determinations that hinge on their knowledge and expertise.

This Court has noted that granting "fair leeway" to police officers to enforce the law and protect communities is an appropriate counterbalance to "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Brinegar*, 338 U.S. at 176. In balancing these opposing interests, courts should recognize that the practical conception of probable cause provides room for police officers to make mistakes. *See id.* Police officers are not perfect and are confronted with countless situations that are "more or less ambiguous." *Id.* Thus, probable cause does not force officers to adhere to a strict legal standard, but rather allows officers to use their knowledge to make reasonable judgment calls. *See, e.g.*, *Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2009) (determining that although the officers made a potential mistake, their decision to discredit plaintiff's explanation "was not unreasonable in light of the information the officers possessed at the time").

The inherent flexibility of probable cause further stems from this Court's recognition that police officers' on-the-spot determinations are held to a far lower standard of proof than convictions. *See Harris*, 133 S. Ct. at 1055; *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975). The split-second decision-making expected of police officers does "not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands." *Gerstein*, 420 U.S. at 121; *see also Feldman v. Cmty. Coll. of Allegany*, 85 F. App'x 821, 826 (3d Cir. 2004) (noting it is without question that officers are "not required or permitted to conduct a trial of the matter on the spot" (citation omitted)). Police officers serve their communities by making fact determinations at the scene of a suspected crime.

It follows that the probable cause standard should give police officers some discretion when they confront on-the-spot credibility determinations. *See, e.g.*, *Arvizu*, 534 U.S. at 273; *Brinegar*, 338 U.S. at 175. Assessing the credibility of witnesses and suspects at the scene is imperative for police officers to determine "whether to investigate, to question, to search, to arrest, to caution, to charge, [or] to prosecute."[2] Police officers' unique training and experience make them the only qualified individuals to conduct credibility assessments on the scene.

Giving police officers discretion in making on-the-spot credibility determinations is also consistent with this Court's analysis of *Terry* stops under the

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[2] Simon Bronitt & Philip Stenning, *Understanding Discretion in Modern Policing*, 35 CRIM. L.J. 319, 320 (2011) (quoting Galligan D., *Regulating Pre-trial Decisions*, *in* A READER ON CRIMINAL JUSTICE 151, 151 (Lacey N., ed. 1994)).

reasonable suspicion standard. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a police officer can stop and briefly detain an individual for investigatory purposes if the officer has reasonable suspicion of criminal activity). Like probable cause, this Court views reasonable suspicion as a concept not "readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 409 U.S. 1, 7 (1989) (quoting *Gates*, 462 U.S. at 232).

Terry stops are subjected to the reasonable suspicion standard because these investigatory stops embody a key aspect of a police officer's job—taking "swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry*, 392 U.S. at 20; *see also Maryland v. Buie*, 494 U.S. 325, 331-32 (1990). As a practical matter, officers must have discretion to act on their on-the-spot observations because there is no time to acquire search warrants for on-the-street frisks. *Terry*, 392 U.S. at 20. Similarly, when officers are facing the decision to arrest under the probable cause standard, they often have no time to obtain an arrest warrant. This holds particularly true in incidents involving alleged domestic violence where the risk of harm could escalate, possession of drugs where a suspect could destroy evidence or fabricate an explanation, and trespassing where the suspected trespassers could further damage the homeowner's property or flee.

A flexible probable cause standard is also consistent with the reasonableness standard used in evaluating excessive force claims. Determining the constitutionality of an officer's use of force requires courts to ask whether the force was objectively

reasonable from the perspective of a reasonable officer on the scene. *Graham v. Connor*, 490 U.S. 386, 396 (1989). In analyzing excessive force cases, this Court has repeatedly noted that the reasonableness standard must account for "the fact that police officers are often forced to make split-second judgments—in circumstances that are often tense, uncertain, and rapidly evolving." *Id.*; *see also Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). If officers are required "to intervene at a moment's notice . . . on the basis of imperfect information and with little time for deliberation," courts must give officers the deference they deserve. *Maney v. Garrison*, No. 14-7791, 2017 WL 937460, at *3 (4th Cir. Mar. 9, 2017).

In the excessive force context, this Court praised one lower court's "wise admonition that judges should be cautious in second guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 565 U.S. at 477; *see also United States v. Sharpe*, 470 U.S. 675, 686 (1985) (noting that courts should not "indulge in unrealistic second-guessing" where police acted in "a swiftly developing situation"). This admonition is just as wise when analyzing police officers' on-the-scene credibility determinations under the probable cause standard, and courts should thus be equally wary of relying on "hindsight and calm deliberation" when reviewing a police officer's judgment in these situations. *Id.*

In evaluating whether a police officer has met the "common-sensical standard" of probable cause, this Court has continually looked to the totality of the

circumstances. *Harris*, 133 S. Ct. at 1055; *Gates*, 462 U.S. at 232, *Brinegar*, 338 U.S. at 176. A totality of the circumstances analysis aligns with this Court's view of probable cause as a "more flexible, all-things-considered approach." *Harris*, 133 S. Ct. at 1055. As first responders to the scene of an alleged crime, police officers are in the best position to weigh and balance the evidence before them in determining whether probable cause exists. *See Gates*, 462 U.S. at 232 ("[T]he evidence . . . collected must be seen and weighed . . . as understood by those versed in the field of law enforcement.").

Suspects' statements are but one factor in the totality of the circumstances analysis. Although a police officer may give weight to a suspect's statement, a suspect's denial of guilt alone should not preclude probable cause. *See Wright*, 409 F.3d at 603 ("Although [the suspect's] explanation for entering [the] residence is a factor in the probable cause analysis, it is not dispositive."). It is undisputed that officers are not required to believe a suspect's innocent explanation in determining probable cause. *See Wesby v. District of Columbia*, 816 F.3d 96, 97 (D.C. Cir. 2016) (Pillard, J., concurring) (agreeing with Judge Kavanaugh's dissent that "officers are not required to take suspects at their word when they deny their guilt"). Moreover, police officers are "under no obligation to give any credence to a suspect's story," if the officers have already established probable cause. *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988); *see also Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 790 n.8 (3d Cir. 2000) (noting officers are not required to "undertake an exhaustive investigation in order to validate the

probable cause that, in [their minds], already exists"); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) ("Once probable cause is established, an officer is under no duty to investigate further.").

Given the demands of an officer's job duties, it is not practical to expect an officer to "explore and eliminate every theoretically plausible claim of innocence before making an arrest," *Amobi v. D.C. Dep't of Corr.*, 755 F.3d 980, 990 (D.C. Cir. 2014) (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997)). Such an exploration would give inappropriate weight to a suspect's statements. Giving a suspect's statement greater weight than other factors would in turn "allow every suspect, guilty or innocent, to avoid arrest simply by claiming 'it wasn't me.'" *Id.*

In direct contradiction to the inherent flexibility of probable cause, the majority decision below requires police officers to adhere to a rigid rule: absent conflicting information, police officers must believe the statements of alleged suspects, even when the officers have reason to doubt the suspects' credibility. Such a rule directly opposes this Court's emphasis on allowing police officers to rely on their unique experience and training to make determinations at the scene of a suspected crime.

The decision below allows the suspects' explanations for their presence on the property to preclude probable cause despite circumstantial evidence indicating the opposite. This hindsight analysis invites a level of second-guessing that undermines police officers' ability to do their jobs in real time. Courts should recognize that police officers

engage in credibility determinations "far removed from the serenity and unhurried decision making of an appellate judge's chambers." *Wesby*, 816 F.3d at 106 (Kavanaugh, J., dissenting). Given the vast disparity between suspected crime scenes and courtrooms, police officers should be accorded deference in the credibility determinations they make on the spot.

B. The decision below will have negative practical effects on police officers' performance of their job duties.

By heightening the probable cause standard, the majority has set a rigid precedent that will chill police officers from making difficult judgment calls. Discouraging police from relying on their own credibility determinations will have negative repercussions in the context of future trespassing cases as well as a range of other crimes, which will negatively affect public safety.

1. A heightened probable cause standard dissuades police officers from addressing suspected trespassers.

This Court has noted that probable cause affords "the best compromise" for accommodating the opposing interests of suspects and law enforcement. *Brinegar*, 338 U.S. at 175. Requiring officers to credit suspects' explanations over contrary circumstantial evidence upsets this balance and "unduly hampers law enforcement." *See id.* If officers are not afforded the breathing room required to make on-the-spot decisions, then they may avoid making such imperative decisions at all.

A heightened probable cause standard would chill law enforcement officers from relying on their experience to where "they cannot possibly perform their duties." *United States v. Heitner*, 149 F.2d 105, 106 (2d Cir. 1945). If a police officer knows his decision will be judged under a heightened probable cause standard, he is less likely to make the judgment calls (e.g. arresting a suspect) necessary to initiate an investigation. This hesitation to make urgent decisions places the public at increased risk and wastes time and resources.

Officer hesitation is particularly problematic in the context of trespassing and related property crimes given the persistence of post-recession vacant properties.[3] Foreclosed homes, or "Zombie homes," plague their surrounding neighborhoods as they "invite trespassers" and are "magnets for crime and drug use."[4] As "havens for criminal activity," vacant homes "require increased police presence to respond

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[3] *See* Robert Hennelly, *America's Foreclosure Crisis Isn't Over*, CBS NEWS (Jan. 26, 2016, 5:00 AM), https://www.cbsnew.com/news/americas-foreclosure-crisis-isnt-over/ (noting that certain geographical areas are still recovering from the housing crisis).

[4] Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. REV. 609, 629 (2016); *see also* Andrea Clark, *Amidst the Walking Dead: Judicial and Nonjudicial Approaches for Eradicating Zombie Mortgages*, 65 EMORY L.J. 795, 804 (2016) (quoting Don Walker, *Hundreds of Zombie Homes Plague Milwaukee Neighborhoods*, MILWAUKEE J. SENTINEL (May 25, 2014), http://www.jsonline.com/news/Milwaukee/hundreds-of-zombie-homes-plague-milwaukee-neighborhoods-b99276701z1-260613161.html).

to [the] higher crime rates."[5] A heightened probable cause standard where police officers must heavily rely on a suspected trespasser's explanation for his presence in a seemingly vacant home will inhibit police officers' ability to prevent future trespassing and the consequences that follow.

When police officers hesitate to take action, the possibility for future disasters increases. In December 2016, the Oakland Ghost Ship Fire—"America's deadliest structural fire in more than a decade"—resulted in thirty-six deaths stemming from multiple code violations, including illegal occupancy.[6] Before this horrific event, police officers received neighbors' complaints about an illegal "rave," involving drugs and alcohol, occurring within the warehouse.[7] After arriving on the scene, officers did not make any arrests or issue citations "despite the warehouse not being licensed as a cabaret" in

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[5] Matthew Connelly, *Rejecting Federal Preference: Why Courts Should Not Exempt Fannie Mae and Freddie Mac Properties From Cities' Vacant Property Registration Ordinances*, 49 WASH. U. J.L & POL'Y 181, 185-86 (2015).

[6] Thomas Fuller et al., *Why the 'Ghost Ship' was Invisible in Oakland, Until 36 Died*, N.Y. TIMES (Dec. 22, 2016), https://www.nytimes.com/2016/12/22/us/why-the-ghost-ship-was-invisible-in-oakland-until-36-died.html.

[7] Samantha Schmidt, *Police Knew About Illegal Housing, Parties at Oakland Warehouse Before Fire That Killed 36, but Took No Action*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/police-knew-about-illegal-housing-parties-at-oakland-warehouse-before-deadly-fire-but-took-no-action/?utm_term=.4f9faac0de.

accordance with the city's ordinances.[8] Outcomes like the Oakland Ghost Ship Fire will only become more prevalent if officers must fear personal liability every time they make an arrest.

2. A heightened probable cause standard harms police officers' decision-making abilities far beyond the scope of trespassing.

The majority below's heightened probable cause standard would impede officers' ability to make arrests in criminal cases in contexts other than trespassing. Crimes involving stolen property, drug possession, domestic abuse, and sexual assault, for example, often require police officers to make on-the-spot judgment calls to determine the best next steps. Such crimes also commonly involve suspects who are likely to have an innocent explanation at the ready. If officers are expected to take suspects at their word and trust any feasible narrative of innocence, guilty actors can and will avoid arrest simply by proffering a creative excuse.

Possession of stolen property is one crime where the decision below could easily undermine an officer's determination of probable cause. In *Krause v. Bennett*, 887 F.2d 362 (2d Cir. 1989), a man suspected of possessing a stolen stop sign informed the investigating officer that he received it from a friend for whom he had done plumbing work—which suggested that plaintiff did not *knowingly* possess stolen property. *Id.* at 365. The Second Circuit, however, correctly concluded that the suspect's

[8] *Id.*

innocent explanation did not negate the officer's finding of probable cause and arrest. *Id.* at 371. The court emphasized that "[i]t would be unreasonable and impractical to require that every innocent explanation of activity that suggests criminal behavior to be proved wrong, or even contradicted, before an arrest warrant could be issued with impunity." *Id.* at 372.

The Second Circuit's reasoning highlights a major problem with the decision below. Had the officer in *Krause* not been allowed to make an arrest until he had corroborative evidence of every element of the crime, the investigation could have been significantly delayed, and evidence of the stolen property could have been destroyed or abandoned.

Similarly, suspects in drug crimes are unlikely to admit knowledge. Imagine that a police officer stops someone for a minor traffic violation and notices a crack pipe sitting in plain sight on the vehicle's floor. From her vantage point the officer also observes white residue on the exterior of the pipe, which she suspects is cocaine. Typically, an individual in possession of cocaine is reluctant to admit he or she *knowingly* possesses the drug. *See, e.g*, *State v. McKnight*, 737 So.2d 218, 218 (La. App. 4 Cir. 1999); *State v. Maxwell*, 699 So.2d 512, 513 (La. App. 4 Cir. 1997). While it would seem that the officer has probable cause for arrest, under the decision below the suspect could potentially thwart such an outcome simply by saying "My friend must have left that pipe in my car. I've never seen it before." The excuse is feasible and, if true, negates the suspect's knowing possession of cocaine.

A heightened probable cause standard could also have devastating consequences in situations involving violent crimes, where arrest may be vital to public safety. Domestic abuse is one such example. Consider a scenario wherein a police officer receives a call from a concerned citizen who hears yelling and other noises indicating a physical struggle coming from his neighbor's apartment. When the police officer arrives on the scene, she observes some strewn furniture. Although the spouse and child seem shaken and anxious, neither admits to any abuse or violent activity upon questioning (a common response even when domestic abuse has actually occurred[9]). Does the officer have probable cause to arrest the suspected abuser based on her circumstantial observations? Under the majority decision below, the answer is, at best, unclear. At worst, the answer is no, and an officer could be constitutionally required to leave the woman and child in a dangerous and abusive situation.

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[9] *See* Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 136–37 (2004); *see also* James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD says*, L.A. TIMES (Mar. 21, 2017, 8:25 PM), https://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html (noting that domestic violence and sexual assault reports among Los Angeles' Latino community have significantly dropped under President Trump's administration due to fear of deportation). A decline in reporting further compounds the difficulty police officers face when making credibility assessments at the scene of a suspected domestic violence incident.

Another troubling possibility involves police officers' ability to intervene in cases of sexual assault, the reported instance of which has dramatically increased in some communities in recent years.[10] In the highly publicized Stanford rape case, police officers arrived at the crime scene to find two men restraining the assailant, Brock Turner.[11] The two bystanders claimed they found Turner sexually assaulting the victim behind a nearby dumpster. Turner maintained the victim consented to the sexual conduct. The responding police officers arrested Turner at the scene, and Turner was eventually convicted of multiple counts of rape and sexual assault. It seems clear that the officers acted properly, but the majority's holding below could very well act to deter such action in future cases. If a suspect claims that he received consent from his alleged victim, how much evidence must officers proffer at the scene to negate the innocent explanation and establish probable cause for arrest? Trained officers are best equipped to make such judgment calls, but they are unlikely to do so if a high probable cause standard turns one mistake into a million-dollar liability risk.

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[10] Aria Bendix, *U.S. Naval and Military Academies See Rise in Sexual Assault*, ATLANTIC (Mar. 16, 2017), https://www.theatlantic.com/education/archive/2017/03/us-naval-and-military-academies-see-rise-in-sexual-assault/519912/; Melissa Korn, *Reports of Sexual Assault Rising Sharply on College Campuses*, WALL STREET J. (May 4, 2016, 1:19 PM), https://www.wsj.com/articles/reports-of-sexual-assault-rising-sharply-on-college-campuses-1462375421.

[11] Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN, http://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/ (last updated June 11, 2016, 5 PM).

II. THE MAJORITY'S QUALIFIED IMMUNITY ANALYSIS IGNORED THE ABSENCE OF CLEARLY ESTABLISHED LAW REQUIRING OFFICERS TO BELIEVE SUSPECTS' STATEMENTS.

Qualified immunity shields police officers from liability when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When there is no clearly established right "at the time of the challenged conduct," a plaintiff cannot overcome a qualified immunity defense. *Plumhoff*, 134 S. Ct. at 2023.

For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In contrast, a right is not clearly established when it is construed at a "high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The majority's framing of Respondents' right—to be free from arrest unless an officer can show probable cause for "each of the necessary elements of the offense"—is exactly the highly generalized construction that this Court prohibits.

The appropriate framing of Respondents' right is whether, as suspected criminals, their proffered excuse precludes probable cause for arrest. *See Wesby v. District of Columbia*, 816 F.3d 96, 110 (2016) (Kavanaugh, J., dissenting). There is no clearly established law that officers must believe suspects' statements, excuses, or explanations. *Id.*

Therefore, the officers in this case should be free from liability under the qualified immunity doctrine, even if this Court were to adopt the majority below's probable cause holding.

Any other result would clash with this Court's emphasis against retroactively punishing police officers for otherwise reasonable conduct. *See, e.g.*, *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (explaining that before officers are to be found liable, they must be put "on notice of any possible constitutional violation"); *Plumhoff*, 134 S. Ct. at 2023 (cautioning against using later-decided cases because those cases "could not have given fair notice" to the officer (internal quotation omitted)), *see also Davis v. United States*, 564 U.S. 229, 241 (2011) (expanding the good-faith exception by reasoning that when evidentiary exclusion only deters "conscientious police work," it should not be applied).

Here, the decision below awarded more than $1 million in damages and fees for two police officers' "on-the-spot decision to make . . . trespassing arrests." *Wesby*, 816 F.3d at 112 (Kavanaugh, J., dissenting). Given the absence of clearly established law on point, this award inappropriately punishes the police officers for an action that they had no reason to believe was illegal and chills performance of on-the-scene duties for all officers in the future.

Local governments and municipalities share equally in the severe consequences stemming from the decision below. The burden of paying liability damages and litigation fees typically falls on local

governmental entities.[12] One study of forty-four jurisdictions found that government funds paid for "an estimated $735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011."[13] The majority's holding would place an additional financial burden on local governments that will have to pay for police officers' otherwise reasonable on-the-spot determinations.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[12] *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV 885 (2014) (examining the widespread indemnification involved in police officer disputes).

[13] *Id.* at 913.