No. 15-1485

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

THEODORE WESBY, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Police officers found late-night partygoers inside a vacant home belonging to someone else. After giving conflicting explanations of their presence, some partygoers claimed that a person known as "Peaches," who was not at the party, had invited them. The lawful owner told officers that he had not authorized entry by anyone. The officers arrested the partygoers for unlawful entry in violation of D.C. Code § 22-3302 (Supp. 2008). The questions presented are:

1. Whether police officers had probable cause to arrest respondents for unlawful entry.

2. Whether, even if the officers lacked probable cause to arrest, they were entitled to qualified immunity.

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INTEREST OF THE UNITED STATES

This case presents the question whether police officers who found late-night partygoers at a near-vacant home without the homeowner's permission had probable cause to arrest the partygoers based on circumstantial evidence that they had engaged in unlawful entry, in violation of D.C. Code § 22-3302 (Supp. 2008). Federal officers arrest and prosecute defendants for violating statutes containing a variety of mental-state elements. Circumstantial evidence is routinely used to form probable cause to believe that a suspect has a particular mental state under those statutes. The United States therefore has a substantial interest in the probable-cause question in this case.

This case also presents the question whether, if officers lacked probable cause to arrest respondents for unlawful entry, the officers were entitled to qualified

immunity under 42 U.S.C. 1983. The principles of qualified immunity that apply in suits against state and local officials under Section 1983 also apply in suits against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, the standard for determining whether a right is "clearly established" for purposes of qualified immunity in civil litigation governs whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that he or she was violating a constitutional right. *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002). Because the United States has interests both in ensuring the effective deterrence of unconstitutional conduct and in protecting employees from unduly burdensome litigation, the United States has a substantial interest in the qualified-immunity question in this case.

STATEMENT

1. At about 1 a.m. on March 16, 2008, the District of Columbia's Metropolitan Police Department received a complaint of "illegal activities" and loud music at a house on Anacostia Avenue in Northeast Washington, D.C. Pet. App. 4a, 47a n.3; see *id.* at 118a-119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also J.A. 94, 98-99, 189. The caller, a former commissioner of the Advisory Neighborhood Commission, told police that the house in question had been "vacant for several months." Pet. App. 61a (citation omitted); see J.A. 94, 131. From speaking with neighbors, officers understood that partying at the house was "an ongoing problem." J.A. 131; see J.A. 94; Pet. App. 55a.

Uniformed officers responded to the house and heard loud music playing inside. Pet. App. 4a. The officers

knocked on the door and saw a man look out the window and then run upstairs. J.A. 112. They entered the home, whose door was ajar, and smelled "[a] strong odor of [m]arijuana." *Ibid.*; see Pet. App. 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also J.A. 96-98, 131, 165. The officers saw women dressed only in bras and thongs, "with money hanging out [from] their garter belts." Pet. App. 58a (citation omitted). Several were performing lap dances. J.A. 112. Other people were holding cash and alcoholic beverages. *Ibid.* When the officers entered, partygoers "scattered into other rooms." Pet. App. 4a; see J.A. 143. The officers found one man hiding in a closet. Pet. App. 59a; J.A. 177.

Officers observed that the home was "sparsely furnished"—consistent with its being a vacant property—with some folding chairs and a mattress. Pet. App. 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see *id.* at 4a, 53a, 65a; see also J.A. 96-97. The house was "in disarray." Pet. App. 65a; see J.A. 112. Cups of liquor and beer were on the floor. J.A. 165. Some men and a naked woman were upstairs, where the lone mattress was located, J.A. 73-74, 96, and officers observed open condoms and a used condom on a windowsill, J.A. 112, 192.

Officers interviewed all 21 people at the house. Pet. App. 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc). Those present gave conflicting accounts. *Id.* at 10a, 56a. Some said they were there for a birthday party, and others said they were there for a bachelor party, but none of the 21 partygoers identified the alleged guest of honor. *Id.* at 4a; see *id.* at 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also J.A. 193-194. And nobody

claimed to live there, or could identify who owned the house. Pet. App. 5a. All said they were in the building "at the 'invitation of somebody else,'" but most could not even "say who gave them permission to be in the house." *Id.* at 56a (citations omitted); see J.A. 131-132. Some said that a woman known as "Peaches" or "Tasty" was the host and had invited them, with one person asserting that Peaches was renting the house. Pet. App. 4a-5a, 48a n.4, 53a, 56a, 79a. Peaches, however, was not present. *Id.* at 4a, 53a, 56a.

An officer sought to investigate further by contacting Peaches on the phone, with the assistance of a partygoer. Pet. App. 54a. The officer reached Peaches, but she was "evasive" and gave inconsistent accounts. J.A. 53; see Pet. App. 36a-37a (Brown, J., dissenting); see also Pet. App. 50a. She told the officer she was "possibly renting the house from the owner who was fixing the house up for her" and that she "gave the people who were inside the place" permission to have a bachelor party—but she hung up when the officer pressed her. J.A. 53. When the officer called again, she "began yelling" and initially asserted she "didn't know the owner's name, but she had permission to be inside the residence," before admitting that she lacked permission and hanging up again. J.A. 54. She refused an officer's request that she come to the scene, saying that she would be arrested if she did. Pet. App. 5a, 54a.

Officers also contacted the owner of the house, Damion Hughes, who said that although he had been trying to negotiate a lease with Peaches, no one, including Peaches, had permission to be at the house. J.A. 99-100; see Pet. App. 48a, 54a n.7.

After having talked to everyone present, Peaches, and Hughes, officers arrested the 21 people at the

house for unlawful entry, a misdemeanor. Pet. App. 6a, 8a-9a. At the station, after consulting with a prosecutor, the watch commander directed that the arrestees instead be cited for disorderly conduct. *Id.* at 6a. The partygoers were cited and then released, having spent "several hours" in police custody. *Id.* at 48a-49a. Prosecutors later dropped the disorderly-conduct charges. *Id.* at 49a.

Sixteen of the 21 arrestees—respondents here—brought a civil suit seeking damages from police officers involved in the arrest and from the District of Columbia. Pet. App. 46a. Respondents asserted claims under 42 U.S.C. 1983 against five officers, including petitioners Andre Parker and Anthony Campanale, alleging that the officers had violated the Fourth Amendment by participating in respondents' arrests. Pet. App. 46a, 70a. Respondents also brought common-law false-arrest claims against the five officers and against petitioner District of Columbia on the basis of respondeat superior. In addition, respondents asserted a common-law claim of negligent supervision against the District of Columbia. *Id.* at 46a. All parties moved for summary judgment on liability. *Id.* at 47a.

2. a. The district court granted summary judgment on liability to respondents on their claims against Officers Parker and Campanale in their personal capacities, and against the District of Columbia. Pet. App. 45a-99a.[1]

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[1] Official-capacity claims against the officer-defendants were dismissed after respondents "clarified that they [we]re proceeding against the officers solely in their individual capacities." Pet. App. 46a n.1. In addition, the district court found genuine issues of material fact existed that were relevant to the liability of the officer-defendants other than Officers Parker and Campanale, and

The district court concluded that police had lacked probable cause to arrest respondents for unlawful entry, even if the facts, which were "generally undisputed," Pet. App. 47a, were viewed in the light most favorable to petitioners, *id.* at 63a-70a. In particular, the court concluded, officers could not have found probable cause that respondents knew or should have known that their entry was not legally authorized. *Id.* at 64a-66a. The court found it "undisputed that [respondents] were expressly or impliedly invited onto the property by a woman named 'Peaches'" and, in the court's view, "nothing about what the police learned at the scene suggests that [respondents] 'knew or should have known that [they were] entering against the [owner's] will.'" *Id.* at 64a (final two sets of brackets in original). The court also concluded that Officers Parker and Campanale were not entitled to qualified immunity under Section 1983, reasoning that it was clearly established that the unlawful-entry offense requires that an entrant knew or should have known that his or her entry was against the will of the owner. *Id.* at 78a-79a.[2]

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accordingly denied summary judgment with respect to those defendants. *Id.* at 3a, 70a-93a, 98a-99a. Respondents then voluntarily dismissed those defendants from the suit. *Id.* at 3a.

[2] The district court also found Officers Parker and Campanale liable for common-law false arrest, relying on its determinations that respondents had been arrested without probable cause and that the officers could not have had a reasonable, good-faith belief that the arrests were lawful. The court found the District of Columbia liable for the same tort on a respondeat superior theory. Pet. App. 89a-93a. And the court found the District of Columbia liable for negligent supervision "because the unlawful arrests were ordered by high level officials who knew or should have known that probable cause was lacking for these arrests." *Id.* at 96a.

b. At a trial limited to damages, a jury awarded each respondent between $35,000 and $50,000. Pet. App. 3a. Officers Parker and Campanale and the District of Columbia were made jointly liable for the $680,000 judgment. *Id.* at 121a & n.4 (Kavanaugh, J., dissenting from the denial of rehearing en banc). In addition, the court ordered Officers Parker and Campanale to pay respondents' attorney's fees, bringing the total award against the officers to about $1 million. *Id.* at 117a, 121a; D. Ct. Doc. 86 (Feb. 5, 2013); D. Ct. Doc. 106 (May 23, 2016).

3. a. A divided panel of the court of appeals affirmed. Pet. App. 1a-32a. The court observed that in order to convict a defendant of unlawful entry under D.C. Code § 22-3302 (Supp. 2008), the government must show not only that a defendant entered property without lawful authority, but also that the defendant "knew or should have known [he] had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof.'" Pet. App. 9a (citation omitted).

Here, the court of appeals determined, officers lacked probable cause to believe that respondents knew or should have known their presence at the near-vacant Anacostia Avenue house was unlawful. Pet. App. 17a. The court emphasized that "Peaches and a guest at the scene" had stated that "Peaches had told the people inside the house that they could be there." *Id.* at 10a. The court reasoned that "in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of [respondents'] intent to enter against the will of the lawful owner." *Id.* at 11a. The court deemed irrelevant prior decisions finding circumstantial evidence sufficient to support "infer[ring]

an interloper's intent to enter against the will of the owner." *Id.* at 14a; see *id.* at 13a-15a. The court reasoned that the circumstances that the officers confronted in this case—including the condition of the near-vacant premises, the activities occurring at the party, and the partygoers' flight—could be consistent with an innocent mens rea. *Id.* at 15a-17a.

The court of appeals also denied qualified immunity under Section 1983. Pet. App. 21a-30a. The court acknowledged that respondents had identified no case that "invalidated an arrest for unlawful entry under similar circumstances." *Id.* at 22a. But the court found the law clearly established on the ground that it was settled that probable cause "requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense" and that "criminal intent is a necessary element of the offense of unlawful entry." *Id.* at 23a.[3]

b. Judge Brown dissented. Pet. App. 32a-44a. In her view, the court of appeals "essentially remove[d] most species of unlawful entry from the criminal code" by indicating that "any plausible explanation" means that "police lack probable cause to make arrests." *Id.* at 32a. That approach was mistaken, Judge Brown

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[3] The court of appeals concluded that its Section 1983 analysis also sufficed to sustain the common-law false-arrest verdicts because "[t]he elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim," Pet. App. 7a (citation omitted; brackets in original), and "the common-law privilege [petitioners] invoke overlaps with but is harder to establish than qualified immunity," *id.* at 30a. The court also affirmed the negligent-supervision verdict against the District of Columbia after rejecting the argument "that the negligent supervision claim must fail because the arrests were supported by probable cause." *Ibid.*

wrote, because "surrounding facts and circumstances" may furnish probable cause of a culpable mens rea. *Id.* at 38a. Judge Brown found such circumstances present in this case, where respondents' "party was taking place in a home so sparsely furnished as to be consistent with a vacant building," the partygoers' "response to the presence of police was to run and hide," and the partygoers gave "conflicting accounts about 'why' the party was being held" and "purported to rely on an invitation from a 'tenant' who was not actually present" and who herself gave conflicting and evasive statements. *Id.* at 39a. In any event, Judge Brown wrote, the officers should have been shielded from liability by qualified immunity, because no prior decision "require[d] officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." *Id.* at 43a-44a; see *id.* at 41a-44a.

4. The court of appeals denied rehearing en banc by a 6-4 vote. Pet. App. 102a-104a.

a. Judge Pillard, who authored the court of appeals' decision, concurred in the denial of rehearing en banc, joined by Judge Edwards. Pet. App. 105a-115a. She characterized the disagreement between the majority and the dissent as turning on differing "case-specific assessment[s] of the circumstantial evidence in the record," but asserted that the evidence that the partygoers had a culpable mens rea here did not even "arguably" amount to probable cause. *Id.* at 113a, 115a.

b. Judge Kavanaugh dissented from the denial of rehearing en banc, joined by Judges Henderson, Brown, and Griffith. Pet. App. 116a-139a. The dissenters concluded that the officers had probable cause to arrest

respondents. *Id.* at 117a-118a, 122a, 138a. But they principally argued that the court's decision contravened 11 recent cases in which this Court has "repeatedly told courts of appeals that police officers may not be held liable for damages unless the officers were 'plainly incompetent' or 'knowingly violated' clearly established law." *Id.* at 116a (brackets and citation omitted).

Under the qualified-immunity principles of those decisions, Judge Kavanaugh wrote, this was "a fairly easy case." Pet. App. 136a. Surveying cases from many circuits, he found it settled that when "the actus re[u]s is complete and the sole issue is * * * mens rea," officers are not categorically required to accept the "variety of mens rea-related excuses" that suspects may proffer. *Id.* at 125a-126a. And here, the dissenters observed, "it was entirely reasonable for the officers to have doubts about the partiers' story." *Id.* at 132a. At a minimum, the dissenters concluded, qualified immunity was appropriate because prior decisions had "permit[ted] police officers to arrest a person for trespassing even when that person claim[ed] to have the right to be on the property," and "[n]o decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." *Id.* at 136a (emphasis omitted).

SUMMARY OF ARGUMENT

Officers had probable cause to arrest respondents for unlawful entry after finding them partying after 1 a.m. in a nearly vacant house without the consent of the homeowner. And even if the officers lacked probable cause, they were entitled to qualified immunity because prior decisions supported probable cause and

no decision clearly established that probable cause was absent.

A. Under the Fourth Amendment, officers may arrest a person when they have probable cause to believe that the person committed an offense. See, *e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Probable cause is "not a high bar," *Kaley* v. *United States*, 134 S. Ct. 1090, 1103 (2014), and requires only a "fair probability" or "substantial chance of criminal activity," *Illinois* v. *Gates*, 462 U.S. 213, 238, 244 n.13 (1983).

Officers had probable cause to believe that respondents had committed unlawful entry. Because it is undisputed that officers had reason to believe that respondents had committed the actus reus of that crime, the only question is whether the officers had probable cause that respondents knew or should have known that their presence was contrary to the will of the homeowner.

The evidence to satisfy a mens rea requirement will generally be circumstantial. Here, abundant circumstantial evidence indicated that respondents knew or should have known that their presence was unauthorized. Respondents were present late at night in a nearly vacant house, with no putative owner, tenant, or host on the premises. The house was in disarray, with open and used condoms in view and beer and liquor cups on the floor. The home smelled strongly of marijuana, and women dressed in bras and thongs were giving lap dances. Officers could reasonably conclude that these circumstances were more consistent with trespassers knowingly or recklessly exploiting a vacant property than partygoers attending what they reasonably believed to be a lawful tenant's house party. And when partygoers scattered after officers arrived,

with one person going so far as to hide in the closet, and then gave "implausible," "conflicting," and "evasive" accounts of their presence, 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.6(f), at 449-451 (5th ed. 2012), officers could reasonably construe the partygoers' words and deeds as evidence of consciousness of guilt.

B. Even if officers lacked probable cause, they were entitled to qualified immunity under Section 1983. Under principles of qualified immunity, officers may be subject to money damages only if they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

It was not clearly established at the time of respondents' arrests that officers lacked probable cause for unlawful entry under the circumstances of this case. The most relevant precedent at the time of the arrests indicated that officers were entitled to infer probable cause that respondents had a culpable mental state when they found respondents in a vacant house without the homeowner's permission, in light of "the ordinary and reasonable inference that people know what they are doing when they act." *Tillman* v. *Washington Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C. 1997). The D.C. Court of Appeals had repeatedly sustained jury verdicts against trespassers who had asserted an innocent state of mind. And courts across the country had rejected claims that officers lacked probable cause in trespassing cases where the evidence of a culpable mental state was circumstantial, and the arrestees asserted that they believed they were lawfully present. In addition, the disagreement of

judges over whether the circumstances of this case established probable cause is strong evidence that existing precedent did not dictate that respondents' arrests were unlawful. Because prior decisions had not clearly established that officers lacked probable cause, the officers were entitled to qualified immunity.

ARGUMENT

When officers responded to a report of illegal activity at a property that was supposed to be unoccupied and found respondents throwing a party with illegal drugs and strippers, the condition of the home, the conduct that officers observed, and the partygoers' flight from officers and inconsistent and dubious accounts furnished probable cause to arrest those present for unlawful entry. Even if the officers lacked probable cause, they were entitled to qualified immunity from suit under Section 1983, because it was not clearly established at the time of the arrests that probable cause was absent.

A. Officers Had Probable Cause To Arrest Respondents For Unlawful Entry

1. Under the Fourth Amendment, a person may be arrested when the police have probable cause to believe that the person committed an offense. See, *e.g.*, *Michigan* v. *DeFillippo*, 443 U.S. 31, 37 (1979); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Probable cause is "not a high bar." *Kaley* v. *United States*, 134 S. Ct. 1090, 1103 (2014). It "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands." *Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975). Instead, it is a "practical," "fluid," "flexible," "common-sense" standard, *Illinois* v. *Gates*, 462 U.S. 213, 232, 236, 238, 239 (1983), that

"requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act," *Kaley*, 134 S. Ct. at 1103 (brackets, citations, and internal quotation marks omitted). The standard is satisfied if there exists "a fair probability," *Gates*, 462 U.S. at 238, or "substantial chance of criminal activity," *id.* at 244 n.13.

To determine whether probable cause exists, this Court "ha[s] consistently looked to the totality of the circumstances." *Florida* v. *Harris*, 133 S. Ct. 1050, 1055 (2013). Under the totality-of-the-circumstances approach, observations that are "readily susceptible to an innocent explanation" may nevertheless support an inference of criminal behavior when viewed alongside other evidence. *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002) (explaining the totality-of-the-circumstances approach in the context of reasonable suspicion); see *Gates*, 462 U.S. at 243-246. "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest," but because the analysis is objective, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck* v. *Alford*, 543 U.S. 146, 152-153 (2004). And under what is generally known as the collective-knowledge doctrine, in cases "where law enforcement authorities are cooperating in an investigation, * * * the knowledge of one is presumed shared by all." *Illinois* v. *Andreas*, 463 U.S. 765, 771 n.5 (1983).

2. a. When respondents were found holding a party after 1 a.m. at a home that was supposed to be vacant, without the permission of the property's owner, police had probable cause to conclude that they had commit-

ted unlawful entry. The misdemeanor offense of unlawful entry requires that a person have (1) "'entered, or attempted to enter,' a private dwelling or part thereof"; (2) "voluntarily, on purpose, and not by mistake or accident"; (3) "without lawful authority"; (4) "'against the will' of 'the person lawfully in charge of the premises'"; and (5) that the person "'knew or should have known that s/he was entering against that person's will.'" *Ortberg* v. *United States*, 81 A.3d 303, 309 (D.C. 2013) (emphases omitted) (quoting Criminal Jury Instructions for the District of Columbia, No. 5.401 (5th ed. 2009)).[4] Here, there is no question that respondents committed the actus reus of unlawful entry when they held a party in a home without the authorization of a person lawfully in charge of the premises. Respondents dispute instead whether police had probable cause that they knew or should have known their presence was contrary to the will of the person lawfully in charge of the home, as required to satisfy the statute's mens rea.

A suspect's mental state will "almost always be proved" by circumstantial evidence, *United States* v. *Santos*, 553 U.S. 507, 521 (2008) (plurality opinion) (discussing mens rea of knowledge), because "it is so unlikely that direct evidence will be available," 2A Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 411, at 119 (4th ed. 2009). Here, substantial circumstantial evidence supported

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[4] *Ortberg* postdates the events in this case and involved the version of the unlawful-entry statute that was in effect in 2011, but the court described its holding regarding the elements of unlawful entry as a synthesis of several decades of case law. 81 A.3d at 306-309 & n.3.

the inference that respondents knew or should have known their presence was unauthorized.

Respondents were present late at night at a house that did not belong to any of them—with no putative owner, tenant, or host even present in the building. The condition of the property suggested that opportunists were exploiting a vacant space, not that a lawful tenant was hosting a party. The level of furnishing was consistent with a vacant home, and the premises were in "disarray," J.A. 112, with open condoms in view and liquor and beer cups left on the floor. Officers could reasonably conclude that these conditions were more consistent with trespassers knowingly or recklessly taking advantage of a vacant property than partygoers attending what they reasonably believed to be a legitimate house party.

The activities occurring at the near-vacant property provided additional support for an inference of culpable mens rea. Officers had been called to investigate a neighbor's report of illegal activities on the premises, and once they arrived they smelled a strong odor of marijuana, observed women giving lap dances, and found a naked woman and several men on the upstairs floor that contained the lone mattress. The illegal drug use and conduct "consist[e]nt with activity being conducted in strip clubs for profit," J.A. 112, provided additional reason for officers to conclude that partygoers likely realized—or should have realized—that the party had not been authorized by the home's absent owner.

Partygoers gave more direct evidence of a culpable mental state when they scattered as officers arrived, with one person going so far as to hide in the closet. J.A. 143, 177. As this Court has explained, "deliber-

ately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*," because they are evidence of consciousness of guilt. *Sibron* v. *New York*, 392 U.S. 40, 66 (1968); see *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) (describing "[h]eadlong flight" as "the consummate act of evasion," which while "not necessarily indicative of wrongdoing, * * * is certainly suggestive of such"). The panicked reaction of partygoers when police arrived thus furnished additional evidence that any invitation the partygoers had received did not lead them to believe that their presence was authorized by any lawful owner or tenant. See 2 LaFave § 3.6(e), at 445-446 & n.202 (collecting cases holding that "if two or more individuals are jointly engaged in suspicious activity and one of the group flees upon seeing the police, this also may be considered as bearing upon the question of whether there is probable cause as to the non-fleeing companions").

Officers' conversations with the 21 people at the party cast additional doubt on an innocent mens rea. When the officers interviewed partygoers, not a single person could even identify the homeowner, and while several partygoers claimed they had been invited by a person known as Peaches, most could not "say who gave them permission to be in the house" at all, Pet. App. 56a (citation omitted); see J.A. 131-132—strongly suggesting that no one had given them such permission.

When officers probed further, partygoers offered the kinds of "conflicting" and "inconsistent" accounts, Pet. App. 10a, that suggest a culpable mens rea, see 2 LaFave § 3.6(f), at 449-451 & nn.214-216 (collecting cases holding that "implausible," "conflicting," or "eva-

sive" accounts "may well constitute probable cause when considered together with * * * prior suspicions"). Some of those present asserted they were there for a bachelor party, but others asserted they were there for a birthday party, and no partygoer identified the purported guest of honor. Officers could reasonably infer under these circumstances that the partygoers were providing a cover story that was not true. And this Court has long recognized that false statements can not only provide reason to doubt a person's account, but can also provide affirmative evidence of consciousness of wrongdoing. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *Wright* v. *West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Wilson* v. *United States*, 162 U.S. 613, 621 (1896).

b. The panel majority appeared to reason that once several partygoers told officers that Peaches had invited them to the near-vacant home, and a person identifying herself as Peaches provided a similar account, officers were required to credit those accounts as "uncontroverted" and to conclude that partygoers had an innocent mental state as a result. Pet. App. 10a; see *id.* at 9a-10a. That analysis is mistaken on several fronts. First, the accounts of Peaches and several of the partygoers did not provide "uncontroverted" evidence of an innocent mens rea, *id.* at 10a, because, as set forth above, abundant circumstantial evidence suggested that respondents knew or should have known that their presence was contrary to the will of the home's lawful owner. Officers making on-the-spot arrest decisions are not required to credit, in determining probable cause, the exculpatory accounts that jurors would be free to discredit in applying the

more stringent beyond-a-reasonable-doubt standard at trial. See *id.* at 127a-130a (Kavanaugh, J., dissenting from the denial of rehearing en banc) (collecting cases); see also *id.* at 105a (Pillard, J., concurring in the denial of rehearing en banc) (acknowledging that officers faced with claims of an innocent mens rea need not "ignore other[] circumstantial evidence of culpability" or credit accounts that are "implausible").

The account of Peaches, moreover, was especially unworthy of belief, because Peaches was evasive, lied to officers, and refused to come to the house to speak to the officers in person—before hanging up the phone and cutting off contact with officers altogether. Pet. App. 5a, 50a.

Further, even if the version of events provided by Peaches were fully credited, officers could still have inferred that partygoers knew or should have known that their presence was unauthorized in view of the condition of the premises, the conduct occurring there, the partygoers' flight, and the implausible and inconsistent accounts given by those at the party.

c. The panel below alternatively suggested that, even setting aside Peaches' account and the exculpatory statements of partygoers, not enough evidence existed to provide probable cause that partygoers knew or should have known they were not authorized to be on the premises. In reaching that conclusion, however, the court relied on a "divide-and-conquer analysis" that "departs sharply" from this Court's guidance concerning totality-of-the-circumstances analysis. *Arvizu*, 534 U.S. at 274 (explaining that a divide-and-conquer approach is inconsistent with totality-of-the-circumstances analysis, in the context of a reasonable-suspicion-based stop); see *Harris*, 133 S. Ct. at 1055

(reaffirming that probable-cause determinations are made based on the totality of the circumstances). The court examined circumstances suggesting a culpable mens rea on which petitioners relied, discarding them in turn because it found each insufficient to establish probable cause when considered separately. It brushed aside the virtually vacant condition of the house in which respondents were found after 1 a.m. because it concluded that condition was "*on its own*" inadequately probative, and it discounted the partygoers' scattering once they saw police as not "sufficient *standing alone* to create probable cause." Pet. App. 16a (emphases added). That "evaluation and rejection" of evidence by considering factors "in isolation from each other" is inconsistent with analysis premised on "the 'totality of the circumstances,' as [this Court's] cases have understood that phrase." *Arvizu*, 534 U.S. at 274.

The panel similarly erred in dismissing circumstantial evidence that respondents knew or should have known their presence was unauthorized on the ground that the evidence could have an innocuous explanation. The court declined to draw any inference from the illegal drugs at the party, suggesting that officers who smelled a strong odor of marijuana could have been mistaken because the officers "did not *see* any evidence of drugs." Pet. App. 16a n.5 (emphasis added). It declined to find relevant the near-vacant condition of the home, reasoning that the "sparse furnishings" could be consistent with a tenant's hosting a party just before moving in. *Id.* at 16a-17a. And it suggested that the strip-club-like activity was not probative because homeowners could have agreed to host a bachelor party involving such activity in their home. *Id.* at 15a-16a. That approach was contrary to this

Court's decisions. The Court has held that "[i]nnocent behavior frequently will provide the basis for a showing of probable cause." *Gates*, 462 U.S. at 244 n.13; see *id.* at 243-246. It has likewise rejected the proposition that conduct is irrelevant under a totality-of-the-circumstances framework simply because it is "susceptible to an innocent explanation." *Arvizu*, 534 U.S. at 274.

d. The court of appeals' unduly stringent approach to mens rea would undermine the "fair leeway for enforcing the law in the community's protection" that the probable-cause standard embodies. *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). As an initial matter, the panel's approach would make it exceedingly difficult to make arrests and begin the adjudicatory process in trespassing cases. If circumstantial evidence is insufficient for probable cause in a case in which the premises were virtually vacant and in disarray, illegal activity was occurring on the premises, partygoers fled and hid when police arrived, and those present gave inconsistent and implausible accounts, then it will be the rare case where officers will have sufficient evidence to arrest for trespass at a private home in the absence of a confession or evidence of an additional crime such as burglary. The majority below all but acknowledged this point: In response to petitioners' observation that the court's approach would make it nearly impossible to enforce the unlawful-entry statute at many types of properties, the panel responded only that officers could still ask trespassers to leave—and make arrests if the exact same trespassers later returned. Pet. App. 17a.

The court of appeals' approach to mens rea would have ramifications beyond trespassing statutes. Mens

rea requirements, such as those contained in the unlawful-entry statute, are the "general rule" in criminal law. *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted). And as Judge Kavanaugh observed in his dissent below, "officers often hear a variety of mens rea-related excuses" when "people appear to be engaged in unlawful activity": "'The drugs in my locker aren't mine.' 'I don't know how the loaded gun got under my seat.' 'I didn't realize the under-aged high school kids in my basement had a keg.' 'I wasn't looking at child pornography on my computer, I was hacked.' 'I don't know how the stolen money got in my trunk.' 'I didn't see the red light.' 'I punched my girlfriend in self-defense.'" Pet. App. 126a. A decision that requires officers to give substantial weight to exculpatory accounts at the probable-cause stage or that adopts a stringent, piecemeal approach to circumstantial evidence of mens rea at the time of arrest would jeopardize the ability of law enforcement agents, prosecutors, and grand juries to begin the adjudicatory process across the entire spectrum of cases involving mens rea elements. And such a decision would have ramifications for pre-arrest investigations as well, because probable cause is also the showing necessary to obtain a search warrant in a criminal investigation.

B. At A Minimum, The Officers Were Entitled To Qualified Immunity

Even if officers lacked probable cause to arrest respondents, they were entitled to qualified immunity under Section 1983, because they did not violate clearly established law.

1. Section 1983, which provides a cause of action against state and local officials for the deprivation of

constitutional rights under color of law, incorporates common-law principles of official immunity. See *Filarsky* v. *Delia*, 566 U.S. 377, 383-384 (2012); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982). The same common-law immunity principles apply in actions against federal officials for violations of constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Under the doctrine of qualified immunity, government officials may not be subject to civil monetary damages for their acts unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citations omitted). A clearly established right, this Court has explained, "is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Ibid.* (citation omitted). The doctrine thus "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (citations and internal quotation marks omitted). In so doing, qualified immunity serves the public interest by ensuring that "fear of personal monetary liability and harassing litigation" will not "unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987); see *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985).

The first step of qualified-immunity analysis is to define the right at issue "at the appropriate level of specificity." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). This Court has repeatedly cautioned "that 'clearly es-

tablished law' should not be defined 'at a high level of generality.'" *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)). Framed "as a broad general proposition" —for instance, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established. *Reichle* v. *Howards*, 566 U.S. 658, 665 (2012) (citation omitted). Instead, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Ibid.* (citation omitted). This Court has instructed that "specificity is especially important in the Fourth Amendment context"—an area involving highly case-specific determinations in which "it is sometimes difficult for an officer to determine how the relevant legal doctrine * * * will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (brackets and citation omitted).

After defining the right at issue at an appropriate level of specificity, a court must next ask whether "every reasonable official would have understood that what he is doing violates" that particularized right. *Reichle*, 566 U.S. at 664 (citations, brackets, and internal quotation marks omitted). In this analysis, although "the very action in question" need not "have previously been held unlawful," *Safford Unified Sch. Dist. #1* v. *Redding*, 557 U.S. 364, 377 (2009) (brackets and citation omitted), "existing precedent must have placed the * * * constitutional question beyond debate," *Reichle*, 566 U.S. at 664 (citation omitted).

2. a. Officers were entitled to qualified immunity because, at a minimum, it was not clearly established when officers arrested respondents that doing so violated respondents' Fourth Amendment rights. Whether an

arrest comports with the Fourth Amendment depends on whether, under the totality of the circumstances known to officers, there existed probable cause that the arrestee was committing a crime. See, *e.g.*, *Beck*, 379 U.S. at 91. Accordingly, to determine whether it was clearly established that an arrest violated the Fourth Amendment, a court must determine whether it was clearly established that the facts and circumstances known to officers did not constitute probable cause. See *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (explaining in the context of a *Bivens* suit for false arrest in violation of the Fourth Amendment that qualified immunity depended on whether "a reasonable officer could have believed that probable cause existed to arrest" in light of "the facts and circumstances within [officers'] knowledge") (citation omitted).

Particularized to "the facts and circumstances" known to police officers at the time of respondents' arrests, the question in this case is whether it was clearly established that officers lacked probable cause that a group of people "having a party late at night with strippers and drugs" in a "house that none of the partiers owned or rented," had committed unlawful entry, when the homeowner confirmed that the party was unauthorized, the premises were in disarray and furnished in a manner consistent with a vacant house, and partygoers scattered when officers arrived and gave inconsistent and implausible accounts—but several partygoers claimed "permission from a woman named Peaches to use the house." Pet. App. 119a, 125a (Kavanaugh, J., dissenting from the denial of rehearing en banc).

It was not clearly established that officers lacked probable cause for unlawful entry under these circumstances, so that "every reasonable official" would have understood that arresting respondents violated the Fourth Amendment. *Reichle*, 566 U.S. at 664 (citations and internal quotation marks omitted). Neither respondents nor the panel below identified any decision finding that officers lacked probable cause of unlawful entry under remotely similar facts. See Pet. App. 22a; *id.* at 136a (Kavanaugh, J., dissenting from the denial of rehearing en banc). Nor had any decision held, more generally, that officers were required to credit claims of an innocent mens rea in assessing probable cause. *Id.* at 136a (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Instead, the most on-point case law supported officers' decision to arrest. *Tillman* v. *Washington Metropolitan Area Transit Authority*, 695 A.2d 94 (D.C. 1997), strongly suggested that officers who found a defendant unlawfully present at a location were generally permitted to find probable cause that the defendant had a culpable mens rea based on the defendant's commission of the actus reus. *Id.* at 96. That decision rejected the Section 1983 claims of a person arrested for violating a law that prohibited "knowingly" entering "the paid area" of a Metro station without paying a fare. *Ibid.* (quoting D.C. Code § 44-224 (Supp. 1990)). The court declined to accept the plaintiff's argument that officers lacked probable cause because they "had no reason to believe that [the plaintiff] was 'knowingly' in the paid area," concluding instead that "[t]he officers reasonably could have inferred from [the plaintiff's] undisputed conduct that he had the intent required." *Ibid.* More broadly, the

court explained: "We think it would be an unusual case where the circumstances, while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that the police would not even have probable cause for an arrest," in light of "the ordinary and reasonable inference that people know what they are doing when they act." *Ibid.* (citing cases involving filing a false tax return, fare evasion, entering building with intent to steal, and shoplifting). That principle has obvious application here.

Cases under the unlawful-entry provision at issue in this case afforded additional reason to conclude that there was probable cause to arrest respondents. As Judge Kavanaugh observed in his dissent (Pet. App. 134a-136a), the D.C. Court of Appeals had repeatedly affirmed unlawful-entry convictions of defendants who offered innocent excuses for their presence. See *Artisst* v. *United States*, 554 A.2d 327, 329 (1989) (defendant claiming to have entered a dormitory to buy soccer equipment from a resident); *McGloin* v. *United States*, 232 A.2d 90, 90-91 (1967) (defendant claiming to have entered an apartment building in search of a friend or a lost cat); see also Pet. Br. 46 (citing additional cases). By confirming that claims of innocent mens rea may be discounted when determining guilt beyond a reasonable doubt, these decisions established *a fortiori* that officers need not credit such claims when determining probable cause.

Moreover, the decisions of the D.C. Court of Appeals were consistent with cases of "[a]lmost every court of appeals" holding that officers need not "definitively resolve difficult mens rea questions in the few moments in which officers have to decide whether to

make an arrest." Pet. App. 127a (Kavanaugh, J., dissenting from the denial of rehearing en banc) (emphasis omitted); see *id.* at 127a-130a (collecting cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits). Applying that principle, courts across the country have found that officers acted properly in arresting individuals for trespassing, even when the arrestees offered innocent explanations to officers on the scene.[5]

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[5] See *Finigan* v. *Marshall*, 574 F.3d 57, 59 (2d Cir. 2009) (rejecting false-arrest claim of member of divorcing couple arrested at her former home, although the woman had told the arresting officer that she shared legal title to the premises); *Wright* v. *City of Philadelphia*, 409 F.3d 595, 597, 603 (3d Cir. 2005) (concluding that officers had probable cause to arrest a woman for trespassing, even though she had apparently reentered a property where she was sexually assaulted to retrieve personal belongings and evidence, because while officers "may have made a mistake" when they "did not believe [the woman's] explanation for her entry," the probable-cause "standard does not require that officers correctly resolve conflicting evidence" or accurately assess credibility); *Hutton* v. *Strickland*, 919 F.2d 1531, 1540-1541 (11th Cir. 1990) (rejecting Section 1983 claim of couple arrested for trespassing even though the arrestees asserted that "they lacked the willful intent to commit an unlawful act" on the ground that "the obvious presence of the elements evidencing the commission of misdemeanor trespass warranted the arrest"); *Bodzin* v. *City of Dallas*, 768 F.2d 722, 723-726 (5th Cir. 1985) (rejecting false-arrest claim of plaintiff arrested for trespassing who had asserted that he was on public property); *Anderson* v. *DeCristofalo*, 494 F.2d 321, 322-323 (2d Cir. 1974) (per curiam) (rejecting Section 1983 claims of plaintiffs arrested for trespassing even though the plaintiffs had asserted they were lawfully present in an apartment); *State* v. *Newcomb*, 20 A.3d 881, 884-885 (N.H. 2011) (concluding that officers had probable cause to arrest a defendant who claimed he was leaving a U-Haul truck on his aunt's property, because circumstantial evidence suggested defendant "knew he was not

In sum, at the time that respondents were arrested, no case suggested that officers lacked probable cause for unlawful entry when an arrestee offered an innocent explanation but there was circumstantial evidence of a culpable mens rea, and many decisions supported a contrary conclusion.

Finally, the disagreement among judges on probable cause in this case confirms that this was not a situation in which any reasonable officer would have found probable cause lacking. Four out of the 11 judges considering this case at the district court and court of appeals stages found that officers *did* have probable cause to arrest respondents. When judges themselves disagree, this Court has long recognized that it is generally "unfair to subject police to money damages for picking the losing side of the controversy." *Layne*, 526 U.S. at 618; see *al-Kidd*, 563 U.S. at 743.

b. In denying qualified immunity notwithstanding the state of the law and the disagreement among judges, the court below deviated from this Court's framework for qualified-immunity decisions. Although this Court has explained that the "clearly established law" against which officers' conduct is measured for purposes of qualified immunity must be "'particularized'

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allowed on the premises"); see also *Borgman* v. *Kedley*, 646 F.3d 518, 524 (8th Cir. 2011) (explaining in a case involving a trespassing arrest that "[i]t is usually not possible for an officer to be certain about a suspect's state of mind at the time of a criminal act" and that officer "need not rely on an explanation given by the suspect"); *Paff* v. *Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (stating in a case involving a trespassing arrest that "[a]bsent a confession, the officer considering the probable cause issue in the context of crime requiring a mens rea on the part of the suspect will always be required to rely on circumstantial evidence regarding the state of his or her mind").

to the facts of the case," the court of appeals measured petitioners' conduct against the principle, "at a high level of generality," *Pauly*, 137 S. Ct. at 552 (citations omitted), "that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element," Pet. App. 23a. That broad principle cannot establish that only the "plainly incompetent or those who knowingly violate the law" would have thought respondents' arrests lawful, *Carman*, 135 S. Ct. at 350 (citations omitted), because it does not resolve whether the facts of this case provided "some evidence" supporting each of the elements of unlawful entry, Pet. App. 23a; see *Mullenix*, 136 S. Ct. at 308 (emphasizing the need for "specificity" in determining qualified immunity under the Fourth Amendment because "it is sometimes difficult for an officer to determine how the relevant legal doctrine * * * will apply to the factual situation the officer confronts") (brackets and citation omitted); see also *Bryant*, 502 U.S. at 228 (concluding that officers were entitled to qualified immunity for arrests if they could reasonably have believed probable cause existed in light of the "facts and circumstances within their knowledge") (citation omitted).

The panel alternatively asserted that it was obvious that the circumstantial evidence of a culpable mens rea in this case was inadequate, even in the absence of any decision reaching that conclusion on similar facts —invoking the principle that officials can sometimes be "on notice that their conduct violates established law even in novel factual circumstances." Pet. App. 23a (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002));

see *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (stating that "in an obvious case" Fourth Amendment principles "at a high level of generality" "can 'clearly establish' the answer, even without a body of relevant case law"). But a case involving evidence long recognized as supporting an inference of culpable mens rea, see, *e.g.*, *Sibron*, 392 U.S. at 66 (flight); *Tillman*, 695 A.2d at 96 (unlawful presence); 2 LaFave § 3.6(f), at 449-451 (implausible or inconsistent accounts), where the closest precedents supported a finding of probable cause and judges sharply disagreed over the ultimate probable-cause determination, is not a case in which general principles alone made it obvious that probable cause was lacking.

Nor is it consistent with the objectives of qualified immunity to impose personal liability because judges conclude, after the fact, that the evidence fell short in light of a "case-specific assessment of the circumstantial evidence in the record"—even though no case had previously reached such a holding on similar facts. Pet. App. 113a (Pillard, J., concurring in the denial of rehearing en banc). Officers must routinely determine on the spot whether a novel set of facts established probable cause for an offense with a mens rea requirement. See *id.* at 126a (Kavanaugh, J., dissenting from the denial of rehearing en banc) (offering examples involving guns, drugs, child pornography, theft, assault, and other crimes). If million-dollar personal liability judgments could rest on a court's after-the-fact conclusion that particular circumstantial evidence did not add up to sufficient proof of mens rea, officers would likely be chilled from making even legitimate arrests. A central purpose of qualified im-

munity is to prevent that result. See, *e.g.*, *Forsyth*, 472 U.S. at 525-526.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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