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.*,
Respondent.

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

BRIEF FOR PETITIONERS

TERESA AKKARA
JACK HEYBURN
DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL
441 4th Street, N.W., Suite 600S
Washington, D.C. 20001

Counsel for Petitioners

OCTOBER 20, 2017

QUESTIONS PRESENTED

Responding to a complaint of loud noise and illegal activity, police officers found a group of partiers late at night in a vacant house. None of those present owned or rented the house. The suspects' behavior also seemed suspicious: some fled upon seeing the officers; others gave inconsistent explanations for their presence; and the purported host refused to come to the house out of fear of arrest. When the officers contacted the actual owner, he explicitly stated that no one had permission to be at the property. Given these circumstances, the officers arrested the suspects for unlawful entry.

The questions presented are:

1. Did the officers have probable cause under the Fourth Amendment to arrest the suspects for unlawful entry?
2. Were the officers entitled to qualified immunity, a doctrine which protects all those but the "plainly incompetent" or those who "knowingly violate clearly established law?" *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014).

PARTIES TO THE PROCEEDINGS

Petitioners, who were defendant-appellants below, are the District of Columbia and Officers Andre Parker and Anthony Campanale.

Respondents, who were plaintiff-appellees below, are Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Ethelbert Louis, Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., and Stanley Richardson.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

COURT OF APPEALS CASES

DISTRICT COURT CASES

STATE COURT CASES

TREATISES

OTHER AUTHORITIES

STATUTES

IN THE
Supreme Court of the United States

No. 15-1485

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,
Petitioners,

v.

THEODORE WESBY, *et al.*,
Respondent.

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

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion and order of the court of appeals denying a petition for rehearing en banc (J.A. 105-42) is reported at 816 F.3d 96. The opinion of the court of appeals (J.A. 4-47) is reported at 765 F.3d 13. The opinion and order of the district court (J.A. 48-104) is reported at 841 F.Supp.2d 20.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. A petition for rehearing en banc was

denied on February 8, 2016. The petition for a writ of certiorari was filed on June 8, 2016, and was granted on January 19, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…" U.S. Const. amend. IV.

STATEMENT

1. As Saturday night turned into Sunday morning on March 16, 2008, the District of Columbia Metropolitan Police Department received a complaint of loud music and possible illegal activity in a vacant house in D.C.'s Anacostia neighborhood. J.A. 214. This was not the first time that officers had been called to this location. J.A. 203. Neighbors had repeatedly voiced concerns about the "ongoing problem" at this location, which appeared to be abandoned. J.A. 233. In this case, appearances were not deceiving; on the night in question, the property had been listed as vacant for several months. J.A. 214.

Officers arrived on the scene at approximately 1:30 a.m. J.A. 50. As they approached the front door, they could hear loud music emanating from the house. J.A. 214. Two officers knocked on the front door, prompting a man to peer out of the window. J.A. 214. After identifying the callers as uniformed police officers, he darted away from the door and up a flight of stairs to the second floor. J.A. 214. Another individual then opened the door, and the officers observed several others "scattering into different rooms." J.A. 245.

Upon entering, the officers identified the smell of illicit drugs wafting throughout the house. J.A. 214; J.A. 207; J.A. 233. Field tests would later confirm that the suspicious substance found on a window ledge was in fact marijuana. J.A. 214. In addition to the presence of illegal drugs, the house was also littered with beer cans, cups of liquor, and condoms. J.A. 206; J.A. 214; J.A. 267. Several of the women present were scantily clad, wearing only undergarments with dollar bills strapped to garter belts around their legs. J.A. 214; J.A. 267. Their actions, officers observed, were "consistent with activity being conducted in strip clubs." J.A. 214.

It seemed clear to the officers that no one was living in this house. J.A. 214. Officers reported that the "entire home was in disarray" and that the circumstances were "consistent with it being a vacant property." J.A. 214. "Beyond fixtures and large appliances," the house contained "no furniture" other than a few folding chairs. J.A. 39; J.A. 206. The kitchen was set up "in a manner similar to a bar" and one of the rooms on the second floor was furnished only with a "bare mattress and lighted candles." J.A. 214; J.A. 39. Furthermore, a neighbor who had lived "in the area for numerous years" informed the officers that the property was "supposed to be vacant." J.A. 214.

The officers observed multiple instances of the suspects engaging in furtive behavior. In addition to the man who initially fled the officers, J.A. 214, and the individuals who scattered into different rooms once the officers entered, J.A. 245, officers found another individual hiding in the closet. J.A. 279. The man in the closet, along with two others in the second-story bathroom and bedroom, were subsequently asked to join the other suspects on the first floor. J.A. 279. All told, the officers counted approximately twenty-one men and women present in the house. J.A. 51.

At that point, the officers tried to determine what brought these individuals to the location and who owned the property. J.A. 214. They received "inconsistent and conflicting" statements on both scores. J.A. 13. Most of the guests told the officers that they were there for a bachelor party, but a few maintained that they were celebrating a birthday. J.A. 122. Despite the disagreement about what they were celebrating, everyone gave consistent answers regarding whose birthday or wedding was being celebrated: they didn't know. J.A. 122.

The officers' attempts to determine who owned or rented the property produced similarly confused results. One of the responding officers testified that "no one at the location could provide me a name or a number of the owner." J.A. 162. Other officers also reported that the suspects did not know who owned the home. J.A. 176; J.A. 279. Of the suspects who sat for depositions, one, Brittany Stribling, testified that she did not know who owned or rented the house. J.A. 221-22. Another, Natasha Chittams, did not know for sure who rented the house, but assumed that it was a woman named Tasty. Sanjah Hunt, however, identified a woman named Peaches as the rentor of the house. J.A. 144-45. It was Peaches, Hunt asserted, who authorized the partiers to use the house. J.A. 145.

Peaches, however, was not at the house that night. J.A. 206-07. In fact, she actively stayed away from the house out of fear of being arrested. J.A. 267. When one of the officers managed to get a hold of her over the phone, she initially said that "no one" had given her permission to be inside the house. J.A. 162. She told the officer that she was "possibly renting the house from the owner" and that she told the suspects that they could have their party there. J.A. 162. The officer, once again, asked her "who gave her permission to give them permission" to enter the

house, at which point she "became evasive and hung up" on the officer. J.A. 162.

The officer redialed Peaches, and again asked her who gave her permission to use the house. J.A. 163. On this call, Peaches changed her tune. She "began yelling saying that she had permission," contradicting her previous statement that "no one" gave her permission. J.A. 163. Although she "didn't know the owner's name," she maintained that "she had permission to be inside the residence because she was going to rent the place out." J.A. 163. At that point, she hung up on the officer again. J.A. 163. The next call was placed by a detective who had arrived on the scene. J.A. 163. Once again, Peaches changed her story. On this call, she admitted that "she didn't have permission to be inside the location." J.A. 163.

At some point in the night a third officer also spoke with Peaches. On this call, she stated that she had "left the house to go to the store." J.A. 267. None of the suspects, however, placed Peaches at the house at any point that night. J.A. 7; J.A. 53. When asked to return to the house, she "refused to do so because she stated that she would be arrested." J.A. 267. At this point, Peaches had apparently discovered who owned the house, and gave the officer the number of a man named Hughes. J.A. 208. The same officer called Hughes, who confirmed that he was the owner of the property. J.A. 208. Hughes told the officer that he tried to work out a lease agreement with Peaches but that "they never came to an agreement." J.A. 208. He stated unequivocally that Peaches "did not have permission to be in the house." J.A. 208.

All of this information was relayed to the officer in charge, who then made the decision to "arrest all those present for unlawful entry." J.A. 268. The officers had established that these individuals were on private property

without authorization from the owner. J.A. 208. Furthermore, the officers had observed "evasive" conduct from both Peaches and the suspects at the house, as well as a host of other conduct that they considered to be suspicious. J.A. 162; J.A. 279.

The parties were then named as defendants and transported to the Sixth District for processing. J.A. 214. At the station, the watch commander briefly changed the charges from unlawful entry to disorderly conduct. J.A. 51. These charges were later dropped and the suspects were released on that same day. J.A. 51. Sixteen of the suspects subsequently brought claims against the District of Columbia and five of the officers for false arrest and negligent supervision. J.A. 49.

2. Respondents filed three claims in the U.S. District Court for the District of Columbia. First, they brought a false arrest claim against five officers in their individual capacities under 42 U.S.C. § 1983. Second, they brought false arrest claims against both the officers and the District of Columbia under D.C. common law. Third, they brought a negligent supervision claim against the District of Columbia. Only the false arrest claim under 42 U.S.C. § 1983, brought against Officers Campanale and Parker and the District of Columbia, is at issue on this appeal.

After evaluating the cross motions for summary judgment, the district court granted summary judgment for Respondents on both the Fourth Amendment and common law claims. J.A. 101-02. The district court held that the officers had lacked probable cause to arrest Respondents for unlawful entry because "nothing about what the police learned at the scene" suggested that respondents "'knew or should have known that they were entering against the owner's will.'" J.A. 67. The district court then dismissed Petitioners' qualified immunity defense, asserting that there is "no question that the law is clearly

established," and that "District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent." J.A. 77. As a result, the officers are now liable for damages to the tune of "almost $1 million." J.A. 120.

3. Over a vocal and well-reasoned dissent, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision. J.A. 5-6. Analyzing the §1983 and common law false arrest claims as one, the D.C. Circuit majority found that there was no probable cause for Respondents' arrest. J.A. 15-16. The court reasoned that while "probable cause 'does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction,'" probable cause cannot be established without "at least some evidence" that the suspects knew or should have known their entry was against the will of the owner. J.A. 12-13. The court proceeded, however, to dismiss other pieces of circumstantial evidence. First, the court dismissed the fact that the homeowner, Hughes, had told officers he had not given the attendees permission to be there. J.A. 15. The court reasoned that "Hughes never said that he or anyone else had told the [respondents] that they were not welcome in the house." J.A. 15. Then, acknowledging that the suspects "scattered and hid," the court reasoned that "such behavior may be 'suggestive' of wrongdoing, but is not sufficient standing alone to create probable cause." J.A. 19.

The D.C. Circuit majority also affirmed the district court's denial of qualified immunity. J.A. 35. It found that it was clearly established that (1) probable cause requires "at least some evidence" for each necessary element, including the "state-of-mind element," and (2) District law

"plainly require[s] that a suspect "knew or should have known that his entry was unwanted." J.A. 26.

Judge Brown's dissent criticized the circuit court's "broad new rule" that "[o]fficers must prove individuals occupying private property know their entry is unauthorized," while "any plausible explanation resolves the issue of culpability in the suspects' favor." J.A. 35. Judge Brown feared that this "impossible standard for finding probable cause" would "undercut[] the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden that the Court declines to specify." J.A. 37. Judge Brown emphasized that for general intent crimes, "probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." J.A. 38. She then acknowledged that while a jury "might credit" Respondents' explanations, for the purpose of summary judgment, "respondents' lack of knowledge must not be merely 'consistent' with the evidence gathered by the police. Instead…[it] must be the only reasonable inference the officers could draw." J.A. 38. On the issue of probable cause, Judge Brown concluded that "[t]he circumstances surrounding the arrest were sufficient to support the inference that the suspects knew or reasonably should have known that their entry was unlawful." J.A. 40.

Judge Brown also dissented from the majority's denial of qualified immunity because "the pre-existing law of unlawful entry is not so clear that a reasonable officer would have known that he lacked probable cause to arrest plaintiffs." J.A. 45. The situation encountered by the officers, Judge Brown explained, "rests uneasily between two distinct strands of District law." J.A. 45. Judge Brown further reasoned: "to the extent that pre-existing law is

broadly comparable, a reasonable person could find it *supports* an officer's finding of probable cause where a trespassers claim of invitation is deemed insufficiently credible." J.A. 46 (emphasis added). In conclusion, Judge Brown stated "nothing in the District's law requires officers to credit the statement of intruders regarding their own purportedly innocent mental state where the surroundings and circumstances cast doubt on the veracity of such claims." J.A. 46.

4. Over a dissent joined by four judges, the D.C. Circuit denied the petition for rehearing en banc. J.A. 107. In a concurring opinion to the denial, Judge Pillard stated that she "view[s] the law the same way the dissent does," but disagrees solely on the facts. J.A. 108. Judge Pillard accepted that "if the facts of which the officers are aware and the reasonable inferences that arise from those facts cast doubts on a suspect's story, officers need not credit the suspect." J.A. 108. She also acknowledged that "officers are 'entitled to discredit' a suspects' claims of an innocent explanation for entry into house in the face of conflicting information,'" J.A. 108, but ultimately determined that an officer could not conclude that the suspects "had a culpable state of mind." J.A. 116.

The dissent, written by Judge Kavanaugh, and joined by Judges Henderson, Brown, and Griffith, worried that the majority panel opinion "contravene[d] emphatic Supreme Court directives" that "police officers may not be held liable for damages unless the officers were 'plainly incompetent' or 'knowingly violated' clearly established law." J.A. 120. The dissenting judges believed that "the officers reasonably could have concluded that there was probable cause to arrest the partiers for trespassing." J.A. 120. Furthermore, the dissent criticized the majority opinion for requiring officers to credit a suspect's pleas of innocence in the face of conflicting information. To this,

the dissent asked, "What case had ever articulated such a counterintuitive rule? Crickets." J.A. 139.

The concurring opinion, the dissent claimed, was "divorced from the real world that police officers face on a regular basis" and constituted a "new rule." J.A. 140. The dissent concluded by noting: "as the Supreme Court has shouted from its First Street rooftop for several years now, qualified immunity protects officers from personal liability for violating rules that did not exist at the time of the officers' actions." J.A. 140.

SUMMARY OF ARGUMENT

The officers' arrest neither violated the Fourth Amendment nor any clearly established law.

I. This Court has often reminded litigants that probable cause under the Fourth Amendment "is not a high bar." *Kaley* v. *United States*, 134 S. Ct. 1090, 1103 (2014). By design, this standard "rejects rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Florida* v. *Harris*, 568 U.S. 237, 244 (2013). This flexibility is needed in order to accommodate two oft-competing interests: keeping citizens free from unreasonable searches and seizures and providing law enforcement with the leeway to effectively protect communities. *See Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). The D.C. Circuit, however, strayed from this well-established standard. In the decision below, the court crafted a rigid rule of its own—that direct evidence must be found for *each element* of an offense in order to establish probable cause. *See* J.A. 12-13. Such a requirement places an undue burden on officers who must often make snap judgments in the field to further public safety. Time and time again, this Court has rejected such exacting rules in favor of a more "practical and common-

sensical standard" that takes into account "the totality of the circumstances." *Harris*, 568 U.S. at 244.

This Court has repeatedly stated that probable cause does not "require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams* v. *Williams*, 407 U.S. 143 (1972). Nevertheless, the facts known to the officers at the time of the arrest showed, with uncontroverted evidence, that the suspects had met three of the four elements of unlawful entry. The suspects were on private property without legal authorization—the actus reus of the offense—and had the general intent to enter the property to attend a party. With the actus reus established, little else is required for probable cause. *See Maryland* v. *Pringle*, 540 U.S. 366 (2003). Indeed, courts acknowledge that it is often difficult or impossible for officers to obtain evidence of a suspect's mens rea when making an arrest in the field. Nevertheless, the officers could infer from the suspects' furtive behavior, inconsistent statements, and other suspicious activity that there was a "fair probability" that they possessed the necessary mental state for the offense. These facts, when viewed in light of the totality of the circumstances, meet this Court's standard for probable cause under the Fourth Amendment.

II. Even if Respondents' arrest was not supported by probable cause, Petitioners are shielded by qualified immunity. This doctrine protects all but the "plainly incompetent" or those who "knowingly violate" clearly established law. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015). This Court has always instructed lower courts to examine qualified immunity "in light of the specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004). *See also O'Malley* v. *City of Flint*, 652 F.3d 662, 668 (6th Cir. 2011) ("examine the asserted right at a relatively high level of specificity,

and on a fact-specific, case-by-case basis."). To defeat a qualified immunity defense, a plaintiff must demonstrate that "unlawfulness [is] apparent" from the applicable law. *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Wardlaw* v. *Pickett*, 1 F.3d 1297, 1301(D.C. Cir. 1993) ("unlawfulness of the defendants [must be] so apparent that no reasonable officer could have believed in the lawfulness of his actions"). Both the circuit and district courts ignored these directives by retroactively applying new rules to the facts of this case. Their subsequent denial of qualified immunity deprives Officers Parker and Campanale of their constitutional right to notice.

Three areas of law, pertinent to unlawful entry, are not sufficiently clear. First, the standard for the mens rea element of unlawful entry "lacked precision." *Ortberg* v. *United States*, 81 A.3d 303, 307 (D.C. 2013). Though the D.C. Circuit later clarified this standard in *Ortberg*, it erred in applying that newly articulated rule retroactively to the instant case. The officers were thus deprived of their right to notice. Second, the court applied the "some evidence for each element" probable cause standard to the general intent crime of unlawful entry. Within the D.C. Circuit, this standard has—at least arguably—only been used for crimes of *specific* intent. *See, e.g.*, *United States* v. *Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999) (applying the "some evidence" standard to a crime of specific intent). That the "some evidence for each element" standard would be applied to a crime of general intent was not clearly established. Third, the circuit court cites no case that justifies a requirement that officers credit a suspect's claim of innocent entry in the face of circumstantial evidence casting doubt on such claims. Furthermore, the circuit court's categorical dismissal of circumstantial evidence requires officers to procure *direct* evidence regarding mental state when faced with any claims to innocence,

however dubious. The circuit court's retroactive application of these new rules shrivels in the face of the officers' constitutional right to notice. This cockeyed approach to qualified immunity hamstrings officers when resolute action is needed to further public safety.

ARGUMENT

THE OFFICERS' ARRESTS NEITHER VIOLATED THE FOURTH AMENDMENT NOR ANY CLEARLY ESTABLISHED LAW

When analyzing an officer's assertion of qualified immunity, a court must conduct two analyses. *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). First, the Court must determine whether the facts show that a constitutional right has been violated. Here, the officers' arrest of Respondents for unlawful entry—when Respondents were found on private property without authorization and circumstantial evidence showed that they possessed the necessary mens rea—meets the low bar established by this Court for probable cause. *Kaley*, 134 S. Ct. at 1103 ("Probable cause, we have often told litigants, is not a high bar."). Because the officers' arrest was valid under the Fourth Amendment, the Court needn't reach the second question. If, however, the Court finds that the facts show a constitutional violation, it must determine whether "a reasonable officer could have believed [the arrest] to be lawful, in light of *clearly established law*." *Anderson* v. *Creighton,* 483 U.S. 635, 641 (1987) (emphasis added). There is no authority, either in the federal courts or the D.C. courts, which clearly establishes an officers' lack of probable cause to arrest under these circumstances. Accordingly, Respondents' claims fail on the second inquiry as well.

I. THE OFFICERS' ARRESTS MEET THIS COURT'S FLEXIBLE STANDARD FOR PROBABLE CAUSE UNDER THE FOURTH AMENDMENT

A warrantless arrest is lawful under the Fourth Amendment if it is supported by probable cause. *Beck* v. *Ohio*, 379 U.S. 89 (1964). Because probable cause is "incapable of precise definition," *Pringle*, 540 U.S. at 371, this Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Harris*, 568 U.S. at 244. Probable cause is therefore a "fluid concept" that must be analyzed in light of the "totality of the circumstances." *Illinois* v. *Gates,* 462 U.S. 213, 230-32 (1983). Furthermore, because this is an appeal of a grant of Respondents' motion for summary judgment, the facts must be viewed in the light most favorable to Petitioners. *Scott* v. *Harris*, 550 U.S. 372, 378 (2007). Under this "practical and common-sensical standard," Petitioners had probable cause to arrest partiers for unlawful entry after discovering them in a vacant home without legal authorization to enter. *Harris*, 568 U.S. at 244. The suspects' pleas of innocence, in the face of evidence casting doubt on those claims, do not shield them from arrest.

A. Probable Cause Under The Fourth Amendment Is A Flexible And Objective Standard

1. When reviewing whether an arrest is lawful under the Fourth Amendment, courts ask "whether at the moment the arrest was made…the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck*, 379 U.S. at 91. This requires "more than bare suspicion," but "less than evidence which would justify condemnation or

conviction." *Brinegar*, 338 U.S. at 175. What is required, then, "is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Harris*, 568 U.S. at 244 (quoting *Gates*, 462 U.S. at 238). This standard, "we have often told litigants, is *not a high bar*." *Kaley*, 134 S. Ct. at 1103 (emphasis added).

The standard's flexibility is deeply rooted in our nation's history and "reflect[s] the ancient common-law rule" of probable cause. *United States* v. *Watson*, 423 U.S. 411, 418 (1976); *see also* William Blackstone, 4 Commentaries *287-89 ("[I]n case of felony actually committed, [the constable] may upon probable suspicion arrest the felon"). It has stood the test of time not due to blind respect for tradition, but instead because it has proven to be the "best compromise" between two oft-competing interests: "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime [and] giv[ing] fair leeway for enforcing the law in the community's protection." *Brinegar*, 338 U.S. at 176. "Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*

The D.C. Circuit's approach, which requires direct evidence for *each element* of an offense, is at odds with this time-tested standard. Although the concurring opinion to the court's denial for rehearing en banc referred to this as a "rather unexceptional statement," it is one that finds no support in this Court's jurisprudence. J.A. 111. In fact, this Court has explicitly rejected the proposition that officers must make a prima facie showing to establish probable cause. *Spinelli* v. *United States*, 393 U. S. 410, 419 (1969), overruled on other grounds in *Gates*, 462 U. S. at 238. This reflects the common-sense notion that officers are ill-suited to parse through the legal elements of an offense when making decisions in the field. "Because many

situations which confront officers in the course of executing their duties are more or less ambiguous," this Court has acknowledged that "room must be allowed for some mistakes on [the officers'] part." *Brinegar*, 338 U.S. at 176. The D.C. Circuit's rule, however, severely restricts officers seeking to make resolute decisions in ambiguous circumstances.

2. State law plays a limited role in the Fourth Amendment probable cause analysis. Although states often have their own requirements for what constitutes a lawful arrest, the question here "is not whether the [arrest] was authorized by state law. The question is rather whether the [arrest] was reasonable under the Fourth Amendment." *Cooper* v. *State of Cal.*, 386 U.S. 58, 61 (1967). That question is a matter of federal constitutional law; state law cannot alter that standard. *See Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) ("We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule."). Therefore, while the state offense for which a suspect was arrested serves as part of the factual backdrop, the requirements of the probable cause analysis are mandated by the Constitution.

In fact, an officer isn't even required to know the offense for which a suspect will be charged before making an arrest. This Court has observed that "[w]hile it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required." *Devenpeck* v. *Alford*, 543 U.S. 146, 155 (2004). Nor is it constitutionally required that the charged offense is "closely related"—or even tangentially related—to the offense that the arresting officer believed had been committed. *See Id*. at 153 ("The rule that the offense establishing probable cause must be 'closely related' to, and based on

the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with [our] precedent.").

This Court rejected the "closely-related" rule because the probable cause standard hinges on *objective* facts and circumstances, not the officer's *subjective* beliefs about those facts and circumstances. The D.C. Circuit's criticism, then, that the officers' were "apparently…confused or uninformed about the law" has no place in this analysis. J.A. 31. This Court's precedent "make[s] clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck*, 543 U.S. at 153. All that matters is whether the "circumstances, viewed *objectively*, justify [the] action." *Id.* (emphasis added).

B. The Facts And Circumstances Known To The Officers At The Time Of Arrest Support A Finding of Probable Cause

The probable cause analysis is so fact-intensive "that one determination will seldom be a useful 'precedent' for another." *Gates*, 462 U.S. at 238 n.11. Even where there is no single controlling case, however, this Court's body of case law constitutes a "mosaic" from which a "set of rules" can be derived. *Ornelas* v. *United States*, 517 U.S. 690, 697-98 (1996). This body of case law teaches that "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Williams*, 407 U.S. at 149. Rather, the elements of an offense serve as part of the factual backdrop to the probable cause analysis. Furthermore, these cases show that when the actus reus of a crime is established, officers do not need direct evidence of a suspect's mental state. Even so, the officers observed strong indicia of the suspects' guilty consciences, including fur-

tive behavior, inconsistent statements, and otherwise innocent behavior that is suspicious in the totality of the circumstances.

1. To support a *conviction* for unlawful entry, the government must prove that: "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter." *Culp* v. *United States*, 486 A.2d 1174, 1176 (D.C. 1985); *see also* D.C. Code Ann. § 22-3302 (West). Arresting officers, however, tend to make decisions without access to Westlaw terminals. Therefore, while the elements of D.C.'s unlawful entry statute are part of the factual backdrop of the probable cause analysis, they are not technical requirements to be parsed through in the field.

Even under the exacting standards of trial, the objective facts known to the officers were likely sufficient to establish three of these four elements, *beyond a reasonable doubt*. *First*, it is undisputed that the suspects entered private property; the officers witnessed this first-hand. J.A. 214. *Second*, the officers knew that the suspects did not have permission to be there; the owner explicitly told the officers that he had not authorized their entry. J.A. 208. *Third*, the officers knew that the suspects had the general intent to enter the house. J.A. 7. Because the D.C. unlawful entry statute is a general intent offense, *see Culp*, 486 A.26 at 1176 (requiring a "general intent to enter"), the suspects need not have the specific intent to violate the unlawful entry statute to satisfy the fourth element. Accordingly, the suspects' general intent to enter the premises to attend a party is sufficient to satisfy this element.

Given the overwhelming evidence against the suspects for three of the four elements, the officers likely had probable cause to arrest without any direct evidence whatsoever for the third element. The only open question, then, was whether the suspects' entry was against the express will of the owner. As we discuss in Section II, the law regarding this element of the offense is not clearly established. Furthermore, officers are under no constitutional requirement to provide some evidence for *each element* of the offense. Nevertheless, we will discuss the third element within the framework established by the D.C. Circuit in the opinion below. J.A. 12 (holding that unlawful entry requires that the suspect "knew or should have known" that they lacked authorization to enter).

2. In a case, such as this, where the actus reus of an offense has been established, officers do not need direct evidence for the mens rea element in order to establish probable cause. *See Pringle*, 540 U.S. 366. Evidence of a suspect's mental state is often the most difficult element of an offense to prove. Prosecutors may spend months, or even years, developing the case to prove a defendant's guilty conscience. Given the difficulty this inquiry poses to legal technicians who are not operating under strict time constraints, courts have recognized that it is unreasonable to expect officers to be able to prove a suspect's mental state, or even provide direct evidence for the same, when making decisions in the field. *See*, *e.g.*, *Cox* v. *Hainey*, 391 F.3d 25, 33–34 (1st Cir. 2004) ("[T]he practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great."); *Krause* v. *Bennett*, 887 F.2d 362, 372 (2d Cir. 1989) ("It is up to the factfinder to determine whether a defendant's story holds water, not the arresting officer.");

Paff v. *Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) ("Absent 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.").

In *Maryland* v. *Pringle*, this Court confronted circumstances, similar to the instant case, where officers made an arrest despite the suspects' pleas of innocence. 540 U.S. 366 (2003). There, officers stopped three suspects in a car with several bags of cocaine—all packaged for sale—and over $700 in rolled-up bills. *Id.* at 368. All three suspects claimed ignorance as to the ownership of the drugs. *Id.* This Court, in upholding the officers' finding of probable cause, rejected the approach of the Maryland Court of Appeals, which held: "[w]ithout additional facts available to the officer that would tend to establish petitioner's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when petitioner was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession." *Pringle* v. *State*, 370 Md. 525, 545 (2003). This court held, however, that it is "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine." *Pringle*, 540 U.S. at 372. The suspects' pleas of "we didn't do it" weren't enough to shield them from arrest.

3. Although probable cause requires little or no direct evidence of mens rea, the officers nevertheless observed facts and circumstances supporting an inference of the requisite mental state. These facts, taken together with the uncontroverted evidence showing that Respondent's committed the actus reus of the offense, are sufficient to establish probable cause to arrest for unlawful entry.

a. The officers observed several instances of the suspects engaging in furtive behavior. Indeed, the first act that the officers observed was flight. J.A. 214. The first person to see the officers darted away from the door and up a flight of stairs. J.A. 214. When the officers entered the house, several others scattered into different rooms. J.A. 245. Furthermore, at least one of the suspects was found hiding in a closet on the second floor. J.A. 279. This Court has repeatedly held that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea." *Sibron* v. *New York*, 392 U.S. 40, 66 (1968); *see also Illinois* v. *Wardlow*, 528 U.S. 119 (2000) (holding that defendant's flight from officers in a high crime area supported officers' reasonable suspicion that he was involved in criminal activity). Furthermore, this Court has explicitly stated that furtive behavior and flight, "when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime,"—knowledge such as, perhaps, uncontroverted evidence that the suspects committed the actus reus of the crime—"are proper factors to be considered in the decision to make an arrest." *Sibron*, 392 U.S. at 66–67. The suspects' furtive acts, therefore, lend significant weight to the officers' determination of probable cause.

b. The suspects also gave inconsistent and incomplete explanations for their presence. Some claimed they were at the house for a birthday party while others maintained they were attending a bachelor party. J.A. 122. Curiously, no one in this group of only twenty-one could identify the guest of honor and only one or two could provide an answer for who owned or rented the house. J.A. 122; J.A. 144-45; J.A. 162. While inconsistent statements are regulated by the federal rules of evidence for use at trial, *see* Fed. R. Evid. 613, this Court has held that these requirements do not apply to the probable cause analysis. *See Jones* v. *United States*, 362 U.S. 257, 271 (1960) *overruled*

on other grounds by United States v. *Salvucci*, 448 U.S. 83 (1980) ("We conclude therefore that hearsay may be the basis for a warrant."); 1 Barron & Holtzoff, Federal Practice & Procedure § 52 (4th ed.) ("The probable cause determination may be based on information inadmissible at trial."). Furthermore, courts of appeals often rely on such evidence when upholding an officer's finding of probable cause. *See*, *e.g.*, *United States* v. *Pack*, 612 F.3d 341, 360–61 (5th Cir.) ("[W]e decline to hold that the inconsistent stories in Pack's case do not suffice to create a reasonable suspicion of criminal activity."); *United States* v. *Galvan-Castro*, 225 F.3d 664 (9th Cir. 2000) ("Moreover, a defendant's inconsistent stories may strengthen an inference of knowledge."); *United States* v. *Armstead*, 112 F.3d 320, 322 (8th Cir. 1997) ("We think Armstead's inconsistent answers to the officers' questions and his curious explanation for his presence in the motel, when combined with the travel information, support a finding of probable cause.").

c. Moreover, "innocent behavior frequently will provide the basis for a showing of probable cause." *Gates*, 462 U.S. at 244 n.13. In *Gates*, this Court rejected the lower court's "too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause." *Id.* It held that the question is not whether "particular conduct is 'innocent' or 'guilty.'" Rather, courts should focus more broadly upon "the degree of suspicion that attaches to particular types of non-criminal acts." *Id.* "[T]o require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Id.* Accordingly, all of the suspicious circumstances that officers observed on the night in question, even those that did not constitute illegal behavior in their own right, can support a finding of probable cause. Suspicious facts and circumstances include: the vacant and untidy state of the house;

the presence of "scantily clad" women with dollar bills strapped to their thighs; the condoms and beer cans that littered the floor; and the smell and presence of drugs in the house.[1] J.A. 214. When viewed in light of the totality of the circumstances, however, these facts support the officers' finding of probable cause.

C. The D.C. Circuit's Approach Unduly Hampers Important Law Enforcement Interests

Flexibility and a lack of bright-line rules are features of the probable cause standard, not bugs. Courts, from the days of Blackstone to the modern Supreme Court, have emphasized the necessity of these features. *See* William Blackstone, 4 Commentaries *287-89 ("The constable…hath great original and inherent authority with regard to arrests."). Throughout this history, this standard has proven to be "the best compromise" between the liberty interests of the citizenry and law enforcement's important duty to police and protect the community. *Brinegar*, 338 U.S. at 176.

It is certainly undesirable to detain an innocent individual for any period of time. This unfortunate circumstance, however, is the necessary price of allowing law enforcement to vigorously promote public safety. Indeed, "the Fourth Amendment accepts [the] risk [that] persons arrested and detained on probable cause…may turn out to be innocent." *Wardlow*, 528 U.S. at 126. Moreover, "[t]he validity of [an] arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979). Accord-

---

[1] Even though drug possession is a crime in the District of Columbia, the officers did not pursue charges for this offense.

ingly, Respondent's ultimate release from custody without being charged plays no role in this Court's probable cause analysis.

A ruling for Respondents would significantly raise the bar that is required to establish probable cause. Throughout the course of their investigation, the officers determined that the suspects were on private property without legal authorization. Furthermore, the suspects had the general intent to enter the property. The only open question was whether they knew or should have known that they lacked permission to be there. Given the overwhelming evidence establishing the other elements of the offense, little else is required to support a finding of probable cause. Nevertheless, there was no shortage of evidence discrediting the suspects' pleas of innocence. The D.C. Circuit, however, held that this wasn't enough. Its rigid approach would saddle officers with requirements that are traditionally within the province of prosecutors: examining the technical elements of an offense and determining whether the facts fit the crime. This approach dangerously handicaps law enforcement and flies in the face of this Court's long-established probable cause jurisprudence.

II. QUALIFIED IMMUNITY SHIELDS OFFICERS PARKER AND CAMPANALE BECAUSE THEY WERE NEITHER "PLAINLY INCOMPETENT," NOR DID THEY "KNOWINGLY VIOLATE CLEARLY ESTABLISHED LAW" IN ARRESTING THE PARTIERS

The D.C. Circuit erred in denying officers Parker and Campanale qualified immunity; the officers were neither "plainly incompetent" nor did they "knowingly violate" clearly established law by arresting Respondents for unlawful entry. *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014). Qualified immunity advances two critical goals.

Butz v. *Economou*, 438 U.S. 478, 506 (1978). First, qualified immunity "operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Hope* v. *Pelzer*, 536 U.S. 730, 731 (2002). Second, qualified immunity balances the "public interest in encouraging the vigorous exercise of official authority," with the liberty interests of citizenry. *Butz*, 438 U.S. at 506. It allows public officials the requisite breathing room to make reasonable, if mistaken, judgments. *See Anderson,* 483 U.S. at 641. This flexibility removes the specter of uncertain liability, which would otherwise chill officers' willingness to perform their jobs. *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991). *See, also*, *Carroll*, 135 S. Ct. 348 at 350.

Any qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198 (internal citations omitted). The facts bear repeating: police officers found a group of partiers late at night in a vacant house that none of them owned or rented. J.A. 162. They claimed to have been invited by an absent woman named Peaches, J.A. 145, but gave curiously conflicting explanations for their presence. J.A. 122. The officers arrested the partiers for trespassing after contacting the owner, who explicitly stated that no one had permission to use the property. J.A. 208. The fact-specific question appropriately before this court is whether, given the circumstances, the officers *reasonably could have believed* that they had probable cause to arrest the partiers for unlawful entry. This very question resulted in vocal dissents to the decisions below. In circumstances like this, this Court has instructed that "[i]f 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*, 526 U.S. at 618.

Here, the qualified immunity analysis intersects with the question of probable cause, adding "an extra dose of judicial deference," J.A. 126, to an already "fluid concept." *Gates*, 462 U.S. at 231-32. Even if Respondents' arrests were not properly supported by probable cause, qualified immunity shields Officers Parker and Campanale because pertinent law was not clearly established with respect to: (1) the standard for the requisite mens rea; (2) the application of "some evidence for each element" probable cause; and (3) the standard for what constitutes conflicting or inconsistent information.

A. The Mens Rea Element For Unlawful Entry Was Not Clearly Established

1. The necessary intent for unlawful entry is insufficiently clear. *See, e.g., Ortberg*, 81 A.3d at 307 ("prior discussions of mental state have lacked some precision"). The D.C. Code prohibits a person from "without lawful authority . . . enter[ing] . . . [a] private dwelling . . . against the will of the lawful occupant or the person lawfully in charge thereof." D.C. Code § 22-3302 (2008). Here, the statute says nothing on its face regarding the necessary mental state for unlawful entry. Arresting officers are not required to possess the skills of legal technicians when evaluating the statutes that they are charged with enforcing; D.C. courts interpreting the statute have instructed only that a suspect must have "general intent to enter." *Culp*, 486 A.2d at 1176. The terminology "general intent" indicated that any guidance related to requisite intent concerned the voluntary nature of the physical act of entering a house – not, as the D.C. Circuit found here, a requirement that the suspect "'knew or should have known' they had entered the house 'against the will of the lawful occupant…and intended to act in the face of that knowledge." J.A. 12. To support their elevated standard for intent, the D.C. Circuit primarily cites *Ortberg*, a case

decided five years after the arrests here. J.A. 12. To retroactively apply *Ortberg* to the instant case would be to ascribe the gift of clairvoyance to Petitioners; the requisite mental state for unlawful entry, at least as articulated by the D.C. Circuit, was not sufficiently clear to provide the officers with their constitutional right to notice.

Here, uncontroverted facts establish that the suspects committed the actus reus for unlawful entry. J.A. 51. "[I]t 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." *Tillman* v. *Washington Metro. Area Transit Auth.,* 695 A.2d 94, 96 (D.C. 1997). This case, is not unusual in that respect; the officers established that the partiers had "general intent to enter" the property to celebrate either a birthday or bachelor party. J.A. 122. The D.C. Circuit, however, combined the third and fourth elements of unlawful entry,[2] believing that these elements "together identify the culpable mental state for unlawful entry." J.A. 12. But *Culp* and other relevant precedent had not made that apparent. In fact, the D.C. Circuit in *Ortberg* openly acknowledges the lack of clarity in earlier cases, stating:

- "[f]or the crime of unlawful entry based on the entry (as distinct from the refusal to leave), we have repeatedly said that *only general intent is required*,";
- "prior discussions of mental state have *lacked some precision*";

[2] As articulated in *Culp*, the third and fourth elements provide: "(3) he did so against the express will of the lawful occupant or owner; and had (4) general intent to enter." *Culp*, 486 A.2d 1174, 1176.

- "The general intent and specific intent common law classification 'has been the source of *a good deal of confusion*'"; and
- "[t]he statement that a crime as a whole requires proof of 'general intent' fails to distinguish between elements of the crime, to which different mental states may apply. '[*C]lear analysis* requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime[.]'"

Ortberg, 81 A.3d at 307-309 (citations omitted and emphasis added). The D.C. Circuit in *Ortberg* understood that the unlawful entry statute and relevant precedent, were imprecise, and sought to bring clarity to the standard. *Id.* at 307. It was mistaken, however, to apply the newly clarified rule to events that had taken place years prior. In fact, perhaps in response to the lack of clarity, the Criminal Jury Instructions were modified. The new instruction explicitly defines the distinct mental states required, stating that the government must show that the defendant "entered, or attempted to enter the property *voluntarily, on purpose, and not by mistake or accident"* and that the defendant "*knew or should have known* that s/he was entering against that person's will." Criminal Jury Instructions, No. 5.401 (emphasis added). Though the commentary "does not indicate the impetus for the clarification of the requisite mental state," the change occurred in 2009, a year after the *Wesby* arrests. *Ortberg*, 81 A.3d 303, 309. To hold the officers liable for clarified rules provided after the arrests would be to deprive them of their constitutional right to notice.

2. At the time of the arrests, it was also not clearly established that a suspect's bona fide belief in their right to

enter could function as something other than an affirmative defense. *See, e.g., Gaetano* v. *United States*, 406 A.2d 1291, 1293 (D.C. 1979) (categorizing a "bona fide" belief as a defense). It is true that newfound instruction regarding the requisite mental state has changed the effect of a "bona fide belief" on the validity of arrests for unlawful entry. *Ortberg*, 81 A.3d 303, 309. Until *Ortberg* and related clarifications, however, it was well-established that "[c]riminal trespass generally requires no specific intent." *Whittlesey* v. *United States*, 221 A.2d 86, 92 (D.C. 1966). In fact, courts explicitly stated that "[i]f a trespass is committed under a bona fide belief of a right to enter, such may be shown in *defense*." *Id.* (emphasis added). The D.C. Circuit supports its proposition that a "bona fide belief" vitiates the necessary mental state for unlawful entry by citing *Smith*, a court of appeals case which states that "'a person with a good purpose and bona fide belief of her right to enter 'lacks the element of criminal intent required' by the statute" – but even that case describes a bona fide belief as a "valid *defense*." *Smith* v. *United States*, 281 A.2d 438, 439 (D.C. 1971*)*. In fact, other cases appear to explicitly remove it from affecting the elements; the same court of appeals that decided *Smith* later held that "[t]he elements of [unlawful entry] are clear; they are not at issue here. What is at issue is the *defense* of "bona fide belief." *Gaetano*, 406 A.2d 1291, 1293 (emphasis added). The reasonable officer could have believed that, for intent, he need only be concerned with the voluntary nature of the physical act of entry because courts have consistently categorized a "bona fide belief" as a *defense*. *See Jackson* v. *United States,* 281 A.2d 409, 411 (D.C. 1976) ("innocent entry upon unmarked or ambiguously marked premises may constitute a *defense* to a charge of unlawful entry").

B. Application Of The "Some Evidence For Each Element" Standard Was Not Clearly Established

The D.C. Circuit's rule, requiring arresting officers to find "some evidence for each of the necessary elements," including intent, was far from well-settled at the time of the arrests. J.A. 111. Though the court acknowledged that probable cause "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," its new standard dangerously blurs the line between what is needed for arrest and what is needed for conviction. *Williams*, 407 U.S. at 149. The court relied primarily on two cases to support this novel standard. Neither of them, however, squarely support the taxing requirements that the D.C. Circuit would impose on officers policing unlawful entry.

1. The circuit court first cites *United States* v. *Christian* for the proposition that probable cause requires some evidence for each element of an offense. Though *Christian* did require that officers have some evidence regarding requisite mental state before arresting for possession, that case is distinct for two important reasons. *United States* v. *Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999) ("Given the possibility of a lawful purpose, and the absence of any evidence whatsoever that Christian possessed the knife for an unlawful one, the officers lacked probable cause to believe a crime had been committed."). First, the crime analyzed in *Christian* was a *specific* intent crime, not a *general* intent crime, as here. *See Gasho* v. *United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[A]n officer need not have probable cause for every element of an offense[,]. . . however, when specific intent is a required element of the offense, the arresting officer must have probable cause for that element."). Second, though the *Christian* court did apply the "some evidence standard,"

it did not require *direct* evidence of intent, recognizing that circumstantial evidence may support the necessary inference of unlawful possession. *Christian* at 667, citing *Williams*, 407 U.S. 143 ("although the police lacked direct evidence that the defendant unlawfully possessed the pistol in question, the circumstances surrounding his arrest supported the necessary inference").

Unlike in *Christian,* where officers lacked "any evidence whatsoever" that the suspect was using a dagger unlawfully, the officers here had several pieces of information that could have reasonably led them to doubt the suspects' claims to innocent entry. See p. 20-23, *supra* (detailing the suspects' flight and inconsistent explanations). The district and circuit courts dismissed these pieces of evidence in their analysis of the requisite mental state. *See* J.A. 13 (acknowledging only "three pieces of information that could bear" on the probable cause analysis: (1) the suspects' belief that they had been invited to a party; (2) Peaches' confirmation that she had invited them; and (3) the owner's statement that no one had permission to be on the property.) Both the district and circuit courts applied *Christian* to a materially dissimilar situation, thus depriving Officers Parker and Campanale of their constitutional right to notice.

2. The circuit court next cites *Carr* v. *District of Columbia*, which can be similarly distinguished. 587 F.3d 401 (D.C. Cir. 2009). First, though *Carr*, like *Christian*, requires that officers have some evidence regarding mental state, it too concerns a specific intent crime. As this Court noted in *United States* v. *Bailey*, the distinction between general intent and specific intent "has been the source of a good deal of confusion." 444 U.S. 394, 403 (1980). The offense discussed in *Carr*, requires that suspects (1) take part in a parade (2) without a permit (3) "*knowing* no permit was granted." *Carr,* 587 F.3d at 410

(emphasis in original). This offense is, at least arguably, a *specific* intent crime because it requires that an individual know that no permit was granted, thereby intending "to disobey or disregard the law." *See United States* v. *Moore*, 435 F.2d 113, 115 (D.C. Cir. 1970) ("a person who knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent").

Second, the bar proposed by *Carr* regarding the type of evidence that could be used in an inference of intent was far lower. The court recognized the "formidable challenge" that the officers faced in showing that they "could reasonably believe that all of the protestors knew no permit was granted." *Carr*, 587 F.3d, 401, 411. Responding to the officers' argument that the protestors must have known that there was no permit because of the "apparently spontaneous" nature of the protests, the court said that the spontaneity argument "might have been sufficient *but for* the distribution of the flier, which necessarily suggested that the group earlier planned for the march." *Id.* (emphasis added).

The bar proposed by the court in *Carr* is far lower than the unreasonable standard that the D.C. Circuit would impose on officers policing unlawful entry. An inference drawn from the "apparently spontaneous" protest might have sufficed to establish probable cause for arrest absent conflicting evidence demonstrating that the protest was planned. *Id.* Here, the arresting officers had far more evidence than just the "apparent" nature of the gathering. See p. 20-23, *supra* (discussing the suspects' initial flight; inconsistent and conflicting explanations for entry; presence of strippers, condoms, and drugs; absence of the purported host; and the owner's insistence that no one had permission to be on the property). The application of *Carr*, like *Christian*, to this case deprives the officers of notice,

with respect to both the appropriate standard for probable cause and the restrictive bar imposed on the kinds of evidence used to reach that standard.

3. Even if the officers had the wherewithal to analyze the laws of other circuits before making the decision to arrest, they would have been met with conflicting guidance regarding the "some evidence for each element" standard. *United States* v. *Argueta-Mejia*, 615 F. App'x 485, 489–90 (10th Cir. 2015) (discussing the circuit split on this issue). The question is typically framed as whether probable cause is required for each element of a crime. *Compare Spiegel* v. *Cortese*, 196 F.3d 717, 724 n. 1 (7th Cir.2000) (stating that probable cause is unnecessary on each element of a crime), *and Gasho* v. *United States*, 39 F.3d 1420, 1428 (9th Cir.1994) ("[A]n officer need not have probable cause for every element of the offense."), *with Williams* v. *Alexander, Ark.*, 772 F.3d 1307, 1312 (8th Cir.2014) ("For probable cause to exist, there must be probable cause for all elements of the crime."), and *United States* v. *Joseph*, 730 F.3d 336, 342 (3d Cir.2013) ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense.").

The Eleventh Circuit uses the same language as the D.C. Circuit and explicitly applies the "some evidence for each element" standard only to crimes of *specific* intent. For general intent crimes, that circuit states "the officer needs no specific evidence of the suspect's intent. All that is required is probable cause to believe that the suspect did the prohibited acts." *Jordan* v. *Mosley*, 487 F.3d 1350, 1356 (11th Cir. 2007). The law regarding the appropriate standard for crimes of general intent was not clearly established in the D.C. Circuit at the time of the arrests, and on a national level, remains unresolved.

C. Unlawful Entry Law Concerning The Relationship Between An Officer's Credibility Determinations And A Suspect's Claims To Innocent Entry Was Not Clearly Established

Denial of qualified immunity requires courts to find that "in the light of pre-existing law…unlawfulness [is] apparent." *Anderson,* 483 U.S. at 641. Put simply: "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft* v. *al–Kidd,* 563 U.S. 731, 741 (2011). Both the district and circuit court ignored that instruction here, retroactively applying newly clarified standards to hold the officers liable, thus depriving them of their constitutional right to notice.

Here, nothing in D.C. law at the time of the arrests indicated that officers are required to credit a suspect's proclamations of innocence in the face of doubts derived from the "totality of the circumstances." The facts of *Wesby* "rest uneasily between two distinct strands of District law" dealing with either obviously abandoned buildings or occupied private dwellings. (J.A. 45). *Compare McGloin* v. *United States*, 232 A.2d 90, 91 (D.C.1967) ("[N]o one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.") *with Culp*, 486 A.2d at 1177 (noting boarded windows gives sufficient warning an abandoned building should not be entered). Neither provide direct guidance for handling these facts; the law was insufficiently clear to give the officers notice that they lacked probable cause.

1. It was not clearly established that District law did not support probable cause under these facts. In fact, to the extent that District law is on point, it *supports* the officers' finding of probable cause for arrest; courts have upheld officers' finding of probable cause in spite of claims

to innocent entry. *See, e.g., Culp*, 486 A.2d 1174 (upholding a finding of probable cause in spite of the suspect's argument that he lacked the requisite mental state). Indeed, the District has upheld *convictions* for unlawful entry in circumstances where, as here, a suspect has alleged innocent entry. *See McGloin*, 232 A.2d at 90-91 (upholding the conviction of a man who was found inside an occupied residential building despite his excuse that he was looking for a cat or his friend DeWitt); *Artisst* v. *United States*, 554 A.2d 327, 329-30 (D.C. 1989) (upholding the conviction of a man for unlawful entry into a university residence facility despite his argument that he lacked the requisite intent because he entered to inquire about purchasing soccer equipment from a student); *Kozlovska* v. *United States*, 30 A.3d 799, 800-801 (D.C. 2011) (upholding the conviction of a woman who claimed the building's "super" permitted her to use the building). Under the D.C. Circuit's rule, the officers in those cases could not have found probable cause, let alone conviction.

Officers could reasonably have believed that District law supported a finding of probable cause under these facts, and at the very least it was not "beyond debate" that the officers conduct violated the constitutional rights of the partiers. *Ashcroft*, 563 U.S. at 741 ("[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate"). The D.C. Circuit confusingly asserts that the officers were not privy to "any conflicting information" regarding the suspects' mental state. J.A. 14. But this fails to comport with their acknowledgement that the partiers' explanation for entry was itself "inconsistent and conflicting." J.A. 13. In a group of only twenty-one, some suspects believed they were celebrating a bachelor party while others believed they were celebrating a birthday party. J.A. 122. In a group of only twenty-one, no one could identify the guest of honor. J.A. 122.

The D.C. Circuit acknowledged that no case has "invalidated an arrest for unlawful entry under similar circumstances," and dismissed it as an incorrect standard. J.A. 25 (internal quotations omitted). Though it is true that officers can still violate the law in "novel factual circumstances," this is not a case in which a constitutional violation is "obvious on the facts alleged." *Cf Hope*, 536 U.S. at 731 (holding that while there was no "materially similar" case, handcuffing a shirtless Alabama prisonmate to a hitching post for seven hours with one or two water breaks and no bathroom breaks while a guard taunted him about his thirst was obviously a violation of the Eight Amendment). The standard for conviction is far greater than the standard for probable cause, which is in turn more demanding than the standard for qualified immunity. *Williams*, 407 U.S. at 149. Where *conviction* for unlawful entry has been upheld despite a suspects' claims to innocent entry, the officers here could have reasonably believed that they had probable cause for arrest, given the totality of the circumstances. They are thus deserving of qualified immunity.

2. District law provides little guidance regarding how inconsistent statements or circumstantial evidence affect probable cause. For instance, District cases finding that inconsistent statements are insufficient grounds for probable cause, rely on heavily fact-specific circumstances. See e.g., *United States* v. *Malachi*, 728 F. Supp. 777, 781 (D.D.C. 1989) (holding that "inconsistent" answers were not sufficient to establish probable cause because "[f]or nearly every "suspicious" element…there [was] a plausible explanation" based on the time and mode of the suspects' travel). No District case evaluating the effect of inconsistent statements on probable cause articulates a clear rule. Had the officers looked outside of the District for guidance, they would have found that most circuits

view inconsistent answers, explanations, or stories as appropriate elements of a probable cause determination. See p. 21-22, *supra* (discussing broad consensus of several circuit courts that inconsistent stories are a sufficient foundation for probable cause). District law is insufficiently clear regarding the kinds of inconsistent statements that constitute a sufficient foundation for probable cause.

Similarly, District law provides little or conflicting instruction regarding how circumstantial evidence can affect probable cause in the instant case. Citing *Wright* v. *City of Philadelphia*, the D.C. Circuit acknowledged that officers are "entitled to discredit" a suspect's "innocent explanation for entry into a house in the face of conflicting evidence." J.A. 108 (citing *Wright* v. *City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005)). It further acknowledged that circumstantial evidence may "make it reasonable to infer that a suspect has a culpable state of mind." J.A. 109. What qualifies as "circumstantial information" for the D.C. Circuit, however, is insufficiently clear; the court's application seems diametrically opposed to its cited case. In *Wright*, the Third Circuit found that the officers had probable cause to arrest a woman for unlawful entry *despite* her innocent explanation that she had reentered a home to retrieve both her clothes and evidence proving she had been assaulted. *Wright*, 409 F.3d at 602. Wright's assailants later pled guilty to the very charges that she accused them of, validating her initial explanation.

The Third Circuit upheld the *Wright* officers' finding of probable cause because "Wright admitted breaking a window and entering the residence and removing items of little or no evidentiary value." *Id.* at 603. That those events are consistent with a sexual assault victim's understandably haphazard attempt to find justice mattered little to the Court because "the officers did not believe

Wright's explanation for her entry." *Id.* *Wright* demonstrates that an officer can reasonably discredit a suspect's claim to innocent entry, even if supported by evidence, and still be shielded by qualified immunity. This shield remains unbroken even if the decision was, in retrospect, "mistaken." *Id.*

That is the rule that should have been applied here. But though the district and circuit courts acknowledge that "circumstantial evidence" and "conflicting information" can be used in evaluations of mental state, they reject important information that falls squarely into those categories without articulating a reasoned rule. For instance, upon entry, several suspects fled, seeking cover in different rooms or closets. J.A. 214; 245; 279. Both courts dismissed this, stating that flight, while "suggestive" of wrongdoing, is not sufficient standing alone to create probable cause. *See Wardlow*, 528 U.S. at 124 (noting that unprovoked flight "is not necessarily indicative of wrongdoing," but is suggestive enough that, given other circumstances, may justify further investigation); *Sibron*, 392 U.S. at 66 ("deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea").

But the suspects' flight did not stand alone. The purported host was not present and, when contacted, was uncooperative with the police. J.A. 162. There were strippers and condoms and marijuana present – facts indicative of both prostitution and illegal drug use. J.A. 214; 267. The suspects gave inconsistent and conflicting statements regarding their claims to innocent entry. J.A. 122. Without articulating a reasoned rule, the D.C. Circuit rejected all of this, finding that the suspects' inconsistent statements, furtive behavior, and other suspicious activities lent no support to the officers' finding of probable cause. J.A. 18.

That there is no succinct rule to guide a court evaluating the intersection of circumstantial evidence and probable cause is unsurprising. Probable cause is, after all, a fact-specific inquiry based on the "totality of the circumstances." *Jefferson* v. *United States*, 906 A.2d 885, 888 (D.C. 2006). The lack of such a rule, however, illustrates that the reasonable officer could have believed that inconsistent statements and other suspicious activity should factor into a probable cause determination regarding mental state. An officer could have reasonably believed that these circumstances discredited any claims to innocent entry.

* * * * *

The court of appeals lost sight of well-established principles of Fourth Amendment and qualified immunity law in the decision below. This Court has never articulated a standard for probable cause that requires officers to find some evidence for each element of an offense before making an arrest. The circuit court's rule flew in the face of the flexible, all-things-considered approach that has been a hallmark of this Court's probable cause jurisprudence. Then, adding insult to injury, it held that Petitioners were "plainly incompetent" for not adhering to a rule which, at the time the arrests in question, had yet to obtain the force of law in a judicial opinion. Such a holding violates a core principle of this Court's qualified immunity jurisprudence: that constitutional rules be clearly established before officers can be found liable for them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

TERESA AKKARA
JACK HEYBURN
DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL
441 4th Street, N.W., Suite 600S
Washington, D.C. 20001

Counsel for Petitioners

OCTOBER 20, 2017