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

REPLY 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

NOVEMBER 17, 2017

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INTRODUCTION

Officers knew that the suspects satisfied three of the four elements of the crime of unlawful entry. They also observed furtive behavior and were fed inconsistent stories. With this information in hand, the officers made the reasonable decision to arrest the suspects for unlawful entry. In our opening brief, we contended both that the officers had established probable cause and that they were deserving of qualified immunity. In defense of the court of appeals' rationale, Respondents argue that there was uncontroverted exculpatory evidence and that all areas of unlawful entry law were well established. Their position is incorrect: (1) the suspects' pleas of innocence were not "uncontroverted" and do not "prove" their innocence; and (2) unlawful entry law was not clearly established with respect to either the requisite mens rea or the probable cause standard for general intent crimes.

I. OFFICERS' ARRESTS WERE SUPPORTED BY PROBABLE CAUSE

In theory, Respondents agree with our view of probable cause. They assert that officers must "must consider all the facts made available or reasonably known" (Resp. Br. 8) and they criticize as "inflexible and unworkable" the requirement that officers find "probable cause for each element of an offense" (Resp. Br. 10). Respondents stray from these statements in practice, however, and seek to narrow the focus of this inquiry to whether the suspects possessed the necessary mental state for the crime of unlawful entry. To that end, Respondents place undue weight on the suspects' pleas of innocence and Peaches' (inconsistent) statements. These statements not only carry little

weight in a probable cause analysis, but they are also not *uncontroverted*, as Respondents assert, nor do they *prove* the suspects' innocent mental states. Furthermore, Respondents diminish or ignore the uncontroverted evidence regarding the actus reus of the offense and the evidence suggesting the suspects' guilty consciences.

A. Respondents Place Undue Weight On The Suspects' Pleas Of Innocence And Peaches' Contradictory Statements

Officers do not contest that "when *uncontroverted* evidence is uncovered that *proves* an innocent mental state," they would not have probable cause for arrest. Resp. Br. 11 (emphasis added). The evidence cited by Respondents, however, is not *uncontroverted* and it certainly does not *prove* the suspects' innocent mental states. Respondents put forth two pieces of evidence to support the suspects' innocent mental states: (1) the suspects' own pleas of innocence; and (2) Peaches' statements to the arresting officers. Both of these pieces of evidence are of limited value: a suspect's pleas of innocence carries little weight in a probable cause analysis and Peaches contradicted herself on multiple occasions, thus diminishing the weight that officers should reasonably ascribe to her words.

1. Arresting officers are not required to credit a suspect's pleas of innocence. In *Baker* v. *McCollan*, this Court held that an officer executing an arrest is not "required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or *a defense such as lack of requisite intent*." 443 U.S. 137 (1979) (emphasis added). The implications of this holding are

spelled out in the decisions of the federal courts of appeals that have followed it: officers are "under no obligation to give any credence to a suspect's story." *Criss* v. *City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988); *see also Stonecipher* v. *Valles*, 759 F.3d 1134, 1146 (10th Cir. 2014) ("Officers executing a search warrant are not required to credit a suspect's explanation if the officers reasonably believe they still have probable cause to make the arrest despite the explanation."). Far from *proving* the suspects' innocent mental states, their own statements carry very little weight without other evidence.

2. The only other support for the suspects' innocent mental states is Peaches' statements to the officers on the night of the arrests. Peaches, however, was at times "evasive" (J.A. 162), at other times "yelling" (J.A. 53), and at all times inconsistent in the information she relayed to the officers. First, she claimed that "no one" had given her permission to use the house (J.A. 162); on the second call, however, she "began yelling saying that she had permission" to use the house but didn't know the owner's name (J.A. 163); only on the third call did she tell the officers the name of the owner, who refuted Peaches' right to use the house when called. J.A. 208. All the while, Peaches refused to come to the house out of fear of being arrested. J.A. 267. The Constitution does not require officers to place dispositive weight on the statements of an individual who has proven to be so evasive and inconsistent. Accordingly, officers acted reasonably in determining that the suspects' pleas of innocence and Peaches' statements failed to *prove* anything.

B. Respondents Ignore Key Facts That Support The Officers' Finding Of Probable Cause

In asserting that the evidence of the suspects' innocent mental state was *uncontroverted*, Respondents ignore several key facts known to the officers at the time of the arrest.

1. First and foremost, the suspects' initial response upon seeing the officers was to run and hide. Respondents attempt to dismiss this fact by arguing that this "was not a case of flight from the scene." Resp. Br. 16. But whether the suspects ran or hid upon seeing the officers is a factual question that must be viewed "in the light most favorable to the party opposing the [summary judgment] motion." *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962). And in the officers view, the suspects ran and hid. *See* J.A. 214. Furthermore, headlong flight from a crime scene is not the only action that qualifies as furtive behavior. *See Sibron* v. *New York*, 392 U.S. 40, 66–67 (1968) ("*[D]eliberately furtive actions and flight* . . . are strong indicia of mens rea.") (emphasis added). Indeed, courts regularly consider actions far more subtle than those seen here to be furtive behavior. *See*, *e.g.*, *United States* v. *Sanders*, 631 F.2d 1309, 1312 (8th Cir. 1980) ("Biggles ma[de] a furtive movement with his right hand from the area of his shirt pocket to the floor of the car . . . [and] had an excited facial expression."); *United States* v. *Awer*, 770 F.3d 83, 92 (1st Cir. 2014) ("Defendant moved his shoulders, moved about the vehicle, kept looking around, turned left and right, *and* bent over forward as if he was trying to conceal or retrieve something.").

Respondents then argue that even if the suspects engaged in furtive behavior, "flight must be coupled with additional facts to reach probable cause." Resp. Br. 16 (citing *Sibron*, 392 U.S. at 66–67). So far so good. *See Sibron*, 392 U.S. at 66–67 ("[D]eliberately furtive actions and flight . . . , when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, . . . are proper factors to be considered in the decision to make an arrest."). But in their telling, no "additional facts" exist. In making this argument, Respondents focus narrowly on the element of intent as opposed to looking to the totality of the circumstances, as the Fourth Amendment demands. Indeed, Respondents need only to consult their own brief to find these "additional facts." Respondents admit that "[i]t is *undisputed* that Attendees voluntarily entered the house and lacked lawful authority to be in the house," thus establishing three of the four elements of unlawful entry. Resp. Br. 14. (emphasis added). Accordingly, these are the additional facts that give weight to the suspects' furtive behavior and make it a proper consideration in the officers' decision to arrest.

2. Respondents also downplay the suspects' inconsistent and incomplete statements. Resp. Br. 16-17. Certainly, the suspects' confusion regarding what and who was being celebrated would not establish probable cause on its own. But when coupled with additional facts (like uncontroverted evidence that the actus reus had been committed), courts regularly approve of officers considering inconsistent statements, even about seemingly innocuous facts. *See*, *e.g.*, *United States* v. *Ameling*, 328 F.3d 443, 448 (8th Cir. 2003) ("Ameling reported that they had been in town

to shop, whereas Brown said they were there for a medical appointment."). These inconsistent statements heighten the degree of suspicion that attaches to the suspects' behavior and are proper factors for officers to consider when making an arrest. *See* Wayne R. LaFave, 2 Search & Seizure: A Treatise On The Fourth Amendment § 3.6(f) (5th ed.) (citing *United States* v. *Ortiz*, 422 U.S. 891 (1975)) ("[T]he Supreme Court has explicitly recognized that the determination of probable cause vis-a-vis suspects may properly involve 'the responses they give to officers questions.'").

3. Respondents also allege that Petitioners "misstate the record to incorrectly allege that there were drugs present." Resp. Br. 20. The presence of drugs, however, was recorded in the official arrest report and filed on page 214 of the Joint Appendix. Furthermore, while Respondents are correct that possession of marijuana has been decriminalized in D.C. (Resp. Br. 17), they fail to mention that this change in law occurred six years after the events in question. Aaron C. Davis, *D.C. Council votes to eliminate jail time for marijuana possession*, Wash. Post (March 5, 2014), http://perma.cc/5QJ9-CWWJ. We do not intend to place undue weight on the presence of drugs in the house. Indeed, this case is about arrests for unlawful entry, not drug possession. Nevertheless, these factual errors need to be corrected in order to make the simple, common-sense point: the presence of drugs in the house affected the totality of the circumstances, if for no other reason than making the suspects' pleas of innocence less credible.

4. Finally, Respondents cite the presence of a fridge, food, and bedding, among other things, as evidence that the house looked inhabited. Resp. Br. 17. The officers (for whom the facts must be viewed most favorably) saw things differently. Indeed, the "bedding" was but a bare mattress on the floor of a bedroom and the "furniture" consisted mostly of folding chairs. J.A. 7. In the officers' view, "[t]he entire home was in disarray which was also consistent with it being a vacant property." J.A. 214. The dilapidated state of the house, and the fact that the property was in fact vacant, are material to the officers' determination of probable cause. *See Culp* v. *United States*, 486 A.2d 1174, 1177 (D.C. 1985) ("[A]rresting officers' knowledge that the property is vacant and closed to the public is material to a determination of probable cause.").

C. In This Case, Direct Evidence Of The Suspects' Mens Rea Was Not Needed

Given the clear and undisputed evidence showing that the suspects committed the actus reus of unlawful entry, we submit that "officers do not need direct evidence for the mens rea element in order to establish probable cause." Pet. Br. 19. Respondents wrongly interpret this statement as our proposing a new rule "in place of the totality of the circumstances test." Resp. Br. 11. We intend to do no such thing. This Court has long held that the totality of the circumstances test is the "best compromise" to balance the liberty interests of the citizenry and the demands on law enforcement to protect the public. *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). As we stated in our opening brief, and now affirm in our reply, we

agree with this Court's view. Pet. Br. 15. Our intent, therefore, is not to establish a new rule, but is simply to highlight similar cases where this Court had upheld a finding of probable cause without direct evidence of the mens rea element of an offense.

One such case is *Maryland* v. *Pringle*, which Respondents misinterpret in key respects. 540 U.S. 366 (2003). As we discussed in our opening brief (Pet. Br. 19-20), the officers in *Pringle*, like the officers in the instant case, knew that the actus reus of the crime had been committed (i.e., someone had ownership of the drugs found in the car). *Id.* at 370. This Court upheld the officers' finding of probable cause despite a lack of direct evidence showing that the defendant had knowledge that the drugs were in the car. *Id.* at 371. Respondents attempt to distinguish *Pringle* by claiming that, unlike the present case, "the defendant in *Pringle* lacked a lawful explanation for the possession of cocaine." Resp. Br. 12. This is simply not true. As a passenger in a car that he did not own, one obvious explanation is that he didn't know the drugs were in the car. If true, this explanation would be just as lawful as Respondents' claim that they didn't know that they lacked legal authority to enter the house. The *Pringle* Court declined to hold, however, that probable cause is defeated by a potential lawful explanation for a suspect's conduct. The same is true here.

Furthermore, Respondents' treatment of *Di Re* is similarly mistaken. *United States* v. *Di Re*, 332 U.S. 581 (1948). Respondents portray *Di Re* as a case where the actus reus of a crime was established but officers lacked probable cause due to "uncontroverted evidence that the defendant didn't meet the required

knowledge element." Resp. Br. 13. But officers in *Di Re* didn't just lack evidence of the defendant's mental state, they also lacked any evidence that he committed the actus reus. There, an informant bought counterfeit coupons from a seller. *Id*. While the officers had probable cause to arrest the seller for the sale of these illegal coupons, the informant said nothing to implicate the defendant, who was with the seller at the time of the arrest. *Id*. at 594. The officers had "no information indicating that Di Re was in the car" when the sale occurred. *Id*. at 593. Thus, unlike the present case, officers had "no information pointing to possession of any coupons," the actus reus, and no "information hinting further at the knowledge and intent required." *Id*. at 592.

D. The D.C. Circuit's "Some Evidence For Each Element" Rule Conflicts With This Court's Precedents

Respondents admit that requiring officers to find probable cause for *each element* on an offense is "inflexible and unworkable" and lacks support from this Court's cases. Resp. Br. 10. As we discussed in our opening brief, we do not see a meaningful distinction between that standard and the one articulated by the court below: requiring some evidence for *each element* of an offense. Pet. Br. 32; J.A. 26. Regardless of the way in which this standard is phrased, it conflicts with this Court's totality of the circumstances approach to probable cause, which we discuss at length in our opening brief. Pet. Br. 14-16. Although Respondents refute the "probable cause for each element" standard, they do not say whether the D.C. Circuit's rule is included in that category. Either way the

standard is articulated, however, it does not comport with this Court's precedents.

II. QUALIFIED IMMUNITY SHIELDS OFFICERS PARKER AND CAMPANALE BECAUSE PERTINENT LAW WAS NOT CLEARLY ESTABLISHED

To deny qualified immunity, courts must find that officers were "plainly incompetent" or that they "knowingly violate[d]" clearly established law. *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014). While Respondents admit that "[t]his statement is correct," (Resp. Br. 22.), they spend significant time insisting that the focus should be on an officer's reasonableness. In doing so, they emphasize distinctions without a difference; we take no issue with their framing. Some courts analyzing qualified immunity ask whether it "would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Resp. Br. 21 (citing *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1867 (2017)). Others ask whether an officer has "arguable probable cause." *Poulakis* v. *Rogers*, 341 F. App'x 523, 526 (11th Cir. 2009) ("In wrongful arrest cases, we have frequently framed the 'clearly established' prong as an 'arguable probable cause' inquiry."). Regardless, the requisite analysis is the same and seeks to "protect[] all but the plainly incompetent or those who knowingly violate the law." *Caroll*, 135 S. Ct. at 350 (internal quotations omitted).

Contrary to what Respondents assert, pertinent law was not clearly established with respect to (1) the requisite mens rea for unlawful entry and (2) the probable cause standard for general intent crimes. The murkiness of these standards deprived Officers

Parker and Campanale of their right to notice. Accordingly, they are deserving of qualified immunity as they were neither "plainly incompetent" nor did they "knowingly violate" clearly established law. *Id*.

A. At The Time Of The Arrests, The Mens Rea For Unlawful Entry Was Unclear

The necessary intent for unlawful entry was not clearly established at the time of the arrests. Respondents maintain, to the contrary, that "it was well established in the District of Columbia at the time of the 2008 arrest that unlawful entry crimes required a particular mens rea – knowingly violating the owner's wishes." Resp. Br. 24. Their position is incorrect for two reasons. First, relevant legal authority had not yet provided clear guidance regarding the requisite mens rea for unlawful entry. Second, at the time of the arrests, a "bona fide belief" in right to enter had been applied by the courts exclusively as a defense. It had never been applied as a mechanism for negating probable cause for unlawful entry.

1. In order to be aware of the "law governing [an officer's] conduct" for the crime of unlawful entry, a reasonable officer could have turned to the D.C. Code, relevant caselaw, or the Criminal Jury Instructions. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982). At the time of the arrests, none of these authorities would have provided *clear* guidance for the mens rea required for unlawful entry.

a. The D.C. Code provides no support for Respondents' argument. By its text, it 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). The Code thus speaks explicitly about the will of the lawful owner, but is silent on the requisite mens rea for unlawful entry. This being the case, it is necessary to turn to either the caselaw or Criminal Jury Instructions for guidance.

b. Cases involving the elements of unlawful entry, however, are similarly unclear. The D.C. Circuit itself acknowledged that "[f]or the crime of unlawful entry . . . [courts] have repeatedly said that *only general intent* is required," and that "prior discussions of mental state have *lacked some precision*." *Ortberg* v. *United States*, 81 A.3d 303, 307 (D.C. 2013) (emphasis added). Though the D.C. Circuit did posit in *Ortberg* that the requisite intent for unlawful entry "[requires] the government to establish that the defendant knew or should have known that his entry was unwanted," that case was decided in 2013. *Id*. Therefore, the court erred in retroactively applying that decision to arrests made years prior. Had the officers turned to existing unlawful entry caselaw at the time of the arrests, they would have learned that the requisite mens rea was "general intent." *Culp* v. *United States*, 486 A.2d 1174, 1176 (D.C. 1985).

General intent and specific intent, according to the D.C. Circuit, "ha[ve] been the source of a good deal of confusion." *Ortberg*, 81 A.3d at 307-309. Unlawful entry is a crime of general intent. *Id*. at 307 ("only general intent is required."). *See also Whittlesey* v. *United States*, 221 A.2d 86, 92 (D.C. 1966) ("Criminal trespass generally requires no specific intent."). Guidance on the distinction between general and specific intent teaches that "a general intent crime requires only

that the act was volitional (as opposed to accidental), and the defendant's state of mind is not otherwise relevant." *United States* v. *Lamott*, 831 F.3d 1153 (9th Cir. 2016), cert. denied, 137 S. Ct. 258 (2016). General intent in the context of unlawful entry, therefore, requires only that the *physical act* of entering the home needed to be volitional. On this matter, both sides are in agreement: the suspects' entry was voluntary, and not accidental.

c. At the time of the arrests, the Criminal Jury Instruction mirrored the relevant caselaw, providing the same degree of guidance. Like the unlawful entry cases, it listed four elements. Explicit discussion of mens rea occurred only in the last element, which required "general intent." *Culp*, 486 A.2d at 1176. A year after the arrests, these instructions were modified to clarify the requisite mens rea. *Ortberg*, 81 A.3d 309. The modified instruction identifies five elements. *Id.* Both the second and the fifth explicitly define the requisite mental state for unlawful entry. *Id.* The second element requires that the defendant "entered, or attempted to enter the property *voluntarily, on purpose, and not by mistake or accident*" while the fifth requires 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). We do not dispute that these instructions are clear. We instead contend that retroactive application of these instructions to the arrests at issue here would deprive the officers of their right to notice.

2. It is true that as unlawful entry law stands today, a bona fide belief vitiates the necessary mental state for unlawful entry. *Ortberg*, 81 A.3d 308. At the

time of the arrests, however, a bona fide belief was applied by the courts exclusively as an affirmative defense. *See Jackson* v. *United States*, 281 A.2d 409, 411 (D.C. 1976) ("[I]nnocent entry . . . may constitute a *defense* to a charge of unlawful entry.") (emphasis added). Respondents attempt to refute this, arguing that a bona fide belief negates the required elements of unlawful entry and that our characterization of the law is "both inaccurate and an attempt to make the law more convoluted than it is." Resp. Br. 25. But Respondents cite no case applying a suspect's bona fide belief to negate probable cause for unlawful entry. Instead, to justify their view, Respondents rely *solely* on language from *Ortberg*. As we have had cause to emphasize time and time again, *Ortberg* was decided well after the arrests at issue in this case. Respondents' view of the law post-*Ortberg* may well be correct. We must, however, apply the law as it stood at the time of the arrests. Application of *Ortberg* to this case would deprive the officers of their constitutional right to notice.

Furthermore, years prior to *Ortberg*, the D.C. Circuit explicitly removed bona fide belief from affecting the elements of unlawful entry. In *Gaetano*, the D.C. Circuit determined that the basic elements of unlawful entry had been satisfied, and *then* turned to an analysis of bona fide belief in a distinctly separate step, removed from the unlawful entry elements. *Gaetano* v. *United States*, 406 A.2d 1291, 1293 (D.C. 1979). Respondents do not address cases such as *Gaetano* applying bona fide belief exclusively and specifically as an affirmative defense. Here, just as in

Gaetano, "[t]he elements of the crime [of unlawful entry] are clear; they are not at issue here. What is at issue is the defense of 'bona fide belief.'" *Id.*

B. At The Time Of The Arrests It Was Not Clearly Established That Probable Cause for General Intent Crimes Required "Some Evidence for Each Element"

At the time of the arrests, D.C. law did not require officers to have probable cause or "some evidence" specifically for the mental element of unlawful entry. To counter this, Respondents rely primarily on *Carr*, and the rule—currently at the heart of an existing circuit split—requiring "probable cause for each element of the offense." Their reasoning is flawed. Resp. Br. 27-28. First, *Carr* is materially dissimilar to the instant case. Second, it was not clearly established that the D.C. Circuit would apply the "probable cause for each element" standard to general intent crimes. To apply a newly elevated standard to this case would deprive the officers of their constitutional right to notice.

1. Respondents contend our analysis of *Carr* "contravenes [our] statement that the District of Columbia requires a probable cause determination only for specific intent crimes." Resp. Br. 27. This is a mischaracterization of our position. We have never suggested that some crimes require a probable cause determination while others do not. We merely contend that crimes of general intent do not require a probable cause determination specifically for the mens rea element. All crimes, of course, require a probable cause determination for the offense as a whole.

Carr is consistent with our position that at the time of the arrests, the D.C. Circuit had never required "some evidence for each element" or "probable cause for each element" for general intent crimes. Relying on snippets of our *Carr* analysis but disregarding their context, Respondents create a false equivalence between knowledge and general intent. The two are not equal. The distinction between general and specific intent "has been a source of a good deal of confusion." *Ortberg*, 81 A.3d 307. The differences between the two are not so readily distillable that one simply means "knowledge" while the other does not. If that were the case, jurists would not have spent significant time grappling with this issue. *Carr* discusses the crime of parading without a permit, which we argue is "a specific intent crime." Pet. Br. 31.

To support this position, we turn to guidance on the distinction between general intent and specific intent issued by the very same court that decided *Carr*, the D.C. Circuit. In *United States* v. *Moore*, the D.C. Circuit taught that "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." *United States* v. *Moore*, 435 F.2d 113, 115 (D.C. Cir. 1970). The offense discussed in *Carr*, requires that suspects parade without a permit "*knowing* no permit was granted." *Carr* v. *District of Columbia*, 587 F.3d 401, 410 (D.C. Cir. 2009) (emphasis in original). The offense of parading without a permit is thus arguably a crime of specific intent because it requires that suspects "intend[] with bad purpose either to disobey or disregard the law." *Moore*, 435 F.2d at 115. Therefore, contrary to what Respondents argue, *Carr* supports our argument that

the D.C. Circuit had never applied an elevated probable cause standard to crimes of general intent, as here.

2. At the time of the arrests, officers did not need probable cause for a specific element, like mental state, to establish probable cause for unlawful entry as a whole. To suggest the opposite, Respondents primarily cite: (1) cases from circuits that require "probable cause for each element"; and (2) cases involving specific intent crimes. None of these authorities support their position.

a. First, to support their contention that probable cause is required specifically "to suspect the culpable mental state," Respondents cite circuits requiring "probable cause for each element." Resp. Br. 28 n.1. Accepting the "probable cause for each element" standard would of course entail accepting its application to the mens rea element of a given crime. But that standard does not comport with this Court's caselaw, as Respondents admit earlier in their brief. In their probable cause analysis, Respondents assert that "[t]his Court has made clear that an officer is not required to find probable cause for each element of the offense... [Respondents] do not advocate a return to such an inflexible and unworkable standard." Resp. Br. 10 (internal citations omitted). We agree that the standard is "inflexible and unworkable." Using these cases, then, should not support the requirement that the officers need probable cause or "some evidence" specifically for the mens rea element of unlawful entry.

The merits of the standard notwithstanding, at the time of the arrests, the D.C. Circuit had yet to

indicate their position regarding the application of this standard to general intent crimes. This distinction is important because some circuits have applied a heightened probable cause standard only to specific intent crimes. *See*, *e.g.*, *Jordan* v. *Mosley*, 487 F.3d 1350, 1356 (11th Cir. 2007) (applying the "some evidence for each element" standard to crimes of specific, but not general, intent).

b. Second, Respondents' reliance on cases involving specific intent crimes is misplaced. By citing *U.S.* v. *Vinton* and *U.S.* v. *Lopez*—cases explicitly discussing crimes of specific intent—Respondents obscure the distinction between general intent and specific intent crimes. Resp. Br. 27-28. In Respondents' telling, *Vinton* stands for the proposition that to establish probable cause, "[t]here must be evidence of *[the required]* intent." Resp. Br. 27. (emphasis added) (alteration in original). *Vinton*, however, clearly refers only to crimes of specific intent. *See United States* v. *Vinton*, 2007 WL 495799 at *2 (D.D.C., Feb. 12, 2007) (emphasis added) ("There must be evidence of *specific intent* to use the weapon unlawfully against another.") (emphasis added).

Respondents' use of *Lopez* similarly obfuscates that court's distinction between general and specific intent crimes. *Compare* Resp. Br. 28, citing *United States* v. *Lopez*, 482 F.3d 1067, 1072–73 (9th Cir. 2007) ("*When a particular mental state* 'is a required element of the offense, the arresting officer must have probable cause for that element.'") (emphasis added); *with Lopez*, 482 F.3d 1072-73 ("[*W]hen specific intent* is a required element of the offense, the arresting officer must have probable cause for that element.")

(emphasis added). Far from supporting Respondents' position, these cases actually support the distinction that we draw between the standards applied to general and specific intent crimes.

The question of whether Officers Parker and Campanale are entitled to qualified immunity has inspired emphatic dissents to the decisions below. This Court has taught 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* v. *Layne*, 526U.S. 603, 618 (1999). It would be unfair to subject the officers to money damages when the law was not clearly established with respect to both the requisite mens rea and the probable cause standard applied to general intent crimes. Such a decision would deprive these officers of their constitutional right to notice.

* * * * *

The question before this Court is whether the officers acted reasonably. Probable cause affords officers significant leeway to make decisions in the field. Qualified immunity adds an extra dose of judicial deference to their decisions. Given all the evidence against the suspects, the officers acted reasonably in making the decision to arrest. In doing so, they neither violated the Constitution, nor did they forfeit the defense of qualified immunity.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, 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

NOVEMBER 17, 2017