No. 20-____

IN THE
Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472;
POLICE OFFICER PAUL MONTEFUSCO, SHIELD #10580;
POLICE OFFICER PHILLIP ROMANO, SHIELD #6295;
POLICE OFFICER GERARD BOUWMANS, SHIELD #2102,

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

QUESTION PRESENTED

I. Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," *Laskar v. Hurd*, 972 F.3d 1278, 1293 (11th Cir. 2020), or that the proceeding "ended in a manner that affirmatively indicates his innocence," *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018); *see also Laskar*, 972 F.3d at 1293 (acknowledging 7-1 circuit conflict).

II. Where a Section 1983 plaintiff brings a Fourth Amendment claim for unlawful warrantless entry of his home and the government pursues a justification of exigent circumstances, does the government have the burden to prove exigency existed (as the Third, Sixth, Ninth and Tenth Circuits have held), or does the plaintiff have to prove its non-existence (as the Second, Seventh and Eighth Circuits have held).

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Larry Thompson petitions for a writ of certiorari to review the Second Circuit's judgment in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 3a-7a) is unpublished and available at 794 F. App'x 140. The district court's post-trial opinion (Pet. App. 8a-49a) is published at 364 F. Supp. 3d 178. The district court's oral rulings at trial (Pet. App. 50a-57a) are not published.

JURISDICTION

The Second Circuit entered its opinion on February 24, 2020 and denied rehearing on June 9, 2020. Pursuant to this Court's March 19, 2020 order, the time to file this petition was extended to 150 days, to November 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

1. Petitioner Larry Thompson is a Navy veteran who has since served for 20 years as a postal worker. He lives in Brooklyn with his wife Talleta Watson, who cares for autistic children and, before that, people struggling with substance abuse. During the relevant time, the couple was caring for Talleta's sister, Camille Watson, who has cognitive delays.

On January 15, 2014, petitioner and Talleta (then his fiancée) were the proud parents of a one-week old daughter, Nala. Pet. App. 13a. That day, they brought Nala to her first check-up, where she received a clean bill of health. *Id*. At around 10:00 p.m., the couple was

at home and ready to sleep, dressed in only their underwear. *Id.* Unbeknownst to the couple, Camille dialed 911. She stated that Nala often cries when petitioner changes her diaper and that she had seen "red rashes" on the Nala's buttocks area (commonly known as, and later confirmed to be, diaper rash). JA138; Pet. App. 13a. Mistaking these for signs of abuse, Camille provided a description of petitioner and his address. Pet. App. 13a, 15a.

In response, two Emergency Medical Technicians ("EMTs") arrived to petitioner's apartment building to investigate. The EMTs met Camille outside the building and she led them into petitioner's apartment unit. Pet. App. 14a. Once inside, the EMTs saw Talleta sitting on the couch holding Nala safely. *Id.* Petitioner entered the room and asked the EMTs why they were in his home. *Id.* Unaware of Camille's 911 call, petitioner informed the EMTs that no one in his home had called 911 and they must have the wrong address. *Id.*; JA172. Petitioner asked the EMTs to leave, and they did. JA172.

Respondents, four NYPD officers, arrived thereafter in response to the 911 call and met with the EMTs who had just been inside petitioner's apartment. *Id.* The EMTs reported that petitioner was upset to find them in his apartment and they left. *Id.* They said they would "get in trouble" if they did not make contact with and examine the baby. *Id.*

Respondents went upstairs to petitioner's apartment unit and petitioner answered the door. *Id.* They told petitioner that they were investigating possible child abuse and wanted to examine his daughter. Pet. App. 14a-15a. Petitioner asked to speak to respond-

ents' sergeant and, when they refused, asked respondents if they had a warrant to enter his home. Pet. App. 15a; JA174. Respondents did not phone in a warrant; instead, they physically attempted to enter petitioner's home. Pet. App. 15a.[1] When petitioner stood his ground in the doorway, respondents tackled petitioner to the floor and handcuffed him. *Id.*

Despite having restrained petitioner, respondents entered and searched petitioner's apartment over his objection, without calling in a warrant. *Id.* The EMTs then went back into petitioner's apartment, examined his baby, and saw what they understood to be diaper rash, with no signs of abuse. JA43, 138. The EMTs stated that the 911 call meant that they had to take petitioner's baby to the hospital for evaluation, which later confirmed that it was only diaper rash. Pet. App. 15a; JA101.

Respondents escorted petitioner out of his building in handcuffs and put him in jail for two days. Pet. App. 16a, 18a. According to respondents, petitioner's mere refusal to let them into his home without a warrant to examine his child was sufficient basis to arrest and pursue charges for resisting arrest and obstructing governmental administration. Pet. App. 16a; N.Y. Penal Law §§ 195.05, 205.30. JA65, 68, 162.

In the subsequent criminal proceedings, petitioner consistently denied any wrongdoing and declined any offer from the prosecution. Two months after peti-

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[1] Although not relevant to this petition, respondents claimed at trial that petitioner pushed the officer who attempted to enter his apartment, which petitioner denied. Given the posture, all facts must be taken in the light most favorable to petitioner.

tioner was charged, for instance, the prosecution offered petitioner an "adjournment in contemplation of dismissal" under New York law, which would have resulted in no conviction and sealed all records of his prosecution. Pet. App. 18a; *see also* N.Y. Crim. Proc. L. § 170.55. The prosecutor told petitioner that if he accepted, all he had to do was "stay out of trouble and everything will go away." Pet. App. 18a. Petitioner declined, insisting he did nothing wrong and would "see this to the end." *Id.*; JA181-82.

One month later, the prosecution dismissed the charges against petitioner without any plea or compromise. Petitioner's case was called at a hearing, and the prosecution simply stated: "People are dismissing the case in the interest of justice." Pet. App. 18a-19a. The court granted the prosecution's request, stating, "The matter is dismissed." *Id.*[2]

2. After obtaining dismissal of the charges, petitioner filed this action under 42 U.S.C. § 1983 alleging that respondents violated his Fourth Amendment rights through warrantless entry of his home and by unreasonably seizing him pursuant to legal process (often described as a "malicious prosecution" claim, referring to the analogous common-law tort). Both claims survived summary judgment and proceeded to trial.[3]

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[2] According to petitioner's defense counsel, the prosecution's decision to dismiss followed a conversation between defense counsel and the prosecution about the "legal problem" with charging petitioner for simply asserting his Fourth Amendment rights. Pet. App. 31a.

[3] Mr. Thompson also asserted other claims which are no longer at issue.

2a. At trial, one of the principal disputes was whether petitioner had shown "favorable termination" of the criminal proceedings against him, as required to bring his § 1983 malicious prosecution claim. Relying on *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), respondents argued that criminal proceedings have not terminated favorably unless they "affirmatively indicated that the plaintiff was innocent of the crimes charged." JA129; *see also* JA130 ("[W]hat *Lanning* states is that the dismissal has to affirmatively indicate the plaintiff's innocence."). According to respondents, because the dismissal here did not affirmatively establish petitioner was innocent of the crime charged, he could not claim unreasonable seizure. JA129.

Petitioner objected, arguing that dismissal of the charges was "sufficient to show that the plaintiff has had the case dismissed in his favor." Pet. App. 53a. He pointed out that petitioner had rejected the prosecution's offer for even an adjournment in contemplation of dismissal, causing the prosecutor to unconditionally dismiss the charges. Pet. App. 55a-56a. Petitioner argued that "the judge is not required to say you are innocent," something that "never happens." Pet. App. 56a. Petitioner contended that respondent's position would be absurd, requiring people who are wrongfully and unreasonably accused of crimes to *object* when the prosecution attempts to dismiss the charges against them and insist on going to trial. JA 132-33.

The district court reluctantly adopted respondents' rule and granted them judgment as a matter of law. It held that under *Lanning*, criminal proceedings terminate "in favor of the accused only when their final disposition [is] such as to indicate the accused is not

guilty." Pet. App. 55a (quoting *Lanning*, 908 F.3d at 26). In the district court's view, the Second Circuit was "wrong." Pet. App. 57a. According to the court, the Second Circuit's rule caused the "insane" result that people who have been wrongfully and maliciously prosecuted would need to object to the dismissal of the unfounded charges unless the judge is willing to state "on the record" that the dismissal was on the merits of guilt or innocence. Pet. App. 56a. Because that would never happen, the Second Circuit's rule "essentially wipes this cause of action off the books." Pet. App. 52a-53a. However, the court said it could not "buck the Second Circuit." Pet. App. 57a.

After trial, the court issued a written opinion to explain its reasoning and express its disagreement. The court reiterated that "current Second Circuit law" required plaintiff to "show that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence." Pet. App. 43a (quoting *Lanning*, 908 F.3d at 22). The court noted uncertainty as to "how much evidence must be supplied by a plaintiff to show that the dismissal was essentially for innocence." Pet. App. 47a-48a. It nonetheless conducted its own assessment of what the record said about petitioner's innocence, concluding that although "evidence was presented suggesting plaintiff's innocence," petitioner could not show the charges were "dismissed in a manner affirmatively indicative of his innocence." Pet. App. 46a, 47a.

2b. A second issue arose from petitioner's unlawful entry claim. Respondents sought to justify their warrantless entry based on exigent circumstances and the parties disputed whether respondents had the burden to prove their asserted exigency, or whether petitioner

had the burden to prove its non-existence. The district court first concluded that respondents, as the party asserting exigency, had the burden to prove it. *See* JA20-21 ("I can only conclude that in a case like this, the Second Circuit would put the burden of proof for exigent circumstances on the defendant."). However, the court later concluded that Second Circuit precedent required otherwise: that petitioner be assigned the burden to negate exigency. Pet. App. 52a (citing *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991)). The court expressed the view that this was "wrong," but the binding rule. Pet. App. 57a.

When instructing the jury on petitioner's unlawful entry claim, the court twice stressed that Mr. Jones had the burden "to show no exigent circumstances." JA239. In between, the court paused to ask the jurors to acknowledge that they understood, to which the jurors nodded. *Id*. The jury subsequently returned a verdict in favor of respondents. ECF No. 137.

In a post-trial opinion, the district court explained "[t]here is a split among the circuit courts over which party has the burden of proof in civil cases." Pet. App. 34a. "The United States Court of Appeals for the Third, Sixth, Ninth, and Tenth Circuits have assigned the burden of proof on the government." Pet. App. 35a (collecting cases). The Second Circuit, on the other hand, "shares the apparent view of the Seventh and Eighth circuits" which have "have placed the burden of proof on the plaintiff." Pet App. 35a, 36a. The court explained that it was bound by Second Circuit caselaw concerning searches of the home and assigning the plaintiff the burden to prove exceptions, including for "the exigent circumstances exception." Pet. App. 36a-38 (citing *Ruggiero*, 928 F.2d 558; *Harris v. O'Hare*,

770 F.3d 224, 234 n.3 (2d Cir. 2014)). The court noted that this created an incongruity with other civil claims under the Fourth Amendment, where the burden to prove exceptions to the warrant requirement lies with the government actor who asserts the exception. Pet. App. 40a-41a.

The court expressed its view that the Constitution "explicitly favors the rights of the house-dweller over that of police officers" and the Second Circuit's rule "subverts" that protection. Pet. App. 43a. The court reasoned that the exigency justification "is wholly dependent upon the facts often known only to the police officer at the time of the warrantless entry" and the Second Circuit's rule therefore "diminish[es] a plaintiff's ability to enforce his or her constitutionally protected rights as a householder." Pet. App. 42a-43a, 45a. In the court's view there was "no sound basis" for the Second Circuit's rule and "[t]he burden should be on governmental officials seeking to enter a home without a warrant." Pet. App. 43a, 45a. According to the court, the Second Circuit's rule was resulting in "repeat injustice that should stop now." Pet. App. 49a.

3. Petitioner appealed both issues.

3a. With respect to malicious prosecution, petitioner argued that the favorable termination rule does not require him to show affirmative indications of his innocence, and that *Lanning*'s statement to that effect conflicted with this Court's caselaw, "overhauled centuries-old common-law principles," and causes perverse results. *See* Appellant's Br. 14, 19-37. Respondents, on the other hand, argued that the Second Circuit's decision in *Lanning* "made crystal clear that § 1983 malicious prosecution claims require 'affirma-

tive indications of innocence to establish favorable termination'" and "emphatically rejected" petitioner's argument that criminal proceedings terminate favorably for the accused upon a dismissal that is "not inconsistent with innocence." Appellees' Br. 16, 23 (quoting *Lanning*, 908 F.3d at 25).

The Second Circuit agreed with respondents that it and the district court were "bound by *Lanning* to enter judgment in favor of the defendants on Thompson's malicious prosecution claim." Pet. App. 6a-7a. The panel thus issued a summary decision reiterating that *Lanning* "held that section 1983 malicious prosecution claims require 'affirmative indications of innocence to establish favorable termination.'" Pet. App. 5a. Because, here, "neither the prosecution nor the court provided any specific reasons about the dismissal on the record" and petitioner had failed to "point to any affirmative indication of innocence" in the record, he could not satisfy this standard. Pet. App. 6a. The panel added that it was "bound by [*Lanning*] until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Id.*

3b. With respect to unlawful entry, petitioner asked the court to hold that when government actors attempt to justify warrantless entry of a home based on an exigent circumstance, they bear the burden to prove it. Appellant's Br. 38-47. He argued that the Second Circuit's contrary precedent conflicted with this Court's caselaw and foundational common-law authorities. Appellant's Br. 45-46 (citing the Restatement, Blackstone and Lord Camden). Respondents argued, in turn, that "[w]ith respect to exigency, the [Second Circuit] has long assigned the ultimate burden of proof with respect to a § 1983 warrantless

search claim to the plaintiff." Appellees' Br. 17. They argued that the court should not "overturn the approach it has used for decades." Appellees' Br. 34.

The Second Circuit agreed with respondents that it was bound by prior precedent to place the burden of persuasion on the plaintiff. Pet. App. 7a (citing *Ruggiero v. Krezeminski*, 928 F.2d 558 (2d Cir. 1991); *Harris v. O'Hare*, 770 F.3d 224, 234 n.3 (2d Cir. 2014)).

4. Petitioner sought rehearing *en banc*, which the Second Circuit denied. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This case presents two independent issues that satisfy this Court's certiorari criteria. The Second Circuit concluded both issues were controlled by its prior precedent, and in both instances the prior precedent is in acknowledged conflict with that of other circuits. Both issues are important to the adjudication of frequently recurring constitutional claims which seek to constrain government intrusion on private life. The Court should grant certiorari to resolve them.

I. This Court Should Resolve Whether The Favorable Termination Rule Requires A Termination That Affirmatively Indicates The Accused's Innocence.

When a person is unreasonably seized pursuant to legal process, he cannot bring a § 1983 claim challenging the seizure until "termination of the prior criminal proceeding in [his] favor." *Heck v. Humphrey*, 512 U.S. 477, 483, 484, 487 (1994); *McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019). The Court derived this "favorable-termination" requirement from "the common

law of torts," wherein "[t]he common-law cause of action for malicious prosecution provides the closest analogy." *Heck*, 512 U.S. at 483, 484. The requirement "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments." *McDonough*, 139 S. Ct. at 2156-57.

Applying this rule, the Court has held that a person who is charged and convicted cannot collaterally attack the conviction through § 1983 until it "has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. But the Court has never squarely addressed how the rule applies to a plaintiff who was never convicted in the first place—*i.e.*, when plaintiff obtains dismissal of the charges and there is therefore no parallel proceeding and no conviction being collaterally attacked.

The court should address that question now. The federal circuits are in a deep and acknowledged conflict on the issue, and the overwhelming majority of them have adopted a standard that is inconsistent with this Court's caselaw and the common law. The majority rule enables abuse of the legal process with virtual impunity, and leads to the perverse result in which a person who is wrongfully and maliciously prosecuted must insist on being tried for a crime he did not commit in order to be able to hold government actors accountable for misconduct.

A. The Circuits Are Split On This Question.

Seven circuits hold that a plaintiff who brings a § 1983 malicious prosecution claim must show "affirmative indications of innocence to establish favorable termination." Pet. App. 5a (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018)).

In *Lanning*, the Second Circuit squarely considered what it takes for a plaintiff to "allege that his criminal proceedings were terminated in his favor under § 1983." 908 F.3d at 24. The plaintiff argued that the Second Circuit should interpret the common law the same way as the New York Court of Appeals, under which "the favorable termination element is satisfied so long as 'the final termination of the criminal proceeding is *not inconsistent with* the Plaintiff's innocence.'" *Id*. at 24-25 (emphasis in original). The Second Circuit disagreed. Writing "to dispel any confusion . . . about the favorable termination element," it held that the favorable termination rule precludes a plaintiff from bringing suit unless he can show that the proceeding terminated "in a manner that is *indicative of* Plaintiff's innocence." *Id*. at 25 (emphasis in original).

The First, Third, Fourth, Sixth, Ninth, and Tenth Circuits likewise hold that "the mere fact that a prosecutor had chosen to abandon a case [is] insufficient to show favorable termination." *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016) (citing *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008)). "Instead, the termination must in some way 'indicate the innocence of the accused.'" *Id*. To determine whether a dismissal sufficiently indicates the accused's innocence, a court must consider "the stated

reasons for the dismissal as well as to the circumstances surrounding it." *Id.*; *see also Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019) (recognizing that "to satisfy the favorable termination element, a plaintiff must show that the prosecution was terminated in such a way as to imply the plaintiff's innocence."); *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (en banc) ("[U]pon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged."); *Salley v. Myers*, 971 F.3d 308, 309 (4th Cir. 2020) (holding that favorable termination requires that "the 'criminal case against the plaintiff has been disposed of in a way that indicates the plaintiff's innocence'"); *Jones v. Clark Cty., Kentucky*, 959 F.3d 748, 763 (6th Cir. 2020) (holding "[t]he termination [of proceedings] must go to the merits of the accused's professed innocence for the dismissal to be 'favorable' to him" (alterations in original)); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004) (holding that "a dismissal in the interests of justice satisfies [the favorable-termination] requirement if it reflects the opinion of the prosecuting party or the court that the action lacked merit or would result in a decision in favor of the defendant").

The Eleventh Circuit has expressly departed from those circuits. In *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020), the court squarely considered "whether a termination must contain evidence of a plaintiff's innocence to be favorable." *Id.* It held that favorable termination requires no such thing: "After considering both the common law and Fourth Amendment, we hold that the favorable-termination element of malicious prosecution is not limited to terminations that

affirmatively support the plaintiff's innocence." *Id*. at 1295. "Instead, the favorable-termination element requires only that the criminal proceedings against the plaintiff formally end in a manner not inconsistent with his innocence on at least one charge that authorized his confinement." *Id*.

Writing for the majority, Judge William Pryor explained courts must "first look to the common-law principles that were 'well settled' when Congress enacted section 1983." *Id*. at 1286. The court engaged in a comprehensive examination of the tort of malicious prosecution at common law, *see id*. at 1286-92, and concluded that the "[t]he clear majority of American courts did not limit favorable terminations to those that suggested the accused's innocence." *Id*. at 1287.

The Eleventh Circuit explained that at common law the favorable-termination requirement was focused on "concerns of finality, not whether evidence of innocence existed." *Id*. at 1288. It "prevent[ed] plaintiffs from attacking criminal proceedings that either were ongoing or had vindicated the defendant's accusations." *Id*. at 1286. That is, "the only final terminations that would bar a plaintiff's suit were those that were inconsistent with a plaintiff's innocence—that is, if a jury convicted the plaintiff or if the plaintiff compromised with his accuser to end the prosecution in a way that conceded his guilt." *Id*. at 1289.

Canvassing state definitions of favorable termination at the time Congress enacted § 1983, the court found that "every State to reach the issue other than Rhode Island agreed that a prosecution terminated when a court formally dismissed the prosecution and discharged the plaintiff." *Id*. Many states explicitly re-

futed the proposition that favorable termination required a record demonstrating "want of probable cause" and instead required only that "the original prosecution, wherever instituted, is at an end." *See id.* at 1287-88 (collecting state definitions). And the remaining states held that "plaintiffs could prevail even when the termination of the prosecutions against them did not bear on the merits, including when a court dismissed the prosecution after the accuser failed to appear, failed to file an indictment, or abandoned the prosecution." *Id*. at 1287 (citations omitted). In other words, "the vast majority of courts to consider the favorable-termination requirement either adopted standards that *excluded* considering the merits of the underlying prosecution or held that particular terminations that *did not* evidence plaintiffs' innocence could satisfy the requirement." *Id*. at 1289 (emphasis added).

The Eleventh Circuit thus had "no trouble" deriving the "well-settled principle of law" that "a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination." *Id*.; *see also id.* at 1291 ("[T]he principle we discern from the common law—that a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination—closely tracks the dominant approaches to the favorable-termination requirement."). "[W]hether a particular termination affirmatively supported a plaintiff's innocence was not material to the favorable-termination element." *Id*. at 1292. Moreover, the court explained, "nothing in the Fourth Amendment supports departing from the weight of the common law." *Id*.

Applying this rule, the Eleventh Circuit held the relevant inquiry was whether the plaintiff "alleges that the prosecution against [him] formally terminated and does not allege that he was convicted or that he admitted his guilt to each charge that justified his seizure." *Id.* at 1295. Because the plaintiff had alleged formal termination without any admission of guilt, "he received a favorable termination." *Id.*; *see also Luke v. Gulley*, 975 F.3d 1140, 1144 (11th Cir. 2020) (holding that plaintiff satisfied favorable-termination requirement where he alleged dismissal of all charges and the record permitted the inference that "he did not admit that he was guilty").

The Eleventh Circuit "acknowledge[d] that [its] conclusion departs from the consensus of [its] sister circuits," including *Lanning* and the six other circuits above. 972 F.3d at 1293. The court explained that it was required "not merely to count noses," but to give its "independent judgment." *Id.* at 1294. Exercising that judgment, it concluded that "the justification that [its] sister circuits offered for the consensus view is unpersuasive." *Id.* The Eleventh Circuit denied rehearing *en banc*, with no judge requesting a poll. 10/23/2020 Order, *Laskar*, 972 F.3d 1278 (No. 19-11719).

B. The Eleventh Circuit Is Right.

The majority rule applied below—that a criminal proceeding terminates favorably for the accused only if it "affirmatively indicates" his innocence—conflicts with this Court's caselaw, the common law, and basic Fourth Amendment principles.

First, this Court's prior cases have recognized a host of ways to satisfy the favorable-termination requirement that do not affirmatively indicate innocence. In *Heck*, for instance, the Court held that a plaintiff who had been convicted could not bring a civil action until the judgment against him was invalidated. The Court explained that to show favorable termination he "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. None of these showings affirmatively indicate a plaintiff's innocence. Furthermore, it is hard to see why being convicted and then having that conviction overturned or "called into question" on appeal or habeas would be favorable, but succeeding outright by dismissal *before* trial or conviction would not.

Similarly, in *McDonough*, this Court explained that the acquittal at issue "unquestionably" satisfied the favorable-termination rule, and went out of its way to clarify that this in no way limited the "broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused." 139 S. Ct. at 2160 & n.10. The Court explained that "prosecutors' broad discretion," including the discretion to determine "whether charges will be dropped," would "properly bear on the question whether a given resolution should be understood as favorable or not" and "call for a context-specific and more capacious understanding of what constitutes 'favorable' termination."

This cannot be squared with restricting favorable termination to dismissals that affirmatively indicate the accused's innocence.

Second, as Judge Pryor explained in great detail, "whether a particular termination affirmatively supported a plaintiff's innocence was not material to the favorable-termination element" at common law. *Laskar*, 972 F.3d at 1292; *see also supra*. Common law courts "on both sides of the Atlantic" held that "a termination on technical grounds did not cure the harm that malicious prosecution caused" and accordingly that "plaintiffs could satisfy the [favorable-termination] requirement with terminations that did not support their innocence." *Laskar*, 972 F.3d at 1286, 1292; *see also id.* at 1287 ("The clear majority of American courts did not limit favorable terminations to those that suggested the accused's innocence."). And "no state required an acquittal" or held that "a termination needed to bar all future prosecutions." *Id.* at 1290. Instead, "a plaintiff could satisfy the favorable-termination element of malicious prosecution by proving that a court formally ended the prosecution in a manner that was not inconsistent with his innocence." *Id.* at 1292.

Circuits adopting the majority position have relied exclusively on a comment in the Restatement, which states that a termination must be "such as to indicate the innocence of the accused." Restatement (Second) of Torts § 660 cmt. a (1965). To begin with, this is a superficial reading of the Restatement.[4] But as Judge

[4] Whatever this comment means, the Restatement's actual text is clear. It states that to bring a malicious prosecution claim, "the criminal proceedings must have terminated in favor of the ac-

Pryor explained, even if this were a correct interpretation of the Restatement, such a requirement has "no [historical] pedigree" and the Restatement summarizes doctrine "developed long after Congress enacted section 1983." *Laskar*, 972 F.3d at 1294.

Third, requiring "affirmative indications of innocence" has nothing to do with the purpose of the favorable-termination requirement. As this Court has recognized, the favorable-termination rule is "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter" and avoiding "collateral attacks on criminal judgments through civil litigation." *McDonough*, 139 S. Ct. at 2156-57 (citing *Heck*, 512 U.S. at 484-85). The Court has accordingly "defer[red] accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment." *Id.* at 2155. But where a plaintiff waits until dismissal of the charges against him before he files a civil action, there is neither any "parallel criminal litigation" nor any "collateral attack on a criminal judgment." *Id.* at 2155, 2156.

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cused," Restatement (Second) of Torts § 658, and then specifically defines what it means. It says, first, that the requirement is met not only by "acquittal," but various other ways including "the formal abandonment of the proceedings." *Id.* § 659. It even clarifies that the abandonment may be by "*nolle prosequi* [*i.e.*, dismissal of the charges], either with or without the leave of the court" or "any method other than that of the entry of a *nolle prosequi*, by which a public prosecutor may formally abandon the prosecution of the proceedings." *Id.* cmt. e. The Restatement also sets forth narrow exceptions in which the dismissal of charges "is not a sufficient termination" and none of those exceptions limits favorable terminations to dismissals that affirmatively indicate innocence. *Id.* § 660.

Finally, requiring a plaintiff to show indications of innocence in his criminal proceeding confuses the Fourth Amendment claim that is being asserted. As Judge Pryor explained, whether a person has been unreasonably seized for the purposes of a § 1983 malicious prosecution claim turns on whether the "officer who authorized the seizure had sufficient information before him to support the seizure." *Laskar*, 972 F.3d at 1292. The indications-of-innocence test mistakenly "redirects the focus to whether the entire prosecution was justified." *Id*. Moreover, it "considers the wrong body of information," forcing a plaintiff to prove unreasonableness based on the record in his criminal proceedings, as opposed to the information known when he was seized pursuant to legal process. *Id*. Nothing in § 1983 or the Fourth Amendment requires a plaintiff to rely on "such a narrow, inapposite source of evidence." *Id*. Rather, the favorable termination requirement "bar[s] a suit for malicious prosecution only when the prosecution remains ongoing or terminates in a way that precludes any finding that the plaintiff was innocent of the charges that justified his seizure." *Id*. at 1293.

C. This Issue Is Important.

The question presented concerns a recurring federal issue of national importance, which bears directly on whether government actors who abuse the legal process for improper or even discriminatory means can be held accountable for violating the Constitution.

Answering the question presented has profound consequences because of the immense distance between the two rules. As the district court explained, the majority rule effectively nullifies the constitutional protection against malicious prosecution and

means that government actors who abuse the legal process can virtually never be held to account. Pet. App. 52a-53a. The reason is straightforward: When prosecutors dismiss charges they generally do not indicate on the record that the accused is innocent. Rather, they just say they are dismissing charges "in the interests of justice," Pet. App. 18a-19a; *Awabdy*, 368 F.3d at 1068 (9th Cir.) (same), or the "in the interest of judicial economy," *Olaizola v. Foley*, 797 F. App'x 623, 625 (2d Cir. 2020). Under the majority rule, this is enough to immunize all government actors even from gross abuses of the legal process. In contrast, under the Eleventh Circuit's rule, a person who is maliciously targeted using the legal process and defends himself to the point of dismissal will have accrued a claim to hold the relevant government actors accountable for their misconduct.

Moreover, the indications-of-innocence approach that presently governs most of this country causes perverse results. It puts a victim of malicious charges in the untenable position of having to *object to* the dismissal of the bogus charges or forgo the right to hold the relevant government actors accountable. If the prosecution or court declines to state his innocence on the record, then the victim presumably must insist on being tried so that he can obtain acquittal. Simply put, it requires a victim to choose to risk subjecting himself to criminal penalties in order to preserve his right to later bring a malicious prosecution claim. Before the district court, respondents conceded this was the effect of their rule. *See* JA24 (counsel for respondents acknowledging that in the event the prosecution decided to dismiss charges, the plaintiff would have to say, "your Honor, we want to bring a civil suit . . . so

don't dismiss it"). In the district court's words, this is "insane." Pet. App. 56a.

The majority rule also has troubling consequences for the coherence, and perhaps even legitimacy, of the criminal legal system. At its best, the rule is irrational: charges dismissed before trial are *more likely* to lack substance than ones that are pursued to trial and result in acquittal. In other words, the majority rule shields government actors from liability for the most unjustified accusations. At its worst, the majority rule undermines confidence in the legal system by affording prosecutors the unilateral power to immunize themselves and/or their colleagues for abuses of the legal system. A prosecutor that engages in or learns of such abuse could simply dismiss the charges and extinguish the accused's right to bring an action. Indeed, in *McDonough*, the defendant district attorney openly acknowledged prosecutors would take this into account, describing the "powerful incentive to ensure that the proceedings do not terminate favorably."[5] This Court acknowledged this "valid" consideration and explained that it "more properly bear[s] on the question whether a given resolution should be understood as favorable or not"—in other words, the question here. *McDonough*, 139 S. Ct. at 2160 & n.10.

D. This Is A Suitable Vehicle.

Petitioner argued at every stage that the favorable-termination requirement is satisfied by the dismissal of charges against him and does not require him to show affirmative indications of his innocence.

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[5] Respondent's Br. 41-42, *McDonough*, 139 S. Ct. 2149 (No. 18-485), 2018 WL 7890209.

Both courts ruled against him on that argument. Pet. App. 6a-7a, 46a-49a.

Petitioner's failure to satisfy the favorable-termination requirement was the Second Circuit's sole basis for affirming the dismissal of petitioner's malicious prosecution claim. Applying *Lanning*'s "affirmative indications of innocence" test, the court found that petitioner had failed to show favorable termination because "neither the prosecution nor the court provided any specific reasons about the dismissal on the record" and petitioner was otherwise "unable to point to any affirmative indication of innocence" in the record. Pet. App. 6a. The court thus concluded it and the district court were "bound by *Lanning* to enter judgment in favor of the defendants" and would be so "until such time as [it is] overruled either by an en banc panel of [the Second Circuit] or by the Supreme Court." Pet. App. 6a-7a. The Second Circuit subsequently denied rehearing en banc.

It is clear only this Court can resolve the conflict. Seven circuits have lined upon one side, including the court below, which declined to revisit its prior precedent. Pet. App. 1a-2a, 5a. The Eleventh Circuit consciously parted ways, finding in its "independent judgment" that "the justification that [its] sister circuits offered for the consensus view is unpersuasive," *Laskar*, 972 F.3d at 1294, and refusing to reconsider its decision *en banc*, *see* 10/23/2020 Order, *Laskar*, 972 F.3d 1278 (No. 19-11719).

II. The Court Should Resolve Who Has The Burden Of Proof When The Government Attempts To Justify Warrantless Entry Of A Home Based On Exigency.

The second issue presented independently warrants review. Courts are in an acknowledged 4-3 conflict over whether the government bears the burden to prove the justification of exigency in a civil case, or whether the plaintiff has the burden to prove non-exigency. This Court resolves such questions about the administration of § 1983 claims with reference to the common law and, here, all of the Court's go-to common-law authorities confirm that the burden to justify trespass on the home, including the justification of emergency aid, was borne by the defendant. The Court should provide guidance to correct the contrary decision below, restore uniformity in how such claims are adjudicated, and reestablish the constitutional protection afforded to the home.

A. The Circuits Are Split On This Question.

Courts are in acknowledged conflict over who has the burden of proof in a § 1983 action when the government asserts exigency as a justification for unlawfully searching a home. *See, e.g.*, Pet. App. 34a-36a ("There is a split among the circuit courts over which party has the burden of proof in civil cases."); *Bogan v. City of Chicago*, 644 F.3d 563, 569 (7th Cir. 2011) (recognizing "the circuits [are] split on the issue").

Four circuits hold that when a government actor asserts exigency as a justification for a warrantless search of someone's home, the government must prove the asserted exigency. In *Parkhurst v. Trapp*, 77 F.3d

707 (3d Cir. 1996), for instance, the Third Circuit considered the warrantless search of a home based on a missing-child report. *Id.* at 710-11. The court explained that "[t]o search a person's home and belongings, police officers ordinarily must first seek a warrant based on probable cause supported by oath or affirmation" and that warrantless search of a home is "per se illegal" absent an exception which excuses the warrant requirement. *Id* at 711. Recognizing that the "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment," the court explained that "the burden rests on the State to show the existence of these exceptional circumstances." *Id.*; *see also Sharrar v. Felsing*, 128 F.3d 810, 820 (3d Cir. 1997) (recognizing that the issue of exigency is "one for the jury" and "[t]he government bears the burden of proving that exigent circumstances existed"), *abrogated on other grounds by Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007).

The Sixth, Ninth and Tenth Circuits have adopted the same rule. *See Hardesty v. Hamburg Twp.*, 461 F.3d 646, 655 (6th Cir. 2006) ("The government bears the burden of proving that exigent circumstances such as a medical emergency existed to justify a warrantless search."); *Johnson v. City of Memphis*, 617 F.3d 864, 868 (6th Cir. 2010) ("The government bears a 'heavy burden' to demonstrate that such an exigency occurred."); *Hopkins* v. *Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009) (stating that "the Government bears the burden of demonstrating that the search at issue meets" the exigency exception); *Sims v. Stanton*, 706 F.3d 954, 960-61 (9th Cir. 2013), *reversed on other grounds by Stanton v. Sims*, 571 U.S. 3 (2013); *Armijo*

ex rel. Armijo Sanchez v. Peterson, 601 F.3d 1065, 1070 (10th Cir. 2010) ("The officers bear the burden of establishing that the threats posed exigent circumstances justifying the warrantless entry."); *Mascorrow v. Billings,* 656 F.3d 1198, 1205 (10th Cir. 2011) ("The burden is on the government to demonstrate the existence of exigent circumstances."); *McInerney v. King*, 791 F.3d 1224, 1231 (10th Cir. 2015).

Three circuits reject this approach. These circuits instead hold that once the government produces evidence of exigency, the plaintiff has the burden to negate exigency.

The Second Circuit adopted its rule in *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991), which considered who has the burden of persuasion when the government asserts consent as the basis for its entry of the home. The court rejected the plaintiffs' argument that "the burden of proving the exceptions to the fourth amendment warrant requirement rested on the defendants." *Id.* at 562-63. Instead, it held that a defendant had only "the duty of producing evidence of consent or search incident to an arrest or other exceptions to the warrant requirement," and the plaintiff assumed the burden of proof in negating the government's justification. *Id.* at 563. The court has since applied the rule to assign the plaintiff the burden to negate the existence of exigent circumstances, including here. *E.g.*, *Harris v. O'Hare*, 770 F.3d 224, 234 & n.3 (2d Cir. 2014); Pet. App. 7a.

The Seventh and Eighth Circuits agree with the Second Circuit. In *Bogan*, the Seventh Circuit considered the question here: "In a § 1983 warrantless-search action, in which the defendants claim that the search was justified based on exigent circumstances,

which party bears the burden of proving the presence or absence of such circumstances?" 644 F.3d at 568. The court rejected the plaintiff's argument that "the burden of proof fell on the officers to establish that their actions were justified by exigent circumstances." *Id.*. The court instead adopted the Second Circuit's rule, noting that its holding "may deepen a preexisting circuit split." *Id.* at 569. Like the Second Circuit below, the Seventh Circuit has declined to "revisit [its] holding in *Bogan* and reallocate the burden of proof in warrantless Fourth Amendment cases." *Martinez v. City of Chicago*, 900 F.3d 838, 844, 846 (7th Cir. 2018).

In *Der v. Connolly*, 666 F.3d 1120 (8th Cir. 2012), the Eighth Circuit similarly acknowledged a conflict of authority and sided with the Second and Seventh Circuits. *Id.* at 1126-29. The court rejected the plaintiffs' argument that "the district court improperly shifted the burden of proving the affirmative defense[] of . . . exigent circumstances to them." *Id.* at 1126. Adopting the rationale of *Ruggiero* and *Bogan*, the Eighth Circuit concluded that the plaintiff must prove non-existence of exigency. *Id.* at 1128-29.

B. The Decision Below Is Wrong.

Requiring civil plaintiffs to disprove the existence of exigency conflicts with this Court's caselaw, and with the bedrock common-law principles that underlie the Fourth Amendment's protection of the home and inform the adjudication of related claims under Section 1983.

This Court has long recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980);

Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) ("It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"). The Court has thus repeatedly urged that the warrantless search of a home is "*per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971); *see also, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006); *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Given the Constitution's fierce protection of the sanctity of the home, "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches." *Welsh*, 466 U.S. at 749-50.

The Court has been uniform in describing this heavy burden as one that the government must bear. It has said courts "cannot be true to [the Fourth Amendment] and excuse the absence of a search warrant without a showing *by those who seek exemption from the constitutional mandate* that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948) (emphasis added). In civil cases, the Court has emphasized "the 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," and explained "[i]t is incumbent *on the officer*" to ensure his "search is lawfully authorized and lawfully conducted." *Groh*, 540 U.S. at 559-63 (emphasis added).

This allocation of the burden also follows from the Court's instruction that in "defining the contours of a claim under § 1983, we look to 'common-law principles that were well settled at the time of its enactment.'" *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). When it comes to an unlawful entry claim, "the most natural common law analogy" is the common-law tort of trespass. *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019); *see also United States v. Jones*, 565 U.S. 400, 406 (2012) (observing that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates"); *Kyllo*, 533 U.S. at 31.

Common-law authorities uniformly explain that once the plaintiff proved that the defendant entered the plaintiff's land, the defendant bore the burden of proving his justification or "privilege" to be present. The Restatement, for instance, recognizes that such privileges "must always be pleaded and proved by one who seeks thereby to destroy the seemingly tortious character of his conduct." Restatement (Second) of Torts § 10 cmt. c. This included common-law privileges akin to the Fourth Amendment's "exigent circumstances" justification, such as including "public necessity," *id.* § 196, or "prevent[ing] serious harm to . . . a third person," *id.* § 197; *see also id.* §§ 191-211 (describing all other common-law privileges).[6]

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[6] An exception existed for privileges which were "based upon the consent" of the plaintiff, whereupon "the burden is upon the plaintiff to prove absence of consent." Restatement (Second) of Torts § 10 cmt c. However, even that exception did not apply where it was shown that the defendant trespassed on a "possessory and proprietary interest in land." *Id.*

The Court's other go-to common-law authorities confirm the same. Blackstone wrote that the common law writ of trespass "command[ed] the defendant to show cause *quare clausum querentis fregit*" ("because he broke the close of the plaintiff"), thus differing from Roman laws, which placed the burden on the plaintiff to show that a defendant failed to comply with an express prohibition against entry. 3 William Blackstone, *Commentaries on the Laws of England* 209 (1768) (emphasis added). And in *Entick v. Carrington*, 95 Eng. Rep 807, 817 (C.P. 1765), Lord Camden wrote: "[I]f . . . a trespasser . . . will tread upon his neighbor's ground, *he must justify it by law*." *Id.* at 817 (emphasis added).[7]

Consistent with this Court's Fourth Amendment jurisprudence and the common-law principles which animate § 1983 claims, the defendant bears the burden to justify warrantless entry into a home, and the Second Circuit is wrong to instruct otherwise.

C. This Issue Is Important.

As reflected in the record in this case—as well as the frequency with which circuits have confronted the question presented and then been asked to reconsider it—the question presented is important to proper resolution of unlawful entry claims.

"Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by

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[7] This Court has previously characterized *Entick* as "a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' with regard to search and seizure." *Jones*, 565 U.S. at 405.

the Fourth Amendment." *Payton*, 445 at 587. Assignment of the burden bears directly on the degree of that protection. This is especially so because "the facts that establish exigent circumstances are uniquely within the knowledge of the police." Pet. App. 44a-45a. By nonetheless locating the burden on the plaintiff, the rule below thus "diminish[es] a plaintiff's ability to enforce his or her constitutionally protected rights as a householder." Pet. App. 43a.

It is for this reason that the parties vigorously litigated who bears the burden, even revisiting it multiple times throughout trial. JA18, 23, 78, 130, 192. And it is for this reason that the district court found it necessary to issue a post-trial opinion, decrying the rule below as one that causes "repeated injustice that should stop now." Pet. App. 49a.

D. This Is A Suitable Vehicle

The question presented was preserved and both sides were fully aired at trial and on appeal. Petitioner specifically urged that the burden of proof should be placed on the defendants, while respondents urged the Second Circuit's "longstanding precedent of assigning the burden of proof in § 1983 unlawful search cases to plaintiffs." Appellees' Br. 34. The panel agreed with respondent, holding that its earlier precedent controlled and there was thus "no error" in "assigning [petitioner] the burden of proof with respect to whether exigent circumstances authorized the police officers' warrantless search of his apartment." Pet. App. 7a.

The answer to the question presented is determinative of whether reversal is appropriate. "Under [Second Circuit] precedent, it is accepted that an error

in instructing a jury on the burden of proof is ordinarily harmful." *Terra Firma Investments (GP) 2 Ltd. v. Citigroup Inc.*, 716 F.3d 296, 298 (2d Cir. 2013). Jury instructions that "incorrectly shift[] the burden of proof" from one party are thus deemed "prejudicial and require reversal." *Id.* at 301; *see also* Martin A. Schwartz and George C. Pratt, SECTION 1983 LITIG. JURY INSTRUCTIONS § 1.10B (2d ed.) (recognizing the general principle that instructions which "erroneously shift the burden of proof[] are likely to be prejudicial").

The record here, which caused the parties and the district court to repeatedly revisit the burden issue at trial, is representative of the issue. Respondents premised their claim of exigency on the existence of an imminent threat to petitioner's child at the time they entered his apartment. That justification had serious difficulties: EMTs had been inside petitioner's apartment just minutes earlier and had seen the baby safe in its mother's arms. Respondents' claim of a present threat was further undercut by the fact that they had petitioner, their only suspect, with them at the door and, indeed, handcuffed on the floor when they entered his apartment. With these facts, respondents frequently benefited from the fact that plaintiff could not prove what respondents knew at the time they entered.[8]

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[8] The account in respondents' appellate brief is illustrative how this dynamic played out: Respondents could claim that they had exclusively received information pointing toward exigency, *see* Appellees' Br. 4-5, and had received none of the information that undermined reliability of the 911 call, *see id.* n.1. For instance, the EMTs' testimony undermined the reliability of the 911 call at the very outset, stating that they could tell from their "first impression" of Camille that she was not "all there upstairs" and

Contrast that with the outcome in a circuit that assigns the government the burden to prove its exigency. In *Parkhurst*, for instance, police were investigating the report of a missing child and believed that the plaintiff and the plaintiff's mother might be endangering the child. 77 F.3d at 709. After detaining the plaintiff, the officers returned to the plaintiff's house and searched it without a warrant in order to find the plaintiff's mother, who was still at large and with the missing child. *Id.* at 710. Recognizing that "the burden rests on the State to show" exigency and an even "greater burden" for "officials who enter a home or dwelling without consent," the Third Circuit held that the officers' could not satisfy their burden to show imminent danger where they had already detained the plaintiff. *Id.* at 711-12. The officers' testimony that they "didn't know" various facts and general professions that "time was of the essence" was insufficient to satisfy that affirmative burden. *Id.* at 711-12.

Under this standard, petitioner plainly would have prevailed as well. In other words, the question presented is not only dispositive of whether reversal is required for a new trial, but potentially even whether petitioner prevails. The outcome and evidentiary difficulties in proving a Fourth Amendment violation should not differ depending on whether police enter a home in Brooklyn or in one of the four circuits that assign the burden to the government.

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acting in "strange" ways. JA135, 142; *see also* JA 106. Respondents claimed the EMTs never mentioned this, and petitioner had no way to prove otherwise.

CONCLUSION

The petition should be granted.

Respectfully submitted,

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

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