No. _____

In The
Supreme Court of the United States

THE ESTATE OF ADRIANO ROMAN, JR.,

Petitioner,

vs.

CITY OF NEWARK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 42 U.S.C. § 1983 incorporates fundamental concepts of tort law. A fundamental concept of tort law is joint and several liability, which shifts the burden to plausible joint tortfeasors to apportion their own fault and liability. Do pleadings under 42 U.S.C. § 1983 incorporate joint and several liability?

2. If so, where a plaintiff pleads that multiple police officers began a warrantless and unconstitutional search of premises as a group, and pleads that a state criminal court has already held that the search was unconstitutional at its inception, has the plaintiff adequately pled a Fourth Amendment violation against the officers, such that the plaintiff need not identify the actions of each officer during the search, which are unknowable because the plaintiff was face-down and handcuffed on the floor?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- The Estate of Adriano Roman, Jr.—plaintiff and appellant below, and petitioner here.
- City of Newark, City of Newark Police Department, Anthony Campos, chief of police, Rodger C. Mendes, Albano Ferreira, Onofre H. Cabezas, Joseph Cueto, FNU Ressureicao, FNU Golpe, Joyce Hill, individually and in their capacity as police officers, John Does 1-20, as fictious names for presently unknown agents, members, commissioners, and chiefs—defendants and appellees below, respondents here.

There are no publicly held corporations involved in this proceeding.

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The Third Circuit opinion that is the subject of this petition is published at 913 F.3d 789 (3d Cir. 2019). (App1-46.) The district court's un-published opinion dismissing the petitioner's complaint is available at 2017 WL 436251 (D.N.J. January 30, 2017) (Wigenton). The district court's un-published opinion dismissing the petitioner's amended complaint is not available on Westlaw or Lexis and is reproduced in the appendix to this petition. (App47-50.)

BASIS FOR JURISDICTION IN THIS COURT

The Third Circuit filed its opinion on January 29, 2019 (App1), which this Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The petitioner brought his underlying complaint under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The petitioner alleges that the respondents violated the petitioner's rights under the Fourth Amendment to the United States Constitution, which states as follows:

> 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.

STATEMENT OF THE CASE

In affirming the district court's dismissal of the petitioner's Fourth Amendment claim against three individual officers, the Third Circuit accepted that the petitioner had adequately pled the following facts, either expressly or through incorporation. (App1, 4 n.1.)

On the night of May 2, 2014, at least three known police officers "forcibly entered" Adriano Roman's apartment in Newark, New Jersey. (App1, 4.) As Mr. Roman was watching a movie with his girlfriend, Tiffany Reyes, four police officers had set up surveillance outside Mr. Roman's apartment building because of "complaints about narcotics activity." (App4-5.) Three officers exited the surveillance vehicle to get a closer look at the building: Rodger C. Mendes, Albano Ferreira, and Joseph Cueto ("**Searching Officers**"). (App61-62.)[1] The Searching Officers supposedly heard an argument from inside the building and tried to enter, but the inner door to the building was locked. (App4-5.) Ms. Reyes' friend, Melissa Isaksem, happened to be walking into the building at the same time. (App5-6.) The Searching Officers cornered her and threatened to arrest her if she did not let them into the building and knock on the door to Mr. Roman's apartment. (App5-6.) Ms. Isaksem complied with the Searching Officers threats and knocked on the apartment door, announcing her presence; when Ms. Reyes opened the door, the Searching Officers stormed in. (App5-6.)

After storming into Mr. Roman's apartment, the Searching Officers handcuffed Mr. Roman, Ms. Reyes, and Ms. Isaksem and "demanded Roman call someone to bring drugs to the apartment." (App5.) "If he did,

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[1] The Third Circuit opinion does not name the Searching Officers, but cites to the transcript of a suppression hearing where they were named. The transcript was incorporated into the pleadings and relied on by the Third Circuit. (App4 n.1.)

they assured him they would make a deal and let him go." (App5.) The Searching Officers, with additional police officers now present, ransacked the apartment and supposedly found drugs in a "common area" used by "multiple tenants." (App5.) No drugs were found in the apartment itself. (App58.) In mock celebration, Mendes went over to Mr. Roman lying handcuffed on the floor, drove his knee into his neck, and told him that he would be "raped in prison." (App5.) Mr. Roman's father lived next door, his apartment was likewise invaded by the Searching Officers, and he watched most of the search of Mr. Roman's apartment. (App69-70.) The Searching Officers told him his son would "go away for a long time." (App5.)

Mr. Roman was arrested and jailed the same night and eventually indicted for possession of drugs and intent to distribute in New Jersey Superior Court. Mr. Roman moved to suppress the drugs as evidence on the basis of an unconstitutional search and a suppression hearing was held. (App5-6.) At the hearing, Mendes remarkably testified that Ms. Isaksem was not at Mr. Roman's building or apartment during the unconstitutional search. (App66.) But Ms. Isaksem testified that she could prove she was there because another police officer had asked her for her phone number during the unconstitutional search, written her phone number down, and texted her for a date. (App67-68.)

A New Jersey Superior Court judge held that Mendes' story was "incredible," and not in a good way. (App66.) He rejected Mendes' story that the Searching Officers did not use Ms. Isaksem to enter Mr. Roman's

building and he rejected the story that the Searching Officers did not search the apartment of Mr. Roman's father. (App69.) The judge held that the search was unconstitutional at its inception, the Searching Officers had no basis to enter the building or apartment without a warrant, and suppressed the drugs as evidence against Mr. Roman. (App69-70.)

Newark did not appeal and dismissed the indictment against Mr. Roman. (App6.) Mr. Roman ultimately spent six months in jail for no reason. (App5-6.)

PROCEDURAL BACKGROUND

A year later, Mr. Roman filed a complaint under 42 U.S.C. § 1983 in federal court in Newark, alleging that the search of his apartment violated the Fourth Amendment, among other causes of action, and that the Searching Officers were personally liable. While the complaint impleaded officers beyond the Searching Officers, the Third Circuit opinion accepts that, at a bare minimum, the Searching Officers were there at the inception of the unconstitutional search and were the driving force behind it. (App4 n.1.)

The respondents moved to dismiss Mr. Roman's complaint. The district court granted the motion, holding, among other things, that Mr. Roman did not "explain which [Defendants] committed the allegedly wrongful acts." (App8.) Mr. Roman then amended his complaint to name five officers as specifically responsible for the unconstitutional search, including the

Searching Officers who began the search. (App56.) The three other officers named as part of the unconstitutional search—Onofre H. Cabezas, FNU[2] Golpe and FNU Ressureicao—arrived at the apartment after the Searching Officers entered Mr. Roman's building on an unconstitutional basis. *See* App63 (only the Searching Officers were present when they forced Ms. Isaksem to let them into the building); App67 (other officers arrived for a protective sweep after the building was breached).[3] Respondents again moved to dismiss, and the district court again granted the motion for the same reasons as the first motion. (App49-50.) Both the complaint and amended complaint allege that a New Jersey Superior Court judge had already held the search of the building and apartment as unconstitutional at its inception. (App59-60.)

Mr. Roman appealed to the Third Circuit, arguing that the Searching Officers were jointly and severally liable for the unconstitutional search because it was unconstitutional at its inception and therefore they could be pled as a group under 42 U.S.C. § 1983. The Third Circuit rejected this argument in a footnote. (App28 n.10.) It upheld the district court's ruling on the insufficiency of the allegations against the Searching Officers and said it need not address whether joint and several liability applies to unconstitutional searches. (App28 n.10.) But that is a tautology: if joint

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[2] First name unknown.

[3] Joyce Hill is named as a defendant only in her supervisory capacity as a police sergeant and is not alleged to have been part of the unconstitutional search. (App55.)

and several liability plausibly applies to the Searching Officers, at least at the pleadings stage, then Mr. Roman adequately pled the Searching Officers as a group under 42 U.S.C. § 1983.

Mr. Roman succeeded on other claims on appeal to the Third Circuit and the appeal was remanded to the district court. (App32.)

During the appeal to the Third Circuit, Mr. Roman passed away and "The Estate of Adriano Roman, Jr." was substituted in as the appellant. The author of this petition has been designated the "limited administrator" of Mr. Roman's estate with authorization to prosecute the appeal. (App1.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

Police searches are often chaotic and involve multitudes of officers who come and go from the search at various times, as occurred here. In warrantless searches, the search invariably begins with a decision by an officer or group of officers to undertake a search outside the Fourth Amendment's warrant requirement. In most of these searches, the officers have a valid basis for an exception to the warrant requirement. However, as here, where there is no valid basis and the search is unconstitutional at its inception, joint and several liability should apply to the decision of the officers to undertake a warrantless search that results in a facially indivisible constitutional injury.

Otherwise, a plaintiff is presented with a difficult and sometimes impossible burden of pleading and ultimately proving who did what during a search. Here, Mr. Roman was handcuffed, face-down on the floor, not taking notes on which officers were doing what.

42 U.S.C. § 1983 "borrow[s]" basic concepts of tort liability and has been interpreted consistent with such concepts. *Heck v. Humphrey*, 512 U.S. 477, 486 n.4 (1994); *Wallace v. Kato*, 549 U.S. 384, 388 (2007). It is fully consistent with the tort concept of joint and several liability to hold that a plaintiff alleging an unconstitutional search need only plead which individual defendants participated in the unconstitutional search at its inception because the "injury" to the plaintiff is facially "indivisible." *See Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996). Every Federal Circuit Court of Appeal except the Third Circuit has held (or accepts) that joint and several liability[4] governs an allegation that a group of individual defendants acted in "concert to produce a single, indivisible injury"—deprivation of a constitutional right. *Harper v. Albert*, 400 F.3d 1052, 1062 (7th Cir. 2005); *see Anderson v. Nosser*, 456 F.2d 835, 841 (5th Cir. 1972); *Jackson v. City of Pittsburg*, 518 Fed.Appx. 518, 520-521 (9th Cir. 2013); *Finch v. City of Vernon*, 877 F.2d 1497, 1503 (11th Cir. 1989); *Snider v. City of Cape Girardeau*, 752 F.3d 1149,

[4] Joint and several liability is not all that different from the "joint participation" theory that permits a plaintiff to sue an otherwise private party who is "jointly engaged" with a state actor to deprive the plaintiff of a constitutional right. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 950 (1982).

1159 (8th Cir. 2014); *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 14-15 (1st Cir. 2005); *Weeks v. Chaboudy*, 984 F.2d 185, 189 (6th Cir. 1993).[5]

The Third Circuit is an outlier among all the other Federal Circuit Courts of Appeals. It has suggested that joint and several liability does not apply under 42 U.S.C. § 1983, *see Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 289-292 (3d Cir. 2018), and expressly declined to address the issue here on a set of allegations where every other Federal Circuit Court of Appeals would have deemed Mr. Roman's pleadings sufficient based on joint and several liability.

I. THE THIRD CIRCUIT OPINION BELOW CONFLICTS WITH EVERY OTHER FEDERAL CIRCUIT COURT OF APPEAL BECAUSE IT REFUSES TO APPLY JOINT AND SEVERAL LIABILITY UNDER 42 U.S.C. § 1983

The Third Circuit declined to address joint and several liability for unconstitutional searches on the basis that Mr. Roman's pleadings were not otherwise sufficient on the Fourth Amendment claim, but the allegations in a complaint must be viewed through the lens of the applicable law for "plausibility" of "entitlement to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662,

[5] The D.C. Circuit accepts that joint and several liability applies to attorneys' fees under 42 U.S.C. § 1988, which is consistent with joint and several liability for 42 U.S.C. § 1983. *Turner v. D.C. Bd. of Elections & Ethics*, 354 F.3d 890, 898-899 (D.C. Cir. 2004).

678-679 (2009). The applicable law here includes joint and several liability. The difference between pleading against individual officers who took disparate and separate actions during an unconstitutional search—which is what the Third Circuit required here—and pleading officers as a group because they were responsible for the inception of an unconstitutional search is that joint and several liability renders the latter pleading sufficient where it otherwise might not be.

Joint and several liability does not mean that all individual defendants will be liable, or that any will be, it simply means that—consistent with basic tort concepts—discovery and the individual defendants should sort out who did what and who knew what, not the plaintiff, who has the least amount of information at the pleadings stage. *See Summers v. Tice*, 33 Cal.2d 80, 87 (1948).[6] It is unfair to require the injured party to sort out the *plausible* joint tortfeasors as a precondition to *even entering the courthouse*. *Id.*[7] "The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is

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[6] The Pacific Reporter version of *Summers*, 199 P.2d 1 (Cal. 1948), does not contain pincites, so the citations here are to the California Reporter.

[7] *Summers* created the "first modern theory of alternative liability" and is the leading precedent on joint and several liability. Victor Schwartz & Liberty Mashigan, *Failure to Identify the Defendant in Tort Law: Towards A Legislative Solution*, 73 Cal.L.Rev. 941, 946 (1985).

certain that between them they did all; let them be the ones to apportion it among themselves." *Id.* at 86.[8]

The allegations here perfectly highlight how joint and several liability applies to Mr. Roman's pleadings. Mr. Roman alleges that the Searching Officers began a search on a false basis that led to Mr. Roman being unconstitutionally jailed for six months. A New Jersey Superior Court judge held that the search was unconstitutional and predicated on a false basis. While other police officers eventually arrived at Mr. Roman's apartment, but for the Searching Officers the unconstitutional search would not have occurred and Mr. Roman would not have been unconstitutionally jailed for six months. *See Northington*, 102 F.3d at 1568. Mr. Roman's pleadings plausibly allege that the Searching Officers were collectively the cause of his constitutional injury. That is all his pleadings are required to do. *See Iqbal*, 555 U.S. at 679.

This joint and several liability analysis under 42 U.S.C. § 1983 is where the Third Circuit opinion deviates from the other Federal Circuit Courts of Appeals. For example, in *Northington*, inmates and a guard

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[8] Damages in 42 U.S.C. § 1983 are designed to "fit the interests protected by the particular constitutional right in question." *Carey v. Piphus*, 435 U.S. 247, 265 (1978). Generally, damages in an unconstitutional search are limited to invasion of privacy, lost reputation, and property damage. *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000). However, if the causal link cannot be broken from the unconstitutional search through jail or imprisonment and other potentially severable damages, then tortfeasors on the unconstitutional search may be liable for those subsequent damages. *Halsey v. Pfeiffer*, 750 F.3d 273, 297 (3d Cir. 2014).

were determined to have spread a rumor in a prison that led to the beating of a prisoner. The guard argued that he was not liable because the inmates were the "alternate" cause of the injury to the prisoner. The Tenth Circuit disagreed, citing the Restatement (Second) of Torts § 432(2):

> If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Northington, 102 F.3d at 1568. "Multiple tortfeasors who concurrently cause an indivisible injury are jointly and severally liable; each can be held liable for the entire injury. It is not essential that all persons who concurrently caused the harm be joined as defendants . . . Subsection (2) of § 433B [of the Restatement] states the burden of proof also shifts to the defendant in the case of concurrent causes." *Id.* [internal citations/quotations omitted]. The Tenth Circuit then held that joint and several liability and consequent "burden shifting" need not be pled in a complaint because it is simply a "legal theory." *Id.* at 1569-1570.

Nearly every other Federal Circuit Court of Appeal has agreed with the Tenth Circuit in *Northington*. The Seventh Circuit has held that "liability among defendants in a § 1983 case is *joint* and several—at least in the usual case of one plaintiff with a single indivisible injury." *Thomas v. Cook Cty. Sheriff's Dep't*, 604

F.3d 293, 315 (7th Cir. 2010). In *Harper*, the Seventh Circuit rejected the factual application of joint and several liability where, on a motion for a judgment as a matter of law under Fed.R.Civ.P. 50, a reasonable jury could not find that each named defendant participated in the constitutional injury. *Harper*, 400 F.3d at 1062. This is similar to the standard the Third Circuit should have applied here: do Mr. Roman's pleadings create a reasonable inference (including all incorporated documents) that the Searching Officers participated in and were the proximate cause of the constitutional injury such that the burden may plausibly shift to them to determine or break the chain of causation?

Importantly, a plaintiff under 42 U.S.C. § 1983 need not plead the lack of defense of qualified immunity, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), meaning it is unnecessary for a plaintiff to plead that an individual defendant violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known." *See Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009) (definition of qualified immunity). It was therefore not necessary for Mr. Roman to plead anything against the Searching Officers other than that: (a) they undertook an unconstitutional search as a group that led to a constitutional injury—six months in jail; and (b) the New Jersey Superior

Court had already held that the group acted unconstitutionally at the inception of the search.[9]

Similar to *Gomez*, this petition presents a question on the "allocation of the burden of pleading" under 42 U.S.C. § 1983. *See Gomez*, 446 U.S. at 640. Given Mendes' testimony—accepted as part of Mr. Roman's pleadings by the Third Circuit—that the Searching Officers exited the surveillance vehicle and decided to enter Mr. Roman's building, it is beyond plausible that their decision was collective and that they acted together. The Searching Officers' collective decision to enter the building without a valid exception to the warrant requirement is, by itself, a sufficient allegation at the pleadings stage in the context of joint and several liability.

The distinction between the Searching Officers and other police officers who eventually arrived at Mr. Roman's apartment is the distinction between a plausible joint and several liability allegation against the Searching Officers and pleading the specific acts of the other officers who may not have acted on the same unconstitutional basis as the Searching Officers. For example, the record at this point does not evidence what the other officers knew about the unconstitutional search when they arrived at the apartment. It does not

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[9] Fictitious defendant pleadings—i.e. "John Doe"—do not solve the problem of alleging which police officer did what during an unconstitutional search. "John Doe" pleadings are only permitted where an identity is unknown. *See Hindes v. F.D.I.C.*, 137 F.3d 148, 155 (3d Cir. 1998). Here, identity is known, but actions may not be.

evidence whether they knew or had reason to know that they were in the apartment because of the unconstitutional act of the Searching Officers.

This is where joint and several liability is at its most applicable. It serves to *protect* the other police officers and requires the Searching Officers to hash out their own potential liability among themselves. Each of the Searching Officers could be concurrent causes or provided "substantial assistance" for the constitutional deprivation. The other officers who only arrived later to Mr. Roman's apartment might have had their own "independent" reasons and beliefs for the unconstitutional search or there might be "superseding" causes. *See Northington*, 102 F.3d at 1568; *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995). The indictment of Mr. Roman could be a superseding cause, cutting off damages for after the indictment, but leaving the Searching Officers to contest who was the proximate cause of pre-indictment damages. *Halsey*, 750 F.3d at 279; *see Bodine, supra*; *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989). Discovery and trial sorts this out, not *the pleadings*. *Halsey*, *supra*.

The central principles of 42 U.S.C. § 1983 similarly align with joint and several liability. If a plaintiff must plead the specific unconstitutional acts in a group that concededly acted as a group, then liability could often be avoided by the sheer number of police officers and the chaos of a search or arrest. Such a rule subverts the historic purpose of 42 U.S.C. § 1983, raises the bar for relief where a violation of a constitutional right "under color of state law" *has definitively occurred*, and

immunizes a group of police officers from the "natural consequences of [their] actions" *because they acted as a group*. *See Malley v. Briggs*, 475 U.S. 335, 344-345 n.7 (1985). Such a rule does not "benefit[ ] the victim of police misconduct who one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason." *Id.* at 344.

CONCLUSION

42 U.S.C. § 1983 began as part of the Ku Klux Klan Act in 1871 and was designed to provide civil relief against *groups* committing constitutional violations "under color of law." *See Monroe v. Pape*, 365 U.S. 167, 178 (1961) *overruled by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) (history of 42 U.S.C. § 1983); An Act to Enforce the Provisions of the Fourteenth Amendment, 17 Stat. 13 (1871). It would be an historically ironic result if that statute was interpreted over a hundred years later to provide no potential relief when a plaintiff plausibly pleads that a group caused an indivisible constitutional injury "under color of law." This petition should be granted to

conclusively address the applicability of joint and several liability under 42 U.S.C. § 1983 and to allocate the burden of pleading it.

Respectfully submitted,

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