No.

In the Supreme Court of the United States

WILLIE LEE COOKS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CLAYTON R. TARTT
Boles Holmes Parkman White, LLC
1929 3rd Avenue N.
Suite 700
Birmingham, AL 35203
(205) 502-2000

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

QUESTION PRESENTED

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980)). At the same time, the "Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Mincey* v. *Arizona*, 437 U.S. 385, 392 (1978).

There is widespread disagreement among the lower courts over the standards for proper application of this "emergency aid" exception to the warrant requirement. In this case, the Eleventh Circuit held that a warrantless, nonconsensual search of a home is legal under the emergency-aid exception if officers are unable to "rule out the possibility" that a person within the home is in need of aid prior to the search. App., *infra*, 6a, 13a-14a. Under this standard, courts focus not on the facts *known* to the officers, but instead on facts they "couldn't have known," and "were not sure" about, and "had no idea" about. App., *infra*, 12a-14a. Other courts have expressly rejected that approach, holding that a "possibility" based on unknown facts is insufficient to justify a warrantless and nonconsensual home search. These courts require that there be specific, affirmative facts indicating that an emergency is at hand and their assistance is immediately needed.

The question presented is whether the emergency-aid exception permits a warrantless, nonconsensual search of a private home based upon officers' inability to "rule out the possibility" that someone inside the home may be in need of aid.

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Other Authorities

Petitioner Willie Lee Cooks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 920 F.3d 735 (11th Cir. 2019). The decision of the district court (App., *infra*, 32a) is unreported. The report and recommendation of the magistrate judge (App., *infra*, 33a-47a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 3, 2019. On May 31, 2019, the court of appeals denied a timely filed petition for rehearing and rehearing en banc. App., *infra*, 48a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he 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."

INTRODUCTION

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), the Court held that police may conduct a warrantless, nonconsensual search of a private residence to render emergency aid to a person within. *Id*. at 392-393. A search under the emergency-aid doctrine demands "an objectively reasonable basis for believing that a person within the house is in need of immediate aid." *Michigan* v. *Fisher*, 558 U.S. 45, 47 (2009). But this Court has never explained what that standard requires of

police officers as a practical matter. The void has bred confusion and division among the lower courts.

Most courts have held that the "objectively reasonable basis" standard requires more than a mere possibility that someone within is in need of emergency aid. Other courts, including the court of appeals below, have held that a home search based on the emergency-aid exception is reasonable if officers are unable to "rule out the possibility" (App., *infra*, 6a) that an individual within is in need of aid. This latter approach has transformed the emergency-aid doctrine into a powerful license to conduct warrantless searches of any space in a home in which a person could conceivably be found. That was the basis on which the court of appeals affirmed the denial of petitioner's motion to suppress in this case.

That holding deserves certiorari review. Aside from implicating deep division among the lower courts, the question presented recurs frequently and implicates core Fourth Amendment principles. The Court should grant certiorari to ensure that the Fourth Amendment is enforced according to consistent, uniform principles that respect the proper balance between legitimate law enforcement activities and the sanctity of the home.

STATEMENT

A. Legal background

1. The question presented in this petition implicates the interrelation among three recognized exceptions to the warrant requirement.

First among them is the "emergency aid" exception. "Under the 'emergency aid' exception * * *, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Kentucky* v. *King*, 563 U.S. 452, 460 (2011) (quotation marks omitted) (quot-

ing *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)). A home search justified under this exception requires "an objectively reasonable basis for believing that a person within the house is in need of immediate aid." *Fisher*, 558 U.S. at 47 (citation omitted).

The second exception relevant here is the "exigent circumstances" exception. A warrantless home search is legal when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *King*, 563 U.S. at 460 (quotation marks omitted). The Court has recognized several situations constituting exigent circumstances, including hot pursuit of a fleeing felon (*United States* v. *Santana*, 427 U.S. 38, 42-43 (1976)) and imminent destruction of evidence (*Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966)). A search based upon exigent circumstances "generally requires a threshold showing that law enforcement officers had probable cause to enter the premises." *United States* v. *Almonte-Baez*, 857 F.3d 27, 31 (1st Cir. 2017).

The third exception to the warrant requirement is the "community caretaking" doctrine. The Court recognized in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), that officers may undertake a warrantless search to protect the public from a known danger, when doing so would be "totally divorced from the detection, investigation, or acquisition of evidence." *Id*. at 441. Some courts have held that that this exception justifies a warrantless home search when "the officer has a reasonable belief that an emergency exists [inside the home] requiring his or her attention." *United States* v. *Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006).[1]

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[1] There is an acknowledged conflict over whether the community caretaking doctrine permits warrantless home searches at all. See *State* v. *Edmonds*, 47 A.3d 737, 752 & n.13 (N.J. 2012).

2. The lower courts are in acknowledged "disarray" over whether—and if so, when and how—these doctrines "overlap" with respect to searches of the home in emergency-aid circumstances. *MacDonald* v. *Town of Eastham*, 745 F.3d 8, 13 (1st Cir. 2014). "Some courts have treated emergency aid as a freestanding exception to the warrant requirement," untethered to the specific doctrinal requirements of either exigent circumstances or community caretaking. *MacDonald*, 745 F.3d at 13 (citing *Commonwealth* v. *Entwistle*, 973 N.E.2d 115, 127 n.8 (Mass. 2012)).[2] Other courts have characterized the emergency-aid exception "a subset of the exigent circumstances doctrine." *Sutterfield* v. *City of Milwaukee*, 751 F.3d 542, 553 (7th Cir. 2014).[3] Still other courts "have classified emergency aid as 'a subcategory of the community caretaking exception.'" *MacDonald*, 745 F.3d at 13 (quoting *People* v. *Ray*, 981 P.2d 928, 933 (Cal. 1999)).[4]

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[2] See, *e.g.*, *State* v. *Carlson*, 548 N.W.2d 138, 141 n.3 (Iowa 1996) (emergency aid "must be assessed separately and by a distinct test" from community caretaking and exigent circumstances). Relatedly, some courts have defined emergency aid by muddling the other two doctrines. See *State* v. *Fede*, 202 A.3d 1281, 1286 (N.J. 2019) (holding an emergency-aid search justified by "community-caretaker duties prompted by exigent circumstances").

[3] See, *e.g.*, *Corrigan* v. *D.C.*, 841 F.3d 1022, 1030 (D.C. Cir. 2016) (emergency aid "is essentially a type of exigent circumstance"); *State* v. *Hathaway*, 120 A.3d 155, 164 (N.J. 2015) ("The emergency-aid doctrine is a 'species of exigent circumstances.'") (quoting *United States* v. *Martins*, 413 F.3d 139, 147 (1st Cir. 2005)).

[4] See, *e.g.*, *Commonwealth* v. *Wilmer*, 194 A.3d 564, 565 (Pa. 2018) ("[T]he 'emergency aid exception'" is "justified by the 'community caretaking doctrine.'"); *Campbell* v. *State*, 339 P.3d 258, 263 (Wyo. 2014) (similar); *State* v. *Macelman*, 834 A.2d 322, 326 (N.H. 2003) (emergency aid "is part of the 'community caretaking' function"). See also *Sutterfield*, 751 F.3d at 560-561 (describing the community caretaking doctrine as "the [better] fit").

In all events, courts have recognized that "there is some degree of overlap [among these three] doctrines," and "the distinctions [among] them are not always clear." *Sutterfield*, 751 F.3d at 553. Cf. *State* v. *Ryon*, 108 P.3d 1032, 1041 (N.M. 2005) (recognizing the confusing overlap among the doctrines).

3. The practical distinctions among these doctrines have significant implications for the requirements of the emergency-aid exception.

For example, the relevance of officers' subjective states of mind depends on the distinction. Courts treating the emergency-aid exception as a subset of the community caretaking doctrine require that officers not be motivated by an investigative purpose.[5] Other courts treating emergency aid as related to exigent circumstances have held that "subjective motives of the officer rendering emergency-aid" are irrelevant. *State* v. *Gonzales*, 148 A.3d 407, 420 (N.J. 2016).[6] This disagreement has persisted even following this Court's apparent resolution of the issue in *Fisher* in 2009. See *Fisher*, 558 U.S. at 49 (holding that it is irrelevant whether officers were "motivated by a perceived need to provide medical assistance").

The distinction among the underlying doctrines also dictates the degree of confidence officers must have that there is an emergency warranting their immediate intervention. Several courts have held that emergency aid does *not* require probable cause. These courts have held that "probable cause simply has no

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[5] See, *e.g.*, *State* v. *Yazzie*, 437 P.3d 182, 185 (N.M. 2019) ("the officers' primary motivation for the search" must be to rescue and not to investigate); *People* v. *Slaughter*, 803 N.W.2d 171, 181 (Mich. 2011) ("purpose" must not be investigative).

[6] See, *e.g.*, *Commonwealth* v. *Entwistle*, 973 N.E.2d 115, 123 (Mass. 2012) ("[S]ubjective motivation is irrelevant.").

role in the analysis of a warrantless entry into a residence under the emergency aid exception." *People* v. *Troyer*, 246 P.3d 901, 906 (Cal. 2011).[7]

By contrast, courts linking emergency aid to the exigent circumstances doctrine often conclude that the emergency aid rule "explicitly incorporates a threshold requirement approximating probable cause * * * as to the existence of an emergency." *Lum* v. *Koles*, 426 P.3d 1103, 1113 (Alaska 2018). These courts require that "officers have some reasonable basis, approximating probable cause, to connect the emergency to the area to be searched." *State* v. *Yazzie*, 437 P.3d 182, 185 (N.M. 2019).[8]

B. Factual background

A United States Marshals task force visited petitioner's home to execute an arrest warrant for second-degree assault. App., *infra*, 3a; C.A. App. 71. Marshals knocked on the door, but no one answered. App., *infra*, 3a. Undeterred, the marshals forced their way into

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[7] See *Hill* v. *Walsh*, 884 F.3d 16, 23 (1st Cir. 2018) ("the government need not show probable cause"); *United States* v. *Toussaint*, 838 F.3d 503, 508-509 (5th Cir. 2016) (similar); *Commonwealth* v. *Duncan*, 7 N.E. 3d 469, 473 (Mass. 2014) ("[A probable cause] showing is not necessary in emergency aid situations."); *State* v. *Macelman*, 834 A.2d 322, 326 (N.H. 2003) (the emergency aid doctrine requires "a lower standard than the probable cause required for an ordinary search or seizure.").

[8] See *Corrigan* v. *District of Columbia*, 841 F.3d 1022, 1030 (D.C. Cir. 2016) (officers must have "probable cause" concerning an "urgent and compelling need" to enter); *United States* v. *Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002) ("[A]s with any other situation falling within the exigent circumstances exception, the Government must demonstrate both exigency and probable cause."); Wayne R. LaFave, 3 *Search & Seizure* § 6.6(a) (5th ed. 2018) (an emergency aid search of a home entails a "probable cause requirement").

petitioner's home and searched it, finding it empty. App., *infra*, 3a.

Marshals returned to petitioner's home the next morning around 10:30 a.m. and surveilled it for two hours. App., *infra*, 3a. While surveilling, the team noticed a car leave twice. *Ibid*. When the car returned the second time, at around 12:30 p.m., officers shouted at the driver, Precious Clemons, to stop. *Ibid*.

Clemons went inside the house and locked the door. App., *infra*, 3a. Officers surrounded the home. C.A. App. 78. Through the locked front door, officers spoke to two other individuals inside the house—Pamela Price and Everstein Johnson. App., *infra*, 3a. Price confirmed that petitioner was inside the home. C.A. App. 76. When officers asked them to exit the house, Price and Johnson told the officers that they could not exit because the front door was boarded and locked with a deadbolt, and neither of them had a key. C.A. App. 77.

Shortly thereafter, officers heard "sounds similar to a power drill" coming from inside the home. App., *infra*, 3a. Price exited the home's back door and spoke to officers there, informing them that petitioner was inside and armed. C.A. App. 78. Price then returned into the home. *Ibid*.

Officers contacted a SWAT team. App., *infra*, 4a. Forty-five minutes later, SWAT personnel arrived. C.A. App. 79. For the next hour and a half, SWAT personnel negotiated by telephone with those inside the home, including Price and Johnson. C.A. App. 79-80, 83. Price told officers that petitioner was "doing something to a hole in the floor." C.A. App. 101.

An hour later (around 2:30 p.m.), and after negotiations had failed, officers shot tear gas into the home. C.A. App. 83. Approximately two hours after that (now

about 4:30 p.m.), SWAT personnel broke a front window, through which Price and Johnson exited the home. App., *infra*, 4a. Upon her exit, Price told officers that petitioner was inside "doing something in the floor." *Ibid.* She stated specifically that he had put multiple firearms in a hole in the floor. *Ibid*.

After Price and Johnson exited, officers learned the front door had been un-barricaded. C.A. App. 102. Petitioner and Clemons exited the house and were taken into custody, nearly six hours after officers arrived on the scene and four hours after the standoff began. App., *infra*, 4a.

Officers believed that only four people were inside the home; they never had any indication that additional people were inside. C.A. App. 93-94. After arresting petitioner and securing the three other occupants—and without a search warrant—officers entered petitioner's vacated home and searched it, first in a 30-second "sweep," and then in a longer, five-minute "sweep." App., *infra*, 4a. During their warrantless search, officers discovered and broke into a locked closet. App., *infra*, 36a. Adjacent to the locked closet, officers noticed a piece of plywood that had been screwed into the floor. App., *infra*, 5a. Using a crow bar—but again without a search warrant—officers pried the plywood covering up and found a hole leading to the home's crawlspace. *Ibid*. One of the "smaller members of the SWAT team" entered the hole. *Ibid*. The officer put his hand down to brace himself and felt plastic moving under his hand. *Ibid*. The officer looked down and saw the butt of a gun. *Ibid*. He then exited the hole. C.A. App. 149-150.

About one hour later (around 5:30 pm), and *still* without a search warrant, officers called another agent to the scene to document the firearms. App., *infra*, 37a. The officer arrived at 6:00 p.m., entered the hole,

moved the plastic, and found several firearms. *Ibid*. He also noticed several pieces of luggage but could not tell what they contained. *Ibid*.

Officers finally decided to seek a search warrant, which a judge signed by 8:30 p.m.—fully four hours after the home's only occupants had exited and been detained. App., *infra*, 37a. With a search warrant finally in hand, officers searched the house a third and final time, opened the luggage, and discovered additional firearms. *Ibid*.

C. Procedural background

1. The government charged petitioner with two counts of unlawful possession of a firearm under 18 U.S.C. 922(g)(1). App., *infra*, 5a. Petitioner moved to suppress the firearms, arguing that the officers had violated the Fourth Amendment when they entered his home, pried up the plywood covering, and entered the home's crawlspace without a search warrant. App., *infra*, 43a; see also App., *infra*, 5a-6a.

The government argued that the warrantless search was justified under both the protective-sweep doctrine or exigent circumstances doctrine. App., *infra*, 6a. As to exigent circumstances, the government argued that officers could have believed that additional individuals were inside the home and that potential hostages were beneath the screwed-down plywood, in need of emergency aid. App., *infra*, 6a-7a.

At the suppression hearing, officers admitted that they had known of only four individuals inside the home—petitioner, Clemons, Price, and Johnson—and that all four had been secured prior to the search. None indicated that additional people were inside the home. Officer Deramus thus testified:

Q. * * * So from the time that Ms. Clemons showed up and went in and boarded herself in, you had information that four people were inside the home?

A. Yes, sir.

Q. Did that ever change?

A. To my knowledge, no.

Q. Okay. Was there ever a time that you believe there were more than four people in the home?

A. I did not believe it, no.

C.A. App. 93-94.

Sergeant Billy Watts testified that, at the time officers entered the home, they had secured "a total of four" people and "believed there to be four people in the house from the conversations we had with negotiators." C.A. App. 104. He later stated that he "had no idea" whether additional individuals were in the house, asserting that officers "were still not sure" when the searched the crawlspace. App., *infra*, 6a.

2. The magistrate judge recommended denying the motion to suppress. App., *infra*, 33a-47a. The magistrate judge first rejected the government's assertion that the officer "had a right to be in the crawlspace" under the protective-sweep doctrine. App., *infra*, 38a-44a. Prying up nailed-down plywood board, he explained, exceeded the permissible scope of a "cursory visual inspection." App., *infra*, 43a-44a.

Turning the exigent circumstances question, the magistrate judge noted there was "no evidence that any officer observed anything about the * * * hole that would indicate that a dangerous person was inside." App., *infra*, 44a. Although the officers' concern about a threatening person might be based in conceivable fact,

"conceivability does not suffice for reasonableness." *Ibid*.

Nonetheless, the magistrate judge accepted the government's second argument—that the officers' prying up the plywood board to enter the crawlspace was permitted under the emergency-aid exception. App., *infra*, 44a-46a. The magistrate judge explained that "it was not reasonable for the officers to conclude the plywood-covered hole contained a person ready and able to launch an attack at them" but that "a reasonable officer could have believed a hostage could be underneath the plywood covering, inside the hole." App., *infra*, 46a. In reaching that conclusion, the magistrate judge did not cite any facts known to the officers affirmatively suggesting that anyone might actually be in the crawlspace.

The district court adopted the magistrate's report and recommendation without elaboration, denying the motion to suppress. App., *infra*, 32a.

After the district court's denial of the motion to suppress, petitioner conditionally pled guilty to the offenses and reserved his right to appeal the denial of his motion to suppress. CA Supp. App. 20.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-31a.

a. The majority based its holding exclusively on the "emergency-aid aspect of the exigent-circumstances doctrine." App., *infra*, 10a-11a, 20a. The court recognized the government's "burden of demonstrat[ing] both exigency and probable cause." App., *infra*, 10a. Probable cause, it held, "'may be satisfied where officers reasonably believe a person is in danger,'" which may be "based on both knowns and known unknowns." App., *infra*, 10a-11a, 17a (quoting *United States* v. *Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002)).

In the majority's view, "an ongoing hostage situation [necessarily] presents exigent circumstances." App., *infra*, 11a (quoting *United States* v. *Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009)). Thus, the question here is whether "the exigency remained ongoing during the officers' search of the crawlspace." App., *infra*, 11a. The question is, in other words, whether the officers "could have reasonably believed that the hole could have contained someone who was in danger or in need of immediate aid." App., *infra*, 11a-12a. (citations and quotation marks omitted).

The court concluded that "it [was] reasonable for the officers here to believe that Cooks's hole might have contained additional hostages[.]" App., *infra*, 13a. "To be fair," the court remarked, "there are arrows pointing in both directions." App., *infra*, 12a. But the court concluded that it would not "get caught up in facts that the officers couldn't have known at the time." App., *infra*, 12a. Because "the officers believed there were four people in the house *but were not sure whether there were others*," and because the officers could not "rule out the possibility that" other individuals remained trapped under the crawlspace, the majority concluded that it was reasonable for the officers, without a warrant, to pry up the plywood board to search for additional people in the home. App., *infra*, 6a, 13a-15a.

b. Judge Gilman dissented. App., *infra*, 21a-31a. He expressed concern that the majority had "focus[ed] on what the officers could not 'rule out'" rather than "on what information was available to the officers at the time of the warrantless search at issue." App., *infra*, 21a. This approach, he explained, offends the general rule that "speculation, without any factual support, will not suffice to overcome the warrant re-

quirement." App., *infra*, 21a (quoting *United States* v. *Lynch*, 934 F.2d 1226, 1233 (11th Cir. 1991)).

In the dissent's view, the majority had dispensed with the requirement that officers have some "objective fact suggesting that a hostage was likely inside" petitioner's crawlspace after securing the only four individuals officers knew to be in the home. App., *infra*, 21a-23a. Indeed, the dissent noted, officers had objective facts to the contrary: Price told the officers that guns were inside the crawlspace, not people. App., *infra*, 23a-24a.

The dissent thus summed up the implications of the majority's new rule: "If the exigent-circumstances inquiry turned on whether such a circumstance *could* exist, rather than on whether the officers had probable cause to believe that it did in fact exist, then officers would have license to search any crawlspace, closet, shed, or other enclosed space not covered by a lawful protective sweep by simply claiming that they could not 'rule out' the possibility that someone was inside." App., *infra*, 27a. Judge Gilman accordingly would have reversed.

REASONS FOR GRANTING THE PETITION

There is widespread confusion among the lower courts concerning the logical underpinnings for, and thus the practical requirements of, the emergency-aid exception. This case provides one specific example of that confusion: Whereas the D.C. Court of Appeals, D.C. Circuit, Second Circuit, and Sixth Circuit all hold that the bare "possibility" of an emergency inside a home does not justify a warrantless and nonconsensual search, the Fifth and Eleventh Circuits disagree.

The outcome in this case depends on the resolution of this conflict among the lower courts; if this case had arisen in the District of Columbia or the Second or

Sixth Circuits, petitioner's motion to suppress would have been granted. It was denied because it arose in the Eleventh Circuit; it would have been denied in the Fifth Circuit as well. The Fourth Amendment's meaning should not vary based on geography in this way.

The question presented also strikes at the heart of the Fourth Amendment's warrant requirement. This Court should grant certiorari to ensure consistent application of Fourth Amendment principles on this important and recurring question.

A. The lower courts are in disarray over the standards for warrantless emergency-aid searches of homes

This Court has never explained what "reasonabl[e] belie[f]" (*Mincey,* 437 U.S. at 392) or "objectively reasonable basis" (*Fisher*, 558 U.S. at 47) means. In the absence of this Court's guidance, the lower courts predictably have splintered. The Eleventh Circuit's decision below exacerbates the confusion. Especially in light of the broad disagreement among the lower courts over the doctrinal underpinnings of the emergency-aid exception (see *supra*, pp. 3-6), this Court's engagement on the question presented is desperately needed.

1. Courts disagree whether a possibility is sufficient for a home search under the emergency-aid exception

a. In this case, the **Eleventh Circuit** held that officers' warrantless, nonconsensual search of a home is legal under the emergency-aid exception if officers are unable to "rule out the possibility" that a person within the home is in need of aid prior to the search. App., *infra*, 6a, 13a-14a. Under that standard, courts focus not on the facts *known* to the officers, but instead on what they "couldn't have known" and "were not sure" about. App., *infra*, 12a-13a. Thus, according to

the Eleventh Circuit, when officers confront an unsubstantiated possibility the someone is in need of aid, they may force entry into a home without a warrant or consent to conduct an intrusive search of closed spaces for individuals who might, conceivably, be inside.

The **Fifth Circuit** adopted a similar approach in *United States* v. *De Jesus-Batres*, 410 F.3d 154 (5th Cir. 2005). There, the Fifth Circuit held that officers may conduct warrantless home searches when they "[are] not sure" and "[do] not know" whether someone is in fact in need of aid within the area to be searched without a warrant. *Id*. at 159. It is enough to speculate, according to that court, that an unknown person "could have been injured or sick" or "posed a safety risk" within the area searched. *Ibid*.

b. Most courts have expressly rejected the standard adopted by the Eleventh and Fifth Circuits. In *United States* v. *Evans*, 122 A.3d 876 (D.C. 2015), for example, the **D.C. Court of Appeals** held that officers may not force warrantless entry into a home to conduct a warrantless search based on the mere fact that "it was * * * possible that someone else was in the apartment in need of assistance." *Id*. at 882. According to that court, it's what officers *do* know (not what they *don't* know) that matters: Officers must have an affirmative and "specific reason to believe that an unknown third party [is] in the apartment and in need of emergency aid." *Ibid*. An emergency-aid search must, in other words, be "based on more than a hunch or the mere possibility that someone inside needs immediate aid." *Ibid*. The court thus rejected "a bare-possibility standard" for the emergency-aid exception. *Ibid*. That is the precise opposite of the couldn't-rule-out-the-possibility-in-light-of-unknowns standard adopted by the court of appeals in this case. App., *infra*, 13a-14a, 17a.

At least three federal courts of appeals have recently adopted standards consistent with the standard adopted in *Evans*:

- **D.C. Circuit:** In *Corrigan* v. *District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016), the D.C. Circuit held that an emergency-aid search was unlawful where officers were concerned that a person was "possibly inside" with no affirmative facts suggesting so. *Id*. at 1025-1032. The court cited *Evans* as support for rejecting a "bare possibility" standard. *Id*. at 1032.
- **Second Circuit:** In *United States* v. *Simmons*, 661 F.3d 151 (2d Cir. 2011), the court held that "the possibility that there might have been some third person present," unsupported by affirmative facts suggesting so, was insufficient to support an emergency-aid search. *Id*. at 158-159.
- **Sixth Circuit:** In *United States* v. *Washington*, 573 F.3d 279 (6th Cir. 2009), the Sixth Circuit held that "the mere possibility of physical harm," unsupported by affirmative facts showing that such harm is actually "imminent," is insufficient for officers to "dispense with the warrant requirement" under the emergency-aid exception. *Id*. at 288.[9]

The difference in the outcomes in these cases is attributable to differences in the legal standards applied, not in the factual scenarios confronting officers.

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[9] In the closely-related exigent circumstances context, the Sixth Circuit has similarly affirmed that the "objectively reasonable basis" standard requires more than a "mere possibility" or "mere speculation" concerning the relevant facts. *United States* v. *McClain*, 444 F.3d 556, 562-563 (6th Cir. 2005).

Here, as in each of the conflicting cases, there was no affirmative basis for believing that there was anyone inside the home in need of emergency assistance. See *Evans*, 122 A.3d at 882 ("At the time of the entry in this case, the police had no specific reason to believe that an unknown third party was in the apartment and in need of emergency aid."); *Corrigan*, 841 F.3d at 1030-1032 ("Corrigan was in MPD custody and neither his statements to [police] officers nor his actions * * * indicated [there] was an ongoing threat" inside the apartment); *Simmons*, 661 F.3d at 157-159 (officers had not "[seen] or heard anything that might lead them to believe that anyone" else was inside in need of help); *Washington*, 573 F.3d at 288 ("officers had no reason to believe anyone on the scene" was at imminent risk of injury).

Here, as in each of the conflicting cases, there was a possibility that could not be ruled out that someone or something *might* be inside the premises presenting an emergency. See *Evans*, 122 A.3d at 882 ("[I]t was * * * possible that someone else was in the apartment in need of assistance."); *Corrigan*, 841 F.3d at 1032 (there "might" have been "explosives that would ignite" inside the apartment, which was "a possibility"); *Simmons*, 661 F.3d 151, 158-159 (2d Cir. 2011) (there was a "possibility that there might have been some third person present"); *Washington*, 573 F.3d at 288 (there was a "possibility of physical harm" inside the apartment).

But in each of the conflicting cases, *unlike* in this case, each court held that the requirements for the emergency-aid exception were not met. According to those courts, a bare possibility, coupled with an absence of known facts affirmatively suggesting that emergency assistance was needed immediately within, will not support a warrantless home search. That is the

opposite of the Eleventh Circuit's holding in this case. The division of authority is thus clear.

2. There is a deep split on the question whether the emergency-aid exception requires probable cause

The lower courts are also divided on the closely related question whether officers must have probable cause to believe there is an emergency before conducting a warrantless home search under the emergency-aid doctrine. This Court has said that officers must "reasonably believe that a person within is in need of immediate aid." *Mincey,* 437 U.S. at 392. It later added that officers must have an "objectively reasonable basis" to believe an emergency is imminent or ongoing. *Fisher*, 558 U.S. at 47. But it is unclear whether this standard requires probable cause or a lesser degree of suspicion. Cf. *United States* v. *Gorman*, 314 F.3d 1105, 1112 (9th Cir. 2002) (lamenting that "the 'reason to believe' standard is far from clear" in a case concerning *Payton* v. *New York*, 445 U.S. 573 (1980)).

Some courts have held that "probable cause simply has no role in the analysis of a warrantless entry into a residence under the emergency aid exception." *People* v. *Troyer*, 246 P.3d 901, 906 (Cal. 2011). These courts hold officers to a lower standard than probable cause for suspecting that a person in need of immediate aid is inside the home. See *Hill* v. *Walsh*, 884 F.3d 16, 23 (1st Cir. 2018) ("the government need not show probable cause"); *United States* v. *Gordon*, 741 F.3d 64, 70 (10th Cir. 2014) ("[o]fficers do not need probable cause"); *Commonwealth* v. *Duncan*, 7 N.E. 3d 469, 473 (Mass. 2014) ("[A probable cause] showing is not necessary in emergency aid situations."); *State* v. *Macelman*, 834 A.2d 322, 326 (N.H. 2003) (the emergency aid doctrine

requires "a lower standard than the probable cause required for an ordinary search or seizure").

Numerous other courts and respected commentators disagree. They take the position that the emergency-aid exception "explicitly incorporates a threshold requirement approximating probable cause * * * as to the existence of an emergency." *Koles*, 426 P.3d at 1113. These courts require that "officers have some reasonable basis, approximating probable cause, to connect the emergency to the area to be searched." *Yazzie*, 437 P.3d at 185. See *Corrigan*, 841 F.3d at 1030 (officers must have "probable cause" concerning an "urgent and compelling need" to enter); *United States* v. *Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002) ("[A]s with any other situation falling within the exigent circumstances exception, the Government must demonstrate both exigency and probable cause."); Wayne R. LaFave, 3 *Search & Seizure* § 6.6(a) (5th ed. 2018) (an emergency aid search of a home entails a "probable cause requirement").

The difference between probable cause and lesser standards of suspicion is significant. See *Alabama* v. *White*, 496 U.S. 325, 330 (1990) (lesser standards allow officers to rely on evidence "different in quantity [and] content" and that is "less reliable than that required to show probable cause").

The disagreement among the lower courts over whether officers must have probable cause thus deepens the confusion over the more specific question presented in this petition. After all, if the standard for the emergency-aid exception is probable cause, then mere possibilities based on unknowns assuredly do not suffice. See, *e.g.*, LaFave, 3 *Search & Seizure* § 6.6(a) (5th ed. 2018) (officers acting on probable cause "must be able to point to specific and articulable facts which, taken with rational inferences from those facts," sug-

gest a "probability" that an emergency is at hand and their assistance is immediately needed). See also LaFave, 2 *Search & Seizure* § 3.2 (5th ed. 2018) (probable cause turns on "*known* facts and circumstances") (emphasis added). Courts have long recognized, in various legal contexts, that "probability" requires more than "possibility."[10] This case thus presents a clean opportunity to address both conflicts in a single question presented.[11]

Without guidance from this Court on what it means to have a "reasonabl[e] belie[f]" (*Mincey,* 437 U.S. at 392) or "an objectively reasonable basis" (*Fisher*, 558 U.S. at 47), there is no clear, uniform, and principled standard to guide courts in their assessment of the facts necessary for the emergency-aid exception to apply. Unless the Court grants review, the divisions among the lower courts will persist and grow.

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[10] *Herrera* v. *Albuquerque*, 589 F.3d 1064, 1072 (10th Cir. 2009) (in a Section 1983 case, explaining that "[p]robability" means "likelihood," whereas "'possibility' means that something is merely capable of occurring"); *Westchester Media* v. *PRL USA Holdings, Inc.*, 214 F.3d 658, 663-664 (5th Cir. 2000) (in a trademark case, explaining that "probability" is "synonymous" with "[l]ikelihood" and requires "more than a mere possibility"); *Lohrmann* v. *Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir. 1986) (concerning evidentiary rules, explaining that "[p]robability exists when there is more evidence in favor of a proposition than against it," whereas "[m]ere possibility exists when the evidence is anything less").

[11] Remarkably, the Eleventh Circuit purported to apply the probable cause standard in this case. App., *infra*, 13a-14a, 17a. That it found probable cause based on a *possibility* emanating from facts *unknown* to the officers (*ibid.*) is indefensible. The potential that its holding will have a spillover effect on other issues implicating probable cause furnishes yet another basis for this Court's intervention.

B. The question presented is important

The question presented arises frequently and has significant practical implications for the balance between legitimate law-enforcement activities and the privacy of the home.

As an initial matter, the emergency-aid exception arises in many cases every year. That much is clear from the many cases we already have cited.

The question presented is also important independent of the frequency with which it arises. "The right of officers to thrust themselves into a home is * * * a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

Here, the Eleventh Circuit has authorized warrantless home searches whenever officers cannot "rule out the possibility" that an individual may be in need of emergency aid within the home. Such a rule vitiates the warrant requirement, giving officers a license to search any areas of a home where a person may be concealed, including behind closed doors, in closets, cabinets, sheds, garages, crawlspaces, or attics.

Allowing police to use the emergency-aid exception to conduct warrantless whole-home searches based solely on the *absence* of affirmative facts concerning whether an emergency is ongoing within poses a serious threat to the "special protection" afforded to the home "as the center of the private lives of our people." *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006).

C. This is a suitable vehicle for review

This case is a suitable vehicle for addressing the question presented. It is an appeal from a final judgment entered on a conditional guilty plea in which petitioner expressly preserved his right to appeal the

denial of his motion to suppress. The question of the legality of the warrantless search of petitioner's covered crawlspace was fully briefed and argued at all stages of the litigation. And the question was fully addressed in thoroughly reasoned opinions by both lower courts.

The question is also outcome-determinative. As the decision below noted, the "sole and dispositive question" is whether "officers were justified in searching the crawlspace without a warrant." App., *infra*, 9a. In holding the search lawful, the court of appeals relied on a single ground: the emergency-aid exception to the warrant requirement. App., *infra*, 10a-11a. And the central premise on which the lower court based its decision was its conclusion that officers "couldn't rule out the possibility" that additional individuals might be in need of aid within the crawl space. App., *infra*, 6a.

There is no alternative reason that could sustain the judgment below. The government offered just one alternative ground for affirmance on appeal: that the warrantless search of the crawlspace was permitted by the "protective sweep" doctrine. See U.S. CA11 Br. 18-19. But the district court rejected that argument (App., *infra*, 38a-44a), and the court of appeals did not disturb that holding. See App., *infra*, 10a (declining to reach to protective-sweep issue).

Nor could it have. A "protective sweep" is a "quick and limited search of premises" that is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990). There is nothing "quick and limited" about prying up a floorboard to inspect the crawlspace of a home. Nor does prying up a screwed-down plywood board constitute a "cursory visual inspection." The outcome here thus turns exclusively on the answer to the question presented. It is a clean

vehicle for resolving this important issue that has divided the lower courts.

D. The decision below is wrong

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). It has been so "since the origins of the Republic." *Payton*, 445 U.S. at 601. It is therefore the most basic and fundamental principle of Fourth Amendment law "that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City*, 547 U.S. at 403 (quoting *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004)). Thus, "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey*, 437 U.S. at 393-394.

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 403. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Ibid*. (quoting *Mincey*, 437 U.S. at 392). Accordingly, when officers "have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury," they may search without a warrant. *Id.* at 400.

But an objectively reasonable basis for believing someone within is in need of immediate assistance cannot be satisfied by "[s]imply invoking the unknown." *Sandoval* v. *Las Vegas Metropolitan Police Dept.*, 756 F.3d 1154, 1164 (9th Cir. 2014). Instead, police must have some "*specific reason* to believe that an unknown third party was in the apartment and in need

of emergency aid." *Evans*, 122 A.3d at 882. Absent such a requirement, officers would be free to rely on "bare possibilit[ies]" (*ibid.*), which are nothing more than "speculation" (*Simmons*, 661 F.3d at 158-159).

The Eleventh Circuit's contrary decision below flips the presumption against warrantless, nonconsensual home searched on its head. An emergency-aid search is off the table only when officers are affirmatively able to "rule out the possibility" that their aid is immediately needed within. App., *infra*, 6a. Otherwise, officers may in effect presume that their assistance is needed inside the home. That is an exceptionally permissive standard that evokes the "general warrants" of the English Crown. See *Payton*, 445 U.S. at 583 ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment.").

To be sure, officers entering a private home to render emergency aid do so (in theory) to help the home's occupants—but "[t]his Court [should] not exhibit a more generous faith in our government's benign use of general warrants than did the Founders." *State* v. *Gordon*, 820 S.E.2d 339, 346 (N.C. Ct. App. 2018).

In saying this, we appreciate that police officers must have leeway to address ambiguous and evolving circumstances as their professional judgment dictates. But that does not permit officers to conduct a warrantless home search after resolving the only exigency there is cause to believe might exist. When officers have no indication that an injured individual (or someone at imminent risk of harm) is actually inside a home, they may not enter without consent or a warrant. It makes no difference that a crime had just been committed in the home. "[A]bsent exigent circumstances, a warrantless entry to search for weapons or con-

traband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004).

In sum, the decision below is wrong and ripe for this Court's review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

CLAYTON R. TARTT
Boles Holmes Parkman White, LLC
1929 3rd Avenue North
Suite 700
Birmingham, AL 35203
(205) 502-2000

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner