No. _____

In The
Supreme Court of the United States

MELINDA MITCHELL, individually and on behalf of a class of all others similarly situated, HARVEY MITCHELL, individually and on behalf of a class of all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, a municipal entity, NYC POLICE OFFICER JAMES SCHUESSLER, SHIELD NO. 28718, POLICE OFFICER JOSEPH BRINADZE, NYPD CAPTAIN JOSEPH GULOTTA, NYPD SERGEANT DANIELLE ROVENTINI, NYPD LIEUTENANT KATHLEEN CAESAR, RICHARD ROES 1-50, NEW YORK CITY POLICE SUPERVISORS AND COMMANDERS, JOHN DOES and 1-50 NEW YORK CITY POLICE OFFICERS, individually, and in their official capacities, jointly and severally,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err in applying *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), to grant qualified immunity to the police defendants who arrested the plaintiff partygoers for trespass where, unlike the officers in *Wesby*, the police defendants submitted perjured statements concerning the factual basis for the arrests and never determined whether the partygoers had permission to be present in the property; and where there were numerous disputes of material fact as to the condition of the premises?

2. Did the Second Circuit err in holding that a civil rights plaintiff must show subjective malice by police defendants in order to assert a Fourth Amendment post-arrest, pre-trial wrongful seizure claim, since the Fourth Amendment employs a standard of objective reasonableness, and there is a split of circuit authority on the need to show malice?

PARTIES TO THE PROCEEDING

Petitioners, Melinda Mitchell and Harvey Mitchell (who are not familial relations to each other), were the plaintiffs in the district court proceedings and were the appellants in the Circuit Court below.

The defendants, the City of New York, New York City Police Department ("NYPD") Officer James Schuessler, NYPD Officer Joseph Brinadze, NYPD Captain Joseph Gulotta, NYPD Sergeant Danielle Roventini, and NYPD Lieutenant Kathleen Caesar, were the defendants in the district court proceedings and were the appellees in the Circuit Court below.

RELATED CASES

- *Melinda Mitchell, et al. v. City of New York, et al.*; No. 12-cv-2674, U.S. District Court for the Southern District of New York. Judgment entered February 13, 2014.

- *Melinda Mitchell, et al. v. City of New York, et al.*; No. 12-cv-2674, U.S. District Court for the Southern District of New York. Judgment entered February 1, 2018.

- *Melinda Mitchell, et al. v. City of New York, et al.*; No. 14-767, U.S. Court of Appeals for the Second Circuit. Judgment entered October 28, 2016. Petition for Rehearing/Rehearing *En Banc* denied on January 17, 2017.

RELATED CASES – Continued

- *Melinda Mitchell, et al. v. City of New York, et al.*; No. 18-588, U.S. Court of Appeals for the Second Circuit. Judgment entered January 31, 2019. Petition for Rehearing/Rehearing *En Banc* denied on April 9, 2019.

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PETITION FOR WRIT OF CERTIORARI

Melinda Mitchell and Harvey Mitchell petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's Summary Order of January 31, 2019 is reported at 749 F. App'x 75 (2d Cir. 2019), and is reproduced at App. 1-7. The Second Circuit's Opinion of October 28, 2016 is reported at 841 F.3d 72 (2d Cir. 2016), and is reproduced at App. 20-35. The opinions of the District Court for the Southern District of New York are reproduced at App. 8-19 and App. 36-56.

JURISDICTION

The Court of Appeals entered judgment on January 31, 2019. App. 1-7. The court denied a timely petition for rehearing *en banc* on April 9, 2019. App. 57-58. Justice Ginsburg has extended the time for filing this petition to September 6, 2019. Application No. 19A26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

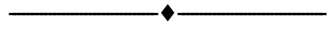
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part that:

> 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.

42 U.S.C. § 1983 provides in pertinent part as follows:

> 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. . . .



INTRODUCTION AND STATEMENT OF THE CASE

The issues presented concerning petitioners' false arrest claims (the first question presented) involve a

question critical to the basic integrity of the criminal justice system: whether police defendants in civil rights litigation can escape liability on the basis of qualified immunity where there is evidence that they perjured themselves in a coordinated manner concerning the purported basis for arresting the plaintiffs. The Second Circuit – in a perfunctory summary order on the second appeal in this heavily litigated, long-running case – ignored this Court's emphatic reminder in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) that the facts, and the reasonable inferences to be drawn from the facts, must be considered in the light most favorable to nonmovants on a summary judgment motion. Instead, the second appellate panel misapplied *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) – which also involved the mass arrest of partygoers within a private home – by ignoring critical factual differences between *Wesby*[1] and this case. The second panel failed to consider the police defendants' perjury and failed otherwise to view the facts, and the reasonable inferences to be drawn from those facts, in the light most favorable to the petitioners.

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[1] When this Court considered *Wesby*, there were no fact disputes at issue. *See Wesby* at 584 n.1 (noting that the plaintiffs had waived the opportunity at the merits stage to contest the defendants' asserted facts because they had not contested them in their brief in opposition to the petition for a writ of certiorari). In the case at bar, however, petitioners have provided evidence contesting numerous of defendants' asserted facts, and provided further material facts and evidence in support of same, as part of the briefing of the parties' cross-motions for summary judgment in the district court.

Petitioners are unaware of any other circuit court decisions applying *Wesby* in the context of other arrests made of people attending parties for trespassing. If the Second Circuit's summary order is not corrected, it is likely to lead other courts throughout the country to incorrectly rely on *Wesby* to protect any police officer who arrests a partygoer who has not or cannot provide the officer with a complete explanation as to the ownership of the party premises and the provenance of the party, even under circumstances where the officer has never determined whether the party was being held with permission, and even where the police have perjured themselves as to the factual basis underlying the arrests. That would be contrary to basic Fourth Amendment jurisprudence, would erode the integrity of the criminal justice system, and would represent a significant threat to the ability of people to gather freely together socially without risking arrest. Accordingly, the second panel of the Second Circuit to have reviewed this case has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power as to the first question presented.

The issues presented in this case concerning petitioner Melinda Mitchell's post-arrest, pre-trial wrongful seizure claim (which is commonly, but erroneously, referred to as a "malicious prosecution" claim) (the second question presented) involve a genuine and current conflict between the Courts of Appeals that is significant and substantially important. The first Second

Circuit panel that heard this case held that petitioner Melinda Mitchell's post-arrest, pre-trial wrongful seizure claim must be dismissed because she had not demonstrated subjective malice on the part of the defendant officers who prosecuted her. App. 31-33. Following that decision, this Court held in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), that such claims should be analyzed under the Fourth Amendment, which utilizes an objective reasonableness standard. Despite *Manuel*, the second panel in the Second Circuit declined to address Melinda Mitchell's post-arrest, pretrial wrongful seizure claim in any way, and the Second Circuit – and district courts within the Second Circuit – have continued to require a showing of subjective malice by prosecuting police defendants in such claims post-*Manuel*. Unlike the Second Circuit, the Fourth and Sixth Circuits had – even prior to *Manuel* – correctly held that a showing of subjective malice is not required for a federal "malicious prosecution" claim. *See Sykes v. Anderson*, 625 F.3d 294, 309-10 (6th Cir. 2010); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996). The Third Circuit has also strongly suggested that malice is not an appropriate component of a Fourth Amendment malicious prosecution claim. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 222 n.6 (3d Cir. 1998). The Tenth Circuit has noted a circuit split on the underlying issue of whether a cognizable § 1983 claim requires satisfaction of the elements of a common law tort, which issue lies at the root of the Second Circuit's requirement of a showing of malice for federal "malicious prosecution" claims. *See Pierce v. Gilchrist*, 359 F.3d 1279 at 1290 & n.8 (10th

Cir. 2004) ("We thus join the Fourth, Fifth, Seventh, and Eleventh Circuits in rejecting the view that a plaintiff does not state a claim actionable under § 1983 unless he satisfies the requirements of an analogous common law tort" and citing *Singer v. Fulton County Sheriff*, 63 F.3d 110 (2d Cir. 1995), as among the "[o]ther circuits . . . [that] have taken the opposite view"). The First Circuit has joined the Tenth, Fourth, Fifth, Seventh, and Eleventh in holding – as this Court instructed in *Manuel* – that common-law categories cannot simply be imported into a federal malicious prosecution cause of action. *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100-01 (1st Cir. 2013). This Court in *Manuel*, however, did not address the specific question of whether a requirement that subjective malice need be shown in order to assert a Fourth Amendment post-arrest, pre-trial wrongful seizure claim is error. The petition should be granted to resolve the circuit split on this issue, as the Courts of Appeals, post-*Manuel*, have differed as to its import in this regard.

The Tenth Circuit for example, has noted that "*Manuel* did not address whether the tort of malicious prosecution, as opposed to some other common law cause of action, provides an appropriate framework for these Fourth Amendment § 1983 claims." *Margheim v. Buliko*, 855 F.3d 1077, 1084 (10th Cir. 2017) (footnote omitted). *Margheim* then went on, however, to refer to these Fourth Amendment claims as "Fourth Amendment malicious-prosecution claims" that have as one of their elements that "the defendant acted with malice." *Id*. at 1085. The Seventh Circuit, in contrast, has held

that *Manuel* "jettisoned the malicious-prosecution analogy and the due-process source of the right, instead grounding the claim in long-established Fourth Amendment doctrine."[2] *Lewis v. City of Chicago*, 914 F.3d 472, 476 (7th Cir. 2019). And the Second Circuit has read *Manuel* as "noting that claims for pretrial detention based on fabricated or withheld evidence are evaluated as malicious prosecution claims under the Fourth Amendment." *Dufort v. City of N.Y.*, 874 F.3d 338, 355 n.7 (2d Cir. 2017). The Second Circuit has also continued to require a showing of subjective malice for Fourth Amendment "malicious prosecution" claims in post-*Manuel* summary orders. *See*, *e.g.*, *Debrosse v. City of New York*, 739 F. App'x 48, 49-50 (2d Cir. 2018) (summary order); *Coleman v. City of New York*, 688 F. App'x 56, 57 (2d Cir. 2017) (summary order).

On January 9, 2011, petitioners, along with approximately forty other people, attended a party at 2142 Atlantic Avenue in Brooklyn, New York. Both petitioners had been invited there by people they knew, but neither of them knew who owned the property or who organized the party. To enter the residence, petitioners opened an unlocked gate outside and proceeded in normal fashion to the front door. There was no sign prohibiting entrance to the building, saying that entering the property constituted trespassing, or warning in

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[2] *See also Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 608 (1st Cir. 2019) (Barron, J., concurring) ("An implication that I draw from *Manuel* is that it does not make sense to continue to treat a Fourth Amendment-based claim for damages resulting from an unlawful seizure effected via pre-trial detention of a criminal defendant as if it were one for 'malicious prosecution.' ").

any other way that access to the property was prohibited. The only sign that was present was from a realty company, which was outside the property, and which included its telephone number for prospective buyers or renters.

The building looked to petitioners to be in fine shape, and was set up like a lounge, with furniture, music playing from DJ equipment, and a bar with one or more bartenders. Neither of the petitioners believed they were not allowed to be at the premises, as they were invited guests and the property looked nice to them. In the hours before police raided the party sometime around 2:44 a.m., petitioners had been enjoying themselves for several hours, socializing, laughing, drinking, dancing, flirting, and listening to music.

The police defendants entered the building forcibly, without a warrant, and without an invitation or consent of the owner or occupants. One of the defendants, NYPD Lieutenant Caesar, and officers under her command, entered forcibly through the back door.

When the police entered the property they – and particularly the arrest decision-maker, NYPD Captain Joseph Gulotta – did not allow anyone to leave, and asked repeatedly who owned the property and who was running the party. None of the people at the party answered. The police told the guests at the party that if no one came forward and stated who owned the property or who was throwing the party, then everyone present would be arrested. Captain Gulotta told the people at the party that if they told the police who

owned the property or who was running the party, they would be allowed to leave without being arrested. Some people complained that they had done nothing wrong, and that they did not know who owned the property or who was throwing the party.

Although Captain Gulotta recognized the people at the party were under no legal duty to answer his questions, and that they had a right to remain silent, when no one said who owned the building or who was throwing the party, he ordered the arrest of everyone present, including petitioners.

Captain Gulotta ordered everyone arrested because he thought that everyone present at the party was criminally responsible for 1) trespassing; 2) loitering for the purpose of using narcotics; and 3) endangering the welfare of a child, because apparently there was a 12-year-old present somewhere in the building.[3] Captain Gulotta was aware, however, through his training and experience that individualized probable cause is required in order to lawfully arrest a person for the suspected commission of a crime.

The police arrest paperwork for Harvey Mitchell alleged that he had violated § 140.15 of the Penal Law, Criminal Trespass in the 2nd Degree, and § 240.36, Loitering for the Unlawful Use of a Controlled Substance. The arrest paperwork for Melinda Mitchell did

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[3] The only probable cause justification that has ever been addressed by the two summary judgment decisions by the district court, and the two decisions by the Second Circuit reviewing same, has been trespass.

not mention trespass at all; it contained only a charge for Loitering for the Unlawful Use of a Controlled Substance.[4]

At least forty people – including petitioners – were handcuffed and arrested due to Captain Gulotta's mass arrest decision. Defendant Police Officer Schuessler – who was assigned as Harvey Mitchell's arresting officer – and two other of the arresting officers (Police Officers Moscato and Peterson) executed perjured "Supporting Deposition – Trespass in a Dwelling and Resisting Arrest" affidavits[5] and submitted them to the Brooklyn District Attorney's office in support of their arrests. The perjured affidavits falsely attest, *inter alia*, that 2142 Atlantic Avenue was a "FTAP [Formal Trespass Affidavit Program] dwelling," and that the NYPD was the lawful custodian of the property "in that there is a notarized deposition by the

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[4] Neither of the petitioners – nor any of the other dozens of arrestees from the scene, according to the arrest paperwork – was accused of anything having to do with endangering the welfare of a minor.

[5] Officer Schuessler executed one of these perjured affidavits for each of the five arrests he processed, including Harvey Mitchell's. Officer Moscato executed one of these perjured affidavits for four of the five arrests he processed. Officer Peterson executed the same perjured affidavit for each of the five arrests he processed. These three arresting officers thus submitted fourteen perjured affidavits (one concerning each of fourteen arrests from 2142 Atlantic Avenue). An example of one of the perjured "Supporting Deposition – Trespass in a Dwelling and Resisting Arrest" affidavits for each of these three officers are at A634-637 and 675-683 of the joint appendix that was filed with the Second Circuit on the second appeal in this case (the four volume joint appendix is at Second Circuit docket #s 35-38 of Second Circuit case # 18-588).

owner/managing agent of said location covering the above date, filed with the NYPD, authorizing members of the NYPD to act as an agent of the owner/managing agent of said dwelling."

These statements – made and signed under penalty of perjury – were untrue. It was undisputed below that 2142 Atlantic Avenue was not, on January 9, 2011 or otherwise, an FTAP dwelling, and it was equally undisputed below that there was no "notarized deposition by the owner/managing agent" of the building on file with the NYPD.[6]

Officer Schuessler (Harvey Mitchell's arresting officer) testified at his deposition concerning his perjured trespass affidavits as follows:

> Q. And then when you got back to the precinct, after the arrests had been made you were told by one of your superiors, you think it might have been Lieutenant Caesar, but you're not sure, that it was, in fact, owned by a bank and that the bank's notarized Supporting Deposition would be faxed to you on Monday?
>
> A. Correct.[7]

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[6] An email from counsel for defendants was submitted as part of the summary judgment record, which stated, "With regard to the FTAP buildings list, 2142 Atlantic Avenue is not now nor was it on 1/9/11 an FTAP building. . . . I believe we have already agreed to stipulate to this fact (in the event we did not, we do now)."

[7] In addition to Officer Schuessler's direct implication of Lieutenant Caesar in generating his perjury, the fact that three

> Q. Do you see that it says, after the next sentence in a parenthesis, that you were to attach to this document the owner or managing agent affidavit?
>
> A. I see that.
>
> Q. But you did not attach any owner or managing agent affidavit at the time you filled this out and faxed it to the DA's office, is that correct?
>
> A. Correct.

Officer Moscato's testimony concerning his perjured trespass affidavits is as follows:

> Q. Did you have any information when you were at 2142 Atlantic Avenue that the property was what's known as an FTAP building, F-T-A-P?
>
> A. No.
>
> . . .
>
> Q. But this says that this is an FTAP building in that there is a notarized supporting deposition by the owner or managing agent of that location. And you're saying you had, in fact, no knowledge at all as to whether there

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of the arresting officers perjured themselves identically concerning the purported trespass basis for probable cause, on fourteen separate sworn affidavits concerning fourteen of the arrestees, itself strongly suggests that the perjury was coordinated and directed by the supervisory defendants.

was a notarized supporting deposition; is that correct?

A. Correct.

Q. At the end of this, it says in parentheses to attach to this document the owner/managing agent affidavit; correct?

A. Yes.

Q. Did you attach anything to this document?

A. No.

Q. Did you take any steps to try and find out whether there was an owner/managing agent affidavit?

A. No.

Officer Peterson's testimony concerning his perjured trespass affidavits is as follows:

Q. When you marked this, did you see a notarized supporting deposition by the owner and managing agent of 2142 Atlantic Avenue?

A. No.

Q. Then why did you mark this space?

A. Because I thought it was an FTAP location because it was – I thought at the time, and still do, that it was a City-owned building and City-owned buildings are under the FTAP.

Q. That's not what this says; is it? It says "I'm the lawful custodian of these premises in that there is a notarized supporting deposition."

A. Yes.

Q. That's what it says; right?

A. Yes.

Q. But you had no knowledge at all, at all, that there was any sort of notarized supporting deposition by the owner and managing agent of 2142 Atlantic Avenue; is that correct?

A. Correct.

Q. And then it says for you at the end, it says in parentheses that you should attach the owner or managing agent affidavit. Do you see that?

A. Yes.

Q. You did not attach any owner or managing agent affidavit to this document when you filled it out; is that correct?

A. Yes.

Q. Yes, it's correct, you did not attach anything?

A. No, I did not attach anything.

The reasonable inference to be drawn from the facts in the record is that these three officers perjured themselves on fourteen separate trespass affidavits in

an attempt to cover up for a mass arrest that they knew lacked probable cause.

It is axiomatic that qualified immunity cannot be invoked if a defendant official "knew or reasonably should have known" that his or her official actions "would violate the constitutional rights of the [Plaintiff]." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity doctrine does not protect the "plainly incompetent or those who knowingly violate the law").

The arrestees were processed following their arrests at a local NYPD precinct. Melinda Mitchell and some of the other arrestees were released from NYPD custody with a Desk Appearance Ticket ("DAT"). Harvey Mitchell and some of the other arrestees were processed through Brooklyn's central booking facility and arraigned.

When Melinda Mitchell appeared at Brooklyn Criminal Court on the date required by the DAT,[8] she discovered that the Brooklyn District Attorney's office had declined to prosecute her.[9] All charges against Harvey Mitchell were dismissed in their entirety

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[8] Under New York State law, the issuance of a DAT initiates a criminal proceeding. *See Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 199 (2d Cir. 2014).

[9] The record evidence indicated that the Brooklyn District Attorney's office had also declined to prosecute all of the other arrestees who received a DAT as well.

pursuant to an Adjournment in Contemplation of Dismissal ("ACD"). A civil case then followed.

Following discovery, defendants moved for summary judgment as to all of petitioners' claims, and petitioners cross moved for partial summary judgment as to their false arrest claims. On February 11, 2014, in its first summary judgment decision (App. 36-56) the district court granted defendants' motion for summary judgment in its entirety. Concerning petitioners' false arrest claims, it held that there was probable cause to arrest them for trespass, and it dismissed Melinda Mitchell's Fourth Amendment post-arrest, pre-trial wrongful seizure claim because it held that she had not been seized for Fourth Amendment purposes.

In its published Opinion dated October 28, 2016 (*Mitchell II*) (App. 20-35), the initial Second Circuit panel reversed as to petitioners' false arrest claims, and highlighted a number of facts from the record that illustrated why probable cause was not present if the facts were to be viewed in the light most favorable to petitioners, including the following:

> - "that no member of the NYPD made serious efforts to verify the legal status of the brownstone, i.e., the existence of a person or entity with a claim of occupancy of ownership, the property's status under the FTAP [the Brooklyn District Attorney's Office's "Formal Trespass Affidavit Program"], or the lack of any claim or other status." *Mitchell II*, 841 F.3d at 77.

- "When Lieutenant Caesar first visited the property in December 2010, she failed to investigate the ownership status of the brownstone and assumed it was abandoned, even though there were signs of use. Based on the evidence in the record, a trier of fact could find that, when Caesar re-entered the brownstone in the early morning of the day of the arrests, she did so based solely on her earlier conjectures that the brownstone was abandoned and that appellants were therefore trespassing. A trier of fact could further find this belief was unreasonable, given the for-sale sign in the front yard. Indeed, as Captain Gulotta conceded, the existence of a real estate sign suggested that someone claimed ownership of the brownstone." *Id*. at 77-78.

- "After the arrests, Officer Girard Moscato, having seen the for-sale sign outside the brownstone, tried to call Weichert Realty to inquire about the brownstone, but, after leaving a voice message, he did not follow up. See *Colon v. City of N.Y.*, 60 N.Y.2d 78, 455 N.E.2d 1248, 1250, 468 N.Y.S.2d 453 (N.Y. 1983) ("[T]he failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause.") (citation omitted). Indeed, as Captain Gulotta conceded, the existence of a real estate sign suggested that someone claimed ownership." *Id*. at 78.[10]

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[10] Melinda Mitchell's arresting officer, defendant Officer Brinadze, also essentially admitted that his superiors recognized

- "Other officers stated (inconsistently) that they believed the brownstone to be part of the FTAP or to be abandoned. It is conceded that these beliefs were mistaken.[11] Moreover, on this record, the only basis, if any, for these beliefs appears to be word of mouth among the officers." *Id*. at 78.

For all the above reasons – none of which existed in *Wesby* – the initial Second Circuit panel concluded that:

> Appellees' mass arrest for trespass, on this record, could *easily* be found to have been based *entirely* on baseless and unreasonable conjectures and assumptions as to the ownership of the property or its FTAP status.
>
> Under these circumstances, viewing the record in the light most favorable to appellants, a dispute of material fact exists as to whether the police officers could have reasonably believed the appellants were trespassers. There was no reasonable basis for the belief that the

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that their failure to contact the owner of the property rendered the trespass arrests unlawful. Officer Brinadze testified that – in addition to the charge of loitering for the purpose of using controlled substances – he originally had been told by a Lieutenant that there was also to be a trespassing charge for his arrestees, but that the trespass charge was dropped after an attempt by the NYPD to reach the owner of 2142 Atlantic Avenue by phone was unsuccessful.

[11] As discussed, *supra*, the record in fact established – if the facts are taken in the light most favorable to petitioners – that the defendant officers were not simply mistaken about their belief regarding the participation of the brownstone in the FTAP. Rather, the evidence established that they committed perjury.

> building was in the FTAP, and the for-sale sign belied abandonment. The lack of any known claimant asserting legal occupancy of the premises on this record may eliminate any claim of unlawful entry by the police, but it provides no corresponding individualized probable cause to arrest appellants for trespass.

Mitchell II, 841 F.3d at 79 (emphasis added). The initial Second Circuit panel therefore reversed the grant of summary judgment as to petitioners' false arrest claims, and remanded for consideration of the question of qualified immunity.

The initial Second Circuit panel also affirmed the dismissal of Melinda Mitchell's Fourth Amendment post-arrest, pre-trial wrongful seizure claim, but did so on grounds that were not addressed by the district court, and that were not briefed by the parties, holding that because Melinda Mitchell had not sufficiently shown subjective malice, her federal "malicious prosecution" claim was properly dismissed.

On remand, the parties further briefed their cross-motions for summary judgment and the issue of qualified immunity, and Melinda Mitchell moved to reinstate her post-arrest, pre-trial wrongful seizure claim in light of this Court's intervening decision in *Manuel v. City of Joliet*, 137 S. Ct. 911.

Relying nearly exclusively on this Court's intervening decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), the district court again granted

defendants' motion for summary judgment on the basis of qualified immunity for the trespass arrests, and again denied petitioners' motion for partial summary judgment. App. 8-19. The district court did not address Melinda Mitchell's motion to reinstate her Fourth Amendment post-arrest, pre-trial wrongful seizure claim, and once again ignored the evidence of the arresting officers' perjury on the trespass affidavits.

Petitioners then appealed again. The second appellate panel affirmed (App. 1-7), holding that qualified immunity was proper due to *Wesby*. The summary order also did not address the evidence of the arresting officers' perjury on the trespass affidavits, and also did not address Melinda Mitchell's Fourth Amendment post-arrest, pre-trial wrongful seizure claim.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Summary Order Misapplied *Wesby* by Ignoring The Record Evidence of Coordinated Perjury by The Police Defendants Concerning The Asserted Probable Cause Basis For The Arrests, as Well as Other Evidence Indicating That The Defendants Knowingly Violated Petitioners' Constitutional Rights And/or That They Acted With Plain Incompetence.

The second panel's summary order improperly granted qualified immunity to defendants on the basis of *Wesby* despite significant evidence in the record of

the defendants' dishonesty, knowing violation of the law, and plain incompetence. The evidence in the record demonstrates beyond cavil that three of the arresting officers – who processed the arrest paperwork of 14 of the arrestees – perjured themselves in a coordinated manner at the direction of their supervisors on so-called "trespass affidavits" in an attempt to justify the otherwise-baseless arrests and the officers' illegal entry into the property. Permitting this summary order to stand will allow police officers to engage in coordinated, dishonest actions, including perjury, to cover up their knowing violation of constitutional rights. The qualified immunity doctrine was never meant to, and does not, protect the "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The second panel erroneously held that qualified immunity protected the defendants solely because this case, like *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), involved a house party, and ignored the numerous critical factual distinctions between the cases. The defendant officers in *Wesby* behaved competently and honestly in determining that the partygoers were not permitted to be present in that property, and thus they possessed probable cause for the arrests and were entitled to qualified immunity. The defendants here behaved dishonestly and at best incompetently by never determining that the petitioners and other partygoers were not lawfully present in the property. Therefore, this case is not controlled by *Wesby*, and defendants are not entitled to qualified immunity.

The second panel granted qualified immunity to the defendants in this case because petitioners did not "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." App. 6 (quoting *Wesby*, 138 S. Ct. at 590). The panel overlooked, however, that:

> "officials can still be on notice that their conduct violates [clearly] established law even in novel factual circumstances," *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), and "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances," *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau*, 543 U.S. at 199).

Simon v. City of N.Y., 893 F.3d 83, 92 (2d Cir. 2018). This is such a case.

The second panel also concluded that "[t]he only truly distinguishing fact between this case and *Wesby* is that in *Wesby*, the police officers made more of an effort to determine if the house was truly abandoned" and "[t]hat is not enough of a difference to deny the City Defendants qualified immunity." App. 6. Based on the evidence in the record, this statement is entirely inaccurate.

In *Wesby*, the police actually determined, through diligent efforts, including speaking with the property owner, that the party was not sanctioned by the owner. In the case at bar, in sharp contrast, at no point – either prior to the arrests, or in the eight years since, up

to the present day – have the defendants presented any evidence that the party was not sanctioned by the property's owner or lawful tenant. Everything about the circumstances of the party – based on the facts viewed in the light most favorable to the petitioners – suggests that the partygoers were attending a legitimate party.[12]

The second panel's statement that the police "believed [the property] to be abandoned," (App. 3), is also not an accurate or fair view of the facts viewed in the light most favorable to the non-moving party. As discussed, *supra*, the perjured claims by three of the arresting officers,[13] at their supervisors' direction, on fourteen sworn trespass affidavits concerning fourteen of the arrestees, that the property was participating in the FTAP also militates toward the conclusion that the police did not in fact believe the property was abandoned. A reasonable inference from these facts is that these officers perjured themselves on these sworn affidavits in an attempt to cover up what they knew to be an arrest entirely lacking in probable cause, an arrest that was effectuated solely out of Captain Gulotta's pique at not getting the answers he wanted after the police illegally broke into the property. There was also significant evidence that the conditions inside the

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[12] The first panel's published decision highlighted some of these facts, as was quoted, *supra*, in the Introduction and Statement of the Case.

[13] The deposition testimony by these three officers concerning their perjured affidavits is quoted, *supra*, in the Introduction and Statement of the Case.

property were not suggestive of abandonment, including descriptions of its well-furnished interior, heat and running water, and that there were no "no trespassing" signs or other indications that the property should not be entered. To enter the property, all one had to do (as the petitioners did) was proceed through an unlocked gate in a waist-high ornamental fence, and then enter normally through the front door.

That the second panel ignored the arresting officers' coordinated perjury on the trespass affidavits concerning these mass arrests, and the absurdity of their deposition testimony about their perjury, should more than give this Court pause. It is critical that this coordinated perjury be considered as part of the qualified immunity analysis, as perjury by law enforcement officers on sworn affidavits executed in support of an arrest is a very grave matter that goes to the heart of the integrity of the criminal justice system. This coordinated perjury by these officers, at the direction of their supervisors, to attempt to manufacture a false basis for probable cause for these trespass arrests is powerful probative evidence that the defendants knew there was no probable cause to arrest under the actual facts they were presented with.

It is axiomatic that qualified immunity cannot be invoked if a defendant official "knew or reasonably should have known" that his or her official actions "would violate the constitutional rights of the [Plaintiff]." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). That is because qualified immunity does not protect the "plainly incompetent or those who knowingly

violate the law." *Malley*, 475 U.S. at 341. The facts here, viewed in the light most favorable to petitioners, suggest that the defendants knew there was no probable cause to make the mass arrests at 2142 Atlantic Avenue, and that the arresting officers perjured themselves at their supervisors' direction on the trespass affidavits when processing the arrests to attempt to cover up for what they knew were illegal arrests. Also unmentioned by the panel was the fact that – unlike in *Wesby*, where the officers knocked on the door and entered the property with the permission of the party guest(s) who opened the door for them – in the case at bar the defendants illegally broke into property through the back door, proceeding to then terrify and threaten the partygoers with arrest if they did not inform the defendants who owned the property and who was running the party. A further reasonable inference to be drawn from the facts is that the perjured FTAP affidavits were also executed and submitted to the District Attorney's office to attempt to cover up for the defendants' illegal entry into the property. If the property indeed were in the FTAP the officers would have been authorized to enter (and they also would have had the keys, and would not have had to force their way in). The panel also should have considered the defendants' patently unreasonable and illegal forced entry into the property – in the absence of anything even remotely suggestive of exigent circumstances or consent – in evaluating the question of the reasonableness of the arrests they made once they had forced their way inside. At a minimum, the officers' conduct in this case displays plain incompetence and indifference to the

existence of probable cause. *See*, *e.g.*, *Jenkins v. City of N.Y.*, 478 F.3d 76, 87 (2d Cir. 2007) ("'Arguable' probable cause should not be misunderstood to mean 'almost' probable cause.").

The Second Circuit's decision in *Ricciuti v. New York City Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997), which held that qualified immunity is not available where defendant officers intentionally fabricated evidence, is also instructive when analyzing the petitioners' false arrest claims under the circumstances at bar. Although that holding in *Ricciuti* was made in the context of a fabrication of evidence/fair trial rights claim, and not in connection with a false arrest claim, the underlying, bedrock principle so critical to the proper functioning of our criminal justice system remains the same:

> Lying is wrong, and if the police lie while acting in their official capacity, they also violate the public trust. Courts must ensure that such serious accusations receive appropriate scrutiny lest our Court appears to endorse such official misconduct, which would weaken the public's respect for the administration of justice.

Ricciuti at 125.

The second panel's summary order also did not mention, and appears not to have considered, what the first panel had stressed to the district court in remanding the case initially for consideration of the qualified immunity issue: that "[b]ecause qualified immunity is

an affirmative defense, . . . the defendants bear the burden of showing that the challenged act was objectively reasonable in light of the law existing at the time." *Mitchell II*, 841 F.3d at 79 (quoting *Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000)).[14] This the defendants have completely failed to do. As explained in *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012):

> [I]t is the state's burden to prove that an invitee does not have privilege or license to remain on the premises. Because it is an element of the crime, officers must have probable cause to believe that a person does not have permission to be where she is before they arrest her for trespass: "Probable cause must extend to every element of the crime for which a person is arrested." And, of course, the state cannot rely on a person's exercise of her Fifth Amendment right to remain silent in order to satisfy that burden. . . .

Davis at 426-27 (footnotes omitted) (quoting *Alhovsky v. Paul*, 406 F. App'x 535, 536 (2d Cir. 2011)) (citing *People v. Howard*, 50 N.Y.2d 583, 590-92 (1980) ("[W]hile the police had the right to make the [*Terry*] inquiry, defendant had a constitutional right not to respond. . . . Nor can the failure to stop or co-operate by identifying oneself or answering questions be the predicate for an arrest absent other circumstances constituting probable cause."); *People v. Bright*, 71 N.Y.2d 376, 385 (1988) ("Requiring a person suspected

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[14] *See also Palmer v. Richards*, 364 F.3d 60, 67 (2d Cir. 2004).

of violating the loitering statute [to] provide a 'satisfactory explanation' to avoid arrest is also violative of a citizen's right not to answer questions posed by law enforcement officers.")); *see also People v. Schanbarger*, 24 N.Y.2d 288, 291-92 (1969) ("While it may be true that there was no reason why the defendant should not have answered the trooper's questions, it equally is true that his failure to answer cannot constitute a criminal act. . . .").

As discussed, *supra*, in the Introduction and Statement of the Case, the initial panel concluded that:

> Appellees' mass arrest for trespass, on this record, could *easily* be found to have been based *entirely* on baseless and unreasonable conjectures and assumptions as to the ownership of the property or its FTAP status.
>
> Under these circumstances, viewing the record in the light most favorable to appellants, a dispute of material fact exists as to whether the police officers could have reasonably believed the appellants were trespassers. There was no reasonable basis for the belief that the building was in the FTAP, and the for-sale sign belied abandonment. The lack of any known claimant asserting legal occupancy of the premises on this record may eliminate any claim of unlawful entry by the police, but it provides no corresponding individualized probable cause to arrest appellants for trespass.

Mitchell II, 841 F.3d at 79 (emphasis added).

In addition to reversing the district court's holding that there was probable cause, the initial panel should have also held that there was no qualified immunity under the facts viewed in the light most favorable to the Plaintiffs. This Court's decision in *Wesby*, which was issued after *Mitchell II*, is materially distinguishable from the case at bar, and does not require or suggest that the defendants should be qualifiedly immune from liability for their dishonest, knowingly unlawful, and/or – at best – incompetent actions and omissions in this case. This Court should not permit *Wesby* to be used as a *carte blanche* to insulate police defendants from liability for mass trespass arrests of partygoers where there is significant evidence, as here, of egregious, dishonest and coordinated, and plainly incompetent conduct by the arresting officers and their supervisors.[15]

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[15] Justice Ginsburg, concurring in the judgment in part in *Wesby*, also questioned "whether this Court, in assessing probable cause, should continue to ignore why police in fact acted." *Wesby* at 593. She expressed her concern that the "Court's jurisprudence . . . sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection," *Id*. at 594, and stated that she "would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." *Id*. In addition to the probable cause and qualified immunity analyses that call for reversal herein under the Court's existing jurisprudence, such a reexamination would also be appropriate in the instant case, where the record evidence indicates that the arrest decision-maker arrested the partygoers to retaliate against them for not receiving the information he was seeking concerning the identity of the owner or tenant of the property, and where the evidence indicates that he and his subordinate officers

II. The Second Circuit's Holding That a Civil Rights Plaintiff Must Demonstrate Subjective Malice by a Prosecuting Law Enforcement Defendant to Establish a Fourth Amendment Post-Arrest, Pre-Trial Wrongful Seizure Claim is on The Wrong Side of a Circuit Split.

Manuel v. City of Joliet, 137 S. Ct. 911 (2017) held that a post-arrest, pre-trial unlawful seizure claim should be analyzed under the Fourth Amendment, rather than the Due Process clause. While this Court in *Manuel* thus did not hold directly that subjective malice is not required for a post-arrest, pre-trial unlawful seizure claim, it foreclosed such a requirement, since the Fourth Amendment uses a standard of objective reasonableness.

The *Manuel* majority, in remanding the case for consideration of the accrual date of the claim, signaled that lower courts must be cautious not to reflexively adopt the elements of common-law torts that are incompatible with constitutional claims brought pursuant to 42 U.S.C. § 1983:

> Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving "more as a source of inspired examples than of prefabricated components." *Hartman v. Moore*, 547 U.S. 250, 258 (2006); see *Rehberg v. Paulk*, 566 U.S. 250, 258 (2012)

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knew full well that there was not probable cause to believe the arrestees were trespassing in the property.

> (noting that "§ 1983 is [not] simply a federalized amalgam of pre-existing common-law claims"). In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue.

Manuel, 137 S. Ct. at 921 (alteration in original).[16]

The Second Circuit, post-*Manuel*, continues to require a showing of malice for a federal "malicious prosecution" claim (an unfortunate nomenclature that doubtless has contributed to the proliferation of the error). *See*, *e.g.*, *Dufort v. City of N.Y.*, 874 F.3d 338, 355 n.7 (2d Cir. 2017) (reading *Manuel* as "noting that claims for pretrial detention based on fabricated or withheld evidence are evaluated as malicious prosecution claims under the Fourth Amendment"). *See also Debrosse v. City of New York*, 739 F. App'x 48, 49-50 (2d Cir. 2018) (summary order); *Coleman v. City of New York*, 688 F. App'x 56, 57 (2d Cir. 2017) (summary order). This places the Second Circuit at odds with the Fourth and Sixth Circuits, which had – even prior to *Manuel* – correctly held that a showing of subjective malice is not required for a federal "malicious prosecution"

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[16] Justice Alito, in his dissent in *Manuel*, makes clear the necessary logical and jurisprudential corollary of the Court's holding that the Fourth Amendment governs post-arrest, pre-trial wrongful seizure claims, noting that "while subjective bad faith, *i.e.*, malice, is the core element of a malicious prosecution claim, it is firmly established that the Fourth Amendment standard of reasonableness is fundamentally objective" and "cannot co-exist" with a subjective "malice requirement." *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting).

claim. *See Sykes v. Anderson*, 625 F.3d 294, 309-10 (6th Cir. 2010); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996). So too the Seventh Circuit has recently held that *Manuel* "jettisoned the malicious-prosecution analogy and the due-process source of the right, instead grounding the claim in long-established Fourth Amendment doctrine."[17] *Lewis v. City of Chicago*, 914 F.3d 472, 476 (7th Cir. 2019).

The Tenth Circuit has noted that "*Manuel* did not address whether the tort of malicious prosecution, as opposed to some other common law cause of action, provides an appropriate framework for these Fourth Amendment § 1983 claims." *Margheim v. Buliko*, 855 F.3d 1077, 1084 (10th Cir. 2017) (footnote omitted). *Margheim* then went on, however, to refer to these Fourth Amendment claims as "Fourth Amendment malicious-prosecution claims" that have as one of their elements that "the defendant acted with malice." *Id*. at 1085.

This case presents this Court with an opportunity to resolve the Circuit split, and to hold that the Fourth and Sixth (and, seemingly, the Seventh) Circuits are correct in holding that considerations of subjective malice have no place in analyzing a Fourth Amendment post-arrest, pre-trial wrongful seizure claim.

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[17] *See also Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 608 (1st Cir. 2019) (Barron, J., concurring) ("An implication that I draw from *Manuel* is that it does not make sense to continue to treat a Fourth Amendment-based claim for damages resulting from an unlawful seizure effected via pre-trial detention of a criminal defendant as if it were one for 'malicious prosecution.' ").

"[R]ecogniz[ing] that actual malice is an element of a malicious prosecution claim at common law," the Fourth Circuit held in *Brooks* that "the subjective state of mind of the defendant, whether good faith or ill will, is irrelevant in th[e] context" of a federal malicious prosecution claim. 85 F.3d at 184 n.5 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)). The court noted that while "common-law principles 'provide the appropriate starting point for' determining the elements of § 1983 actions," *id.* (quoting *Heck v. Humphrey*, 512 U.S. 477, 483 (1994)), "the Supreme Court has indicated that the reasonableness of a seizure under the Fourth Amendment should be analyzed from an objective perspective." *Id.* (citing *Graham*, 490 U.S. at 396-97). Accordingly, the court rejected a malice element for a federal malicious prosecution claim. *Id.*[18]

More recently, in *Sykes* the Sixth Circuit in 2010 recognized that it "has never required that a plaintiff demonstrate 'malice' in order to prevail on a Fourth Amendment claim for malicious prosecution," and it "join[ed] the Fourth Circuit in declining to impose that requirement." 625 F.3d at 309. The court explained that "[t]he circuits that require malice have imported elements from the common law without reflecting on their consistency with the overriding constitutional

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[18] The Fourth Circuit reaffirmed this holding in *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) ("What we termed a 'malicious prosecution' claim in *Brooks* is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution – specifically, the requirement that the prior proceeding terminate favorably to the plaintiff." (internal quotation marks omitted)).

nature of § 1983 claims." *Id.* (citing, *inter alia*, *Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010)). But, as the Fourth Circuit further explained, "[c]ommonlaw and § 1983 claims have different foundations." *Id.* (citing *Albright v. Oliver*, 510 U.S. 266, 277 n.1 (1994) (Ginsburg, J., concurring), *Carey v. Piphus*, 435 U.S. 247, 258 (1978)). Accordingly, the court refused to import the state law elements of malicious prosecution to govern the relevant Fourth Amendment claim. *Id.* (citing *Pierce v. Gilchrist*, 359 F.3d 1279, 1285-90 (10th Cir. 2004)).

Thus, *Sykes* held that "malice is not an element of a § 1983 suit for malicious prosecution." *Id.* at 310. This is because "the Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice." *Id.* at 309 ("Fourth Amendment jurisprudence makes clear that we should not delve into the defendants' intent."). The Court "recognize[d] that designating the constitutional claim as one for 'malicious prosecution' is both unfortunate and confusing. A better name that would perhaps grasp the essence of this cause of action under applicable Fourth Amendment principles might be 'unreasonable prosecutorial seizure.'" *Id.* at 310 (internal quotation marks omitted).[19]

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[19] The Third Circuit has also strongly suggested that malice is not an appropriate component of a Fourth Amendment malicious prosecution claim. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 222 n.6 (3d Cir. 1998) ("In fact, by suggesting that malicious prosecution in and of itself is not a harm, *Albright* also suggests that a plaintiff would not need to prove all of the common law elements of the tort in order to recover in federal court. For

This Court should therefore grant a writ of certiorari to decide whether Melinda Mitchell need show that the legal process initiated by the DAT was done with malice in order to advance her Fourth Amendment post-arrest, pre-trial wrongful seizure claim.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

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instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice."), cited in *Sykes*, 625 F.3d at 309.