No. _____

IN THE

Supreme Court of the United States

LEONARD MORRISON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a court find voluntary "implied consent" to a warrantless home entry when the officer did not request permission to enter and was unaware of any context for the movement he claimed to interpret as "implied consent to come in"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Leonard Morrison respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

"Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972). While the Constitution allows police officers to enter a private home based on the resident's consent, the government must prove by a preponderance of the evidence that the consent was "freely and voluntarily given"—a burden that "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). Indeed, even the most subtle coercion would render any resulting "consent" merely "a pretext

for the unjustified police intrusion." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Accordingly, this Court has cautioned judges to exercise "the most careful scrutiny" when validating consent-based searches under the Fourth Amendment, because anything less "would sanction the possibility of official coercion." *Id.* at 229.

The Fifth Circuit has now strayed far from those foundational principles, affirming a warrantless home entry by police officers during a "knock-and-talk" operation based on a single officer's bare, unsupported claim of "implied consent." That officer—the self-proclaimed "backup" officer for the knock-and-talk—testified that he could not recall the substance of any conversations between the lead officer and the woman who answered the door because he was focused on "looking into the house" for safety threats, but he did remember the woman "kind of moving out the way, her opening the door," which he took it as "implied consent to come in." No one had asked the woman for permission to enter, and the lead officer who was speaking with her did not interpret any movement as a communication of consent. To the contrary, the lead officer provided a conflicting (and properly discredited) explanation for their entry. Nevertheless, the district court found—and the Fifth Circuit affirmed—that the backup officer's testimony was sufficient to establish a lawful, warrantless home entry by all officers based on voluntary "implied consent."

The Fifth Circuit's decision is wrong—violating decades of Supreme Court precedent, the Fourth Amendment's "touchstone" reasonableness requirement, and the sanctity of the home. It also creates conflict with other U.S. Courts of Appeals and state courts of last resort regarding the circumstances in which police may reasonably

rely on "implied consent" to enter a person's home without a warrant. Several of those courts reasonably have held that officers must request consent to enter a house in order to rely on "implied consent" to justify their warrantless entry.

Beyond that, this decision paves the way for significant abuses by law enforcement—erasing the "firm line" drawn at the entrance to the home, eliminating the deterrent force of the suppression rule, and making people vulnerable to unlawful intrusions by the police any time they answer the door. Under the Fifth Circuit's ruling, police officers can enter a private home without a warrant as long as one officer claims to have observed and interpreted some movement at the door as "implied consent to come in"—even when no one has asked for permission to enter and the officer has no basis, much less a *reasonable* basis, to believe he has consent. That is especially alarming given that consent searches are estimated to "comprise more than 90% of all warrantless searches by police" and "are unquestionably the largest source of searches conducted without suspicion." Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 Fla. L. Rev. 509 (2016).

This Court should grant certiorari on this important question of federal law and reverse the Fifth Circuit's judgment.

JUDGMENT AT ISSUE

The Fifth Circuit Court of Appeals issued its final decision on May 7, 2021, which is attached hereto as part of the Appendix and is available at 854 F. App'x 586. Mr. Morrison filed timely petitions for panel rehearing and rehearing en banc, which were denied on June 2, 2021.

JURISDICTION

Mr. Morrison's timely-filed petitions for rehearing and rehearing en banc were denied on June 2, 2021. Accordingly, this petition for a writ of certiorari is timely pursuant to Supreme Court Rule 13, as modified by this Court's Order dated March 19, 2020, because it is being filed within 150 days of the date of those denials. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 25, 2016, at around 6:00 a.m., a team of eight police officers from three different law enforcement agencies drove to Petitioner Leonard Morrison's home to conduct a "knock-and-talk." That effort was part of a lengthy drug trafficking investigation targeting Mr. Morrison's cousins, who lived in the same neighborhood and had been under surveillance for a year. Although Mr. Morrison was never observed participating in drug deals or engaging in any other illegal activity, he was identified as a target based on his association with his cousins. Officers strategically planned to conduct the knock-and-talk at the same time that other teams of officers were executing search warrants at the cousins' residences. And while officers did not have any warrants related to Mr. Morrison, one officer on the knock-and-talk team

thought they had an arrest warrant for him because "[h]e was part of the target packets," later confirming that the incident "resembled a situation where [officers] would go into a house to effect an arrest on a person[.]"

Upon arriving at Mr. Morrison's home, two of the eight officers on the team—Rohn Bordelon and David Biondolillo—approached the door while the other six surrounded the front of the house, taking positions in the yard and driveway. Officers did not go into the backyard because, according to Biondolillo, the gate was locked. Biondolillo testified that Bordelon "was going to do the majority of the talking" while Biondolillo—who joined the team "towards the end" and had less knowledge about the investigation—was just "going to stand there as backup for him." When asked why the officers conducted the knock-and-talk so early, Biondolillo explained:

> We didn't have a search warrant and we wanted to -- oh, well, we had the entire investigation going, and for safety reasons, we try to hit them early in the morning while people are sleeping, and it just puts things on our side.

Bordelon and Biondolillo knocked on the door and a woman opened it. She spoke briefly with Bordelon, and both officers walked inside soon thereafter. Other officers from the team followed in "seconds later." Once inside, officers immediately confronted Mr. Morrison about an alleged marijuana smell and obtained his written consent to search the house. During that search, officers discovered a gun in a closet, which led to Mr. Morrison ultimately being convicted of unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g)(1).

Before trial, Mr. Morrison challenged the legality of the search based, in part, on the fact that officers entered his home without a warrant and without consent.

The district court held an evidentiary hearing on the suppression motion, during which it heard testimony from Shalonda Jupiter—the woman who answered the door—as well as Bordelon and Biondolillo. Jupiter, Bordelon, and Biondolillo gave three different (and conflicting) accounts of the officers' entry into the house, summarized as follows:

- Jupiter testified that the officers asked her a few questions about the house's ownership and Mr. Morrison before pushing past her into the living room, at which point she walked to the bedroom in the back of the house to get Mr. Morrison, who was asleep.

- Bordelon testified—contrary to both his and Biondolillo's investigation reports—that Mr. Morrison appeared behind Jupiter at the door while they were still standing outside and gave him verbal, explicit permission to "come in and talk."

- Biondolillo testified that he was not paying attention to, and thus could not recall, anything said at the door after Bordelon's initial introduction because he was focused on looking into the house for potential safety threats, but he claimed that he did "remember [Jupiter] kind of moving out the way, her opening the door allowing us in," later stating that he took it as "implied consent to come in."[1]

The district court did not credit Bordelon's claim that Mr. Morrison appeared at the door and gave explicit verbal consent to the officers to enter. Nevertheless, the court denied the suppression motion, relying on Biondolillo's assertion of *implied* consent to find the entry lawful. The district court specifically found that Jupiter's

[1] Tellingly, Biondolillo testified at trial that the officers "actually did have probable cause to go into the residence"—revealing that he incorrectly believed that consent was unnecessary. Nonetheless, for purposes of this petition, the credibility finding in favor of Biondolillo's testimony that he subjectively believed he had "implied consent" to enter is not disputed.

failure to "verbally object" to the entry established that she voluntarily "gave implied consent for the officers to enter the residence."

Mr. Morrison appealed the suppression ruling, and the Fifth Circuit reversed, holding that the district court erred in finding that Jupiter's failure to verbally object to the entry constituted consent. *United States v. Staggers*, 961 F.3d 745, 757 (5th Cir. 2020) ("*Morrison I*"). The court explained that, under existing circuit precedent, consent can be inferred from silence or a failure to object "only if that silence follows a request for consent." *Id.* Accordingly, the court remanded the matter to the district court to consider and weigh the conflicting testimony, explaining that Jupiter "implicitly consented to the officers' entry, if at all, by opening the door wider and stepping aside, a gesture that could be understood as communicating consent depending on the surrounding circumstances." *Id.* at 758.

On remand, the district court again denied suppression, this time adopting a patchwork version of events presented by the government, which pieced together elements of the witnesses' conflicting accounts. Relying heavily on Jupiter's testimony that the officers "waited in the living room" while she went to get Mr. Morrison from the bedroom, the district court purported to credit "the testimony of the officers that Jupiter impliedly consented to their entry into the living room of the defendant's home by stepping back and opening the door to allow them in after they asked to speak to Morrison." This, despite the fact that both officers claimed Mr. Morrison was already at the door when they entered; both claimed that they immediately confronted him about an alleged marijuana smell upon entering;

Biondolillo was the only one who claimed to believe Jupiter "impliedly consented" to the entry; and Biondolillo was unaware of anything said at the door prior to entry.

Mr. Morrison appealed again, arguing that the finding of implied consent was both factually and legally erroneous. This time, the Fifth Circuit affirmed the denial of suppression, holding that the district court's implied consent finding "was not clearly erroneous." *United States v. Morrison*, 854 F. App'x 586, 589 (5th Cir. 2021) ("*Morrison II*"). The Fifth Circuit did not address the reasonableness of Biondolillo's purported belief, nor did it consider whether his testimony was legally sufficient to satisfy the government's heavy burden of proving voluntary consent to a warrantless home entry. In fact, the court did not even acknowledge Biondolillo's admitted lack of awareness of any "surrounding circumstances" for the alleged movement, nor did it acknowledge that Bordelon—the officer who *was* speaking with Jupiter at the door—provided a different and conflicting explanation for their entry. Instead, the court simply stated that this case "comports with other instances where courts have found implied consent from a similar gesture." *Id.*

Mr. Morrison filed timely petitions for panel rehearing and rehearing en banc on May 21, 2021, which were denied on June 2, 2021.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case for several reasons. First, the Fifth Circuit's affirmance of the district court's "implied consent" finding creates conflict with other U.S. Courts of Appeals as well as multiple state courts of last resort. The Fifth Circuit's decision also abandons the long-established objective reasonableness

requirement that is central to all Fourth Amendment intrusions, instead sanctioning blind deference to an officer's conclusory and subjective assertion of consent. This Court has not addressed whether, or to what extent, officers may reasonably rely on "implied consent" to enter a home without a warrant, but it is an important and reoccurring issue that, if left undecided, threatens the most fundamental Fourth Amendment protection. This Court's intervention is needed to resolve this unsettled, divisive, and critically important question of constitutional law.

I. The Fifth Circuit's decision creates a split with Courts of Appeals that require officers to request entry to rely on "implied consent."

The Fifth Circuit's implied consent holding creates a clear split with other Courts of Appeals. At least three other circuits—the Sixth, Ninth, and Eleventh—have held that they will not sanction warrantless home entries based on an alleged gesture of "implied consent" absent an explicit request for permission by officers. Because it is undisputed that no officer asked Jupiter for permission to enter the house—and, indeed, Biondolillo was unaware of anything said at the door before they entered—the evidence in this case is legally insufficient to establish a lawful, consensual home entry in any of those other circuits.

For example, in *Lopez-Rodriguez v. Mukasey*, the Ninth Circuit explained: "[I]n keeping with the narrow scope of the consent exception, we have never sanctioned entry to the home based on inferred consent in the absence of a request by the officers or ongoing, affirmative cooperation by the suspect." 536 F.3d 1012, 1018 (9th Cir. 2008) (quotation marks and citations omitted); *see also id.* at 1017 (stating that it will sustain "an inference of consent to enter a residence only under

very limited circumstances—i.e., where the officers have verbally requested permission to enter and the occupant's action suggests assent, or where prior collaborative interactions between the suspect and the officers make the inference of consent unequivocal" (citations omitted)); *United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990) ("We will not infer both the request and the consent.").

Similarly, in *United States v. Little*, the Sixth Circuit held that officers cannot enter a residence without a warrant unless they "*request* and obtain consent" to enter. 431 F. App'x 417, 420 (6th Cir. 2011) (emphasis in original). As the court explained, "logic dictates that a person cannot consent to a request that has not been made—particularly in light of the fact that the government bears the burden of showing that consent was given voluntarily." *Id.* Thus, absent exigent circumstances, an officer has "two alternative ways that he [can] enter [a] residence in compliance with the Fourth Amendment: obtain a search warrant or *request* and obtain consent from defendant." *Id.* (emphasis in original). Because the officer in *Little* "did neither," "his entry violated the Fourth Amendment[.]" *Id.*; *accord United States v. Carter*, 378 F.3d 584, 588 (6th Cir. 2004) (finding that an occupant consented to an entry when he stepped back and allowed officers in after they "properly asked permission to enter").

In *United States v. Gonzalez*, the Eleventh Circuit stated that it "agree[d] with our colleagues in the Ninth Circuit that, whatever relevance the implied consent doctrine may have in other contexts, it is inappropriate to sanction entry into the home based upon inferred consent." 71 F.3d 819, 830 (11th Cir. 1996), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009). While that court has affirmed

entries based on nonverbal gestures, it—like the Sixth and Ninth Circuits—requires that an officer explicitly request admittance to rely on "implied consent." *Compare United States v. Ramirez–Chilel*, 289 F.3d 744, 752 (11th Cir. 2002) (affirming a finding of implied consent when, in response to the officers' request for admittance, the defendant "yielded the right-of-way"), *with Bashir v. Rockdale County, Ga.*, 445 F.3d 1323, 1329 (11th Cir. 2006) (distinguishing *Ramirez-Chilel* when an officer "never asked for permission" to enter the house before going inside).

Accordingly, the Fifth Circuit's affirmance in this case creates a clear split from other Courts of Appeals that have found entries based on "implied consent" to be unreasonable and unlawful absent an explicit request for entry by the police. *See also United States v. Zubia-Melendez*, 263 F.3d 1155, 1162 (10th Cir. 2001) (stating that, in the Tenth Circuit, "the government must proffer clear and positive testimony that consent was unequivocal and specific and freely given" (internal quotation marks and citation omitted)); *Patzner v. Burkett*, 779 F.2d 1363, 1369 (8th Cir. 1985) (holding that an "inference of consent to enter" could not "reasonably be drawn" from an occupant agreeing to get the defendant and telling police he was in the kitchen because, at most, "his cooperation . . . only extended to acting as a messenger for [the officer] in response to her express requests," and there was "no showing that he cooperated further by asking her in or otherwise acted on his own initiative").

II. The Fifth Circuit's decision conflicts with state courts that require any expression of consent to be clear, specific, and unequivocal.

The Fifth Circuit's implied consent holding also conflicts with state courts of last resort, some of which have held—like the federal Courts of Appeals above—that

the failure of an officer to request entry renders any reliance on "implied consent" unreasonable. State courts have also explained that an occupant's communication of consent to a home entry must be clear, specific, and unequivocal, finding entries unreasonable and unlawful based on nearly identical facts to those described by the officers in this case.

The Supreme Court of Arkansas, for one, requires "unequivocal proof" of consent and found a warrantless home entry unreasonable when the officer did not ask for permission to enter, and the occupant did not "verbally invite him to enter." *Holmes v. State*, 65 S.W.3d 860, 865 (Ark. 2002). In *Holmes*, the officer testified that he asked the occupant "if there was anywhere that they could talk," the occupant "opened the door and stepped back," and the officer—interpreting the occupant's movement "as an invitation to come into the house"—stepped inside. *Id.* at 862. That was held legally insufficient to prove a lawful home entry based on the occupant's consent. *Id.* at 866; *see also Latta v. State*, 88 S.W.3d 833, 837, 839–41 (Ark. 2002) (finding insufficient evidence of consent when an officer who conducted a knock-and-talk testified that the occupant "stepped back away from the door" after confirming that the person they were looking for was inside, with the government conceding that the "lack of clear words inviting the officers into the home" likely rendered the evidence insufficient); *Stone v.* State, 74 S.W.3d 591, 592, 597–98 (Ark. 2002).

The Supreme Court of Kansas has similarly held that reliance on a nonverbal expression of "consent" can only be reasonable if there is a "substantive nexus between the officer's *request* and the [occupant's] nonverbal *response*"—explaining

that the presence or absence of that nexus "is often highly probative" of whether "a reasonable officer would interpret nonverbal conduct as valid consent." *State v. Daino*, 475 P.3d 354, 363 (Kan. 2020) (emphasis added) ("[A]n individual may express his or her consent through gestures or other indications of affirmation, so long as they sufficiently communicate an individual's unequivocal, specific, and freely given consent."). As that court explained, "courts have generally found nonverbal conduct to be more characteristic of mere acquiescence where law enforcement officers either *did not ask for permission to enter or search, and thus did not make known their objective*, or, if they did, their request was met with no response or one that was nonspecific and ambiguous." *Id.* (emphasis added). The absence of a request for entry in this case combined with Biondolillo's admitted ignorance of any context for Jupiter's alleged movement made his interpretation of "implied consent" plainly unreasonable under this precedent as well.

The Supreme Court of Vermont has likewise rejected a finding of implied consent when, as here, the occupant "did not ask [the officers] to come in or verbally consent to a request from the officers to enter the residence." *State v. Allis*, 178 A.3d 993, 994 (Vt. 2017). In that case, the testimony indicated that officers knocked on the door and the defendant's girlfriend answered, they asked her for the defendant, she went and got him, she then "opened the front door and motioned towards" him, and the officers walked inside. *Id.* The Supreme Court of Vermont held: "As a matter of law, the girlfriend's actions were not sufficient to convey to a reasonable observer that the observer had received consent to enter the house[.]" *Id.* at 997.

Similarly, the Supreme Court of Iowa concluded that an entry by police officers onto a woman's porch "was not consensual and was unreasonable under the Fourth Amendment" when the officers stepped inside without asking permission to enter. *State v. Reinier*, 628 N.W.2d 460, 467 (Iowa 2001). While the officers testified that they believed the woman invited them in "because it was cold outside and she opened the door wide in response to their knock," they "could not recall if they actually engaged in any conversation with [her] before they stepped onto the porch[.]" *Id*. The court stated that this evidence "was insufficient to objectively show [the woman] consented by opening the door," emphasizing that the burden was on the state to prove voluntary consent by a preponderance of the evidence. *Id.* at 465, 467.

Thus, certiorari is also warranted here because the Fifth Circuit's decision conflicts with state courts of last resort, in addition to U.S. Courts of Appeals, creating further geographic disparity in the protection of Fourth Amendment rights.

III. The Fifth Circuit's decision is wrong, conflicts with this Court's precedent, and abandons the "reasonableness" requirement.

A. An officer's determination that he had consent for a warrantless entry must be objectively reasonable based on the facts known to him at the time.

The Fourth Amendment "draw[s] a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 490 (1980). Thus, "warrant exception[s] permitting home entry are 'jealously and carefully drawn,' in keeping with the 'centuries-old principle' that the 'home is entitled to special protection.'" *Lange v. California*, 141 S. Ct. 2011, 2018 (2021) (quoting *Georgia v. Randolph*, 547 U.S. 103, 109 (2006)); *see also Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must

be answered no."). And, for good reason, "this Court has repeatedly declined to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home." *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021).

Objective reasonableness is a critical requirement for any warrantless entry because "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (citations omitted). Indeed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Lange*, 141 S. Ct. at 2017 (citation omitted). If an officer's subjective or "good faith" belief alone were sufficient to justify a warrantless intrusion, "the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." *Terry*, 392 U.S. at 22 (quotation marks and citation omitted). Accordingly, "determination[s] of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution" to believe that he had consent? *See Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (quotation marks, alterations, and citations omitted).

Put another way, "law enforcement officials must be expected to apply their judgment" when relying on consent to enter a home or conduct a search, and they must do so "reasonably." *Id.* at 186. In determining whether an officer's belief was "reasonable," courts must consider "what the officers knew *at the time they sought consent*[.]" *United States v. Terry*, 915 F.3d 1141, 1145 (7th Cir. 2019) (quotation

marks and citation omitted) (emphasis in original). If an officer does "not know enough to reasonably conclude" that someone is granting valid, voluntary consent to a home entry, he has "a duty to inquire further before [he can] rely on her consent[.]" *See id.* (quotation marks and citations omitted). In other words, if "the facts known by the police cry out for further inquiry . . . it is not reasonable for the police to proceed on the theory that 'ignorance is bliss.'" *See* Wayne R. LaFave, 4 Search and Seizure § 8.3(g) (6th ed. 2020)); *see also Rodriguez*, 497 U.S. at 188.

In the context of consent-based searches, this Court has previously suggested that requesting permission may be critical to establishing a reasonable and thus lawful search, particularly if officers do not expressly notify the person of her right to refuse. In *United States v. Drayton*, the Court held that a consent-based search was voluntary and reasonable despite the officer's failure to "inform respondents of their right to refuse the search" because the officer "request[ed] permission to search." 536 U.S. 194, 207 (2002). The Court explained:

> Police officers act in full accord with the law *when they ask citizens for consent*. It reinforces the rule of law for the citizen to *advise* the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Id. (emphasis added).

At the very least, an officer who relies on consent to enter someone's home "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" his belief that he has voluntary consent from someone with authority to grant it. *See Terry*, 392 U.S. at 21.

That should generally be a simple task, easily provable by a straightforward verbal exchange—especially in a contained and controlled "knock-and-talk" situation. However, to the extent an officer may be permitted to rely on a nonverbal expression of "consent," the Fourth Amendment and this Court's precedent require the officer to point to specific conduct and specific *context* for that conduct—*i.e.*, "surrounding circumstances"—that make his interpretation objectively reasonable. *See Rodriguez*, 497 U.S. at 188. Otherwise, the officer has shown "no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 549.

B. Biondolillo did not know any context for the movement he claimed to interpret as "consent," making his judgment plainly unreasonable.

Under this Court's longstanding precedent, the Fifth Circuit's task was clear: it was required to evaluate whether Biondolillo's claimed belief that the officers had Jupiter's "implied consent" to enter the house was *reasonable* based on the facts known to him at the time. The court refused. Despite Biondolillo's own testimony that he was aware of no context for Jupiter's alleged movement—much less any facts from which he could *reasonably* conclude she was consenting to an unrequested entry—the Fifth Circuit declined to engage in any reasonableness analysis. It did not even acknowledge the conflicting testimony of Bordelon, who was the one speaking with Jupiter at the door and who did *not* interpret any movement by her as an expression of consent. Instead, the Fifth Circuit joined the district court in blindly deferring to Biondolillo's subjective, conclusory, and unsupported assertion of "implied consent."

Notably, decades before this Court clarified the objective reasonableness standard for assessing consent-based searches, it found a Fourth Amendment

violation based on nearly identical—but less tenuous—circumstances to those described by Biondolillo. In *Johnson v. United States*, an officer knocked on a hotel room door, spoke directly with the occupant after she answered, stated that he wanted "to talk to [her] a little bit," and claimed that she then "stepped back acquiescently and admitted [the officers]." 333 U.S. 10, 12–13 (1948). Based on those circumstances, the Court concluded that the "[e]ntry to defendant's living quarters, which was the beginning of the search, was demanded under color of office" and "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13.

The same is true here. Biondolillo's assertion of implied consent relied on a similar (but more equivocal) movement to that described by the officer in *Johnson*. But, unlike in *Johnson*, Biondolillo was not even speaking with the occupant when he decided to enter the house, and he was oblivious to any preceding communications. His bare testimony that he recalled Jupiter "kind of moving out the way, her opening the door" at some point during the interaction, without any context, at best suggests acquiescence to the officers' entry. And, if there was any doubt, the undisputed fact that no one asked Jupiter for permission to come inside or advised her of her right to refuse entry makes the finding of "implied consent" plainly unreasonable—especially given the government's burden to prove consent and Bordelon's contradictory testimony.

"Instead of adhering to the warrant requirement, [this] decision tells the police they may dodge it," *see Fernandez v. California*, 571 U.S. 292, 310 (2014) (Ginsburg,

J., Sotomayor, J., and Kagan, J., dissenting), making the Fourth Amendment a "random protection" that is contingent on whether an officer is willing to respect it. *See Randolph*, 547 U.S. at 127 (Stevens, C.J., and Scalia, J., dissenting). Pursuant to the Fifth Circuit's ruling, the government can justify a presumptively unreasonable, warrantless home entry by police officers based on a single officer's testimony that he saw movement at the door and thought it "implied consent to come in"—a claim that could be made any time someone answers the door to police. "It cannot be that the Constitution meant to make it legally advantageous not to have a warrant," *Davis v. United States*, 328 U.S. 582, 595 (1946) (Frankfurter, J., dissenting), but that is precisely what the Fifth Circuit's decision does—encouraging officers to go straight to a target's house and use any movement at the door as a justification to gain entry, thereby sidestepping the probable cause requirement and judicial oversight entirely.

"Reasonableness of a warrantless search due to voluntary consent is a simple binary proposition; either there is consent or there is not." *United States v. Weston*, 67 M.J. 390, 393 (C.A.A.F. 2009). The government bears the heavy burden of proving voluntary consent to a home entry, but when officers act lawfully, that should rarely be a difficult burden to satisfy. We are taught from a young age that we should clearly ask for the things we want instead assuming we can just take them. Thus, when an officer is seeking consent to enter a home, the easiest and most obvious course is to simply ask for permission and thereby "make [his] objective known." Relying on "implied consent" to an entry when no request has been made contradicts the basic notion of "consent," prioritizing an officer's subjective experience and desires over

those of the people whose rights are being infringed. At the very least, courts cannot allow officers to justify warrantless intrusions based on some perceived movement at the door when they are oblivious to any context for the movement.

Biondolillo's testimony fell far short of showing that Jupiter consented to the officers' entry, much less voluntarily. The Fifth Circuit's ruling must be reversed.

IV. This case presents an ideal vehicle to address this important constitutional question.

Mr. Morrison's case presents an ideal vehicle to resolve this important Fourth Amendment question regarding the circumstances in which "implied consent" can reasonably justify a home entry by police. The arguments have been thoroughly litigated and well-preserved, and there are no factual disputes relevant to the question presented. Moreover, the Fifth Circuit's affirmance of the "implied consent" finding was case-dispositive, as Mr. Morrison's sole conviction was based on his possession of a gun found in his home during the search. The government never argued or tried to present evidence to establish that his written consent to the search (signed minutes after the officers' entry) was an "independent act of free will," and thus suppression was mandated in light of the unlawful entry. In other words, this question is not merely academic in Mr. Morrison's case—it is critically important and outcome-determinative.

CONCLUSION

"[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure," and thus "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886). The Fifth Circuit abandoned that duty here, sanctioning an unreasonable police practice that effectively nullifies the Fourth Amendment warrant requirement. This petition for writ of certiorari should thus be granted. Alternatively, given the clear insufficiency of Biondolillo's testimony to establish "implied consent" to the officers' entry, the Court could summarily reverse the Fifth Circuit's ruling.

Respectfully submitted,

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