No. 23-331

IN THE
Supreme Court of the United States

JAMES DOE,
Petitioner,

v.

GLADYS PISANI, DANIEL MCANASPIE AND JOSEPH JOUDY,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals erred in concluding that "arguable probable cause" can support a claim for qualified immunity on summary judgment after the District Court denied qualified immunity finding there were disputed issues of material facts requiring a jury trial.

2. Whether the Federal Courts of Appeals should be required to evaluate factual findings in interlocutory appeals denying summary judgment based on qualified immunity under an abuse of discretion standard rather than a de novo standard.

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STATEMENT OF THE CASE

The Petitioner, James Doe, moves this Honorable Court, in part, to reconsider, and overrule or modify the use of the "arguable probable" doctrine to support a grant of qualified immunity to police officers. As is more fully set forth herein, Petitioner's arguments are unsound and contravene the spirit and intent of qualified immunity altogether. To support his arguments, Petitioner relies on draconian concepts ill-suited for modern application. These factors all render the subject Petition an inappropriate case upon which to grant certiorari.

NATURE OF THE CASE

This action stems from the arrest of Petitioner, James Doe, following allegations of sexual abuse made by James's two young children, John Doe and Jane Doe. Following his arrest, James, his wife, Mother Doe, and their children, John, Jane, and Youngest Child Doe (hereinafter collectively referred to as "the Doe Family"), asserted that Newton Police Officers lacked probable cause and wrongfully arrested and maliciously prosecuted James for crimes related to the sexual abuse allegations.

The facts relevant to the Petition provide that on January 18, 2013 when Mother Doe was putting her children to bed, her son, John, said to her, "Daddy comes into my bed and squeezes my penis." (Pet. App at 16-17) John then told her that it had been happening for a few years. (*Id.* at 17) Mother Doe did not believe John at first, but then she looked into his

eyes and there was no question that something had happened to him. (*Id.*) Mother Doe believed John when he made his disclosure (*Id*.)

Mother Doe did not wake her husband, James, and instead called her brother and his wife. (*Id*.) Mother Doe's sister-in-law was a lawyer and guardian ad litem. (*Id*.) The sister-in-law told Mother Doe to call DCF; both knew this disclosure would prompt an investigation. (*Id.*) On January 19, 2013, the police arrived at the Doe residence and Mother Doe gave a written statement. (*Id.*) None of the Respondents named in this lawsuit took Mother Doe's written statement. (*Id.*) Officers corrected the misspelling of Jane Doe's name and Mother Doe did not note any additional inaccuracies in the statement. (*Id.*) Mother Doe does not contest that her statement contained what John told her about James. (*Id.)*

After the initial disclosure Mother Doe contacted the Newtown Police Department and informed them that John recanted his disclosure. (*Id.* at 18). She also reported that John had a history of making things up. (*Id.*) Despite the alleged recantation, Mother Doe allowed forensic interviews to be conducted on both of her children on January 23, 2013. (*Id.* at 19)

On April 8, 2013, Newtown Police Youth Officer, Gladys Pisani, signed an affidavit in support of an arrest warrant application with respect to James Doe for crimes of sexual assault in the fourth degree and risk of injury to a minor. (*Id.* at 20) Officer Pisani's affidavit was based upon Mother Doe's sworn

statement which detailed accounts of sexual abuse alleged by both John and Jane against her husband. (*Id.* at 20-21) The affidavit also included information disclosed by John during the forensic interview wherein John recounted several occasions during which James sexually abused him and also demonstrated the abuse on an anatomical doll. (*Id.* at 21). Also included in the affidavit was information disclosed by Jane during the forensic interview where she stated that her father hugs her but she does not like it because he touches his genitals when he hugs her. (*Id.*) The affidavit further included statements of John's classmates that indicated that John stated his father told him how to masturbate and further alleged sexual abuse by his father consistent with the sexual abuse acts previously described by John. (*Id.* at 23-24).

Officer Pisani's affidavit also included John's recantation and Mother Doe's subsequent statement that she began to worry about putting words in Jane's mouth and sexualized what Jane had been saying. (*Id.* at 22-23) The affidavit further included James's statement wherein he professed his innocence and stated that his son must have been lying and influenced his daughter. (*Id.*)

The information provided by Mother Doe in the warrant affidavit more than satisfied probable cause to charge James for the sexual abuse crimes set forth in the arrest warrant. Specifically, the affidavit provided that Mother Doe reported that John told her that her husband, James, 1) taught John how to masturbate and told John to watch James do it; 2) "pulls [John's] covers off and grabs his thing" at

which point John motioned toward his genitals; 3) James "squeezes it and it hurts;" and 4) James Doe had been sexually assaulting him "since [he] was 4." (*Id.* at 21). With respect to Jane, Officer Pisani attested that Jane disclosed to Mother Doe that James got into bed with her in the middle of the night and "hugged her while he put his hands on his [genitals]." (*Id.* at 21)

Taken as a whole, this information established the existence of probable cause for an arrest. What the children told their mother, coupled with the circumstances of the disclosure and James being escorted from the home, had every indicia of reliability. Mother Doe was home with her children who confided in her. It was reasonable to assume that after hearing the detailed allegations of sexual abuse her children made about their father, Mother Doe took further action, which resulted in involvement by DCF and the Newtown Police Department coming to the home. James was never confronted by his wife about what the children said before she called DCF. A judge signed the arrest warrant on April 10, 2023. (*Id*. at 6-7). James would go on to later dispute the sufficiency of the arrest warrant, claiming that it was deficient, inaccurate and lacked probable cause.

After obtaining the arrest warrant, the Respondents applied for and obtained various search warrants for James which pertained to James's person, some of the family's electronic devices and the Doe's home. (*Id.* at 6-7). James later disputed the sufficiency of three search warrants dated January 29, 2013, February 26, 2013 and January 8, 2015 which

were submitted by Detectives McAnaspie and Joudy. (*Id.*) All three search warrant affidavits in question summarized Mother Doe's sworn statement and the contents of the children's forensic interviews. (*Id.*) All three search warrants were approved by a judge. (*Id.*)

On June 15, 2016, a Nolle hearing was held with respect to James's pending criminal charges. (*Id.* at 28) At the hearing, the Court granted defense's Motion to Dismiss. "Mother Doe admitted at her deposition that she was refusing to let the children testify at any criminal trial." (*Id.* at 28-29). The witnesses (Mother Doe, Jane, John and Youngest Doe,) were living in England and refused to return to the United States to testify. (*Id.* at 29). The State could not pursue the charges because the family was beyond its subpoena power. The dismissal of the criminal charges against James Doe was jurisdictional, not based on the State's inability to prove his guilt beyond a reasonable doubt.

PROCEDURAL HISTORY OF THE SUBJECT FEDERAL ACTION

On or about October 13, 2016 the Doe Family commenced an action in the United States District Court for the District of Connecticut against Newton Police Officer Gladys Pisani, Detective Daniel McAnaspie and Detective Joseph Joudy. James Doe asserted federal and state law claims against the defendants. (*Id.* at 29). The Doe Family collectively asserted a supplemental state law claim of Intentional Infliction of Emotional Distress. (*Id.*) Specifically, the Doe Family alleged that the Arrest Warrant Affidavit

submitted by Officer Pisani and the Search Warrant Affidavits submitted by Detectives McAnaspie and Joudy contained fabrications, falsities, and material omissions which failed to establish probable cause.

Thereafter, on February 16, 2021, defendants moved for summary judgment. In support thereof, defendants filed a Memorandum of Law addressing each of plaintiffs' claims and asserting qualified immunity. On October 18, 2021 the District Court issued its ruling as set forth in the Memorandum of Decision ("MOD") (*Id.* at 15-54). The MOD granted summary judgment on all plaintiffs' intentional infliction of emotional distress claims, and denied the motion as to the malicious prosecution claims of James Doe. (*Id.*)

It should be noted that in the MOD, the District Court noted, *inter alia*, that Mother Doe's sworn statement detailing her children's account of the sexual abuse by James Doe fell "squarely within the provisions" of the offenses for which James Doe was ultimately charged. (*Id.* at 36-37) The Court also acknowledged that Officer Pisani's Warrant Affidavit contained much of the factual information that plaintiffs argued supported James Doe's innocence and precluded the existence of probable cause. (*Id.* at 37) The Court pointed out that after considering all of the information in Officer Pisani's Warrant Affidavit, a judge signed the warrant for James Doe's arrest. (*Id.* at 38) Even further, the Court noted that after James Doe challenged the warrant in the criminal case, a judge's application of the corrected warrant doctrine resulted in the determination that the corrected

warrant *still* contained sufficient probable cause for the original criminal charges. (*Id.*) Despite these findings, the District Court ultimately concluded that there existed material facts which precluded summary judgment as to the malicious prosecution claims. (*Id.* at 39-41)

The Respondents thereafter filed an Interlocutory Appeal from the Order and Summary Judgment Ruling of the United States District Court for the District of Connecticut (Alfred V. Covello, Judge) entered on 10/15/20. (*Id.* at 2-3) Respondents' Interlocutory Appeal was based on the District Court's denial of qualified immunity with respect to James Doe's malicious prosecution claims. (*Id.*) The Respondents maintained that they had arguable probable cause to submit the subject arrest and search warrants for James Doe. (*Id.*)

The United States Court of Appeals for the Second Circuit agreed, noting in its Summary Order ("SO"):

> We conclude that arguable probable cause existed at the time defendants submitted the warrants that form the basis of James's malicious prosecution claims…[In performing the corrected affidavit process] we conclude that that the "corrected" warrant affidavits remain sufficient to support a finding of probable cause…[A]ll four affidavits would have included John and Jane's firsthand accounts of their alleged abuse, which

> were largely consistent with a sworn statement from their mother. That is sufficient to establish probable cause….[The existence of] "conflicting accounts"…do not negate arguable probable cause where an officer chose to believe one credible account over others. Defendants were entitled to credit, among other things, Mother Doe's sworn statement and the children's consistent disclosures during forensic interviews over subsequent conflicting accounts." (Internal citation and quotation marks omitted).

(Pet. App. at 10-13)

The United States Court of Appeals for the Second Circuit held that the Respondents were entitled to qualified immunity, concluding, "We cannot say that *no* reasonable officer, out of a wide range of reasonable people who enforce the laws in the country, *could have* determined that probable cause existed." [*emphasis in the original*](internal citation and quotation marks omitted). (*Id*. at 13)

Ultimately, the Second Circuit issued an Order that the portion of the ruling of the District Court denying summary judgment as to the Malicious Prosecution Claims be reversed and remanded with instructions to dismiss the claims against the Respondents. (*Id*.)

James Doe thereafter filed the subject Petition for Writ of Certiorari to this Honorable Court. The Petition does not dispute the Second Circuit's analysis which resulted in a finding that the Respondents had arguable probable cause at the time they submitted the warrants and therefore were entitled to qualified immunity. Instead, the Petition seeks to compel this Honorable Court to abolish the doctrine of arguable probable cause altogether, and in doing so, uproot firmly-established legal doctrine adopted universally among our Nation's Circuit Courts and embedded in American Jurisprudence. As an alternative, the Petition requests that Appellate Courts' standard of review be modified to an abuse of discretion standard.

REASONS FOR DENYING THE PETITION

James Doe fails to present a novel or compelling issue warranting the granting of certiorari. Here, the Second Circuit properly concluded that the Respondents had arguable probable cause at the time they submitted the warrants and that the Respondents were therefore entitled to qualified immunity. The Second Circuit's decision was correct and does not conflict with the dictates of this Honorable Court or the application of arguable probable cause to the qualified immunity analysis as applied among the Circuits. Furthermore, James Doe's argument for the re-establishment of the standard of review for Interlocutory Appeals based on the denial of summary judgment is unconvincing and against the weight of well-established precedent. James Doe relies on non-binding sources to drive his points home and his misstatements of facts and law

dilute the veracity of his arguments. In so doing, Doe fails to meet his burden of raising compelling reasons for the invocation of this Court's judicial discretion. These factors all render the subject Petition an inappropriate case upon which to grant certiorari.

I. THE SECOND CIRCUIT CORRECTLY CONCLUDED THAT ARGUABLE PROBABLE CAUSE EXISTED AND SUPPORTED A CLAIM FOR QUALIFIED IMMUNITY ON SUMMARY JUDGMENT

Although not disputed in James's Petition, the Second Circuit's decision here is correct and does not conflict with the dictates of this Court or the application of arguable probable cause to the qualified immunity analysis as applied among the Circuits.

Qualified immunity has been applied by this Court consistently for decades and serves as a cornerstone of American jurisprudence. The doctrine of qualified immunity protects government officials from suit if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This Court has recognized that "[i]mmunity protects all but the plainly incompetent or those who knowingly violate the law." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (Citation omitted; internal quotation marks omitted.). "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based upon mixed questions of law and fact."

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (Citation omitted; internal quotation marks omitted.).

In recent years, this Honorable Court has tightened the qualified immunity standard, and also warned Circuit Courts against casting the clearly established inquiry at a high level of generality. This Court has instructed that the analysis must be undertaken in light of the specific facts and context of the case, and not as a broad general proposition, and that cases cast at a high level of generality will only be sufficient to clearly establish the unlawfulness of the defendants' actions where the conduct at issue is obviously a violation based on the prior cases. See, *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Furthermore, this Court has held that, when conducting the analysis as to whether a right is "clearly established," that analysis must be particularized to the facts confronting the defendant in those particular circumstances. *City of Escondido, Cal. v. Emmons*, 202 L. Ed. 2d 455, 139 S. Ct. 500, 503 (2019) (Holding that the Court of Appeals failed to properly analyze whether clearly established law barred officer from stopping and taking down arrestee in the manner that the officer did at the scene of a reported domestic violence incident. "The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances").

As recognized by this Court in *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011), "[a] Government official's conduct violates clearly established law

when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" (Emphasis added.) *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citation omitted). Moreover, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. at 2085 (citation omitted).

In the context of applying the defense of qualified immunity to allegations asserting a lack of probable cause, the test to be applied for immunity purposes is not probable cause but "arguable probable cause." *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id*. quoting *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991); See, *Walczyk*, 496 F.3d at 163. Put differently, an arresting officer will be afforded the protection of qualified immunity unless "no reasonably competent officer" could have concluded, based on the facts known at the time of arrest, that probable cause existed. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

As articulated by the Second Circuit in *Figueroa v. Mazza*, 825 F.3d 89, 100 (2d Cir. 2016):

> When a plaintiff alleges that a law enforcement officer's official conduct renders him personally liable in damages, our inquiry is not whether the officer *should have* acted as he did. Nor is it whether a singular, hypothetical entity exemplifying the "reasonable officer"—a creature akin to the "reasonable man" of the law of torts, *see* Restatement (Second) of Torts § 283 cmt. c (Am. Law Inst. 1975)—*would have* acted in the same way. It is instead whether *any* reasonable officer, out of the wide range of reasonable people who enforce the laws in this country, *could have* determined that the challenged action was lawful. *See Malley*, 475 U.S. at 341, 106 S.Ct. 1092; *compare Walczyk v. Rio*, 496 F.3d 139, 154 n. 16 (2d Cir. 2007), *with id.* at 169–70 (Sotomayor, J., concurring).
>
> *[emphasis in the original]*

Figueroa, 825 F.3d 89 at 100.

"Thus, the analytically distinct test for qualified immunity is more favorable to the officers than the one for probable cause; 'arguable probable cause' will suffice to confer qualified immunity for the arrest." *Escalera*, 361 F.3d at 743.

Here, the Second Circuit correctly concluded that arguable probable cause existed at the time the Respondents submitted the warrants that form the

basis of James Doe's malicious prosecution claims. The Second Circuit determined that even after performing the "corrected affidavit" process the warrant affidavits remained sufficient to support a finding of probable cause. See *Soares v. State of Conn.*, 8 F.3d 917, 920 (2d Cir. 1993)(When reviewing cases in which a plaintiff alleges a probable cause affidavit contains material misrepresentations and omissions, "a court should put aside allegedly false material, supply any omitted information, and then determine whether the contents of the 'corrected affidavit' would have supported a finding of probable cause.")

Indeed, all four affidavits would have included John and Jane's firsthand accounts of their alleged sexual abuse, which were largely consistent with a sworn statement from their mother. This was sufficient to establish probable cause. Any conflicting accounts did not negate the existence of probable cause "where an…officer chose to believe" one credible account over the others. *Curley v. Vill. Of Suffern,* 268 F.3d 65, 70 (2d Cir. 2001). The officers were entitled to credit Mother Doe's sworn statement, credible reports from John's classmates as well as Jane and John's consistent disclosures of abuse during the forensic interviews over any purported subsequent conflicting accounts. See, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997)("Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest."); *Krause v. Bennett,* 887 F.2d 362, 372 (2d Cir.1989)("[An] arresting officer does not have to prove plaintiff's version wrong before arresting him."); See

also, *Stansbury v. Wertman*, 721 F.3d 84, (2d Cir. 2013) (In determining the existence of arguable probable cause, Courts must consider the evidence based upon the totality of the circumstances).

After a thorough analysis of the issues at hand, the Second Circuit went on to correctly conclude, "We cannot say that *no* reasonable officer, out of a wide range of reasonable people who enforce the laws in this country, *could have* determined that probable cause existed." (internal citation and quotation marks omitted)(*emphasis in the original*) (Pet. App. at 13)

The facts here formulate the exact scenario that the doctrine of arguable probable cause was designed to address. Where, such as here, it was objectively reasonable for officers to believe that probable cause existed based upon the totality of the information at hand, arguable probable cause existed, and the officers are entitled to qualified immunity. The privileges of qualified immunity attach even where officers of reasonable competence disagree on whether the probable cause test was met. *Escalera*, 361 F.3d at 743.

In sum, the Second Circuit properly concluded that the Respondents had arguable probable cause at the time they submitted the warrants and that the Respondents were therefore entitled to qualified immunity.

II. CERTIORARI IS INAPPROPRIATE WHERE THE SECOND CIRCUIT'S RULING DOES NOT CONFLICT WITH THE DICTATES OF THIS COURT OR THE APPLICATION OF ARGUABLE PROBABLE CAUSE AS APPLIED AMONG THE CIRCUITS

The Second Circuit's ruling here does not conflict with the dictates of this Court or the application of arguable probable cause as applied among the circuits. Indeed, the application of arguable probable cause in determining the applicability of qualified immunity is well-established among Circuit Courts – a fact to which the Petitioner even yields. See *Santiago v. Fenton*, 891 F.2d 373 (1st Cir. 1989)(Whether officer was entitled to immunity rested on whether probable cause or arguable probable cause existed to make the arrest.); *Betts v. Shearman*, 751 F.3d 78 (2d Cir. 2014)(Arresting officers had arguable probable cause to arrest, entitling them to qualified immunity.); *Gilles v. Davis*, 427 F.3d 197 (3d Cir.2005)(Determining that officer had at least arguable probable cause to arrest the plaintiff for and was therefore entitled to qualified immunity); *Orem v. Gillmore*, 813 F. App'x 90, (4th Cir. 2020) (Recognizing that qualified immunity applies where arguable probable cause exists.); *Davidson v. City of Stafford, Texas*, 848 F.3d 384 (5th Cir. 2017), as revised (Mar. 31, 2017) (Concluding that that officers lacked actual and arguable probable cause for effectuating arrest under relevant statute.); *Haywood v. Hough*, 811 F. App'x 952 (6th Cir. 2020)(Vacating denial of summary judgment and remanding to the

district court to determine whether officer was entitled to qualified immunity based on claim he had arguable probable cause to detail wife.); *Burritt v. Ditlefsen*, 807 F.3d 239 (7th Cir. 2015)(Holding investigator for sheriff's department had arguable probable cause to arrest, and thus, was entitled to qualified immunity on § 1983 false arrest and false imprisonment claims.); *Brown v. City of St. Louis, Missouri*, 40 F.4th 895 (8th Cir. 2022) (Determining qualified immunity properly granted to officers where arrest was supported by arguable probable cause.); *Reed v. Lieurance*, 863 F.3d 1196 (9th Cir. 2017)(Noting that factual dispute precluded a finding that the officer acted with probable cause or arguable probable cause to believe that plaintiff's presence at observation point would likely obstruct buffalo herding operation and thus, qualified immunity could not attach.); *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016)(Officer's belief that he had probable cause to arrest middle school student for violating a New Mexico statute making it unlawful to interfere with educational process of any public school was objectively reasonable, and, thus, officer had arguable probable cause to arrest and was entitled to qualified immunity on a § 1983 claim.); *Poulakis v. Rogers*, 341 F. App'x 523 (11th Cir. 2009)(Police officers had arguable probable cause to make arrest for carrying an unlawfully concealed firearm in violation of Florida law, and thus were entitled to qualified immunity with respect to § 1983 claim.); and *Wesby v. D.C.,* 816 F.3d 96 (D.C. Cir. 2016)(Noting that liability does not attach to officers in situations where officers *arguably* have probable cause to arrest—that is, where officers *reasonably could have be-*

lieved that there was probable cause to arrest.) Indeed, extensive authority outlines the framework for the application of arguable probable cause.

Moreover, contrary to James Doe's assertion that the application of arguable probable cause has never been examined by this Court, this Court has in fact sanctioned the application of what has been coined "arguable probable cause," holding that officers "who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S. Ct. 534, 116 L.Ed.2d 589 (1991) (internal quotation marks omitted). This Court has further noted that the question of whether a reasonable officer could have believed that he had probable cause for an arrest is a question for the Court, not for the trier of fact. *Hunter,* 502 U.S. 224 at 228. See, *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039–40, 97 L. Ed. 2d 523 (1987)("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable."). Moreover, in *United States v. Leon*, 468 U.S. 897, 926, 104 S. Ct. 3405, 3422, 82 L. Ed. 2d 677 (1984) this Court determined that officers' reliance on a magistrate's determination of probable cause was objectively reasonable where the application included an affidavit that relayed the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals made clear, provided evidence sufficient to create disagreement

among thoughtful and competent judges as to the existence of probable cause.

James Doe has completely failed to invoke this Court's discretionary jurisdiction on this Petition for Writ of Certiorari. Rather than addressing the merits of this case, James Doe takes aim at the rule, seeking to disrupt well-settled case law firmly rooted in American jurisprudence. In so doing, James Doe fails to meet his burden of raising compelling reasons for the invocation of this Court's judicial discretion. U.S. Sup. Ct. Rule 10; See, *Braxton v. United States,* 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991)(" A principal purpose for which we use our certiorari jurisdiction,…is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). The Second Circuit's decision does not conflict with the dictates of this Court and should be affirmed.

III. THIS COURT SHOULD NOT REPLACE NOVO REVIEW WITH AN ABUSE OF DISCRETION STANDARD OF REVIEW IN THE CONTEXT OF INTERLOCUTORY APPEALS DENYING SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY

Section 1292 of Chapter 28 of the United States Code states, in pertinent part, "(a) [e]xcept as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States…." 28 U.S.C.A. § 1292. The Federal

Courts of Appeals "review a district court's decision on qualified immunity de novo." *Anderson v. Recore*, 446 F.3d 324, 328 (2d Cir. 2006).

James Doe seeks to compel this Honorable Court to disrupt years of case precedent and upend the well-settled approach of using *de novo* review in the context of interlocutory appeals for denial of qualified immunity and replace it with an abuse of discretion standard. In his Petition, James Doe fails to assert a compelling basis for the significant alterations he seeks to make upon Federal Courts across our Nation.

A Court of Appeals is permitted to take review of an appeal from a final judgment only. 28 U.S.C.A. § 1291. Federal Appellate courts, however, are permitted to hear appeals from interlocutory orders, 28 U.S.C.A. § 1292. Such appeals are heard *de novo*. *Murphy v. Hughson*, 82 F.4th 177, 183 (2d Cir. 2023).

The Petitioner argues that the Courts of Appeals, in reviewing qualified immunity appeals *de novo*, actually engage in their own fact finding. While the term "*de novo*" means "anew,"[1] the Courts do not return to the case files and make determinations of facts. Rather, they examine the lower court's legal analysis, in light of the facts. In some circumstances this review may appear as if the Appellate Courts are examining and determining the facts when they are determining whether the disputed facts, if any, could possibly affect the outcome at trial. *Bouboulis v.*

[1] Merriam-Webster. (n.d.). De novo. In Merriam-Webster.com dictionary. Retrieved October 19, 2023, from https://www.merriam-webster.com/dictionary/de%20novo

Transp. Workers Union of Am., 442 F.3d 55, 59 (2d Cir. 2006); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). If the Court determines that a disputed fact would not affect the outcome, then it is appropriate for the Appellate Court to hear the case and determine if summary judgment is warranted based on the record.

Petitioner fails to provide any support for his proposition of replacing *de novo* review with abuse of discretion for interlocutory appeals of qualified immunity. Respectfully, this Court should deny the Petition and decline to alter decades of well settled law by changing the standard of review.

IV. ISSUES IN THE PETITION WHICH DILUTE THE PERSUASIVENESS OF HIS ARGUMENT

Pursuant to Supreme Court Rule 14.1(b)(iii), "the brief in opposition should address any perceived misstatement of fact or law in the petition…." U.S. Sup. Ct. R. 15. Further, "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." *Id.* Accordingly, Respondents are obligated to point out the factual and legal misstatements and misrepresentations peppered throughout James Doe's Petition.

First, James Doe stated in his Petition that ***the day after*** John Doe told Mother Doe that James Doe taught him to masturbate, "Mother Doe reported the comment to the Connecticut Department of Children

and Families." See Petition for Writ of Certiorari at 4. The record reflects that Mother Doe learned of James Doe's alleged abuse at the children's bedtime on January 18, 2013. Mother Doe finished putting the children to bed, spoke with her brother and sister-in-law on the phone and then immediately reported James Doe to the authorities. "At approximately two o'clock in the morning of January 19, 2013, officers from Newtown Police Department [ ] arrived at the Doe's home. James was escorted off the property." (Pet. App. at 4). While the inference that Mother Doe reported her husband the following day may seem minor (and technically correct as she made the report after midnight), it is of great significance and alters the reality of the situation in which Mother Doe was confronted. In reporting James Doe's sexual abuse of their children immediately, it was evident that Mother Doe did not doubt her children's accusations. In fact, she found the reports of her children so credible that she reported her husband without first confronting him with the accusations. The recitation of the events in the Petition infers that there was a stretch of time where Mother Doe may have weighed the plausibility of her children's accusations. This was not the case. Indeed, James Doe's account is misleading and minimizes the conviction of Mother Doe in immediately reporting her husband to authorities after learning of the sexual abuse.

Second, throughout his Petition, James Doe relies on the ultimate "favorable" outcome of the criminal matter. James Doe insinuates that the ultimate dismissal of the criminal charges against him establishes his innocence when, in fact, the merits of

the criminal case were never tried. Instead of allowing the administration of justice to be carried out, Mother Doe moved with her children to another country and refused to return and allow her children to testify. The State was foreclosed from pursuing the criminal charges with the Doe Family residing in a jurisdiction beyond its subpoena power. The dismissal of the criminal charges against James Doe was jurisdictional, not based on the State's inability to prove his guilt beyond a reasonable doubt.

Moreover, James Doe's Petition fails to adequately capture the true evolution of qualified immunity over the last several decades. In doing so, James Doe completely fails to consider the ways in which our Courts have refined and curtailed the reach of qualified immunity. For example, while James Doe highlights the flaws surrounding the conceptual framework of *Monroe v. Pape,* 365 U.S. 167 (1961), he fails to address that the effect *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658, 663 (1978) had on limiting the ramifications of *Monroe* and reframing the application of qualified immunity. See *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658, 663 (1978)(where Court "overrule[d] *Monroe v. Pape* [ ] insofar as it holds that local governments are wholly immune from suit under § 1983.").

The Petition also ignores post-*Monell* jurisprudence where this Honorable Court has tightened the qualified immunity standard and warned Circuit Courts against casting the clearly established inquiry at a high level of generality. See,

Brosseau v. Haugen, 543 U.S. 194, 198 (2004) and *City of Escondido, Cal. v. Emmons*, 202 L. Ed. 2d 455, 139 S. Ct. 500, 503 (2019). Certainly, Petitioner's claim that nothing has been done to "limit[] its reach of effectiveness by offering defendants immunity, whether absolute or qualified, from the statutes reach[]" is meritless and is, in fact, false. See Petition for Writ of Certiorari at 11.

Moreover, while seeking to disrupt well-settled legal principles, James Doe fails to consider the longstanding policy rational behind the application of qualified immunity. Indeed, his analysis is bereft of any consideration for the need to "give[…] government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. Al-Kidd,* 131 S. Ct. 2074, 2085 (2011) (citation omitted). Doe's limited analysis of the concept of qualified immunity dilutes the persuasiveness of his arguments and showcases the untenable nature of his proposed changes to the legal framework of the doctrine.

Throughout the Petition, James Doe also relies on cites to numerous novels. For example, on pages 10, 17, and 18 Petitioner references three different novels: Aziz Z. Huq, *The Collapse of Constitutional Remedies* (fourth edition 2021), Joanna Schwartz, *Shielded: How the Police Became Untouchable* (2023), and Alex Vitale, *The End of Policing* (2017). Although references to non-legal sources is not prohibited, they have no binding effect on the issues at hand. It appears that Petitioner's use of each book is an effort to educate this Court on the current public opinion

surrounding the nation's police force. Petitioner's use of books published by private citizens is more suited for a call for legislative changes rather than for an opinion of this Court. Petitioner, through his Petition is effectively seeking nation-wide reform of our policing system by highlighting current public opinions. "It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Accordingly, this Court should continue its long-standing job of following, rather than prescribing legislative policy.

Furthermore, on page 16 of his Petition, James Doe claims that the decision of the Fourth Circuit in *Lea v. Kirby*, 171 F. Supp. 2d 579, 583–84 (M.D.N.C. 2001), *aff'd in part, dismissed in part*, 39 F. App'x 901 (4th Cir. 2002)[2] "illustrates the incoherence of the arguable probable cause standard." See Petition for Certiorari at 16.

Doe misses the mark here in summarizing the *Lea* holding so narrowly.

A more expansive review of the *Lea* decision reveals the following:

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[2] It should be noted that the facts present in *Lea*, are distinct from those present here. *Id.* In Lea, the arresting officers, acting on the mistaken belief that probable cause existed, executed a ***warrantless*** arrest. *Id. Lea* is distinctly different from the facts presented here as the officers here had ***both*** probable cause ***and*** an arrest warrant.

> Although an officer must show probable cause to make a warrantless arrest, in determining whether or not an officer is entitled to qualified immunity under Section 1983, the issue is whether arguable probable cause exists. *See Hunter v. Bryant,* 502 U.S. 224, 226–27, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (stating that "the reasonableness of defendants' actions is not contingent upon whether probable cause actually existed"); *see also Malley v. Briggs,* 475 U.S. 335, 343, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (stating that the doctrine of qualified immunity contemplates that law enforcement officials will make the occasional mistake in judgment); *see also McLenagan v. Karnes,* 27 F.3d 1002, 1007 (4th Cir.1994) (stating that an officer is entitled to qualified immunity if he "could have ... believed that his conduct was lawful"). While reasonable minds might disagree as to whether or not probable cause existed for Saul E. Lea's arrest, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley,* 475 U.S. at 341, 106 S.Ct. 1092.

Lea v. Kirby, 171 F. Supp. 2d 579, 583–84 (M.D.N.C. 2001), aff'd in part, dismissed in part, 39 F. App'x 901 (4th Cir. 2002)

Lea and the plethora of other cases across the Circuits all hold that probable cause is needed to make

an arrest, but for purposes of determining whether qualified immunity applies for Section 1983 claims, the issue is whether arguable probable cause existed. These cases provide the necessary breathing room for governmental officials to make decisions without the benefit of hindsight. *Lea's* holding falls in line with the dictates of federal jurisprudence on the issue.

It should also be noted that on page 20, Petitioner's quotation from *Salim v. Proulx*, 93 F.3d 86, (2d Cir. 1996)[3] is inaccurate. Petitioner's recantation of the *Salim* quote reads as follows: "[a] District court's mere assertion that disputed factual issues exist… [is not] enough jurisdiction to preclude an immediate appeal." See Petition for Writ of Certiorari at 20.

The proper citation from *Salim* provides:

> In *Behrens,* the District Court had denied summary judgment precisely on the ground that a disputed issue of fact existed, *id.* at ——, 116 S.Ct. at 838, yet an appeal was not precluded, *id.* at ——,

[3] *Salim* holding goes on to further note:

> Thus, as long as the defendant can support an immunity defense on stipulated facts, facts accepted for purposes of the appeal, or the plaintiff's version of the facts that the district judge deemed available for jury resolution, an interlocutory appeal is available to assert that an immunity defense is established as a matter of law."
>
> *Salim v. Proulx*, 93 F.3d 86, 90 (2d Cir. 1996)

> 116 S.Ct. at 842. **Thus, *Behrens* laid to rest any possibility that a district court's mere assertion that disputed factual issues existed was enough to preclude an immediate appeal. [emphasis added]**

Salim v. Proulx, 93 F.3d 86, 89 (2d Cir. 1996)

These errors in the Petition for Writ of Certiorari undermine the persuasiveness of the arguments Doe seeks to advance and together with the other arguments advanced by the Respondents above, establish that the Petition for Writ of Certiorari be denied.

CONCLUSION

For the foregoing reasons, the Respondents, Gladys Pisani, Daniel McAnaspie and Joseph Joudy, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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