

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, et al.,)
 Petitioners,)
 v.) No. 15-1485
THEODORE WESBY, et al.,)
 Respondents.)

Pages: 1 through 65

Place: Washington, D.C.

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9 Washington, D.C.

10 Wednesday, October 4, 2017

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15

16 APPEARANCES:

17 TODD KIM, Solicitor General, Washington, D.C.; on
18 behalf of the Petitioners.

19 ROBERT A. PARKER, Assistant to the Solicitor General,
20 Department of Justice, Washington, D.C., for the
21 United States, as amicus curiae.

22 NATHANIEL P. GARRETT, San Francisco, California;
23 on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-1485, the District of Columbia versus Wesby.

Mr. Kim.

ORAL ARGUMENT OF TODD KIM

ON BEHALF OF THE PETITIONERS

MR. KIM: Mr. Chief Justice, and may it please the Court:

Probable cause is a practical standard, and thus it accounts for the practical limitations that officers face when making arrest decisions, including their inability to look directly into the minds of suspects offering innocent explanations for suspicious conduct. And so, in a case like this one, what the actus reus established and circumstantial evidence of mens rea that is strong or at least fair, arrest is reasonable, and hence constitutional, and more clearly qualified immunity applies.

Let's turn to the totality of the circumstances and consider them from the correct perspective.

1 JUSTICE GINSBURG: Mr. Kim, before you
2 do that, could you clarify the other charges
3 that are in this case, the one relating to
4 disorderly conduct and negligent supervision?
5 Where do they stand? And are they in any way
6 affected by the argument you're making today?

7 MR. KIM: We do not pursue an argument
8 that probable cause existed for disorderly
9 conduct. As to negligent supervision, that
10 common law claim fails if there was either
11 probable cause or qualified immunity. That's
12 where they stand, Your Honor.

13 If I may turn back to the totality of
14 the circumstances, my clients responded to
15 neighbors' complaints about --

16 JUSTICE SOTOMAYOR: I'm sorry, I'm not
17 sure I understood what you just said. Whether
18 we hold on qualified immunity grounds or
19 probable cause grounds, I don't think it
20 affects those claims, does it?

21 MR. KIM: No, that's right, Your
22 Honor.

23 JUSTICE SOTOMAYOR: So why would our
24 finding of probable cause affect it? I think
25 those stand on their own, don't they?

1 MR. KIM: No, Your Honor, if -- if
2 there was probable cause, the negligent
3 supervision would fail as a matter of law.
4 That was undisputed in the courts below, and
5 it's undisputed in this Court.

6 JUSTICE SOTOMAYOR: Well, we'll let
7 your adversary answer that.

8 MR. KIM: Thank you, Your Honor.

9 So my clients responded to a
10 neighbor's complaints about illegal activities
11 in a house in their residential community that
12 was supposed to be vacant. They found a group
13 of late-night partiers, none of whom claimed
14 any right over the home. The homeowner, Mr.
15 Hughes, confirmed --

16 JUSTICE SOTOMAYOR: I'm sorry, why
17 isn't there a right? Someone invites me into
18 what they claim is their home or their place of
19 living. Isn't that an invitation?

20 MR. KIM: Yes, there was a claim of
21 invitation, Your Honor. I was referring to the
22 absence of any claim of any property right over
23 the home. But, yes, there was --

24 JUSTICE SOTOMAYOR: But I don't --

25 MR. KIM: -- a claim --

1 JUSTICE SOTOMAYOR: -- have a property
2 right when I get invited into someone's home.

3 MR. KIM: To be sure, Your Honor.

4 JUSTICE SOTOMAYOR: I don't ask to
5 look at their lease. I don't ask to -- for
6 them to establish, to my satisfaction or anyone
7 else's, their right to be there. I assume if
8 they're there, they can invite me in.

9 MR. KIM: Your Honor, we're not
10 suggesting that there has to be some type of
11 confirmation by any party guest of the
12 inviter's right to invite. What we're saying
13 instead is from the officer's perspective,
14 looking at the totality of the circumstances,
15 there was a fair probability that Respondents
16 were trespassing either knowingly or
17 negligently. This is not about whether or not
18 a partygoer needs to confirm an invitation.
19 This is from the officer's perspective.

20 If he has the fair probability of
21 guilt necessary to arrest, a prosecutor later
22 can decide whether to press charges, but there
23 was that fair probability here based on the
24 totality of the circumstances.

25 So the homeowner had confirmed no one

1 was supposed to be there. He had not been
2 there to guard against the partygoers' entry,
3 and the house appeared vacant. It confirmed
4 the neighbor's tip that it was supposed to be
5 vacant. It was essentially unfurnished and in
6 disarray -- and this is a quote from the arrest
7 report at JA 112 -- "in disarray in a manner
8 consistent with it being a vacant house. It
9 looked like it was being used just for the
10 party, like no one was living there. This is
11 the type of vacant home that trespassers
12 target."

13 JUSTICE KAGAN: Just to make sure I
14 understand, Mr. Kim. The tip was a neighbor
15 saying that home is supposed to be vacant and
16 yet there's a party going on. It's not just a
17 neighbor calling and saying there's a very loud
18 party, it's disturbing my sleep. That the
19 tippee, tipper -- that the tipper specifically
20 said it's supposed to be vacant; is that
21 correct?

22 MR. KIM: That's correct, Your Honor.
23 It's actually multiple tippers.

24 JUSTICE KAGAN: Multiple?

25 MR. KIM: Multiple tippers, Your

1 Honor. And one of whom was an elected official
2 of the District of Columbia.

3 CHIEF JUSTICE ROBERTS: How -- just
4 how many were there? These were calls to the
5 officers before they went there --

6 MR. KIM: Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: -- or when
8 they were there?

9 MR. KIM: Before they went there.

10 CHIEF JUSTICE ROBERTS: And how many?

11 MR. KIM: We don't know that, Your
12 Honor. We do know that there were calls.

13 CHIEF JUSTICE ROBERTS: But more than
14 one?

15 MR. KIM: We do know from the arrest
16 report that multiple people did complain. We
17 don't know if that was before or after the
18 beginning of the investigation, but there were
19 --

20 JUSTICE SOTOMAYOR: With more --

21 MR. KIM: -- at least some calls before
22 the investigation began.

23 JUSTICE BREYER: How many people said
24 the house is supposed to be vacant?

25 MR. KIM: We know at least two.

1 JUSTICE BREYER: Two said --

2 MR. KIM: At least two.

3 JUSTICE BREYER: -- the house is
4 supposed to be vacant. I see. Okay.

5 MR. KIM: Yeah, but then, when the
6 police actually entered the home, they could
7 see with their own eyes that the house was
8 essentially unfurnished and in disarray in a
9 manner that --

10 JUSTICE BREYER: There were some
11 chairs and mattresses?

12 MR. KIM: That's right, Your Honor.

13 JUSTICE BREYER: Anything else?

14 MR. KIM: There was -- there were some
15 chairs. There was a mattress. There were open
16 cups of beer and liquor scattered about.

17 JUSTICE BREYER: Utilities working or
18 not?

19 MR. KIM: Utilities were working, Your
20 Honor, it appears; electricity and plumbing.

21 JUSTICE SOTOMAYOR: With more --

22 MR. KIM: But that's consistent with
23 there being a continued claim of right by the
24 owner over the home, but he was absent from the
25 home. Trespassers target vacant homes just

1 like this one. And indeed, they sometimes
2 engage in the types of activities that we see
3 here.

4 JUSTICE GINSBURG: Were the -- were
5 the tips anonymous?

6 MR. KIM: No, Your Honor. There are
7 names in the arrest report, Your Honor. So --

8 JUSTICE BREYER: I mean, the -- I am
9 told, perhaps I shouldn't take this into
10 account, but compared to the Middle Ages with
11 which I am more familiar --

12 (Laughter.)

13 JUSTICE BREYER: -- the -- the people
14 today, younger people frequently say, hey,
15 there's a party at Joe's house. And before you
16 know it, 50 people go to Joe's house. And they
17 all -- they don't really ask themselves does
18 Joe own the house or rent the house or
19 something. It's Joe's house. But the normal
20 assumption would be it's Joe's house. And
21 nobody questions it.

22 So what's the evidence here that's
23 different from that?

24 MR. KIM: Well --

25 JUSTICE BREYER: Because I -- if I

1 just think that's what happened, hey, there's a
2 party at Joe's house, I would think the people
3 who went over there, whether they knew Joe,
4 heard it secondhand, thirdhand or whatever, are
5 normally naturally going to think that Joe has
6 a right to the house. Okay.

7 But here this is different than that
8 because?

9 MR. KIM: For two reasons, Your Honor.
10 First, if I take your hypothetical correctly,
11 Joe had the authority to throw the party. So
12 there's that --

13 JUSTICE BREYER: No, no, but I'm not
14 talking about Joe's authority. I'm talking
15 about what the partygoers think.

16 MR. KIM: Absolutely, Your Honor.

17 JUSTICE BREYER: When they hear
18 there's a party -- I don't want to repeat
19 myself -- I'm saying what -- what I would
20 assume is the normal thought in the partygoer's
21 house is no more than just what I said.
22 There's a party at Joe's house. Let's go.
23 Period.

24 Now, in my mind, that doesn't give any
25 reason whatsoever for thinking that this

1 partygoer suspects, knows, or believes that it
2 isn't Joe's house that he has some right to.

3 So you -- I want you to tell me what's
4 different about this case.

5 MR. KIM: Absolutely, Your Honor.

6 What's different about this case are
7 these facts: First, it was a house that was
8 supposed to be vacant and looked vacant. And
9 it was a house where the -- the owner said that
10 no one had permission. It was a house where
11 the purported hosts --

12 JUSTICE BREYER: No, no, I know that,
13 but now put yourself in the mind of the -- of
14 the partygoer. The policeman has to be
15 thinking about the partygoer. So one thing is
16 the policeman knows, the policeman knows, and
17 maybe Peaches knows, call her Joe, it wasn't
18 Joe's house.

19 Now, all right, that's one thing, so I
20 have to ask myself, is that a reason for
21 thinking the partygoer knew it or did anybody
22 think the partygoer knew it.

23 Okay. What's the second?

24 MR. KIM: Well, the absence of the
25 supposed host, Joe or Peaches, you can name

1 however you want, the host wasn't even there.
2 The person who supposedly gave them the
3 authority over the house --

4 JUSTICE BREYER: Okay. Nobody's
5 there. That's the second.

6 MR. KIM: -- wasn't even there.

7 JUSTICE BREYER: Okay.

8 MR. KIM: There were illegal
9 activities happening there or so the officers
10 reasonably could think of the type typically
11 associated --

12 JUSTICE GINSBURG: Was it -- may I
13 stop you there?

14 MR. KIM: Yes, Your Honor.

15 JUSTICE GINSBURG: Didn't the person
16 who extended the invitation, Peaches, hadn't
17 she been there and she said she left to go to
18 the store, but she had been there?

19 MR. KIM: Your Honor, there was
20 evidence that she told Officer Parker that she
21 had gone to the store. The partygoers
22 themselves did not say that, notably. They
23 simply said in response to the question where
24 is Peaches, she's not here.

25 JUSTICE BREYER: Okay. I'm trying to

1 get a full answer and I -- and I -- I have,
2 one, the house looked vacant. Two, that, in
3 fact, Peaches didn't have a right to be in the
4 house. Okay.

5 Anything else? I want to have a
6 complete list of the things that make it
7 different.

8 MR. KIM: Yes, Your Honor. Number 3,
9 Peaches was not there. Number 4, partygoers
10 acted suspiciously in response to the police
11 presence. They fled and hid and they acted
12 very suspiciously when asked sensible questions
13 like: Who's the owner? Who lives here? No
14 one answered those questions according to the
15 -- the depositions.

16 JUSTICE BREYER: Okay.

17 MR. KIM: And I don't think we should
18 discount the fact that Peaches proved herself
19 to be quite evasive, untrustworthy. She
20 repeatedly hung up on the police when they
21 tried to investigate. She said if she came
22 back to the scene she would be arrested. And
23 she eventually admitted trespassing herself.

24 Given all the circumstances, the
25 police --

1 JUSTICE BREYER: That's it, though,
2 that's it, nothing else?

3 MR. KIM: There is more, Your Honor.
4 I could keep on going. The actus reus itself I
5 think can be used here as a basis to infer the
6 necessary mens rea. Let's remember, it's
7 either knowledge or negligence, even assuming
8 the partygoers actually relied upon an
9 invitation from Peaches, and even assuming they
10 actually believed she had the permission to
11 invite them, if their actual reliance was
12 negligent, that, nonetheless, was criminal
13 trespass in the District of Columbia.

14 So the Court of Appeals here, in what
15 I think is an impractical approach for what's
16 supposed to be a practical standard, said that
17 the officers basically had to heighten their
18 understanding of the credibility of -- of the
19 partygoers' clear invitation and Peaches'
20 supposed corroboration.

21 We don't think that's what police
22 officers are required to do on the scene.

23 Suspects on the scene offer any number
24 of different types of innocent explanations for
25 conduct. These will often be false. Police

1 officers need the -- the leeway -- the leeway
2 --

3 JUSTICE SOTOMAYOR: Mr. Kim, why
4 weren't any of these partygoers arrested? For
5 example, one among the many officers said he
6 smelled marijuana, but, as I understand it, no
7 drugs were found, correct?

8 MR. KIM: The evidence is that no
9 drugs were found, that's right, Your Honor.

10 JUSTICE SOTOMAYOR: Not marijuana or
11 any other. Why weren't the people who were
12 suspected of engaging in sex arrested? Why
13 weren't the people standing around the
14 strippers arrested for those activities, if
15 they were illegal?

16 MR. KIM: Your Honor, everyone was
17 arrested because the officers believed and they
18 had probable cause to believe that everyone in
19 the house had committed the offense of unlawful
20 entry.

21 Specific people in the house may have
22 also committed other crimes, but --

23 JUSTICE SOTOMAYOR: But they weren't
24 charged with those crimes.

25 MR. KIM: As far as we know from the

1 record, that's right, but --

2 CHIEF JUSTICE ROBERTS: How many --
3 how many people were in the house?

4 MR. KIM: At the time 21. At the time
5 21.

6 JUSTICE KAGAN: Mr. Kim, could you
7 tell me a little bit about how you think the
8 summary judgment posture of this case does or
9 doesn't matter? I mean, usually in summary
10 judgment cases, we say we need to view the
11 facts in the light most favorable to the
12 non-moving party.

13 And many of these facts, you could see
14 it one way or you could see it another way. It
15 has one explanation or it has another
16 explanation.

17 So how does the summary judgment
18 standard fit with the probable cause standard
19 and also with the qualified immunity standard?
20 How do those three things work together here?

21 MR. KIM: Thank you, Your Honor.

22 I think the essential facts were
23 undisputed until Respondent's brief on the
24 merits. Their attempts to dispute those facts
25 come too late for reasons I'm happy to discuss.

1 The inferences to be drawn from those
2 established facts are for the Court, and
3 probable cause to be determined as a matter of
4 law.

5 The Court puts itself in the shoes of
6 the officer and thinks: Was it reasonable for
7 the officer to arrest based on these facts?
8 And, of course, if there are inferences drawn
9 from the police officers, the Court will defer
10 to those inferences.

11 CHIEF JUSTICE ROBERTS: What are the
12 -- you said you were happy to discuss the
13 reasons that the -- the -- the disputed facts
14 come too late. What are those?

15 MR. KIM: Because it was inappropriate
16 for the respondents to wait even in their cert
17 papers to raise these disputes and it was -- it
18 is inappropriate for them to ask this Court to
19 be the first Court to parse the record closely
20 to consider these claims of dispute.

21 These disputes were --

22 JUSTICE GINSBURG: Why -- why would --
23 why would they be asking that? I mean, one
24 thing is their motion for summary judgment,
25 which was successful.

1 But why would you be entitled to
2 summary judgment in view of the disputed facts
3 that they claim now?

4 MR. KIM: Because, Your Honor, their
5 disputes are waived or forfeited. They should
6 have been raised before, and especially in the
7 brief in opposition before this Court decided
8 in its discretion to grant cert on the two
9 questions presented.

10 Moreover, I would note that even if
11 you took the facts that are undisputed, even
12 now, and added them with the facts stated
13 directly in the questions presented, that would
14 be sufficient to establish probable cause as a
15 matter of law.

16 No matter how you would want to take
17 the inferences in the light most favorable to
18 the Respondents, it wouldn't matter here
19 because, again, the inferences are for the
20 Court and the established facts establish
21 probable cause.

22 JUSTICE GINSBURG: What --

23 CHIEF JUSTICE ROBERTS: So they --
24 they didn't dispute the central facts in their
25 brief in opposition?

1 MR. KIM: That's right.

2 CHIEF JUSTICE ROBERTS: Facts that
3 were laid out in the petition for cert?

4 MR. KIM: That's right, Your Honor.
5 In fact, they affirmatively agreed to what we
6 think is the most central fact. The first
7 sentence in the brief in opposition says that
8 this case is about, among other things, what
9 happens when the owner has indicated to the
10 police that he has not given permission.

11 They now attempt to dispute that. And
12 it's too late for them to do so, Your Honor.

13 So, if you actually look at the
14 totality of the circumstances and you allow the
15 officers to use their common sense, this Court
16 has said that this is a commonsensical
17 standard. A readily available inference to a
18 reasonable officer was that the partygoers were
19 not blameless dupes tricked into someone else's
20 house, but the simpler explanation, they were
21 trespassing to throw a party with drugs and
22 strippers in a place where they thought they
23 wouldn't be caught.

24 JUSTICE GINSBURG: They weren't
25 charged with trespass, unlawful entry, were

1 they?

2 MR. KIM: They were, Your Honor.
3 Unlawful entry was the charge.

4 JUSTICE GINSBURG: I thought that that
5 charge was not made once they were at the
6 police station and instead they were charged
7 with disorderly conduct.

8 MR. KIM: That's correct. The
9 arresting officers, though, indicated that the
10 reason for the arrest was unlawful entry. And
11 the fact that it was changed --

12 JUSTICE GINSBURG: And wasn't that
13 because when their superior was on the scene
14 and determined that the owner had not leased
15 the house to anyone, he thought that that was
16 sufficient to arrest?

17 MR. KIM: Well, yes, Your Honor, that
18 appears to be Sergeant Suber's subjective
19 reasoning. Of course, probable cause is an
20 objective analysis.

21 I see my time is almost up. I would
22 like to say one word about qualified immunity.
23 I would hope that the debate today and the fact
24 that four judges on the D.C. Circuit thought
25 there was probable cause would be enough to

1 establish that this constitutional question was
2 not beyond the debate. I'll reserve the rest
3 of my time.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. Thank you, counsel.

6 Mr. Parker.

7 ORAL ARGUMENT OF ROBERT A. PARKER
8 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

9 MR. PARKER: Mr. Chief Justice, and
10 may it please the Court:

11 There are two fundamental errors in
12 the way that the lower courts analyzed the
13 question of probable cause in this case.

14 First, they took certain important
15 facts out of context, viewed them in isolation,
16 and engaged in precisely the sort of
17 divide-and-conquer analysis that this Court has
18 said is inappropriate.

19 And the second is they concluded that
20 because those facts were susceptible to
21 possible innocent explanations, they could not
22 contribute to a finding of probable cause.

23 Neither of those is correct. When
24 police officers encounter a criminal suspect,
25 they are required to draw fair inferences from

1 the entire constellation of facts, drawing on
2 practical and commonsense experience. Those
3 facts will rarely be clear and often they will
4 point in different directions.

5 And when they do, this Court has said
6 repeatedly that the possibility of competing
7 inferences supports, not undermines, a finding
8 of probable cause. That is especially true in
9 the case of mens rea, which is not directly
10 knowable. The police officer cannot peer into
11 the head of the criminal suspect and know
12 exactly what he or she is thinking.

13 And just like juries and judges must
14 rely on all of the surrounding circumstances to
15 infer what the mental state is, certainly
16 police officers should be permitted to do so
17 under the less exacting requirements of
18 probable cause.

19 This case presents a very good example
20 of why these principles are appropriate. And I
21 -- I want to be very clear at the outset what
22 we are not saying.

23 We are not saying that no one can
24 accept a secondhand invitation to a party or
25 that they cannot go to a party at the home of

1 somebody they don't know or that, when they
2 arrive, they have to inspect the lease to
3 ensure that the person has authority to invite
4 them.

5 All we are saying is that if a person
6 finds himself or herself in a compromising
7 situation -- here, finding themselves in a
8 vacant home that actually is vacant -- where
9 they, as a matter of fact, are an intruder who
10 is committing the actus reus of a crime, and
11 especially if there are surrounding
12 circumstances that would lead a reasonable
13 observer to think that that may be what really
14 is going on, then the deck is stacked against
15 that person.

16 JUSTICE BREYER: You are saying that
17 anytime a policeman goes into a house and
18 there's a party and people tell you, somebody
19 invited me, and it turns out that that somebody
20 didn't have a right to be in the house, you can
21 arrest them?

22 MR. PARKER: No, I'm not -- I'm not
23 saying that.

24 JUSTICE BREYER: You're not?

25 MR. PARKER: No.

1 JUSTICE BREYER: Then what else is
2 there here than that?

3 MR. PARKER: Well --

4 JUSTICE BREYER: Oh, sorry, there is
5 one other thing. The other thing is that it
6 isn't -- it's sparsely furnished. So whenever
7 you see a sparsely furnished house with some
8 people in it and they say word got around that
9 Joe invited everybody to his house for a party,
10 it turns out that Joe hadn't rented the house,
11 you can arrest them. Isn't that what you're
12 saying?

13 MR. PARKER: It is not what I'm
14 saying, and I think --

15 JUSTICE BREYER: Okay. Then why isn't
16 it?

17 MR. PARKER: Well, because -- there
18 are two answers. One is that, I think, would
19 be precisely the kind of bright-line rule that
20 this Court has repeatedly said is not to be
21 imposed in probable cause cases. What I think
22 instead is required is an analysis of the
23 totality of the circumstances to determine
24 whether the statement of a -- or the claim of
25 an innocent mental state is --

1 JUSTICE BREYER: I'm saying what else
2 is there here? And I don't see anything else.
3 And maybe it's a question of believability,
4 then let's have a trial?

5 MR. PARKER: Well, let -- let me --
6 let me talk about the facts of this case, if I
7 can turn to that.

8 I think it's useful to think of this
9 almost as like two sides of a ledger. On one
10 side, there's the condition of the home. On
11 the other side, there's the statements of the
12 people who were there.

13 If you think about the condition of
14 the home, the police were responding to a -- a
15 citizen complaint, multiple citizen complaints,
16 that this was a vacant home. Not only was it a
17 vacant home, but they said that it had been
18 repeatedly exploited to throw parties in the
19 past.

20 JUSTICE GINSBURG: But the story of
21 the -- of Peaches, who extended the invitation,
22 was that she had just leased the house. So, if
23 somebody had just leased a house, the sparse
24 furnishing would not be at -- at all
25 incriminating.

1 MR. PARKER: I -- I think that that is
2 a perfectly permissible inference from the
3 facts that you described, Justice Ginsburg. I
4 think our only point is it is not the only
5 permissible inference based on the totality of
6 the facts here.

7 In addition to the tip that they
8 received, when the officers arrived, they
9 noticed that the -- the condition of the home
10 was entirely consistent with being a vacant
11 house. It wasn't just that it was sparsely
12 furnished. It had folding chairs and a
13 mattress. It was also described as being in a
14 state of disarray, consistent with being a
15 vacant home. It wasn't just that it was messy.

16 JUSTICE SOTOMAYOR: What -- what was
17 that? If all it had, according to you, was a
18 bed and some folding chairs and utilities that
19 worked, nothing had been turned off, what
20 happens during a party?

21 MR. PARKER: Well --

22 JUSTICE SOTOMAYOR: Disarray? So what
23 was different in this disarray from a party?

24 MR. PARKER: Well, the -- the evidence
25 in the record indicates that the house was

1 considerably more dirty than just an ordinary
2 house. In fact, one of the individuals who
3 went to the house said that the floor was so
4 dirty, she was unwilling to sit on it. There
5 was trash strewn about. There were used
6 contraceptives strewn about.

7 I think that all of those things would
8 lead a reasonable officer to think that perhaps
9 these are just particularly messy houseguests,
10 but this is also consistent with the type of
11 party people would throw in a vacant house
12 where they're not too concerned about the state
13 that they leave it in.

14 JUSTICE KAGAN: Mr. Parker --

15 MR. PARKER: Yes.

16 JUSTICE KAGAN: -- you know, you're
17 exactly right, that, of course, we have to view
18 this through the eyes of the officer. And
19 there is much that an officer could look at
20 here and say, I think I have probable cause.
21 And, certainly, when the qualified immunity
22 standard is laid on top of that, makes it even
23 easier for the officer.

24 I guess one of the things that -- that
25 strikes me as why there's resistance here, is

1 that when looked at from the point of view of
2 the reasonable partygoer, it looks a little bit
3 different. And I -- I take the point that
4 that's not the standard, but we are setting
5 rules and those rules are going to affect how
6 police officers act in the future as well.

7 And when looked at from the reasonable
8 partygoer's view, there are these parties that,
9 once long ago, I used to be invited to --

10 (Laughter.)

11 JUSTICE KAGAN: -- where you didn't --
12 don't know the host, but you know Joe is having
13 a party. And can I say that long, long ago,
14 marijuana was maybe present at those parties?
15 And, you know, so -- and, you know, it just is
16 not obvious that the reasonable partygoer is
17 supposed to walk into this apartment and say:
18 Got to get out of here.

19 And -- and it seems a little bit hard
20 that they're subject to arrest. So -- so how
21 do I think about that question?

22 MR. PARKER: Well, I -- I think there
23 are a couple of ways.

24 I think the overarching point here is
25 that, as I said, when a partygoer goes to a

1 house, if it turns out that it actually is
2 vacant and that they actually are intruding,
3 the police, upon encountering that situation --

4 JUSTICE KAGAN: Right, but they don't
5 know that, as I said.

6 MR. PARKER: That's right.

7 JUSTICE KAGAN: I mean, from the
8 partygoers' point of view, they just know that
9 Joe is having a big party, and it's a good
10 time, and -- and maybe there will be some
11 liquor and maybe there will be some
12 recreational drugs. And -- and they're having
13 a good time.

14 MR. PARKER: I -- I think that that's
15 an entirely possible inference to draw, but
16 it's not the only inference. And I think here
17 there are a number of facts that suggest that
18 that, in fact, was not what was happening.

19 It's not just that the house looked
20 vacant and that people who were reasonably on
21 the scene would -- would be able to observe
22 that this looks like a situation where we
23 should not be; it's that when they were asked
24 about it, the individuals said nothing to
25 dispel probable cause. If anything, they

1 reinforced it.

2 It wasn't just that none of them lived
3 there; none of them knew who lived there. They
4 also -- when asked who invited you, almost all
5 of them said somebody else. The record doesn't
6 reflect whether they named any particular
7 person, but we do know that only two of the
8 individuals on the scene, it appears at least,
9 named Peaches. And those were two of the young
10 women who had been hired to come dance at this
11 party. They were not the actual partygoers
12 themselves.

13 When Peaches was -- was called, she,
14 as -- as Mr. Kim explained earlier, was
15 evasive. She lied to the officers. She said
16 that she had authority to throw a party there,
17 and she didn't. All of those things, I think,
18 would fit into a reasonable officer's
19 understanding of the facts and suggest that
20 they may be hearing a story that is not true,
21 both from the partygoers and from Peaches.

22 And certainly I think that when police
23 arrive at a scene and see the actus reus of a
24 crime in the process of being committed, they
25 can at least reasonably intuit that the people

1 here probably know what they're doing.

2 That isn't always going to be able to
3 get you over the probable cause hump, because,
4 as I've said, this is not an area susceptible
5 to those sorts of bright-line rules, but at
6 least it's going to inform what a prudent
7 officer, who is exercising an appropriate level
8 of skepticism when dealing -- may I complete?

9 CHIEF JUSTICE ROBERTS: Finish your
10 sentence.

11 MR. PARKER: -- when dealing with
12 these sorts of people would think. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Garrett.

16 ORAL ARGUMENT OF MR. GARRETT

17 ON BEHALF OF THE RESPONDENTS

18 MR. GARRETT: Mr. Chief Justice, and
19 may it please the Court:

20 The Court should affirm the grant of
21 Respondents' summary judgment motion.
22 Respondents uniformly told police they had been
23 invited to a party. The host corroborated
24 their statements and the owner of the house
25 confirmed the host was not some stranger. She

1 had been involved in lease negotiations that
2 ultimately fell through.

3 Petitioners now maintain that there
4 was probable cause to arrest because the party
5 was raucous and involved stripping and drinking
6 and marijuana smoke, but those activities don't
7 put a partygoer on notice that the host has
8 failed --

9 CHIEF JUSTICE ROBERTS: Well, there
10 was a lot more involved than the Petitioner is
11 relying on than those things that you just
12 listed. He went through six different items
13 that weren't limited to the fact that it was a
14 raucous party.

15 MR. GARRETT: So there was also the
16 fact that Peaches was absent. Justice
17 Ginsburg, you were correct that Peaches was at
18 the party. That's undisputed at JA 43. Then
19 they arrive and she has left.

20 Does a partygoer who arrives at a
21 party where the host is there and then she
22 leaves know he should not be there, after she
23 was there when he arrived?

24 They also mentioned disarray, and the
25 -- and the status of the home. I think, in

1 fact, the status of the home is generally
2 undisputed in terms of what was there. And
3 many things were left out, so let me explain
4 them.

5 The bed, the chairs, which were not
6 folding chairs -- you can see that from the
7 pictures in the record -- the stereo, the
8 utilities were on. Somebody was paying the
9 utility bills. There were candles. There was
10 food in the refrigerator. There were window
11 coverings. There was shower curtains.

12 So they say it was vacant, but it's
13 certainly not vacant under the definition of
14 D.C. law. D.C. law defines vacant. It
15 certainly wasn't vacant. So they must mean,
16 well, when the people arrived, the condition of
17 the house was such that they should have
18 realized they're not supposed to be there.

19 CHIEF JUSTICE ROBERTS: Does it matter
20 that the tips they had said that it was vacant?

21 MR. GARRETT: Well, the tip, I think
22 the tip is hard to sort of decipher. We've got
23 the police report at 1:12 where there are two
24 tipsters named Keck and Foster. And we don't
25 know who exactly said what because it doesn't

1 distinguish between them.

2 Three pieces of information given:
3 Vacant, illegal activity, loud music.

4 Oddly, Mr. Keck comes in at summary
5 judgment and files an affidavit that seems
6 quite different from that. He actually says it
7 used to be vacant; about a month ago I started
8 seeing people using the house.

9 CHIEF JUSTICE ROBERTS: The important
10 thing I suppose would be what the officers were
11 told and whether it was reasonable for them to
12 act on what they were told.

13 MR. GARRETT: And it certainly was
14 reasonable for them to act, Chief Justice
15 Roberts. We don't dispute -- and this is what
16 the Petitioners maintained in the District
17 Court -- certainly at that point when the tip
18 comes in they have suspicion. They can go to
19 the house, investigate what's going on, which
20 they did.

21 The question is then what develops
22 into probable cause for unlawful entry and,
23 most importantly, what is the evidence that
24 these individuals knew that they weren't
25 supposed to be here or at least were negligent

1 in not knowing them?

2 JUSTICE ALITO: What should the
3 officers have done after they had made all
4 their inquiries at the house?

5 MR. GARRETT: I think there are
6 several things they could have done here,
7 Justice Alito.

8 Number 1, they now had information
9 from the owner that he didn't want them there.
10 They immediately could have asked the
11 individuals or ordered the individuals to leave
12 and, if they hadn't, that's unlawful entry.
13 They could arrest.

14 They could have issued a citation for
15 disorderly conduct which likely would not have
16 raised Fourth Amendment concerns at all. They
17 could have investigated, as they now maintain,
18 they smelled marijuana smoke. There's a
19 suggestion that one officer heard about
20 prostitution. Well, they certainly could have
21 investigated those crimes.

22 I think it's interesting, or at least
23 telling, that under Devenpeck they could have
24 come in here at any time and say we arrested
25 for unlawful entry, but really we had probable

1 cause for other things, whether it's
2 disorderly conduct, marijuana, narcotics,
3 prostitution.

4 They've abandoned the disorderly
5 conduct justification and they've never
6 suggested they had probable cause to arrest
7 anybody for the other crimes. And I think the
8 --

9 JUSTICE BREYER: The key things that I
10 hadn't fully taken in, one, you put yourself in
11 the position of the officer. Two, people tell
12 you this is a vacant house.

13 So it is known, i.e., they knew, I
14 guess there's some evidence of this, that there
15 were vacant houses in this area used for
16 parties.

17 They know also that it is a vacant
18 house. And it doesn't -- and those are the
19 things that -- and then they look around and it
20 looks sort of vacant, not completely, but sort
21 of.

22 And so that together leads them to
23 think, well, these people knew it was a vacant
24 house.

25 MR. GARRETT: But --

1 JUSTICE BREYER: And -- and would a
2 reasonable officer have concluded that the
3 partygoers knew or they knew it was a vacant
4 house? If so, that's enough.

5 MR. GARRETT: And --

6 JUSTICE BREYER: Because it is
7 trespass to go into a vacant house, I gather.

8 MR. GARRETT: No, it's not, Your
9 Honor.

10 JUSTICE BREYER: It's not? Well, but
11 the other stuff they have, I guess, isn't it?
12 Vacant -- you can't -- it isn't trespassing in
13 the District of Columbia to go into a vacant
14 house?

15 MR. GARRETT: No, it's not, Your
16 Honor. In fact, if a house --

17 JUSTICE BREYER: What if -- go ahead.

18 MR. GARRETT: Well, if a house is
19 actually vacant -- I mean, this is the oddity
20 of how this argument comes up -- if a house is
21 actually vacant or abandoned, it's not
22 trespassing because somebody is not maintaining
23 their control over it.

24 It is prima facie evidence of trespass
25 if somebody's in a vacant house that is boarded

1 up or otherwise secured in a manner that
2 conveys it's not to be entered.

3 I think one fact that was not talked
4 about here is that there was no evidence of
5 boarding up and there's no evidence of forced
6 entry.

7 JUSTICE ALITO: Well, when those tips
8 -- when the people nearby called it and they
9 said the house is vacant, you think they were
10 referring to the technicalities of District of
11 Columbia law? Don't you think they meant --

12 MR. GARRETT: No.

13 JUSTICE ALITO: -- that nobody was
14 living there?

15 MR. GARRETT: That's correct, Your
16 Honor. I do think that's right. And then the
17 question arises: These partygoers, did they
18 have reason or did they know that it was
19 supposed to be vacant?

20 Now, the host had told both -- she
21 told the partygoers she had just moved in. The
22 police actually knew this because Peaches told
23 Sergeant Suber the owner is supposed to be
24 fixing the house up for me.

25 We also are obviously in a low-income

1 neighborhood. So, our point on the -- on the
2 status of the home is that a partygoer going to
3 the home would not infer, simply because of its
4 condition, there must be something wrong with
5 the host title.

6 JUSTICE ALITO: Well, the fact of what
7 you just mentioned is troubling to me. You say
8 it's a low-income neighborhood.

9 And I just wonder, if we moved all of
10 these facts to an affluent community, and what
11 the neighbors said when they called the police
12 is, you know, our neighbor, Joe, who is the CEO
13 of this and that company has been -- or an
14 officer in a big company, has been transferred
15 to another city and has moved out and the house
16 is unoccupied, would you be making the same
17 argument?

18 MR. GARRETT: Well, it depends on what
19 the party looks like. If certainly --

20 JUSTICE ALITO: It looks exactly like
21 this party.

22 MR. GARRETT: Well, then I think the
23 police need to invest- -- no, I think the
24 police -- if the house is completely empty --

25 JUSTICE ALITO: The facts are exactly

1 the same except the party is in Potomac.

2 MR. GARRETT: Well, I think it would
3 be a closer case, but I --

4 JUSTICE ALITO: Why would it be a
5 closer case?

6 MR. GARRETT: Because --

7 JUSTICE ALITO: I mean, is the
8 expectation, well, this is a low-income
9 neighborhood; we don't care what goes on here?

10 MR. GARRETT: Oh, quite the opposite.
11 The point is that we're looking at this from a
12 police officer's commonsense perspective.

13 And certainly it seems like
14 commonsense that, if you're in River Terrace,
15 the condition -- the facts that the home
16 doesn't look the same as it might in Northwest
17 D.C. is something the police ought to take into
18 consideration. I --

19 JUSTICE BREYER: This is important to
20 me. I'm sorry that it is. I didn't know this.
21 In fact, the house under D.C. law wasn't
22 vacant?

23 MR. GARRETT: No, Your Honor.

24 JUSTICE BREYER: And, indeed, if the
25 officers -- which is unlikely -- had known all

1 these details, they would have known it's not
2 vacant. What it is, is not owned by or rented
3 by the person who supposedly invited them to
4 the party.

5 MR. GARRETT: Correct. And --

6 JUSTICE BREYER: So then the question
7 becomes did -- would a reasonable officer have
8 believed that they were trespassing and they
9 were trespassing if and only if there is some
10 reason a reasonable person could have believed
11 that they knew that the person who invited
12 them, first, second or thirdhand, did not have
13 a right to be there?

14 MR. GARRETT: Correct.

15 JUSTICE BREYER: And there's -- you
16 think there's nothing to have a trial about?

17 MR. GARRETT: Oh, I -- well, so let me
18 -- let me maybe use that question as a
19 transition to Justice Kagan's question about
20 the differing standards of review in the
21 different motions.

22 So, both parties filed motions for
23 summary judgment. And -- and I want to also
24 make sure I talk about the waiver issue.

25 So if, if the Court is reviewing our

1 motion and asking whether to reverse that
2 motion, the facts are construed in the
3 District's favor.

4 If the Court is reviewing should it
5 direct entry of judgment for Petitioners, then
6 you would construe the facts in our favor.
7 Now, there was some discussion of, well, have
8 we waived this distinction, and let me explain
9 why that's not the case.

10 In their petition, the Petitioners
11 asked for reversal of liability findings at
12 pages 16 and 25. And they construed the facts
13 in their favor. It wasn't until their merits
14 brief that they very clearly said not only
15 should you reverse their motion, you should
16 grant ours.

17 They also say: Well, you never
18 disputed some of these facts below. Well, I
19 encourage the Court to look at JA 186, which is
20 their 56.1 statement in support of summary
21 judgment. They never mention five of the seven
22 facts they rely on here. They --

23 CHIEF JUSTICE ROBERTS: But they did
24 mention them in their petition. And our rule,
25 Rule 15, makes it perfectly clear, if you do

1 not challenge the factual assertions in the
2 petition, you're bound by those assertions.

3 The reason is that we make a judgment
4 about whether to take a case based on the cert
5 papers. And we take the facts as set forth in
6 the petition, if not challenged in the brief in
7 opposition. And I went through and read your
8 brief in opposition again, and you did not
9 challenge -- in fact, you conceded most of the
10 pertinent facts on which Mr. Kim has relied.

11 MR. GARRETT: Because we can't
12 challenge them when reviewing our motion for
13 summary judgment. If they --

14 CHIEF JUSTICE ROBERTS: No, no, these
15 are historical facts that they asserted. It
16 doesn't matter the motion this, the motion
17 that. They said the different things, the
18 police received a phone tip, that Peaches
19 recanted her claim.

20 And in many of those, you agreed. You
21 -- you repeated their assertions. And on -- on
22 others, you didn't challenge them.

23 MR. GARRETT: Again, I'm not sure I --
24 I could have much to add, other than if the
25 question is whether we're reviewing our motion,

1 we do take those facts as true.

2 But they clearly -- Petitioners
3 clearly know how to say we want a directed
4 judgment in our favor. And they didn't ask for
5 it in the petition. And -- and my point is
6 simply I think it ought to be at least
7 unambiguous if they're going to change relief,
8 in their merits brief, they ought to have made
9 that clear at the petition stage because there
10 are two different motions. And you don't
11 necessarily enter summary judgment for them
12 even if the Court's inclined to reverse our
13 motion.

14 CHIEF JUSTICE ROBERTS: Well, but I do
15 think, again, under our rules, in reviewing
16 either motion, you take the facts as they
17 asserted in the petition that you either
18 accepted or did not rebut.

19 MR. GARRETT: And -- and we don't
20 dispute those facts in the context of our
21 motion. And I would also note the cases
22 they're relying on are cases where the facts
23 end up mooted -- the waiver cases end up
24 mooted the legal question. We're not asking
25 to moot any legal question.

1 The point is they've now extended in
2 their merits brief the scope of this case from
3 our motion to their motion. And so we're
4 responding to that.

5 And as I was saying earlier, the --
6 the reason these facts weren't disputed below
7 is because in the district court, Petitioners'
8 theory was that this was a summary -- a strict
9 liability crime, and so they didn't rely on
10 anything having to do with facts that would
11 have put Respondents on notice, because their
12 position was that's irrelevant.

13 As soon as we talked to the owner and
14 he says you're not allowed to be here, game
15 over, they're liable for trespass. So it's --
16 it's now that they're actually asking the Court
17 to enter judgment on a different summary
18 judgment motion than the one they actually
19 filed in the district court.

20 One might ask what other evidence they
21 could have looked for. One of -- Justice Alito
22 asked, what else could they have done? One
23 might also ask what else could the police have
24 looked for as evidence of mens rea?

25 And I think looking at the cases cited

1 in this case, you see a number of examples that
2 were absent here. One is direct evidence,
3 which you see in several cases like Kozlovska,
4 where the owner tells police these individuals
5 knew they weren't supposed to be in the house.
6 We don't have that. There's circumstantial
7 evidence like forced entry, where somebody has
8 to force their way into the house because it's
9 not theirs and they're trying to get into a
10 house.

11 Here, of course, the evidence, as it
12 turned out, is that the host had keys. And so
13 there was no forced entry. They were --

14 JUSTICE GINSBURG: Here, we've --
15 we've been talking about probable cause up
16 until now, but there's also the qualified
17 immunity question, and this Court has said that
18 there's no liability on the part of the officer
19 unless he or she knowingly violated the law or
20 was plainly incompetent.

21 So can you explain how you cross that
22 hurdle?

23 MR. GARRETT: Yes. Yes, Justice
24 Ginsburg. Our position is that these officers
25 were plainly incompetent in disregarding

1 evidence of the partygoers' state of mind.

2 It's not a subjective standard.

3 Nonetheless, multiple officers testified they
4 witnessed nothing that would have put these
5 partygoers on notice that they weren't supposed
6 to be here, which I think speaks to what an
7 objectively reasonable officer would have
8 believed. Of course, they arrested because
9 they believed it was a strict liability crime.

10 And our contention is that the -- the
11 facts that have been mentioned, flight, which I
12 -- which I do want to address, drugs,
13 prostitution -- our point is that none of this
14 is evidence of the mens rea element.

15 JUSTICE KAGAN: Well, Mr. Garrett, as
16 you say, it is an objective standard. And
17 there are all these cases in the District of
18 Columbia; Tillman is the one that gets the most
19 emphasis in the briefs, but there are others,
20 right? There's this Artisst, Smith, McGloin,
21 Bowman. And all of these cases, which are D.C.
22 court cases, say if they upheld convictions,
23 they upheld convictions for trespass, even
24 though the person gave some excuse about how
25 they didn't know or they didn't -- or they --

1 and they -- and they shouldn't -- they had no
2 reason to know that they were there.

3 And I'm -- I'm just wondering, you're
4 a D.C. police officer and there are all these
5 cases that say, you know, we're going to uphold
6 convictions even though people like the
7 partygoers here have -- get up on the stand and
8 say: This is why I thought I had a right to be
9 here.

10 And, you know, what is a police
11 officer supposed to make of all that law?

12 MR. GARRETT: Well, I think what they
13 make of that law -- and I want to make one
14 clarification. Tillman is not actually an
15 unlawful entry statute. It was a different
16 statute.

17 But I think what they make --

18 JUSTICE KAGAN: Are all the others
19 unlawful entry statutes?

20 MR. GARRETT: Yes. And I think what
21 they make of that is where somebody enters a
22 residence where the will of the owner has been
23 expressed, you don't have to accept a suspect's
24 explanation.

25 In Artisst, there was a sign saying

1 you must register. He didn't register. In
2 McGloin, he was in an obviously restricted
3 area. Tillman, I think, is a different case
4 because that is a case where the crime was
5 knowingly entering the paid area of a Metro
6 station, and the reasoning was you walked past
7 the tills, you walked through a door; we can
8 infer from the act itself that you knew what --
9 what you were doing.

10 But, again, the difference I think is
11 in all those cases, there's a sign, there's
12 some indication that puts these -- these
13 suspects on notice, I'm not supposed to be
14 here. And that, I think, is -- is -- is sort
15 of the -- the difference in this case. We're
16 obviously arguing about what were the
17 inferences they could have drawn from things
18 like stripping and -- and marijuana, but it's
19 -- it's certainly very different than a sign
20 outside a -- a building saying don't come in
21 here unless you register.

22 CHIEF JUSTICE ROBERTS: Did I
23 understand you to suggest that the officers
24 should have done more by way of investigation
25 before arresting the partygoers?

1 MR. GARRETT: Well, I was asked what
2 else could they have done. If they wanted to
3 arrest for other crimes, they -- they certainly
4 should have. If they wanted to arrest for
5 unlawful entry, yes, I think if you're going to
6 conduct a mass arrest of 21 individuals, you
7 require some individualized suspicion. So I do
8 think --

9 CHIEF JUSTICE ROBERTS: I thought -- I
10 thought I recalled from the Petitioners' brief
11 that the police interviewed every one of the
12 people at the party.

13 MR. GARRETT: Well, I -- I don't think
14 that's clear. Petitioners say in their summary
15 judgment papers that everyone said they were
16 invited to a bachelor party, so I suppose you
17 could infer from that they talked to everybody,
18 but what the summary judgment record actually
19 shows is specific officers saying: I talked to
20 a handful of people.

21 CHIEF JUSTICE ROBERTS: How many
22 officers were there?

23 MR. GARRETT: Ten to 15. What they
24 certainly never asked about, Your Honor, was
25 evidence that might bear on what these

1 individuals knew. Have you ever been to this
2 house before? How do you know the host? Who
3 invited you? And what do you know about --

4 CHIEF JUSTICE ROBERTS: I thought -- I
5 thought the record established that -- well,
6 Mr. Kim represented that of the 21, 19 people
7 could not identify the person who invited them.

8 MR. GARRETT: That's not accurate,
9 Your Honor. I -- and I don't -- but, to be
10 fair, I don't think that was the
11 representation. I think the representation was
12 that we have limited depositions that were used
13 at summary judgment. There are two depositions
14 where the person states who invited them, and
15 in both cases, they state it was the hostess.

16 Now, there's -- this is -- the
17 statement is -- is in the 56.1, where -- or
18 Officer Campanale says: I talked to several
19 other individuals -- this is JA 135 -- I talked
20 to several other individuals, and they were not
21 invited by the host.

22 CHIEF JUSTICE ROBERTS: Does -- I
23 don't recall, does the petition say anything
24 about whether the police interviewed everyone
25 at the party?

1 MR. GARRETT: I don't recall. I'm
2 sorry.

3 I do want to talk just briefly about
4 the imputation point. Again, the -- they're
5 not -- Petitioners aren't seeking to justify
6 the arrest of 21 individuals on the basis of
7 individualized suspicion. There's been a
8 reliance on Pringle and the common -- and
9 imputing mens rea from one to the other.

10 I just want to make sure I touch on
11 that because I think Pringle is a very
12 different case from this -- from this case.

13 In Pringle, there were three
14 individuals in a car at 3:00 in the morning and
15 the Court reasoned that one person was
16 certainly involved in narcotics activity.

17 And because of that, the -- the
18 officers could infer everybody was because you
19 wouldn't be in a car at 3:00 in the morning
20 with two others, two other innocent people.

21 I don't think that logic works here,
22 simply because the hostess implicated herself,
23 made a statement against interest, and
24 essentially admitted she was liable for
25 criminal trespass. It doesn't necessarily

1 follow that she told everybody else that. And
2 I think that singling out is also the
3 difference between Pringle.

4 Peaches essentially explained that she
5 was the reason for the unlawful entry. She had
6 told people that they were invited. She knew,
7 according to Petitioners, that she hadn't
8 concluded the lease yet. She essentially
9 acknowledged I'm the one who caused this.

10 So, I think if there is an analogy to
11 Pringle, it would be 21 friends on a bus. The
12 police find cocaine and one of them says that's
13 actually mine. And Petitioners are now saying,
14 well, you can still infer that the other 20
15 knew about it.

16 JUSTICE GORSUCH: Mr. Garrett, I just
17 wanted to get back to Justice Alito's question
18 because, as I understood it, you -- you agreed
19 that it would be acceptable for an officer to
20 make this arrest in a more affluent part of
21 town.

22 And maybe I'm mistaken in that, but
23 because perhaps the furniture situation one
24 should understand would be less in this area of
25 town than that area of town. But if it's a new

1 tenant, we all live with folding chairs for a
2 period of time when we move.

3 So does that hold? Is that a fair
4 reason? Should officers really have to
5 distinguish between parts of town in deciding
6 when to make an arrest?

7 MR. GARRETT: I'm sorry if I misspoke,
8 Justice Gorsuch. I'm not trying to argue for
9 some sort of bright line rule between
10 low-income and high-income properties. I'm
11 saying the Court has repeatedly said you look
12 at this from a commonsense perspective.

13 JUSTICE GORSUCH: Right.

14 MR. GARRETT: And so --

15 JUSTICE GORSUCH: The commonsense
16 perspective is it's a new tenant.

17 MR. GARRETT: I agree.

18 JUSTICE GORSUCH: And so the new
19 tenant, we all live -- if I work with boxes,
20 and whatever part of town we're from. So does
21 an officer -- should an officer, I mean,
22 redline where he enforces the law?

23 MR. GARRETT: No, no, no, Your Honor.

24 All I'm saying is there are several
25 considerations that could be taken into account

1 in the condition of a property. I think if I
2 was going to make a concession, the concession
3 would be there are certainly situations where
4 the condition of the home will be enough.

5 So, Petitioners cite examples,
6 real-world examples, where there's a big
7 mansion, it's empty because it's being sold,
8 and there's a For Sale sign out front.

9 Now, when the police show up to a
10 teenage party, they obviously have probable
11 cause to arrest at that point because the For
12 Sale sign, the condition of the house, gives
13 you at least some evidence that --

14 JUSTICE GORSUCH: Take away the for
15 sale sign. We don't have that here. That's
16 not a fact we have. But otherwise pretty much
17 the same, right? But you say it's okay to
18 arrest at the mansion and not here?

19 MR. GARRETT: No, I think it's --
20 well, again, I think it's different because in
21 that case there may likely be forced entry into
22 the home because they don't have keys to the
23 home.

24 JUSTICE GORSUCH: You keep adding
25 facts. I'm saying keep the facts exactly the

1 same. Just move the house.

2 MR. GARRETT: I'm saying it's a closer
3 case, but if there is some -- if the police
4 come upon evidence --

5 JUSTICE GORSUCH: Shouldn't I worry
6 that you think it's a closer case, that
7 officers implicitly may distinguish, and you
8 suggest should, based on where in town they're
9 enforcing the law?

10 MR. GARRETT: Well, I think -- I think
11 the contrary rule would be very odd. I think
12 it would be very odd for police to take into
13 account certain commonsense considerations
14 sometimes, but ignore the fact that this woman
15 has said she's just moved in or you're in a
16 low-income neighborhood and disregard that.

17 I think police are on the ground, they
18 know their neighborhoods, and that kind of
19 commonsense consideration should -- should play
20 into account.

21 JUSTICE ALITO: Just out of curiosity,
22 who is the bachelor at this bachelor party?

23 (Laughter.)

24 MR. GARRETT: It -- it's not clear,
25 but I'm glad you asked, Justice Alito, because

1 the evidence on that is at JA 193. And there's
2 no evidence in the summary judgment record on
3 it. It's a lawyer statement. We objected to
4 it.

5 And what they actually say if you read
6 it closely is that individuals in their
7 depositions were talking about not knowing who
8 the bachelor was, but, of course, that is
9 irrelevant. What matters is what the officers
10 learned on the scene.

11 CHIEF JUSTICE ROBERTS: I -- I hate to
12 keep raising the point, but did you challenge
13 the assertion that they said it was a bachelor
14 party in your brief in opposition, because they
15 certainly made that point in the petition for
16 cert --

17 MR. GARRETT: No, it was -- it was --
18 we agree that they all said it was a bachelor
19 party.

20 CHIEF JUSTICE ROBERTS: I'm sorry,
21 what is --

22 JUSTICE GINSBURG: I thought some said
23 it was a birthday party.

24 MR. GARRETT: No, Your Honor. That --
25 that evidence -- I mean, that evidence came out

1 at a trial, at the trial after summary
2 judgment. Officer Campanale changed his story
3 --

4 JUSTICE KENNEDY: So Peaches is the
5 host at a bachelor party. Is that it?

6 (Laughter.)

7 MR. GARRETT: Yes.

8 Justice Ginsburg, that evidence came
9 in at trial after the summary judgment was
10 concluded and, in fact, that happened on a
11 couple of occasions where officers changed
12 their story, and we were able to cross-examine
13 them about it and get the officers to
14 effectively admit their memory was better now
15 than two years ago.

16 And I think that, combined with the
17 fact that the police report had a falsity in
18 it, probably added to the damages result here.

19 JUSTICE SOTOMAYOR: I'm sorry, what's
20 the falsity?

21 MR. GARRETT: Oh, the police report
22 states that Officer Parker found marijuana and
23 field tested it for THC. And Officer Parker
24 acknowledged that was false.

25 Unless there are any further

1 questions, we'll submit.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Kim, four minutes remaining.

5 REBUTTAL ARGUMENT OF TODD KIM

6 ON BEHALF OF THE PETITIONERS

7 MR. KIM: Thank you, Mr. Chief
8 Justice. I have just a few points.

9 First, just to clear things up --

10 JUSTICE SOTOMAYOR: Mr. Kim, I don't
11 know if I agree completely with your opposing
12 counsel that the wealth of the neighborhood
13 should make a difference, but I suspect that if
14 police officers arrived at a wealthy home and
15 it was white teenagers having a party, and one
16 of them says, "my dad just bought this house,"
17 that it would be very -- and I told the kids
18 they could have a party, and it became, Joe
19 told me to come, and Larry King told me to
20 come, and X King told me to come, that those
21 kids wouldn't be arrested. Maybe the kid who
22 lied might be, but I doubt very much those kids
23 would be arrested.

24 MR. KIM: Well, Your Honor --

25 JUSTICE SOTOMAYOR: So, how is this

1 case different? Same set of facts: Sparsely
2 furnished, even a little bit dirty, lights are
3 on, that sort of thing.

4 So shouldn't we have a rule that if
5 we're going to require mens rea at all, that
6 police officers should be treating people
7 equally?

8 MR. KIM: Absolutely police officers
9 should treat people equally. My clients take
10 very seriously their obligation to do so. And
11 there is no selective enforcement claim in this
12 case, and with good reason.

13 The officers took their time here,
14 investigated very thoroughly. This --

15 JUSTICE SOTOMAYOR: Twenty one people
16 en masse arrested for trespassing for going to
17 a party. Does that feel right?

18 MR. KIM: Yes, Your Honor, because,
19 first, they were responding to a community
20 complaint. The community, this community, took
21 this very seriously. It was an abuse of a
22 vacant home in their community.

23 The officers appropriately took that
24 seriously.

25 JUSTICE SOTOMAYOR: Peaches had keys.

1 MR. KIM: We don't know that --

2 JUSTICE SOTOMAYOR: If those
3 partygoers -- well, we know there wasn't forced
4 entry.

5 MR. KIM: There is no evidence of
6 forced entry for sure, Your Honor. We don't
7 know that the officers thought that Peaches had
8 keys.

9 But going back to your question, this
10 was a vacant home, in the sense that no one was
11 living there. Not in any technical District of
12 Columbia law sense.

13 Neighbors had reported this house
14 wasn't supposed to have anybody living there.
15 And that's the type of home that trespassers
16 can target in houses in any socioeconomic
17 status.

18 CHIEF JUSTICE ROBERTS: Mr. Kim, you
19 got up and said you had a few points. What do
20 you want to run through those?

21 MR. KIM: Yes, Your Honor. First just
22 to clean up. The fact that everyone was
23 interviewed was in our petition on page 3 and
24 supported by the record in multiple spots,
25 including page 131 of the Joint Appendix.

1 As to whether or not this -- the
2 question of competing motions for summary
3 judgment is properly before the Court at this
4 point, it's not just that they didn't raise the
5 disputes. They affirmatively said in their
6 brief in opposition this is the factual
7 background.

8 And if you look again at page 1 of
9 their brief in opposition, they agree as to the
10 essential factor that the owner had not given
11 permission.

12 There was also waiver in the Court of
13 Appeals below. Pages 3 to 4 of their brief in
14 the Circuit says here are the essential
15 undisputed facts. It quotes the trial court
16 about that.

17 And, finally, I just need to close
18 with the reminder both questions, both
19 questions here, need to be considered from the
20 perspective of the on-scene officers who were
21 trying to do their jobs that night.

22 We put ourselves in their shoes, and
23 ask whether what they did was reasonable or at
24 least arguably reasonable.

25 They investigated thoroughly. They

1 had much evidence, circumstantial, but much
2 evidence as to either knowing or at least
3 negligent trespass. Given all that, what they
4 did was reasonable or at least arguably so.

5 They did not have to think that
6 Peaches was the only trespasser that night.

7 JUSTICE KAGAN: Mr. Kim, realizing
8 that this is not the legal question before us,
9 I'm just curious as to what your answer is.

10 If you were giving counsel to the
11 Police Department, and they said in a situation
12 like this what should we do, a very different
13 question from the legal question before us, but
14 what would be the answer to that question?

15 MR. KIM: I think it's difficult. And
16 it really depends on the totality of the
17 circumstances, just like the Fourth Amendment
18 question does.

19 JUSTICE KAGAN: These -- these -- it's
20 these circumstances.

21 MR. KIM: I think community policing
22 is a fraught endeavor with many competing
23 pressures and many competing responsibilities.

24 I am not an expert in that. I would
25 not -- I would not endeavor, especially in this

1 forum, to -- to answer that question.

2 But, again, what we're being asked
3 here is not whether what the officers did
4 was -- was the right decision. There are good
5 arguments why it was. The question is whether
6 we're going to set a nationwide floor that
7 officers may not arrest in circumstances like
8 these.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 10:59 a.m., the case
12 was submitted.)

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