

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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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.

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

25 MR. KIM: No, Your Honor, if -- if

1 there was probable cause, the negligent
2 supervision would fail as a matter of law.
3 That was undisputed in the courts below, and
4 it's undisputed in this Court.

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

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

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

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

23 JUSTICE SOTOMAYOR: But I don't --

24 MR. KIM: -- a claim --

25 JUSTICE SOTOMAYOR: -- have a property

1 right when I get invited into somebody's home.

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

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

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

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

24 So the homeowner had confirmed no one
25 was supposed to be there. He had not been

1 there to guard against the partygoers' entry,
2 and the house appeared vacant. It confirmed
3 the neighbor's tip that it was supposed to be
4 vacant. It was essentially unfurnished and in
5 disarray -- and this is a quote from the arrest
6 report at JA 112 -- "in disarray in a manner
7 consistent with it being a vacant house. It
8 looked like it was being used just for the
9 party, like no one was living there. This is
10 the type of vacant home that trespassers
11 target."

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

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

23 JUSTICE KAGAN: Multiple?

24 MR. KIM: Multiple tippers, Your
25 Honor. And one of whom was an elected official

1 of the District of Columbia.

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

5 MR. KIM: Yes, Your Honor.

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

8 MR. KIM: Before they went there.

9 CHIEF JUSTICE ROBERTS: And how many?

10 MR. KIM: We don't know that, Your
11 Honor. We do know that --

12 CHIEF JUSTICE ROBERTS: But more than
13 one?

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

20 JUSTICE BREYER: How many people said
21 the house is supposed to be vacant?

22 MR. KIM: We know at least two.

23 JUSTICE BREYER: Two said the house is
24 supposed to be vacant. I see. Okay.

25 MR. KIM: Yeah, but then, when the

1 police actually entered the home, they could
2 see with their own eyes that the house was
3 essentially unfurnished and in disarray in a
4 manner that --

5 JUSTICE BREYER: There were some
6 chairs and mattresses?

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

8 JUSTICE BREYER: Anything else?

9 MR. KIM: There was -- there were some
10 chairs. There was a mattress. There were open
11 cups of beer and liquor scattered about.

12 JUSTICE BREYER: Utilities working or
13 not?

14 MR. KIM: Utilities were working, Your
15 Honor, it appears; electricity and plumbing.
16 But that's consistent with there being a
17 continued claim of right by the owner over the
18 home, but he was absent from the home.
19 Trespassers target vacant homes just like this
20 one. And indeed, they sometimes engage in the
21 types of activities that we see here.

22 JUSTICE GINSBURG: Were the -- were
23 the tips anonymous?

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

1 JUSTICE BREYER: I mean, the -- I am
2 told, perhaps I shouldn't take this into
3 account, but compared to the Middle Ages with
4 which I am more familiar --

5 (Laughter.)

6 JUSTICE BREYER: -- the people today,
7 younger people frequently say, hey, there's a
8 party at Joe's house. And before you know it,
9 50 people go to Joe's house. And they all --
10 they don't really ask themselves does Joe own
11 the house or rent the house or something. It's
12 Joe's house. But the normal assumption would
13 be it's Joe's house. And nobody questions it.

14 So what's the evidence here that's
15 different from that?

16 MR. KIM: Well --

17 JUSTICE BREYER: Because I -- if I
18 just think that's what happened, hey, there's a
19 party at Joe's house, I would think the people
20 who went over there, whether they knew Joe,
21 heard it secondhand, thirdhand or whatever, are
22 normally naturally going to think that Joe has
23 a right to the house. Okay.

24 But here this is different than that
25 because?

1 MR. KIM: For two reasons, Your Honor.
2 First, if I take your hypothetical correctly,
3 Joe had the authority to throw the party. So
4 --

5 JUSTICE BREYER: No, no, but I'm not
6 talking about Joe's authority. I'm talking
7 about what the partygoers think.

8 MR. KIM: Absolutely, Your Honor.

9 JUSTICE BREYER: When they hear
10 there's a party -- I don't want to repeat
11 myself -- I'm saying what -- what I would
12 assume is the normal thought in the partygoer's
13 house is no more than just what I said.
14 There's a party at Joe's house. Let's go.
15 Period.

16 Now, in my mind, that doesn't give any
17 reason whatsoever for thinking that this
18 partygoer suspects, knows, or believes that it
19 isn't Joe's house that he has some right to.

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

22 MR. KIM: Absolutely, Your Honor.

23 What's different about this case are
24 these facts: First, it was a house that was
25 supposed to be vacant and looked vacant. And

1 it was a house where the -- the owner said that
2 no one had permission. It was a house where
3 the --

4 JUSTICE BREYER: Now put yourself in
5 the mind of the partygoer. The policeman has
6 to be thinking about the partygoer. So one
7 thing is the policeman knows, the policeman
8 knows, and maybe Peaches knows, call her Joe,
9 it wasn't Joe's house.

10 Now, all right, that's one thing, so I
11 have to ask myself, is that a reason for
12 thinking the partygoer knew it or did anybody
13 think the partygoer knew it.

14 Okay. What's the second?

15 MR. KIM: Well, the absence of the
16 supposed host, Joe or Peaches, you can name
17 however you want, the host wasn't even there.
18 The person who supposedly gave them the
19 authority --

20 JUSTICE BREYER: Okay. Nobody is
21 there. That's the second.

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

23 JUSTICE BREYER: Okay.

24 MR. KIM: There are illegal activities
25 happening there or so the officers reasonably

1 could think of the typically --

2 JUSTICE GINSBURG: May I stop you
3 there?

4 MR. KIM: Yes, Your Honor.

5 JUSTICE GINSBURG: Didn't the person
6 who extended the invitation, Peaches, hadn't
7 she been there and she said she left to go to
8 the store, but she had been there?

9 MR. KIM: Your Honor, there was
10 evidence that she had told Officer Parker that
11 she had gone to the store. The partygoers
12 themselves did not say that, notably. They
13 simply said in response to the question where
14 is Peaches, she's not here.

15 JUSTICE BREYER: Okay. I'm trying to
16 get a full answer and I have, one, the house
17 looked vacant. Two, that, in fact, Peaches
18 didn't have a right to be in the house. Okay.

19 Anything else? I want to have a
20 complete list of the things that make it
21 different.

22 MR. KIM: Yes, Your Honor. Number 3,
23 Peaches was not there. Number 4, partygoers
24 acted suspiciously in response to the police
25 presence. They fled and hid and they acted

1 very suspiciously when asked sensible questions
2 like: Who's the owner? Who lives here? No
3 one answered those questions according to the
4 -- the depositions.

5 JUSTICE BREYER: Okay.

6 MR. KIM: And I don't think we should
7 discount the fact that Peaches proved herself
8 to be quite evasive, untrustworthy. She
9 repeatedly hung up on the police when they
10 tried to investigate. She said if she came
11 back to the scene she would be arrested. And
12 she eventually admitted trespassing herself.

13 Given all the circumstances, the
14 police --

15 JUSTICE BREYER: That's it, though,
16 that's it, nothing else?

17 MR. KIM: There is more, Your Honor.
18 I could keep on going. The actus reus itself I
19 think can be used here as a basis to infer the
20 necessary mens rea. Let's remember, it's
21 either knowledge or negligence, even assuming
22 the partygoers actually relied upon an
23 invitation from Peaches, and even assuming they
24 actually believed she had the permission to
25 invite them, if their actual reliance was

1 negligent, that, nonetheless, was criminal
2 trespassing in the District of Columbia.

3 So the Court of Appeals here, in what
4 I think is an impractical approach for what is
5 supposed to be a practical standard, said that
6 the officers basically had to heighten their
7 understanding of the credibility of -- of the
8 partygoers' clear invitation and Peaches'
9 supposed corroboration.

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

12 Suspects on the scene offer any number
13 of different types of innocent explanations for
14 conduct. These will often be false. Police
15 officers need the -- the leeway --

16 JUSTICE SOTOMAYOR: Mr. Kim, why
17 weren't any of these partygoers arrested for
18 exactly? One among the many officers said he
19 smelled marijuana but, as I understand it, no
20 drugs were found, correct?

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

23 JUSTICE SOTOMAYOR: Not marijuana or
24 any other. Why weren't people who were
25 suspected of engaging in sex arrested? Why

1 weren't the people standing around the
2 strippers arrested for those activities, if
3 they were illegal?

4 MR. KIM: Your Honor, everyone was
5 arrested because the officers believed and they
6 had probable cause to believe that everyone in
7 the house had committed the offense of unlawful
8 entry.

9 Specific people in the house may have
10 also committed other crimes, but --

11 JUSTICE SOTOMAYOR: But they weren't
12 charged with those crimes.

13 MR. KIM: As far as we know from the
14 record, that's right, but --

15 CHIEF JUSTICE ROBERTS: How many
16 people were in the house?

17 MR. KIM: At the time 21. At the time
18 21.

19 JUSTICE KAGAN: Mr. Kim, could you
20 tell me a little bit about how you think the
21 summary judgment posture of this case does or
22 doesn't matter? I mean, usually in summary
23 judgment cases, we say we need to view the
24 facts in the light most favorable to the
25 non-moving party.

1 And many of these facts, you could see
2 it one way or you could see it another way. It
3 has one explanation or it has another
4 explanation.

5 So how does the summary judgment
6 standard fit with the probable cause standard
7 and also with the qualified immunity standard?
8 How do those three things work together here?

9 MR. KIM: Thank you, Your Honor.

10 I think essential facts were
11 undisputed until Respondent's brief on the
12 merits. Their attempts to dispute those facts
13 come too late for reasons I'm happy to discuss.
14 The inferences to be drawn from those
15 established facts are for the Court, and
16 probable cause to be determined as a matter of
17 law.

18 The Court puts itself in the shoes of
19 the officer and thinks: Was it reasonable for
20 the officer to arrest based on these facts?
21 And, of course, if there are inferences drawn
22 from the police officers, the Court will defer
23 to those inferences.

24 CHIEF JUSTICE ROBERTS: What are the
25 -- you said you were happy to discuss the

1 reasons that the -- the disputed facts come too
2 late. What are those?

3 MR. KIM: Because it was inappropriate
4 for the respondents to wait even in their cert
5 papers to raise these disputes and it is
6 inappropriate for them to ask this Court to be
7 the first Court to parse the record closely to
8 consider these claims of dispute.

9 These disputes were --

10 JUSTICE GINSBURG: Why wouldn't -- why
11 would they be asking ask? I mean, one thing is
12 their motion for summary judgment, which was
13 successful.

14 But why would you be entitled to
15 summary judgment in view of the disputed facts
16 that they claim now?

17 MR. KIM: Because, Your Honor, their
18 disputes are waived or forfeited. They should
19 have been raised before, and especially in
20 their brief in opposition before this Court
21 decided in its discretion to grant cert on the
22 two questions presented.

23 Moreover, I would note that even if
24 you took the facts that are undisputed, even
25 now, and added them with the facts stated

1 directly in the questions presented, that would
2 be sufficient to establish probable cause as a
3 matter of law.

4 No matter how you would want to take
5 the inferences in the light most favorable to
6 the Respondents, it wouldn't matter here
7 because, again, the inferences are for the
8 Court and the established facts establish
9 probable cause.

10 CHIEF JUSTICE ROBERTS: So they didn't
11 dispute the central facts in their brief in
12 opposition?

13 MR. KIM: That's right.

14 CHIEF JUSTICE ROBERTS: The facts that
15 were laid out in the petition for cert?

16 MR. KIM: That's right, Your Honor.
17 In fact, they affirmatively agreed to what we
18 think is the most central fact. The first
19 sentence in the briefing opposition says that
20 this case is about, among other things, what
21 happens when the owner has indicated to the
22 police that he has not given permission.

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

25 So if you actually look at the

1 totality of the circumstances and you allow the
2 officers to use their common sense, this Court
3 has said that this is a commonsensical
4 standard. A readily-available inference for a
5 reasonable officer was that the partygoers were
6 not blameless dupes tricked into someone else's
7 house, but the simpler explanation, they were
8 trespassing to throw a party with drugs and
9 strippers in a place where they thought they
10 wouldn't be caught.

11 JUSTICE GINSBURG: They weren't
12 charged with trespass, unlawful entry, were
13 they?

14 MR. KIM: They were, Your Honor.
15 Unlawful entry was the charge.

16 JUSTICE GINSBURG: I thought that that
17 charge was not made once they were at the
18 police station and instead they were charged
19 with disorderly conduct?

20 MR. KIM: That's correct. The
21 arresting officers, though, indicated that the
22 reason for the arrest was unlawful entry. And
23 the fact that it was changed --

24 JUSTICE GINSBURG: And wasn't that
25 because when their superior was on the scene

1 and determined that the owner had not leased
2 the house to anyone, he thought that that was
3 sufficient to arrest?

4 MR. KIM: Well, yes, Your Honor, that
5 appears to be Sergeant Suber's subjective
6 reasoning. Of course, probable cause is an
7 objective analysis.

8 I see my time is almost up. I would
9 like to say one word about qualified immunity.
10 I would hope that the debate today and the fact
11 that four judges on the D.C. Circuit thought
12 there was probable cause would be enough to
13 establish that this constitutional question was
14 not beyond the debate. I'll reserve the rest
15 of my time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Counsel. Thank you, Counsel.

18 ORAL ARGUMENT OF ROBERT A. PARKER
19 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

20 CHIEF JUSTICE ROBERTS: Mr. Parker.

21 MR. PARKER: Mr. Chief Justice, and
22 may it please the Court:

23 There are two fundamental errors in
24 the way that the lower courts analyzed the
25 question of probable cause in this case.

1 First, they took certain important
2 facts out of context, viewed them in isolation,
3 and engaged in precisely the sort of
4 divide-and-conquer analysis that this Court has
5 said is inappropriate.

6 And the second is they concluded that
7 because those facts were susceptible to
8 possible innocent explanations, they could not
9 contribute to a finding of probable cause.

10 Neither of those is correct. When
11 police officers encounter a criminal suspect,
12 they are required to draw fair inferences from
13 the entire constellation of facts, drawing on
14 practical and commonsense experience. Those
15 facts will rarely be clear and often they will
16 point in different directions.

17 And when they do, this Court has said
18 repeatedly that the possibility of competing
19 inferences supports, not undermines, a finding
20 of probable cause. That is especially true in
21 the case of mens rea, which is not directly
22 knowable. The police officer cannot peer into
23 the head of the criminal suspect and know
24 exactly what he or she is thinking.

25 And just like juries and judges must

1 rely on all of the surrounding circumstances to
2 infer what the mental state is, certainly
3 police officers should be permitted to do so
4 under the less exacting requirements of
5 probable cause.

6 This case presents a very good example
7 of why these principles are appropriate. And I
8 -- I want to be very clear at the outset what
9 we are not saying.

10 We are not saying that no one can
11 accept a secondhand invitation to a party or
12 that they cannot go to a party at the home of
13 somebody they don't know or that, when they
14 arrive, they have to inspect the lease to
15 ensure that the person has authority to invite
16 them.

17 All we are saying is that if a person
18 finds himself or herself in a compromising
19 situation -- here, finding themselves in a
20 vacant home that actually is vacant -- where
21 they, as a matter of fact, are an intruder who
22 is committing the actus reus of a crime, and
23 especially if there are surrounding
24 circumstances that would lead a reasonable
25 observer to think that that may be what really

1 is going on, then the deck is stacked against
2 that person.

3 JUSTICE BREYER: You are saying that
4 anytime a policeman goes into a house and
5 there's a party and people tell you, somebody
6 invited me, and it turns out that that somebody
7 didn't have a right to be in the house, you can
8 arrest them?

9 MR. PARKER: No, I'm not -- I'm not
10 saying that.

11 JUSTICE BREYER: You're not?

12 MR. PARKER: No.

13 JUSTICE BREYER: Then what else is
14 there here than that?

15 MR. PARKER: Well --

16 JUSTICE BREYER: Oh, sorry, there is
17 one other thing. The other thing is that it
18 isn't -- it's sparsely furnished. So whenever
19 you see a sparsely furnished house with some
20 people in it and they say word got around that
21 Joe invited everybody to his house for a party,
22 it turns out that Joe hadn't rented the house,
23 you can arrest them. Isn't that what you're
24 saying?

25 MR. PARKER: It is not what I'm

1 saying, and I think --

2 JUSTICE BREYER: Okay. Then why isn't
3 it?

4 MR. PARKER: Well, because -- there
5 are two answers. One is that, I think, would
6 be precisely the kind of bright-line rule that
7 this Court has repeatedly said is not to be
8 imposed in probable cause cases. What I think
9 instead is required is an analysis of the
10 totality of the circumstances to determine
11 whether the statement of a -- or the claim of
12 an innocent mental state is --

13 JUSTICE BREYER: I'm saying what else
14 is there here? And I don't see anything else.
15 And maybe it's a question of believability,
16 then let's have a trial?

17 MR. PARKER: Well, let me -- let me
18 talk about the facts of this case, if I can
19 turn to that.

20 I think it's useful to think of this
21 almost as like two sides of a ledger. On one
22 side, there's the condition of the home. On
23 the other side, there's the statements of the
24 people who were there.

25 If you think about the condition of

1 the home, the police were responding to a -- a
2 citizen complaint, multiple citizen complaints,
3 that this was a vacant home. Not only was it a
4 vacant home, but they said that it had been
5 repeatedly exploited to throw parties in the
6 past.

7 JUSTICE GINSBURG: But the story of
8 the -- of Peaches, who extended the invitation,
9 was that she had just leased the house. So, if
10 somebody had just leased a house, the sparse
11 furnishing would not be at -- at all
12 incriminating.

13 MR. PARKER: I -- I think that that is
14 a perfectly permissible inference from the
15 facts that you described, Justice Ginsburg. I
16 think our only point is it is not the only
17 permissible inference based on the totality of
18 the facts here.

19 In addition to the tip that they
20 received, when the officers arrived, they
21 noticed that the -- the condition of the home
22 was entirely consistent with being a vacant
23 house. It wasn't just that it was sparsely
24 furnished. It had folding chairs and a
25 mattress. It was also described as being in a

1 state of disarray, consistent with being a
2 vacant home. It wasn't just that it was messy.

3 JUSTICE SOTOMAYOR: What -- what was
4 that? If all it had, according to you, was a
5 bed and some folding chairs and utilities that
6 worked, nothing had been turned off, what
7 happens during a party?

8 MR. PARKER: Well --

9 JUSTICE SOTOMAYOR: Disarray? So what
10 was different in this disarray from a party?

11 MR. PARKER: Well, the -- the evidence
12 in the record indicates that the house was
13 considerably more dirty than just an ordinary
14 house. In fact, one of the individuals who
15 went to the house said that the floor was so
16 dirty, she was unwilling to sit on it. There
17 was trash strewn about. There were used
18 contraceptives strewn about.

19 I think that all of those things would
20 lead a reasonable officer to think that perhaps
21 these are just particularly messy houseguests,
22 but this is also consistent with the type of
23 party people would throw in a vacant house
24 where they're not too concerned about the state
25 that they leave it in.

1 JUSTICE KAGAN: Mr. Parker --

2 MR. PARKER: Yes.

3 JUSTICE KAGAN: -- you know, you're
4 exactly right, that, of course, we have to view
5 this through the eyes of the officer. And
6 there is much that an officer could look at
7 here and say, I think I have probable cause.
8 And, certainly, when the qualified immunity
9 standard is laid on top of that, makes it even
10 easier for the officer.

11 I guess one of the things that -- that
12 strikes me as why there's resistance here, is
13 that when looked at from the point of view of
14 the reasonable partygoer, it looks a little bit
15 different. And I -- I take the point that
16 that's not the standard, but we are setting
17 rules and those rules are going to affect how
18 police officers act in the future as well.

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

22 (Laughter.)

23 JUSTICE KAGAN: -- where you didn't --
24 don't know the host, but you know Joe is having
25 a party. And can I say that long, long ago,

1 marijuana was maybe present at those parties?
2 And, you know, so -- and, you know, it just is
3 not obvious that the reasonable partygoer is
4 supposed to walk into this apartment and say:
5 Got to get out of here.

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

9 MR. PARKER: Well, I -- I think there
10 are a couple of ways.

11 I think the overarching point here is
12 that, as I said, when a partygoer goes to a
13 house, if it turns out that it actually is
14 vacant and that they actually are intruding,
15 the police, upon encountering that situation --

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

18 MR. PARKER: That's right.

19 JUSTICE KAGAN: I mean, from the
20 partygoers' point of view, they just know that
21 Joe is having a big party, and it's a good
22 time, and -- and maybe there will be some
23 liquor and maybe there will be some
24 recreational drugs. And -- and they're having
25 a good time.

1 MR. PARKER: I -- I think that that's
2 an entirely possible inference to draw, but
3 it's not the only inference. And I think here
4 there are a number of facts that suggest that
5 that, in fact, was not what was happening.

6 It's not just that the house looked
7 vacant and that people who were reasonably on
8 the scene would -- would be able to observe
9 that this looks like a situation where we
10 should not be; it's that when they were asked
11 about it, the individuals said nothing to
12 dispel probable cause. If anything, they
13 reinforced it.

14 It wasn't just that none of them lived
15 there; none of them knew who lived there. They
16 also -- when asked who invited you, almost all
17 of them said somebody else. The record doesn't
18 reflect whether they named any particular
19 person, but we do know that only two of the
20 individuals on the scene, it appears at least,
21 named Peaches. And those were two of the young
22 women who had been hired to come dance at this
23 party. They were not the actual partygoers
24 themselves.

25 When Peaches was -- was called, she,

1 as -- as Mr. Kim explained earlier, was
2 evasive. She lied to the officers. She said
3 that she had authority to throw a party there,
4 and she didn't. All of those things, I think,
5 would fit into a reasonable officer's
6 understanding of the facts and suggest that
7 they may be hearing a story that is not true,
8 both from the partygoers and from Peaches.

9 And certainly I think that when police
10 arrive at a scene and see the actus reus of a
11 crime in the process of being committed, they
12 can at least reasonably intuit that the people
13 here probably know what they're doing.

14 That isn't always going to be able to
15 get you over the probable cause hump, because,
16 as I've said, this is not an area susceptible
17 to those sorts of bright-line rules, but at
18 least it is going to inform what a prudent
19 officer, who is exercising an appropriate level
20 of skepticism when dealing -- may I complete?

21 CHIEF JUSTICE ROBERTS: Finish your
22 sentence.

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Counsel.

2 Mr. Garrett.

3 ORAL ARGUMENT OF MR. GARRETT

4 ON BEHALF OF THE RESPONDENTS

5 MR. GARRETT: Mr. Chief Justice, and
6 may it please the Court:

7 The Court should affirm the grant of
8 Respondents' summary judgment motion.

9 Respondents uniformly told police they had been
10 invited to a party. The host corroborated
11 their statements and the owner of the house
12 confirmed the host was not some stranger. She
13 had been involved in lease negotiations that
14 ultimately fell through.

15 Petitioners now maintain that there
16 was probable cause to arrest because the party
17 was raucous and involved stripping and drinking
18 and marijuana smoke, but those activities don't
19 put a partygoer on notice that the host has
20 failed --

21 CHIEF JUSTICE ROBERTS: Well, there
22 was a lot more involved than the Petitioner is
23 relying on than those things that you just
24 listed. He went through six different items
25 that weren't limited to the fact that it was a

1 raucous party.

2 MR. GARRETT: So there was also the
3 fact that Peaches was absent. Justice
4 Ginsburg, you were correct that Peaches was at
5 the party. That's undisputed at JA 43. Then
6 they arrive and she has left.

7 Does a partygoer who arrives at a
8 party where the host is there and then she
9 leaves know he should not be there, after she
10 was there when he arrived?

11 They also mentioned disarray, and the
12 -- and the status of the home. I think, in
13 fact, the status of the home is generally
14 undisputed in terms of what was there. And
15 many things were left out, so let me explain
16 them.

17 The bed, the chairs, which were not
18 folding chairs -- you can see that from the
19 pictures in the record -- the stereo, the
20 utilities were on. Somebody was paying the
21 utility bills. There were candles. There was
22 food in the refrigerator. There were window
23 coverings. There was shower curtains.

24 So they say it was vacant, but it is
25 certainly not vacant under the definition of

1 D.C. law. D.C. law defines vacant. It
2 certainly wasn't vacant. So they must mean
3 well, when the people arrived, the condition of
4 the house was such they should have realized
5 they're not supposed to be there.

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

8 MR. GARRETT: Well, the tip, I think
9 the tip is hard to sort of decipher. We've got
10 the police report at 1:12 where there are two
11 tipsters named, Keck and Foster. And we don't
12 know who exactly said what because it doesn't
13 distinguish between them.

14 Three pieces of information given:
15 Vacant, illegal activity, loud music.

16 Oddly, Mr. Keck comes in at summary
17 judgment and files an affidavit that seems
18 quite different from that. He actually says it
19 used to be vacant; about a month ago I started
20 seeing people using the house.

21 CHIEF JUSTICE ROBERTS: The important
22 thing I suppose would be what the officers were
23 told and whether it was reasonable for them to
24 act on what they were told.

25 MR. GARRETT: And it certainly was

1 reasonable for them to act, Chief Justice
2 Roberts. We don't dispute -- and this is what
3 the Petitioners maintained in the District
4 Court -- certainly at that point when the tip
5 comes in they have suspicion. They can go to
6 the house, investigate what's going on, which
7 they did.

8 The question is then what develops
9 into probable cause for unlawful entry and,
10 most importantly, what is the evidence that
11 these individuals knew that they weren't
12 supposed to be here or at least were negligent
13 in not knowing them?

14 JUSTICE ALITO: What should the
15 officers have done after they had made all
16 their inquiries at the house?

17 MR. GARRETT: I think there are
18 several things they could have done here,
19 Justice Alito.

20 Number 1, they now had information
21 from the owner that he didn't want them there.
22 They immediately could have asked the
23 individuals or ordered the individuals to leave
24 and, if they hadn't, that's unlawful entry.
25 They could arrest.

1 They could have issued a citation for
2 disorderly conduct which likely would not have
3 raised Fourth Amendment concerns at all. They
4 could have investigated, as they now maintain
5 they smell marijuana smoke. There is a
6 suggestion that one officer heard about
7 prostitution. Well, they certainly could have
8 investigated those crimes.

9 I think it is interesting, or at least
10 telling, that under Devenpeck they could have
11 come in here at any time and say we arrested
12 for unlawful entry but really we had probable
13 cause for other things, whether it's for
14 disorderly conduct, marijuana, narcotics,
15 prostitution.

16 They have abandoned the disorderly
17 conduct justification and they have never
18 suggested they had probable cause to arrest
19 anybody for the other crimes. And I think the
20 --

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

25 So it is known, i.e., they knew, I

1 guess there is some evidence of this, that
2 there were vacant houses in this area used for
3 parties.

4 They know also that it is a vacant
5 house. And it doesn't -- and those are the
6 things that -- and then they look around and it
7 looks sort of vacant, not completely, but sort
8 of.

9 And so that together leads them to
10 think, well, these people knew it was a vacant
11 house.

12 MR. GARRETT: But --

13 JUSTICE BREYER: And -- and would a
14 reasonable officer have concluded that the
15 partygoers knew or they knew it was a vacant
16 house? If so, that's enough.

17 MR. GARRETT: And --

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

20 MR. GARRETT: No, it's not, Your
21 Honor.

22 JUSTICE BREYER: It's not? Well, but
23 the other stuff they have, I guess, isn't it?
24 Vacant -- you can't -- it isn't trespassing in
25 the District of Columbia to go into a vacant

1 house?

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

4 JUSTICE BREYER: What if -- go ahead.

5 MR. GARRETT: Well, if a house is
6 actually vacant -- I mean, this is the oddity
7 of how this argument comes up -- if a house is
8 actually vacant or abandoned, it is not
9 trespass because somebody is not maintaining
10 their control over it.

11 It is prima facie evidence of trespass
12 if somebody is in a vacant house that is
13 boarded up or otherwise secured in a manner
14 that conveys it is not to be entered.

15 I think one fact that was not talked
16 about here is that there was no evidence of
17 boarding up and there's no evidence of forced
18 entry.

19 JUSTICE ALITO: Well, when those tips
20 -- when the people nearby called it and they
21 said the house is vacant, do you think they
22 were referring to the technicalities of
23 District of Columbia law? Don't you think they
24 meant --

25 MR. GARRETT: No.

1 JUSTICE ALITO: -- that nobody was
2 living there?

3 MR. GARRETT: That's correct, Your
4 Honor. I do think that's right. And then the
5 question arises: These partygoers, did they
6 have reason or did they know that it was
7 supposed to be vacant?

8 Now, the host had told both -- she
9 told the partygoers she had just moved in. The
10 police actually knew this because Peaches told
11 Sergeant Suber the owner is supposed to be
12 fixing the house up for me.

13 We've also -- are obviously in a
14 low-income neighborhood. So, our point on the
15 status of the home is that a partygoer going to
16 the home would not infer, simply because of its
17 condition, there must be something wrong with
18 the host title.

19 JUSTICE ALITO: Well, the fact of what
20 you just mentioned is troubling to me. You say
21 it is a low-income neighborhood.

22 And I just wonder, if we moved all of
23 these facts to an affluent community, and what
24 the neighbors said when they called the police
25 is, you know, our neighbor, Joe, who is the CEO

1 of this and that company has been -- or an
2 officer in a big company, has been transferred
3 to another city and has moved out and the house
4 is unoccupied, would you be making the same
5 argument?

6 MR. GARRETT: Well, it depends on what
7 the party looks like. Certainly --

8 JUSTICE ALITO: It looks exactly like
9 this party.

10 MR. GARRETT: Well, then I think the
11 police need to invest- -- no, I think the
12 police -- if the house is completely --

13 JUSTICE ALITO: The facts are exactly
14 the same except the party is in Potomac.

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

17 JUSTICE ALITO: Why would it be a
18 closer case?

19 MR. GARRETT: Because --

20 JUSTICE ALITO: I mean, is the
21 expectation, well, this is a low income
22 neighborhood; we don't care what goes on here?

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

1 And certainly it seems like
2 commonsense that, if you're in River Terrace,
3 the condition -- the facts that the home
4 doesn't look the same as it might in Northwest
5 D.C. is something the police ought to take into
6 consideration. I --

7 JUSTICE BREYER: This is important to
8 me. I'm sorry that it is. I didn't know this.
9 In fact, the house under D.C. law wasn't
10 vacant?

11 MR. GARRETT: No, Your Honor.

12 JUSTICE BREYER: And, indeed, if the
13 officers -- which is unlikely -- had known all
14 these details, they would have known it's not
15 vacant. What it is, is not owned by or rented
16 by the person who supposedly invited them to
17 the party.

18 MR. GARRETT: Correct.

19 JUSTICE BREYER: So then the question
20 becomes did -- would a reasonable officer have
21 believed that they were trespassing and they
22 were trespassing if and only if there is some
23 reason a reasonable person could have believed
24 that they knew that the person who invited
25 them, first, second or thirdhand, did not have

1 a right to be there?

2 MR. GARRETT: Correct.

3 JUSTICE BREYER: And there's -- you
4 think there is nothing to have a trial about?

5 MR. GARRETT: Oh, I -- well, so let me
6 -- let me maybe use that question as a
7 transition to Justice Kagan's question about
8 the differing standards of review in the
9 different motions.

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

13 So if, if the Court is reviewing our
14 motion and asking whether to reverse that
15 motion, the facts are construed in the
16 District's favor.

17 If the Court is reviewing should it
18 direct entry of judgment for Petitioners, then
19 you would construe the facts in our favor.
20 Now, there was some discussion of, well, have
21 we waived this distinction and let me explain
22 why that's not the case.

23 In their petition, the Petitioners
24 asked for reversal of liability findings at
25 pages 16 and 25. And they construed the facts

1 in their favor. It wasn't until their merits
2 brief that they very clearly said not only
3 should you reverse their motion, you should
4 grant ours.

5 They also say: Well, you never
6 disputed some of these facts below. Well, I
7 encourage the Court to look at JA 186, which is
8 their 56.1 statement in support of summary
9 judgment. They never mention five of the seven
10 facts they rely on here. They --

11 CHIEF JUSTICE ROBERTS: But they did
12 mention them in their petition. And our rule,
13 Rule 15, makes it perfectly clear, if you do
14 not challenge the factual assertions in the
15 petition, you're bound by those assertions.

16 The reason is that we make a judgment
17 about whether to take a case based on the cert
18 papers. And we take the facts as set forth in
19 the petition, if not challenged in the brief in
20 opposition. And I went through and read your
21 brief in opposition again, and you did not
22 challenge -- in fact, you conceded most of the
23 pertinent facts on which Mr. Kim has relied.

24 MR. GARRETT: Because we can't
25 challenge them when reviewing our motion for

1 summary judgment. If they --

2 CHIEF JUSTICE ROBERTS: No, no, these
3 are historical facts that they asserted. It
4 doesn't matter the motion this, the motion
5 that. They said the different things, the
6 police received a phone tip, that Peaches
7 recanted her claim.

8 And in many of those, you agreed. You
9 -- you repeated their assertions. And on -- on
10 others, you didn't challenge them.

11 MR. GARRETT: Again, I'm not sure I --
12 I could have much to add, other than if the
13 question is whether we're reviewing our motion,
14 we do take those facts as true.

15 But they clearly -- Petitioners
16 clearly know how to say we want a directed
17 judgment in our favor. And they didn't ask for
18 it in the petition. And -- and my point is
19 simply I think it ought to be at least
20 unambiguous if they're going to change relief,
21 in their merits brief, they ought to have made
22 that clear at the petition stage because there
23 are two different motions. And you don't
24 necessarily enter summary judgment for them
25 even if the court's inclined to reverse our

1 motion.

2 CHIEF JUSTICE ROBERTS: Well, but I do
3 think, again, under our rules, in reviewing
4 either motion, you take the facts as they
5 asserted in the petition that you either
6 accepted or did not rebut.

7 MR. GARRETT: And -- and we don't
8 dispute those facts in the context of our
9 motion. And I would also note the cases
10 they're relying on are cases where the facts
11 end up mooted -- the waiver cases end up
12 mooted the legal question. We're not asking
13 to moot any legal question.

14 The point is they've now extended in
15 their merits brief the scope of this case from
16 our motion to their motion. And so we're
17 responding to that.

18 And as I was saying earlier, the --
19 the reason these facts weren't disputed below
20 is because in the district court, Petitioners'
21 theory was that this was a summary -- a strict
22 liability crime, and so they didn't rely on
23 anything having to do with facts that would
24 have put Respondents on notice, because their
25 position was that's irrelevant.

1 As soon as we talked to the owner and
2 he says you're not allowed to be here, game
3 over, they're liable for trespass. So it's --
4 it's now that they're actually asking the Court
5 to enter judgment on a different summary
6 judgment motion than the one they actually
7 filed in the district court.

8 One might ask what other evidence they
9 could have looked for. What -- Justice Alito
10 asked, what else could they have done? One
11 might also ask what else could the police have
12 looked for as evidence of mens rea?

13 And I think looking at the cases cited
14 in this case, you see a number of examples that
15 were absent here. One is direct evidence,
16 which you see in several cases like Kozlovska,
17 where the owner tells police these individuals
18 knew they weren't supposed to be in the house.
19 We don't have that. There's circumstantial
20 evidence like forced entry, where somebody has
21 to force their way into the house because it's
22 not theirs and they're trying to get into a
23 house.

24 Here, of course, the evidence, as it
25 turned out, is that the host had keys. And so

1 there was no forced entry.

2 JUSTICE GINSBURG: Here, we've --
3 we've been talking about probable cause up
4 until now, but there's also the qualified
5 immunity question, and this Court has said that
6 there's no liability on the part of the officer
7 unless he or she knowingly violated the law or
8 was plainly incompetent.

9 So can you explain how you cross that
10 hurdle?

11 MR. GARRETT: Yes. Yes, Justice
12 Ginsburg. Our position is that these officers
13 were plainly incompetent in disregarding
14 evidence of the partygoers' state of mind.

15 It's not a subjective standard.
16 Nonetheless, multiple officers testified they
17 witnessed nothing that would have put these
18 partygoers on notice that they weren't supposed
19 to be here, which I think speaks to what an
20 objectively reasonable officer would have
21 believed. Of course, they arrested because
22 they believed it was a strict liability crime.

23 And our contention is that the -- the
24 facts that have been mentioned, flight, which I
25 -- which I do want to address, drugs,

1 prostitution -- our point is that none of this
2 is evidence of the mens rea element.

3 JUSTICE KAGAN: Well, Mr. Garrett, as
4 you say it is an objective standard. And there
5 are all these cases in the District of
6 Columbia; Tillman is the one that gets the most
7 emphasis in the briefs, but there are others,
8 right? There's this Artisst, Smith, McGloin,
9 Bowman. And all of these cases, which are D.C.
10 court cases, say if they upheld convictions,
11 they upheld convictions for trespass, even
12 though the person gave some excuse about how
13 they didn't know or they didn't -- or they --
14 and they -- and they shouldn't -- they had no
15 reason to know that they were there.

16 And I'm -- I'm just wondering, you're
17 a D.C. police officer and there are all these
18 cases that say, you know, we're going to uphold
19 convictions even though people like the
20 partygoers here have -- get up on the stand and
21 say: This is why I thought I had a right to be
22 here.

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

25 MR. GARRETT: Well, I think what they

1 make of that law -- and I want to make one
2 clarification. Tillman is not actually an
3 unlawful entry statute. It was a different
4 statute.

5 But I think what they make --

6 JUSTICE KAGAN: Are all the others
7 unlawful entry statutes?

8 MR. GARRETT: Yes. And I think what
9 they make of that is where somebody enters a
10 residence where the will of the owner has been
11 expressed, you don't have to accept a suspect's
12 explanation.

13 In Artisst, there was a sign saying
14 you must register. He didn't register. In
15 McGloin, he was in an obviously restricted
16 area. Tillman, I think, is a different case
17 because that is a case where the crime was
18 knowingly entering the paid area of a Metro
19 station, and the reasoning was you walked past
20 the tills, you walked through a door; we can
21 infer from the act itself that you knew what --
22 what you were doing.

23 But, again, the difference I think is
24 in all those cases, there's a sign, there's
25 some indication that puts these -- these

1 suspects on notice, I'm not supposed to be
2 here. And that, I think, is -- is -- is sort
3 of the -- the difference in this case. We're
4 obviously arguing about what were the
5 inferences they could have drawn from things
6 like stripping and -- and marijuana, but it's
7 -- it's certainly very different than a sign
8 outside a -- a building saying don't come in
9 here unless you register.

10 CHIEF JUSTICE ROBERTS: Did I
11 understand you to suggest that the officers
12 should have done more by way of investigation
13 before arresting the partygoers?

14 MR. GARRETT: Well, I was asked what
15 else could they have done. If they wanted to
16 arrest for other crimes, they -- they certainly
17 should have. If they wanted to arrest for
18 unlawful entry, yes, I think if you're going to
19 conduct a mass arrest of 21 individuals, you
20 require some individualized suspicion. So I do
21 think --

22 CHIEF JUSTICE ROBERTS: I thought -- I
23 thought I recalled from the Petitioners' brief
24 that the police interviewed every one of the
25 people at the party.

1 MR. GARRETT: Well, I -- I don't think
2 that's clear. Petitioners say in their summary
3 judgment papers that everyone said they were
4 invited to a bachelor party, so I suppose you
5 could infer from that they talked to everybody,
6 but what the summary judgment record actually
7 shows is specific officers saying: I talked to
8 a handful of people.

9 CHIEF JUSTICE ROBERTS: How many
10 officers were there?

11 MR. GARRETT: Ten to 15. What they
12 certainly never asked about, Your Honor, was
13 evidence that might bear on what these
14 individuals knew. Have you ever been to this
15 house before? How do you know the host? Who
16 invited you? And what do you know about --

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

21 MR. GARRETT: That's not accurate,
22 Your Honor. I -- and I don't -- but, to be
23 fair, I don't think that was the
24 representation. I think the representation was
25 that we have limited depositions that were used

1 at summary judgment. There are two depositions
2 where the person states who invited them, and
3 in both cases, they state it was the hostess.

4 Now, there's -- this is -- the
5 statement is -- is in the 56.1, where -- that
6 Officer Campanale says: I talked to several
7 other individuals -- this is JA 135 -- I talked
8 to several other individuals, and they were not
9 invited by the host.

10 CHIEF JUSTICE ROBERTS: Does -- I
11 don't recall, does the petition say anything
12 about whether the police interviewed everyone
13 at the party?

14 MR. GARRETT: I don't recall. I'm
15 sorry.

16 I do want to talk just briefly about
17 the imputation point. Again, the -- they're
18 not -- Petitioners aren't seeking to justify
19 the arrest of 21 individuals on the basis of
20 individualized suspicion. There's been a
21 reliance on Pringle and the common -- and
22 imputing mens rea from one to the other.

23 I just want to make sure I touch on
24 that because I think Pringle is a very
25 different case from this -- from this case.

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

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

9 I don't think that logic works here,
10 simply because the hostess implicated herself,
11 made a statement against interest, and
12 essentially admitted she was liable for
13 criminal trespass. It doesn't necessarily
14 follow that she told everybody else that. And
15 I think that singling out is also the
16 difference between Pringle.

17 Peaches essentially explained that she
18 was the reason for the unlawful entry. She had
19 told people that they were invited. She knew,
20 according to Petitioners, that she hadn't
21 concluded the lease yet. She essentially
22 acknowledged I'm the one who caused this.

23 So, I think if there is an analogy to
24 Pringle, it would be 21 friends on a bus. The
25 police find cocaine and one of them says that's

1 actually mine. And Petitioners are now saying,
2 well, you can still infer that the other 20
3 knew about it.

4 JUSTICE GORSUCH: Mr. Garrett, I just
5 wanted to get back to Justice Alito's question
6 because, as I understood it, you -- you agreed
7 that it would be acceptable for an officer to
8 make this arrest in a more affluent part of
9 town.

10 And maybe I'm mistaken in that, but
11 because perhaps the furniture situation one
12 should understand would be less in this area of
13 town than that area of town. But if it is a
14 new tenant, we all live with folding chairs for
15 a period of time when we move.

16 So does that hold? Is that a fair
17 reason? Should officers really have to
18 distinguish between parts of town in deciding
19 when to make an arrest?

20 MR. GARRETT: I'm sorry if I misspoke,
21 Justice Gorsuch. I'm not trying to argue for
22 some sort of bright line rule between
23 low-income and high-income properties. I'm
24 saying the Court has repeatedly said you look
25 at this from a commonsense perspective.

1 JUSTICE GORSUCH: Right.

2 MR. GARRETT: And so --

3 JUSTICE GORSUCH: The commonsense
4 perspective is it's a new tenant.

5 MR. GARRETT: I agree.

6 JUSTICE GORSUCH: And so the new
7 tenant, we all live -- if I work with boxes,
8 and whatever part of town we're from. So does
9 an officer -- should an officer, I mean,
10 redline where he enforces the law?

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

12 All I'm saying is there are several
13 considerations that could be taken into account
14 in the condition of a property. I think if I
15 was going to make a concession, the concession
16 would be there are certainly situations where
17 the condition of the home will be enough.

18 So, Petitioners cite examples,
19 real-world examples, where there's a big
20 mansion, it's empty because it is being sold,
21 and there is a for sale sign out front.

22 Now, when the police show up to a
23 teenage party, they obviously have probable
24 cause to arrest at that point because the for
25 sale sign, the condition of the house, gives

1 you at least some evidence that --

2 JUSTICE GORSUCH: Take away the for
3 sale sign. We don't have that here. That's
4 not a fact we have. But otherwise pretty much
5 the same, right? But you say it is okay to
6 arrest at the mansion and not here?

7 MR. GARRETT: No, I think -- well,
8 again, I think it's different because in that
9 case there may likely be forced entry into the
10 home because they don't have keys to the home.

11 JUSTICE GORSUCH: You keep adding
12 facts. I'm saying keep the facts exactly the
13 same. Just move the house.

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

17 JUSTICE GORSUCH: Shouldn't I worry
18 that you think it is a closer case, that
19 officers implicitly may distinguish, and you
20 suggest should, based on where in town they are
21 enforcing the law?

22 MR. GARRETT: Well, I think, I think
23 the contrary rule would be very odd. I think
24 it would be very odd for police to take into
25 account certain commonsense considerations

1 sometimes, but ignore the fact that this woman
2 has said she's just moved in or you are in a
3 low-income neighborhood and disregard that.

4 I think police are on the ground, they
5 know their neighborhoods, and that kind of
6 commonsense consideration should -- should play
7 into account.

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

10 (Laughter.)

11 MR. GARRETT: It -- it's not clear but
12 I'm glad you asked, Justice Alito, because the
13 evidence on that is at JA 193. And there is no
14 evidence in the summary judgment record on it.
15 It's a lawyer statement. We objected to it.

16 And what they actually say if you read
17 it closely is that individuals in their
18 depositions were talking about not knowing who
19 the bachelor was, but, of course, that is
20 irrelevant. What matters is what the officers
21 learned on the scene.

22 CHIEF JUSTICE ROBERTS: I -- I hate
23 to keep raising the point, but did you
24 challenge the assertion that they said it was a
25 bachelor party in your brief in opposition,

1 because they certainly made that point in the
2 petition for --

3 MR. GARRETT: No, it was -- it was --
4 we agree that they all said it was a bachelor
5 party.

6 CHIEF JUSTICE ROBERTS: I'm sorry,
7 what is --

8 JUSTICE GINSBURG: I thought some said
9 it was a birthday party.

10 MR. GARRETT: No, Your Honor. That
11 evidence -- I mean, that evidence came out at a
12 trial, at the trial after summary judgment.
13 Officer Campanale changed his story --

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

16 (Laughter.)

17 MR. GARRETT: Yes.

18 Justice Ginsburg, that evidence came
19 in at trial after the summary judgment was
20 concluded and, in fact, that happened on a
21 couple of occasions where officers changed
22 their story, and we were able to cross-examine
23 them about it and get the officers to
24 effectively admit their memory was better now
25 than two years ago.

1 And I think that, combined with the
2 fact that the police report had a falsity in
3 it, probably added to the damages result here.

4 JUSTICE SOTOMAYOR: I'm sorry, the
5 falsity?

6 MR. GARRETT: Oh, the police report
7 states that Officer Parker found marijuana and
8 field tested it for THC. And Officer Parker
9 acknowledged that was false.

10 Unless there are any further
11 questions, we will submit.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Counsel.

14 Mr. Kim, you have four minutes
15 remaining.

16 REBUTTAL ARGUMENT OF TODD KIM
17 ON BEHALF OF THE PETITIONERS

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

20 First, just to clear things up --

21 JUSTICE SOTOMAYOR: Mr. Kim, I don't
22 know if I agree completely with your opposing
23 counsel that the wealth of the neighborhood
24 should make a difference, but I suspect that if
25 police officers arrived at a wealthy home and

1 it was white teenagers having a party, and one
2 of them says, "my dad just bought this house,"
3 that it would be very -- and I told the kids
4 they could have a party, and it became, Joe
5 told me to come, and Larry King told me to
6 come, and X King told me to come, that those
7 kids wouldn't be arrested. Maybe the kid who
8 lied might be, but I doubt very much those kids
9 would be arrested.

10 MR. KIM: Well, Your Honor --

11 JUSTICE SOTOMAYOR: So, how is this
12 case different? Same set of facts: Sparsely
13 furnished, even a little bit dirty, lights are
14 on, that sort of thing.

15 So shouldn't we have a rule that if
16 we're going to require mens rea at all, that
17 police officers should be treating people
18 equally?

19 MR. KIM: Absolutely police officers
20 should treat people equally. My clients take
21 very seriously their obligation to do so. And
22 there is no selective enforcement claim in this
23 case, and with good reason.

24 The officers took their time here,
25 investigated very thoroughly. This --

1 JUSTICE SOTOMAYOR: Twenty one people
2 en masse arrested for trespassing for going to
3 a party. Does that feel right?

4 MR. KIM: Yes, Your Honor, because,
5 first, they were responding to a community
6 complaint. The community, this community, took
7 this very seriously. It was an abuse of a
8 vacant home in their community.

9 The officers appropriately took that
10 seriously.

11 JUSTICE SOTOMAYOR: He just had keys.

12 MR. KIM: We don't know that the --

13 JUSTICE SOTOMAYOR: If those
14 partygoers -- well, we know there wasn't forced
15 entry.

16 MR. KIM: There is no evidence of
17 forced entry for sure, Your Honor. We don't
18 know that the officers thought that Peaches had
19 keys.

20 But going back to your question, this
21 was a vacant home, in the sense that no one was
22 living there. Not in any technical District of
23 Columbia law sense.

24 Neighbors had reported this house
25 wasn't supposed to have anybody living there.

1 And that's the type of home that trespassers
2 can target in houses in any socioeconomic
3 status.

4 CHIEF JUSTICE ROBERTS: Mr. Kim, you
5 got up and said you had a few points. Do you
6 want to run through those?

7 MR. KIM: Yes, Your Honor. First just
8 to clean up. The fact that everyone was
9 interviewed was in our petition on page 3 and
10 supported by the record in multiple spots,
11 including page 131 of the Joint Appendix.

12 As to whether or not this -- the
13 question of competing motions for summary
14 judgment is properly before the Court at this
15 point, it is not just that they didn't raise
16 the disputes. They affirmatively said in their
17 brief in opposition this is the factual
18 background.

19 And if you look again at page 1 of
20 their brief in opposition, they agree as to the
21 essential factor that the owner had not given
22 permission.

23 There was also waiver in the Court of
24 Appeals below. Pages 3 to 4 of their brief in
25 the Circuit says here are the essential

1 undisputed facts. It quotes the trial court
2 about that.

3 And, finally, I just need to close
4 with the reminder both questions, both
5 questions here, need to be considered from the
6 perspective of the on-scene officers who were
7 trying to do their jobs that night.

8 We put ourselves in their shoes, and
9 ask whether what they did was reasonable or at
10 least arguably reasonable.

11 They investigated thoroughly. They
12 had much evidence, circumstantial, but much
13 evidence as to either knowing or at least
14 negligent trespass. Given all that, what they
15 did was reasonable or at least arguably so.

16 They did not have to think that
17 Peaches was the only trespasser that night.

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

21 If you were giving counsel to the
22 Police Department, and they said in a situation
23 like this what should we do, a very different
24 question from the legal question before us, but
25 what would be the answer to that question?

1 MR. KIM: I think it is difficult.
2 And it really depends on the totality of the
3 circumstances, just like the Fourth Amendment
4 question does.

5 JUSTICE KAGAN: These -- these -- it's
6 these circumstances.

7 MR. KIM: I think community policing
8 is a fraught endeavor with many competing
9 pressures and many competing responsibilities.

10 I am not an expert in that. I would
11 not -- I would not endeavor, especially in this
12 forum, to -- to answer that question.

13 But, again, what we're being asked
14 here is not whether what the officers did
15 was -- was the right decision. There are good
16 arguments why it was. The question is whether
17 we're going to set a nationwide floor that
18 officers may not arrest in circumstances like
19 these.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 10:59 a.m., the case
23 was submitted.)

24
25

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