

IN THE SUPREME COURT OF THE UNITED STATES

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 12:39 p.m.
16
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19 on behalf of the Petitioner.
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25 Respondent.

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1 P R O C E E D I N G S

2 (12:39 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 24-624, Case versus
5 Montana.

6 Mr. Rowley.

7 ORAL ARGUMENT OF FRED A. ROWLEY, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. ROWLEY: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 This Court has never allowed state
12 officials to force their way into someone's
13 home without a warrant or probable cause. It
14 should not start now. There is no liberty
15 interest more deeply rooted in the Fourth
16 Amendment than the sanctity of the home. The
17 Court has long recognized that physical entry
18 of the home is the chief evil against which the
19 wording of the Fourth Amendment is directed.

20 And the facts here well illustrate
21 what's at stake with such entries. The police
22 entered Trevor Case's home without permission,
23 a warrant, or even probable cause, and they
24 ended up shooting him in his own house.

25 Montana seeks to justify this

1 intrusion under the emergency aid exception,
2 which permits a home entry only when an officer
3 has an objectively reasonable basis for
4 believing that an occupant is seriously injured
5 or imminently threatened with such injury. As
6 Montana previously acknowledged, that standard
7 "requires in function, if not in form, that
8 officers have probable cause to believe
9 someone's in danger and requires immediate
10 assistance."

11 Now Montana insists probable cause is
12 not the right standard, but it also doesn't
13 defend the reasonable suspicion standard
14 applied by the Montana Supreme Court below.
15 Instead, Montana and the United States ask the
16 Court to adopt some other threshold that would
17 permit officials for the first time to breach
18 the sanctity of the home when they don't have
19 permission, don't have a warrant, and don't
20 even have facts leading to a fair probability
21 that an emergency is actually taking place
22 within the home.

23 Their proposed reasonableness standard
24 is so vague that not even the State and its
25 amici can agree on what it means. And its

1 open-ended balancing approach invites abuse and
2 confusion, leaving police and first responders
3 without the guidance they need and citizens
4 without the security promised by the Fourth
5 Amendment.

6 The Court should adhere to the textual
7 and traditional standard of probable cause.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Do we normally use
10 probable cause standard outside of the criminal
11 context?

12 MR. ROWLEY: Your Honor, the Court has
13 applied probable cause in *Camara*, for example,
14 with respect to administrative warrants and in
15 other contexts as well. I would point to, for
16 example, *Whren*, where the Court applied it to a
17 civil vehicle infraction. And so the Court has
18 applied it in non-criminal contexts.

19 JUSTICE THOMAS: Would you -- what is
20 the objective -- objectively reasonable basis
21 standard?

22 MR. ROWLEY: Your Honor, I think the
23 objectively reasonable basis standard, applied
24 in *Brigham City*, calls for and really
25 contemplates, sort of lends itself to some

1 standard of certainty. And our position is
2 that that standard of certainty is probable
3 cause, the traditional standard that the Court
4 has applied -- yes, Your Honor.

5 JUSTICE THOMAS: Well, I mean, I'm
6 just asking what it means. Is there any
7 difference between that and probable cause?

8 MR. ROWLEY: Your Honor, we think that
9 the -- that the standard sounds in probable
10 cause. The Court didn't use those words in
11 Brigham City, and it did not use those words in
12 Fisher, but we do think that the standard
13 echoes probable cause.

14 I'd point, for example, to the
15 language in -- in Pringle, where the Court said
16 that the substance of all probable cause
17 definitions is reasonable belief of guilt. And
18 so, while the Court didn't use the word
19 "probable cause," we do think that there is an
20 echo between the -- the standard applied in
21 Brigham City and the probable cause standard.

22 CHIEF JUSTICE ROBERTS: Well --

23 JUSTICE SOTOMAYOR: So, Mr. --

24 CHIEF JUSTICE ROBERTS: I was just
25 going to say, when we talk about probable

1 cause, we use it as a shorthand. It's probable
2 cause of what?

3 MR. ROWLEY: So, Mr. Chief Justice,
4 here, it would be probable cause that an
5 occupant is seriously injured or imminently
6 threatened with such injury. Ordinarily, it
7 would be probable cause to think a crime is
8 being committed, but, here --

9 CHIEF JUSTICE ROBERTS: Right.

10 MR. ROWLEY: -- as the government
11 explained in its brief in Brigham City, the
12 object might change, but the way that the
13 standard applies and the level of certainty
14 does not.

15 CHIEF JUSTICE ROBERTS: Well, why
16 isn't it something like probable concern or
17 reasonable concern? It seems to me that you're
18 taking a totally different context and applying
19 these things just because we're -- we're
20 familiar with them and -- and because
21 authorities are -- are involved.

22 I mean, did they enter this home
23 because they were concerned that -- I forget
24 the name of the -- the individual -- would harm
25 himself, or was it because they wanted to

1 arrest him for a particular criminal activity?

2 MR. ROWLEY: So, Your Honor, the
3 dispatch call was for a wellness check. But
4 I -- but I think, to get to your original
5 question, the Court has applied that probable
6 cause standard even though the object of it
7 might change in -- in -- in different contexts.
8 For example, Whren, a civil vehicle infraction,
9 that's not a -- a crime, and the -- the -- the
10 standard still mapped onto it.

11 And we think that it maps onto the
12 emergency context quite well because officers
13 and first responders don't have complete
14 information. They're just trying to assess
15 whether there's an urgent emergency that is
16 happening behind the front door. And probable
17 cause would help them do that.

18 CHIEF JUSTICE ROBERTS: You -- you say
19 urgent emergency.

20 I mean, let's just say you -- what,
21 it's patrol or whatever, he looks in the window
22 and there's somebody who seems to be in some
23 distress.

24 Now is he supposed to say: You know,
25 I can't tell if, you know, his -- he -- he --

1 he has a -- whatever, a pain, or if he's having
2 a heart attack or whatever before, you know,
3 entering?

4 MR. ROWLEY: Mr. Chief Justice, the
5 way --

6 CHIEF JUSTICE ROBERTS: Or even just
7 lying on the ground. You know, why is that
8 person lying on the ground?

9 MR. ROWLEY: Well, the -- well, the
10 Court said in Fisher that you don't have to
11 have ironclad proof that somebody is dying
12 before you go in. But the standard is, under
13 the emergency aid exception, as defined in --
14 in Brigham City, seriously injured or
15 imminently at risk of such injury.

16 And so I do think the Court has fixed
17 the threshold, but it said you don't have to
18 have ironclad proof. And that's consistent
19 with probable cause because, of course,
20 probable cause also does not require ironclad
21 proof. What it requires is a fair probability
22 or a substantial chance.

23 And we think that that strikes the
24 right balance given the important and really
25 fundamental interest in the sanctity of the

1 home.

2 JUSTICE KAVANAUGH: I think it's
3 critical --

4 JUSTICE ALITO: If the --

5 JUSTICE KAVANAUGH: Go ahead.

6 JUSTICE ALITO: If there wasn't
7 probable cause, then there was nothing the
8 police could do. They couldn't get a warrant
9 either, right?

10 MR. ROWLEY: Your Honor, there is a
11 civil warrant available in the State of
12 Montana.

13 But -- but -- but, to answer your
14 question, in these circumstances, given the --
15 the risks, I think what Your Honor is asking is
16 whether they could do it immediately, and it
17 would not be easy to do that.

18 JUSTICE ALITO: No. It's not a
19 question of whether they could dispense with a
20 warrant requirement. If there's no probable
21 cause, then they can't get a warrant.

22 It seems to me that if the police
23 could not enter this house based on the facts
24 that they knew, then I don't know when the
25 police are ever going to be able to enter a

1 house to prevent somebody from committing
2 suicide.

3 Your client's ex-girlfriend calls them
4 and she says that he said he's indicated he was
5 going to kill himself. He was going to get a
6 note. She heard him racking the action on a
7 handgun. Then she heard a popping sound. Then
8 the line went dead. She was screaming on
9 the -- on the phone. He didn't answer.

10 They go to the house. They try
11 knocking on the door and yelling. They get no
12 response. They walk -- they see empty beer
13 cans. They spoke to a neighbor, who said his
14 vehicle was parked outside.

15 They shone a flashlight through
16 the window. They saw his keys on the table,
17 alongside an empty holster and an apparent
18 suicide note.

19 I mean, what more did they need?

20 MR. ROWLEY: Justice Alito, I think
21 what's critical here is the officer's extensive
22 knowledge of Mr. Case. That knowledge goes
23 back decades as to a couple of the officers.
24 Chief Sather testified that -- that -- that he
25 had known Mr. Case his whole life. Captain

1 Heffernan also had known Mr. Case for a long
2 period of time.

3 But it's not just that. Officer
4 Linstead had been present at a couple of the
5 prior incidents that also involved threats of
6 suicide and what was perceived by Officer
7 Linstead as an effort to -- to provoke a
8 confrontation with police.

9 That is pretty unusual to have that
10 amount of -- of knowledge about a -- a specific
11 person. And we submit that that weighs against
12 the inference as -- as --

13 JUSTICE ALITO: Well, what would
14 they -- what more would they need here? Would
15 they need to be able to look through the window
16 and see him with a gun pointed to his head or
17 they need to see a dead body on the floor?
18 What more did they need?

19 MR. ROWLEY: Justice Alito, I think
20 the question is really what -- what you would
21 take away if they didn't know and hadn't had
22 such extensive experience with Mr. Case in --
23 and experience from which they drew the
24 inference that he was unlikely to kill himself,
25 that what he was likely to do instead was to

1 provoke -- yes, Your Honor.

2 JUSTICE ALITO: Well, I mean, you're
3 saying that because he had threatened to kill
4 himself before and he hadn't carried through,
5 then there was -- there were no circumstances
6 under which they could ever enter his house to
7 prevent him from committing suicide if he
8 threatened again? Is that your position?

9 MR. ROWLEY: Our position, Your Honor,
10 is, as assessed by the officers on the scene,
11 based upon their prior experience with them,
12 with Mr. Case, including, I would note,
13 percipient witness experience, they drew the
14 inference that he was unlikely to shoot himself
15 and that he --

16 JUSTICE JACKSON: But I find your
17 argument very odd, right? We're trying to
18 think about a standard here, and I would think
19 that the relevant criteria are the amount of
20 information that the officers had --

21 MR. ROWLEY: Yes.

22 JUSTICE JACKSON: -- and the threat to
23 the individual, the -- you know, the actual
24 nature of the emergency.

25 And so, in this very situation, I'm

1 thinking the fact that they had a lot of
2 information about Mr. Case actually hurts your
3 cause, not helps you.

4 I mean, I understand you want them
5 to draw a different inference about it, but,
6 you know, this person had a long history of
7 threatening suicide, whether it be by cop or
8 whether it be on his own or whatever.

9 We have a long conversation, detailed,
10 specific, with the girlfriend about
11 circumstances that look like they're creating a
12 pretty significant emergency.

13 I would think this, kind of like what
14 Justice Alito is suggesting, on our axis of
15 information and threat or risk, this seems like
16 it's pretty high.

17 MR. ROWLEY: Justice Jackson, I think
18 that that information led to -- led the
19 officers on the scene, because there are
20 deliberations that are captured on body cam,
21 those deliberations by officers with quite a
22 lot of extensive experience with Mr. Case are
23 powerful evidence that Mr. Case was unlikely to
24 shoot himself because they're talking about him
25 provoking a confrontation with the police.

1 And -- and I would just -- just quote,
2 for example, Police Chief Sather -- Sather
3 says: He ain't got the guts, this is probably
4 the tenth time I've dealt with him doing this.

5 Or Sergeant Pasha, who says: He's
6 been suicidal forever, he hasn't done it.

7 JUSTICE JACKSON: Okay. Well, setting
8 aside this particular case, let me just try to
9 understand the standard that you want us to
10 apply.

11 MR. ROWLEY: Yes, Your Honor.

12 JUSTICE JACKSON: You say that it
13 should be probable cause. I thought we already
14 had the emergency aid exception requiring "an
15 objectively reasonable belief" that an
16 emergency is occurring, and I didn't hear that
17 in your recitation. You said you want it to be
18 a fair probability or a substantial chance.

19 So can you just describe for us or
20 explain why it would need to be a higher
21 standard than objectively reasonable belief?

22 MR. ROWLEY: So, Your Honor, we think
23 that the objectively reasonable belief standard
24 really lends itself to some standard of
25 certainty, and we think that the traditional

1 probable cause standard is the appropriate
2 formulation.

3 JUSTICE JACKSON: I see. So you're
4 saying you only have an objectively reasonable
5 belief, in your view, if you meet the threshold
6 of probable cause?

7 MR. ROWLEY: Yes, Justice Jackson.

8 JUSTICE GORSUCH: Why isn't that --

9 MR. ROWLEY: And I would say that the
10 fair -- just one --

11 JUSTICE GORSUCH: Sure. Please.

12 MR. ROWLEY: The fair probability
13 language and substantial chance, that's all
14 from Illinois v. Gates. Those are just
15 principles associated with probable cause. And
16 we think that they make a lot of sense in this
17 context, as they do in the context of -- of
18 investigatory searches and seizures.

19 JUSTICE GORSUCH: I wonder if this is
20 just a labeling exercise, Mr. Rowley, at the
21 end of the day because, when we're interpreting
22 the Fourth Amendment, we often look at, you
23 know, what the common law has been, was, what
24 positive law. We don't always, but we often
25 do. You know, Katz is another thing. But

1 Jardines tells us to look at the actual law.

2 And one thing I'm struck by here is,
3 you know, a private person would have a good
4 necessity defense to a trespass claim always,
5 historically, it appears, from what I can tell,
6 when it reasonably appears necessary to prevent
7 serious harm to the occupant. And that's
8 almost exactly what Brigham City says for
9 officers. And officers can't have any fewer
10 rights than a private citizen to enter a home
11 to render assistance.

12 Now that doesn't give them a license
13 to go rummage about the place for crimes, but
14 it does give them a license to enter to render
15 assistance, I would have thought.

16 What's wrong with just saying Brigham
17 City reflects traditional common law principles
18 and officers treated the same as private
19 citizens?

20 MR. ROWLEY: Justice Gorsuch, I have
21 a few responses to that.

22 JUSTICE GORSUCH: I bet you do.

23 MR. ROWLEY: I think the -- the -- the
24 first response is, when the Court looks to
25 common law examples, what it's asking about is

1 what the authority of constables was at common
2 law. And so I just point to -- to Wilson, for
3 example. The common law of search and seizure
4 recognized a law enforcement officer's
5 authority to break open the doors of a
6 dwelling. So it's what was the -- what was
7 the constable's authority at common law.

8 JUSTICE GORSUCH: See, but it
9 doesn't -- a constable doesn't have fewer
10 rights than a private citizen.

11 MR. ROWLEY: When the Court --

12 JUSTICE GORSUCH: We've often said
13 that.

14 MR. ROWLEY: Justice Gorsuch, when the
15 Court talks about that, about the -- the
16 ability of officers to do the same things that
17 an ordinary person is doing, ordinarily, it's
18 talking about whether there's a search, whether
19 the Fourth Amendment is even implicated.

20 JUSTICE GORSUCH: Right. We -- that's
21 another whole question whether there's even a
22 search here. But I'll -- I'll take as given
23 that there's a search for the person to render
24 assistance --

25 MR. ROWLEY: There is a --

1 JUSTICE GORSUCH: -- but not for other
2 purposes. It's not a license to go rummaging
3 about the place. It is a license perhaps to
4 enter and search for -- for the person, for the
5 occupant who's facing a serious risk.

6 MR. ROWLEY: But the -- but the
7 necessity defense was a -- a broad-based common
8 law tort defense. As my friend points out
9 in -- in -- in the Respondent's brief, it was
10 applicable to private parties as well as
11 constables. So it doesn't say anything
12 specific about constable authority. But, even
13 if it did --

14 JUSTICE GORSUCH: But it applied to
15 both. It applied to both, and it didn't
16 require any -- it didn't require the magic
17 words "probable cause," whatever they may or
18 may not add.

19 MR. ROWLEY: Justice Gorsuch, even
20 if it did, even if you were to consider the
21 necessity defense, as the controlling principle
22 here, as the -- the State has suggested, it
23 would hardly help the State because it was, if
24 anything, more stringent than the probable
25 cause requirement or the affray rule because

1 you had to be right. So they --

2 JUSTICE GORSUCH: No, you had -- read
3 the -- read --

4 MR. ROWLEY: Well, the United States
5 cites the Restatement.

6 JUSTICE GORSUCH: Yes. Okay.

7 MR. ROWLEY: But, at common law, you
8 had to be right that -- that the necessity
9 actually obtained.

10 JUSTICE GORSUCH: What's your best
11 authority for that?

12 MR. ROWLEY: Your -- I would point to
13 the -- the State's own cases. I would point to
14 Rex. I would point to the Wakem case. In
15 general, at common law, you had to be correct.

16 Now there is this reasonableness gloss
17 in the -- the Second Restatement. I would note
18 that the -- the State hasn't pressed this
19 argument. It hasn't suggested that there ought
20 to be some generalized necessity defense that
21 would be drawn from modern-day tort principles.

22 JUSTICE GORSUCH: Got you.

23 MR. ROWLEY: The way this has come up
24 in the briefs, as you suggested, is by way of
25 common law.

1 JUSTICE GORSUCH: Yeah.

2 MR. ROWLEY: And, again, I think that
3 the relevant question is what was the authority
4 of constables, and they had all these specific
5 rules that are set out in the treatises --

6 JUSTICE GORSUCH: Thank -- thank you.
7 Thank you.

8 JUSTICE KAVANAUGH: I thought the
9 hesitation of the officers that you pointed out
10 before showed care before rushing in and -- and
11 thoughtfulness by the officers, so why don't --
12 why don't you look at it that way?

13 MR. ROWLEY: Your Honor, I think that
14 the delay -- there -- there were deliberations
15 that were -- that were quite extensive and it
16 took them 40 minutes to go in, as the dissent
17 in the decision below noted. That amount of
18 time is inconsistent with the kind of urgency
19 you would expect if what you thought was
20 happening was somebody was either bleeding out
21 or was about --

22 JUSTICE KAVANAUGH: Well, if they,
23 after deliberations, walk away and he commits
24 suicide, I mean, what are you thinking then of
25 the officers?

1 MR. ROWLEY: That would be -- that
2 would be unfortunate and -- and tragic --

3 JUSTICE KAVANAUGH: Yeah.

4 MR. ROWLEY: -- but we are trying to
5 strike a balance between --

6 JUSTICE KAVANAUGH: Well, and the
7 officers need some clarity, I would think, in
8 circumstances like this about what they can do
9 and what they can't do. And it seems like they
10 thought about it carefully and -- and decided
11 that the risk was sufficiently high, to Justice
12 Jackson's point, and that harm that would occur
13 was sufficiently substantial that they should
14 go in. And, by the way, they're going in at
15 great risk to themselves.

16 MR. ROWLEY: Of course, Your Honor.

17 JUSTICE KAVANAUGH: And, you know,
18 this is not, as Justice Gorsuch has --
19 pretextually looking for a crime or going in
20 for some other pretextual reason or going in
21 to -- you know, for -- it's going in really
22 to -- to help someone.

23 MR. ROWLEY: A couple of responses.
24 One, there were certainly two risks that were
25 possible. There was the risk that he was going

1 to shoot himself, and there was the risk that
2 he would try to provoke a confrontation with
3 the officers.

4 J.H., the girl -- the ex-girlfriend,
5 actually identifies both risks. In the initial
6 call, she expresses concern that Mr. Case is
7 going to shoot himself. When she arrives on
8 the scene, because she comes to the scene, she
9 says that he also said that he was going to try
10 to shoot it out with the officers.

11 And that echoes what Officer Linstead
12 says when he arrives on the scene. What he
13 says shortly after arriving is: Last time we
14 were here, he, like, said he was going to shoot
15 it out with -- and he mentions another
16 officer -- and I. And then later on he
17 recounts another incident where Mr. Case tried
18 to provoke a confrontation --

19 JUSTICE KAVANAUGH: What -- I'm sorry.
20 Keep going.

21 MR. ROWLEY: -- on his perception.

22 JUSTICE KAVANAUGH: Sorry about that.
23 On the articulation of the standard you want,
24 do you have examples where, under the current
25 law, officers would go in, but you think, under

1 your test, they wouldn't and shouldn't and
2 couldn't go in?

3 MR. ROWLEY: Well, Your Honor, I think
4 the swatting example that we -- we cite in our
5 brief is -- is a very real concern. It's a
6 pretty commonplace concern where somebody
7 calls, and under the United States' theory, I
8 think it's at page 22, where you would use the
9 severity of the -- the threat to ratchet down
10 the level of certainty that's required. If
11 somebody made a swatting call and said, well,
12 there's a bomb inside the house, it's a pretty
13 big bomb, I walked by the house, and I'm
14 worried that it's going to blow up the block,
15 you wouldn't even need corroboration. You
16 could just go in.

17 And so we think that just requiring a
18 fair probability or a substantial chance and
19 some corroborative -- corroborative work, and I
20 think in a lot of heartland scenarios, the
21 police would have that and would --

22 JUSTICE KAGAN: Mr. --

23 MR. ROWLEY: Yes, Justice Kagan.

24 JUSTICE KAGAN: Please. I'm sorry.

25 Did I cut you off?

1 MR. ROWLEY: Please.

2 JUSTICE KAGAN: I mean, one of the
3 things that strikes me here is the term
4 "probable cause" is -- is not itself
5 self-defining, and most of the way we know what
6 probable cause is is because we have a body of
7 case law that talks about it, and it talks
8 about it in an investigatory criminal context.
9 And in this context, that way of figuring out
10 whether there's probable cause just disappears
11 because that's not the context we're in.

12 So I guess I'm wondering whether then
13 taking a term from -- from a context which has
14 a body of precedent that is pretty much
15 irrelevant to this one is -- is -- that -- that
16 seems like a bad idea, and maybe what we did
17 in -- in City of Brigham and in Fisher is
18 exactly what we should have done, is we just
19 use a different language and we -- and we -- we
20 don't try to grade that relative to probable
21 cause. It's just sort of a different inquiry,
22 but it does focus on what's important. Do you
23 have to have an objectively reasonable basis
24 for believing that somebody needs emergency
25 help?

1 And I guess what I'm saying is maybe
2 in those two cases we did, like, the best thing
3 possible, and we're not going to be able to do
4 anything better.

5 MR. ROWLEY: So, Justice Kagan, the --
6 the Court's always been reluctant to adopt a
7 third standard. I think, in Montoya, it
8 said --

9 JUSTICE KAGAN: Well, we did adopt a
10 third standard or, you know, a third
11 standard -- I mean, we used different words for
12 this different context. And why not just leave
13 it at that?

14 MR. ROWLEY: Because, Your Honor,
15 it -- it produced a lot of confusion in the
16 lower courts, as we explained in our -- our
17 cert petition. You had a significant number of
18 circuits in states that applied a lower
19 standard, akin to reasonable suspicion, like
20 the Montana Supreme Court did here. You had
21 other states that applied a probable cause
22 standard.

23 And we do think that, given that this
24 situation is so recurring and that --

25 JUSTICE KAGAN: But why not just say:

1 This is a different context. Our probable
2 cause precedents are pretty much irrelevant and
3 can't help us. We think we got the standard
4 right. That doesn't mean reasonable suspicion.
5 Reasonable suspicion is an entirely different
6 thing. Go figure it out case by case, in the
7 normal way that courts do.

8 MR. ROWLEY: Well, the -- even the
9 State doesn't defend reasonable suspicion at
10 this point.

11 JUSTICE KAGAN: I know. And we would
12 say it's not reasonable suspicion. You know,
13 it's just this. Do you have an objectively
14 reasonable basis for believing that emergency
15 help is required?

16 MR. ROWLEY: If -- if the Court were
17 to reject a reasonable suspicion standard, we
18 would be entitled to a remand even on that
19 ground, but we do think that it would be
20 better, that the better approach is to provide
21 a little more guidance to officers and first
22 responders. And while probable cause hasn't
23 been applied by all courts, it actually has
24 been applied by a significant number of the
25 lower courts.

1 In this specific context, the general
2 principles that apply there, when you're
3 assessing probabilities, comparing the relative
4 strengths of different sources and information,
5 those map on pretty cleanly. And even if the
6 Court just drew on concepts like fair
7 probability and substantial chance, that would
8 actually be helpful and it would be help --

9 JUSTICE KAGAN: But fair probability
10 and substantial chance, why are those any
11 better than objectively reasonable basis? I
12 feel as though we're just substituting, you
13 know, your terms for our terms. So these were
14 our terms. We used them twice. Let's use them
15 again.

16 MR. ROWLEY: Because "reasonable basis
17 to believe," we submit that it lends itself to
18 some standard of certainty, but it doesn't
19 spell it out. And for officers and first
20 responders who are trying to figure out -- it's
21 pretty dangerous to go into a house, as -- as
22 the common law sources recognize, as officers
23 express concern about all the time, and so
24 you'd need some level of certainty for officers
25 and first responders to -- to decide, look,

1 we -- we -- we know enough; there's a
2 substantial chance that somebody is seriously
3 hurt behind that door, and so it makes sense to
4 take the risk and go in.

5 JUSTICE BARRETT: Counsel --

6 JUSTICE SOTOMAYOR: Counsel --

7 MR. ROWLEY: And we think that that
8 standard is certainly preferable to the -- to a
9 reasonableness standard, where you're balancing
10 interests on the ground the way the State and
11 the United States have suggested.

12 If I might, I would just say that the
13 Court has always expressed concern about --
14 in -- in reactive situations, where officers
15 are trying to make quick decisions, about
16 engaging in -- in balancing. The Court
17 expressed concern --

18 CHIEF JUSTICE ROBERTS: Counsel, I
19 think --

20 MR. ROWLEY: -- about that in Dunaway.

21 CHIEF JUSTICE ROBERTS: -- I think
22 Justice Barrett has a question.

23 MR. ROWLEY: Yes, Your Honor.

24 JUSTICE BARRETT: Justice Sotomayor
25 did.

1 MR. ROWLEY: Oh.

2 JUSTICE SOTOMAYOR: Counsel, I think
3 we're fighting about labels, and you got to the
4 point, but you keep resisting it, okay?

5 The -- the court below did not use our
6 Brigham City standard. It used a reasonable
7 suspicion standard. I'm quoting from itself --
8 from the decision below: "Objective, specific,
9 and articulable facts from which an experienced
10 officer would suspect that a" -- "that a
11 citizen is in need." Reasonable suspicion, as
12 we've defined it, means a particularized and
13 objective basis for suspecting the particular
14 person stopped of criminal activity. So they
15 use a standard akin to reasonable suspicion.

16 MR. ROWLEY: Yes, Justice Sotomayor.

17 JUSTICE SOTOMAYOR: So what you're
18 saying is, whatever standard we announce, we
19 should vacate and remand to go back. And the
20 question becomes, how is Brigham City different
21 than probable cause other than in its
22 objective?

23 I got two quotes -- I mean one quote
24 from two of our cases that says probable cause
25 "is a reasonable ground for belief of guilt."

1 Our Brigham standard says we're not talking
2 about guilt here. Our Brigham standard says
3 objectively reasonable basis for believing,
4 that's a reasonable ground, that an occupant is
5 seriously injured or eminently threatened with
6 injury.

7 I don't know, Justice Kagan was right,
8 this is, in my mind, simple. Apply the right
9 standard and tell us what the objective facts
10 were. Correct?

11 MR. ROWLEY: Yes, Your Honor. And
12 certainly on --

13 JUSTICE SOTOMAYOR: For believing --
14 for -- for believing that the occupant was
15 seriously injured or eminently threatened with
16 such injury.

17 MR. ROWLEY: Yes, Your Honor. I would
18 just say that that formulation in Brigham City
19 did generate a bit of confusion in the lower
20 courts, even though we submit that it is --
21 it -- it is consistent with and really
22 resonates with probable cause.

23 JUSTICE SOTOMAYOR: Well, it doesn't
24 resonate with reasonable suspicion.

25 MR. ROWLEY: It does not and we would

1 be entitled to a remand on that ground. But I
2 want to make sure I get to Justice Barrett's
3 question.

4 CHIEF JUSTICE ROBERTS: Yeah, thank
5 you.

6 I think it's very difficult because we
7 talk about how much information the person has.
8 It could be more pertinent in the situation of
9 how little information they have. I mean,
10 think about an officer walks down a regular
11 beat and there's a picture window, and some
12 person lying on the -- on the sofa that looks
13 like he's, you know, kind of in an awkward
14 position and keeps going down and two hours
15 later, comes back, it's the same thing. He
16 knows nothing about it except that the guy
17 appears perhaps to be dead or passed out or --
18 or something.

19 So he knocks on the door and he knocks
20 on the window and gets no response. And then
21 figures, you know, he's worried about it, he
22 breaks the door down or picks the lock and he
23 walks in and the person wakes up and there's,
24 you know, three kilos of whatever, and -- and I
25 mean, is that -- I mean, is it -- is it wrong

1 that he did that out of legitimate concern and
2 he didn't know that, you know, that's just, you
3 know, Fred or whatever?

4 MR. ROWLEY: Well, we know that --
5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: I just thought
7 -- I would want -- I would want -- I would want
8 the police officer in a situation who walks by
9 and sees somebody in the community --

10 MR. ROWLEY: Sure.

11 CHIEF JUSTICE ROBERTS: -- that seems,
12 some -- something is wrong, you know, he hasn't
13 moved in four hours, it doesn't look like he's
14 taking a nap. But, you know, and then what
15 happens, I mean, then does he have sufficient
16 basis to, you know, justify the search that led
17 to the -- the illegal drugs? So he doesn't
18 know anything.

19 I mean, maybe if he knew a little more
20 or maybe it's -- his regular habit is to go to
21 the -- the pub at night and that's why I find
22 it very difficult to articulate a standard. I
23 mean, you know, I don't think it can be based
24 on a -- a -- a probability of -- of -- of
25 something going awry or -- because you do want

1 police to be, you know, on the lookout for
2 things that might be dangerous, even if it's
3 not crime or criminal.

4 MR. ROWLEY: Certainly. But the Court
5 has always said subjective intent. So you
6 might well be concerned as an officer or a
7 first responder or even an ordinary citizen
8 that some -- something is going wrong inside
9 the house but there could also be innocuous
10 explanations even in this scenario that -- that
11 you just sketched out, Mr. Chief Justice.

12 And a lot of the scenarios that
13 Justice Kavanaugh similarly sketched out in his
14 concurrence in Caniglia, it could tack either
15 way but oftentimes in those scenarios the
16 report, especially if it's from a neighbor or
17 from a relative, is going to have a lot of
18 information about why it's uncharacteristic,
19 why this is weird.

20 And that is powerful information and
21 can be linked up with corroborating evidence to
22 support going in --

23 CHIEF JUSTICE ROBERTS: All right.
24 Thank you, counsel.

25 MR. ROWLEY: -- and at least it guards

1 against unnecessary and need -- needlessly
2 dangerous confrontations.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas?

5 Justice Alito?

6 JUSTICE ALITO: What is the -- the
7 substantive difference between the words that
8 were used by the Montana Supreme Court and the
9 words that we used in Brigham City?

10 MR. ROWLEY: So, Justice Alito, what
11 they said was objective, specific and
12 articulable facts from which an experienced
13 officer would suspect that a citizen is in need
14 of help.

15 JUSTICE ALITO: What's the difference
16 between that and what we said in Brigham City?

17 MR. ROWLEY: Reasonable basis to
18 believe that someone is seriously injured or
19 imminently threatened with such injury is
20 different because it doesn't use the word
21 "suspicion."

22 And I think the dissent is right to
23 say that the -- are -- words used in the
24 majority opinion below sound in Terry. The --
25 not just the use of the word "suspicion" but

1 even the specific and articulable facts.

2 That's Terry-type language.

3 In the footnote that accompanies that
4 standard, the majority analogized and said it
5 was comparable to the Ninth Circuit's exigent
6 circumstances test but the language is quite
7 different and it is not the Brigham City
8 language that Justice Sotomayor quoted.

9 JUSTICE ALITO: I know, I'm -- I had a
10 couple more questions.

11 I'm puzzled by your explanation of
12 what -- why the police did what they did. Why
13 did they go in, in your view?

14 MR. ROWLEY: Why -- why do I think
15 subjectively? I think that they treated it as
16 a -- it to be honest as a community caretaking
17 exercise.

18 JUSTICE ALITO: They didn't think he
19 was -- they -- you -- they didn't think he --
20 put aside the fact that Fourth Amendment looks
21 to object to whether -- looks to object to
22 facts, and not to subjective, but your view is
23 they didn't really think he was going to commit
24 suicide, he -- what he really wanted to do was
25 to commit -- not -- wasn't going to kill

1 himself directly. He wanted to commit suicide
2 by police, so they said well, all right, let's
3 go in.

4 So he -- he will pull a gun on us and
5 then we will shoot him and if that's what he
6 wants, we're going to oblige him. I'm totally
7 puzzled by your explanation of what you think
8 really went on here.

9 MR. ROWLEY: Justice Alito, I think
10 that that risk is the risk that was focused on
11 in the on-the-scene deliberations. I -- I'll
12 just quote, again, Sergeant Pasha, he's been
13 suicidal forever and he hasn't done it but
14 there have been several times when he's tried
15 getting us to do it.

16 Later on, Sergeant Pasha says I'm
17 scared that maybe he didn't actually shoot
18 himself because he can't and he's tried to
19 commit -- he's tried suicide-by-cop before and
20 he like left us all this so we're going to go
21 in, into the house and -- and he's going to
22 pull a gun on us. So there's a refrain --

23 JUSTICE ALITO: They wanted to oblige
24 him in his desire to have -- to commit suicide
25 by police and thereby expose themselves to

1 serious risk of death or -- or serious bodily
2 injury? That's what was going on?

3 MR. ROWLEY: Your Honor, at a certain
4 point in the -- when you watch the video, they
5 get sort of a head of steam and they're
6 starting to just prep to go in. And they -- of
7 course they have to do some prep but they are
8 focused on taking the preparations that they'll
9 need in case he wants to -- to -- to shoot it
10 out with them and -- and -- and that kind of
11 momentum leads after 40 minutes to the entry.

12 But, again, if you -- if you consider
13 the on-the-scene assessment by officers who
14 knew Mr. Case, and -- and the -- the risk that
15 they thought was the serious one, it was the
16 risk that he was going to provoke a
17 confrontation, so -- so -- so --

18 JUSTICE ALITO: If we write -- if we
19 write an opinion and we set out the facts of
20 this case and we say well, it has to go back to
21 the Montana Supreme Court for them to apply the
22 Brigham City test, will it not be the case that
23 police -- those people who instruct police
24 officers are going to say: Wow, if the Supreme
25 Court thinks that this is even a close case,

1 has to be sent back to the Montana Supreme
2 Court, we don't know when you can ever go in
3 and try to prevent somebody from committing
4 suicide, unless you literally see through the
5 window the guy has got a gun to his head or
6 they see a dead body on -- on the floor.

7 So, look, let's do the safe thing.
8 We're just not going in unless we've got
9 absolutely ironclad proof.

10 MR. ROWLEY: Justice Alito, three
11 things. The Court has already said in Fisher
12 you don't need ironclad proof. The second
13 thing is the -- the -- of all the Supreme Court
14 justices on the Montana Supreme Court, there
15 was not a single justice who voted to uphold
16 this search under a probable cause standard and
17 three justices said it did not meet probable
18 cause.

19 And -- and -- and -- and the final
20 thing, I -- I again, would go to the officer's
21 own assessment. It is unusual -- an unusual
22 case because they had so much information about
23 him and it's not just that they knew him. One
24 of the officers was -- a percipient witness was
25 there at two of the prior incidents.

1 JUSTICE ALITO: All right. Thank you,
2 I get it.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: Counsel, the --
6 the state court is applying a lesser standard
7 than reasonable suspicion. It cited the
8 Lovegren, its own precedent, Lovegren.

9 MR. ROWLEY: Yes.

10 JUSTICE SOTOMAYOR: And in Lovegren it
11 said it characterized community caretaking
12 stops as the least intrusive category of stop,
13 even less intrusive than a Terry stop. And
14 that's the standard they're using.

15 MR. ROWLEY: That's right, Your Honor.

16 JUSTICE SOTOMAYOR: And that's not the
17 standard we set in Brigham.

18 MR. ROWLEY: It is not. And --

19 JUSTICE SOTOMAYOR: Now, stop trying
20 to help yourself. I've gotten the point out,
21 right?

22 (Laughter.)

23 JUSTICE SOTOMAYOR: Let me get to the
24 second point, which is Brigham also said the
25 manner of entry has to be reasonable, okay?

1 The one thing that nobody ever discussed here,
2 including Justice Alito, is he does this when
3 he's drunk, correct?

4 MR. ROWLEY: Your Honor, the call was
5 that he had been drinking.

6 JUSTICE SOTOMAYOR: And all of these
7 calls to the police had been -- nobody thought
8 of just letting him ride out his drunkenness, did
9 they?

10 MR. ROWLEY: No, Your Honor. There's
11 a -- there's comment on the tape. I believe
12 it's Officer Linsted who poses the question do
13 we leave him, but it is ambiguous as to what
14 he's connoting. I --

15 JUSTICE SOTOMAYOR: All right. Now,
16 they also didn't think of -- instead of death
17 by suicide, since he never pulled a gun on
18 anybody else, okay -- getting medical personnel
19 to go in, which lots of divisions do on suicide
20 cases, don't they?

21 MR. ROWLEY: They do, Your Honor.
22 Here I just would note that Officer Linsted did
23 ask, should we stage medical. But I don't
24 think that they did that, and there was no
25 further discussion.

1 JUSTICE SOTOMAYOR: That's the point.

2 MR. ROWLEY: Yeah.

3 JUSTICE SOTOMAYOR: They didn't try to
4 call. They didn't do anything except not get a
5 warrant and break in. Correct?

6 MR. ROWLEY: That's right, Your Honor.
7 They talked about calling other people, family
8 members, the father. They talked about calling
9 him. They ultimately, at least on the body cam
10 videos, there's no --

11 JUSTICE SOTOMAYOR: So there's a real
12 question, even for the court below, whether the
13 entry under the facts of this case -- not
14 generally when you're really afraid of a
15 suicide, because they're saying he doesn't have
16 the guts. It's not one officer; a bunch of
17 them were taking -- it sound to me like they
18 were taking bets on it. And everybody was
19 saying he wants suicide by cops, he's not going
20 to shoot, he doesn't have the guts.

21 MR. ROWLEY: Right, Justice Sotomayor.
22 I would quote the dissent. What the dissent
23 says is all the officers on the scene stated
24 that it was unlikely Case required immediate
25 aid but, rather, was likely lying in wait for

1 them to commit suicide by cop.

2 JUSTICE SOTOMAYOR: So they can
3 decide, not us, on these facts whether it meets
4 the Brigham standard.

5 MR. ROWLEY: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: What we do know is
7 that the Montana court used a different
8 standard, lower than reasonable suspicion.

9 MR. ROWLEY: That's right.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 JUSTICE BARRETT: One question, and
16 maybe Montana can answer this, weigh in if you
17 don't know. Would it be normal or best
18 practices to send in just medical personnel
19 when someone has cocked a gun over the phone
20 and is known to be armed?

21 MR. ROWLEY: No, Your Honor. I
22 believe in those circumstances, officers would
23 be called to the scene.

24 JUSTICE BARRETT: Thanks.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: In those
3 circumstances, would you think there was
4 probable cause, setting aside the quirky
5 details of this case and all the stuff the
6 officers knew, under your probable cause
7 standard, if we just had the girlfriend call
8 and what they observed when they got to the
9 scene?

10 MR. ROWLEY: If -- if they actually --
11 I want to be careful because -- because if what
12 they actually got was a call that said not a
13 pop but there was a -- that there was a gun,
14 the action as Justice Alito suggested, was
15 engaged and there -- and there was a --

16 JUSTICE JACKSON: Really? It has to
17 be that detailed?

18 MR. ROWLEY: Well, a -- you know, a
19 pop could be anything over the phone. I think
20 it's different if -- if there's slide action or
21 you can hear the gun being engaged in some way.

22 JUSTICE JACKSON: I don't want to
23 belabor this. I guess I'm just trying to
24 isolate --

25 MR. ROWLEY: Sure.

1 JUSTICE JACKSON: -- the
2 suicide-by-cop knowledge and find out whether,
3 under your own test, all the stuff up to that
4 point would count and you're just saying we
5 don't have probable cause because of the
6 suicide-by-cop scenario.

7 MR. ROWLEY: Yes, Your Honor. It's
8 all the information that is countervailing
9 about the risk.

10 JUSTICE JACKSON: Yeah. Thank you.

11 MR. ROWLEY: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Mr. Corrigan.

14 ORAL ARGUMENT OF CHRISTIAN B. CORRIGAN

15 ON BEHALF OF THE RESPONDENT

16 MR. CORRIGAN: Mr. Chief Justice, and
17 may it please the Court:

18 This Court should affirm the judgment
19 below for three reasons.

20 First, the Fourth Amendment protects
21 against unreasonable searches, not all
22 warrantless ones. The Framers enshrined that
23 tradition of reasonableness, not a rigid
24 warrant rule, in the Fourth Amendment. At
25 common law, officers and private citizens alike

1 could enter the home as -- as required by
2 necessity when life is at risk.

3 Petitioner's rule would turn that
4 structure upside down. He asks this Court to
5 graft the Warrant Clause's probable cause
6 requirement into the Reasonableness Clause
7 itself. That move has no basis in text, no
8 footing in history, and no support in this
9 Court's exigency precedents.

10 Second, this Court has already set the
11 standard for emergency entries at objective
12 reasonableness. To adopt Petitioner's view,
13 this Court would have to overrule the holding
14 in *Brigham City v. Stuart*, discard *Michigan v.*
15 *Fisher*, and recast probable cause, the classic
16 criminal law concept about belief of guilt,
17 into something entirely new and applicable to
18 non-criminal, non-investigatory emergencies.

19 Third, the objective reasonableness
20 standard provides sufficient guidance and
21 flexibility for emergency-aid cases.
22 Conversely, a rule demanding probable cause of
23 peril would force officers to stand outside a
24 dying man's door, calculating legal thresholds
25 instead of saving his life. That's not what

1 the framers wrote. And that's not what this
2 Court has ever required.

3 The Montana Supreme Court applied the
4 rule required by the Constitution and this
5 Court's precedents. Officers may enter when
6 they have an objectively reasonable basis to
7 believe someone inside needs immediate aid.
8 That standard is faithful to text, history, and
9 common sense.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Did the Montana
12 Supreme Court cite Brigham City?

13 MR. CORRIGAN: It cited its own case
14 law, and it cited -- it relied on Caniglia,
15 which -- which relied on Brigham City. So --

16 JUSTICE THOMAS: But there seems to be
17 a disagreement between you and Petitioner as to
18 whether or not that standard was applied.

19 MR. CORRIGAN: It -- it applied the
20 Brigham City standard. It -- it applied the
21 totality of the circumstances about whether
22 officers had an objectively reasonable basis
23 that someone needed -- inside needed immediate
24 aid. And so it -- it applied -- it applied the
25 words -- it applied the words of Brigham City.

1 JUSTICE THOMAS: Isn't it our normal
2 practice, though, if -- if we're not certain
3 about standard and we state a new standard,
4 that we send it back?

5 MR. CORRIGAN: Yes, Your Honor, in
6 some instances. But I think it's very clear
7 what standard the Montana Supreme Court applied
8 here, and the facts are particularly strong
9 that whatever standard this Court lays down,
10 the facts here satisfy it, that the -- that the
11 officers here had an objectively reasonable
12 basis for -- for believing Mr. Case needed
13 immediate aid.

14 JUSTICE GORSUCH: Would it be helpful,
15 do you think, to clarify, I -- I mean, if
16 there's some ambiguity about what the standard
17 was that was applied, so we don't care about
18 that, okay? It's what we said in Brigham City.
19 And then apply that standard to these facts, we
20 don't have to, we could send it back, but would
21 it help to provide guidance to confused lower
22 courts for us to use a concrete set of facts to
23 -- to explain what that means.

24 MR. CORRIGAN: Absolutely, Justice
25 Gorsuch. This is a scenario that officers face

1 every day. Emergency-aid scenarios are very
2 common, whether it's a suicide call like in
3 this case, a call of an elderly individual who
4 -- who's missing, or a hybrid scenario like
5 Brigham City or Fisher.

6 Having this Court apply whatever --
7 the Brigham City standard to the facts in this
8 case would be very helpful.

9 JUSTICE GORSUCH: And we have a full
10 enough record to do that, you think?

11 MR. CORRIGAN: Absolutely.

12 JUSTICE GORSUCH: All right. And --
13 and what do you say to your friend on the other
14 side about the necessity defense being more
15 liberal under the Restatement than it was at
16 common law?

17 MR. CORRIGAN: I think at common law,
18 my -- my friend on the other side pointed to
19 the cases of Rex v. Coate and --

20 JUSTICE GORSUCH: Yeah.

21 MR. CORRIGAN: -- Scott v. Wakem.
22 When you read those cases, it's all based on a
23 reasonableness analysis. In -- IN the Rex v.
24 Coate case, the restraining was justified if it
25 had been proved to have been with the best

1 motives or necessity was manifestly proven. To
2 me, that sounds like a reasonableness standard.

3 Now, some of the issue in terms of
4 what -- the reasonableness standard at the time
5 is that we don't -- in tort law, we don't get
6 the full reasonableness standard until 1837 in
7 the Vaughan case in England, but Coke is
8 writing in the -- in the 16th century about
9 applying the law of reason to the
10 reasonableness of the common law. And so
11 implicit in jury and judicial verdicts at the
12 time, the concept in of the ordinary person and
13 reasonableness is baked into the -- the common
14 law in England and the common law here and, of
15 course, textually in the Fourth Amendment.

16 JUSTICE GORSUCH: Does Montana follow
17 the Restatement?

18 MR. CORRIGAN: We follow the Second
19 Restatement, Your Honor.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Counsel, we're
22 talking about this as an emergency situation,
23 but there's a lot going on that doesn't look
24 like an emergency, right? I mean, they get
25 there, they're walking around for a while, then

1 they -- what, they get their boss to come down?
2 I mean, call for somebody else? And they're
3 still there, and then they go get a body
4 shield. I mean, it -- it doesn't have the
5 atmosphere of, you know, we've got to get in
6 there right away.

7 And I wonder if that detracts from the
8 idea that they had sufficient justification,
9 and particularly since, at least as it said,
10 the emergency would come in if the officers
11 came in and they need to have the question of
12 suicide by police.

13 MR. CORRIGAN: Well, Mr. Chief
14 Justice, I would certainly agree that at some
15 point, if they did wait too long, that would --
16 that would cut against an emergency, but in
17 this case, I think the timeline is very
18 important. Officers arrive on the scene at
19 9:14 p.m. His ex-girlfriend arrives at 9:18.
20 They do a knock-and-announce. They knock
21 several times, and they spend the next 20
22 minutes trying to verify the facts that she
23 communicated to them in this case.

24 And it's at 9:34 p.m. that, as -- as
25 they are doing this search of the outside of

1 the house, that they identify the suicide note
2 when they flash their flashlights through the
3 window. And so they spend about 20 minutes
4 trying to verify the facts that were
5 communicated to them.

6 And what I -- and I -- and I do think,
7 though, that the -- the possibility of
8 suicide-by-cop counseled additional caution on
9 their part that -- and you see this on the body
10 cam. Of course, they are worried about the
11 concept -- about the instance of suicide by
12 cop, but that's why they're doing the
13 additional investigation of walking around the
14 outside of the house, yelling into an open
15 window, giving Mr. Case every -- every
16 opportunity to let them know that he is alive
17 and inside, which he didn't do.

18 JUSTICE BARRETT: Is Montana --

19 JUSTICE SOTOMAYOR: General -- oh.

20 JUSTICE BARRETT: Does Montana have --

21 I mean, it seems to me that there's some
22 confusion in the case law. I mean, I think
23 there was some sloppiness in the standard in
24 this case. Does Montana have some separate
25 community caretaker exception or something that

1 it calls a community caretaker exception that's
2 really equivalent to our emergency-aid section
3 from Brigham City?

4 MR. CORRIGAN: Yes, Justice Barrett.
5 I -- I think that's -- when -- when the Montana
6 Supreme Court discusses the community
7 caretaking exception, I think they're folding
8 in Brigham City. There was some confusion, I
9 agree, in the standard. But it is -- it's an
10 exigent circumstance exception to save human
11 life. And I think that's essentially what they
12 did.

13 JUSTICE BARRETT: Okay. I mean,
14 they're free to call it as a matter of state
15 law, I guess, whatever they want to call it.
16 But you would agree that there is no such
17 strand, that we've rejected that, we've
18 rejected it in Caniglia -- Caniglia -- it's
19 been a long day -- but that the emergency aid
20 exception and the standard from Brigham City is
21 all you're asking for, and you're not saying
22 that there's some yet another looser standard?

23 MR. CORRIGAN: That's correct. We are
24 entirely consistent with Brigham City and
25 Caniglia. We're not asking for anything beyond

1 that.

2 JUSTICE KAGAN: And -- and on that
3 point --

4 JUSTICE SOTOMAYOR: And their cite --
5 I'm sorry.

6 And their citation to Lovegren we just
7 ignore, where they said it was less than
8 reasonable suspicion?

9 MR. CORRIGAN: Well, the Court is
10 admittedly using imprecise language. What I
11 think is -- what's important is that the Court
12 is applying the totality of the circumstances
13 and it's making sure the scope and manner of
14 the search is reasonable.

15 And, of course, as was -- as my friend
16 was up here and the Court was asking questions,
17 pointed out that the Court does use some
18 language mirroring, at times, in sort of the --
19 the more specific application of the test that
20 mirrors reasonable suspicion. But this Court
21 has done that in TLO and the special needs
22 cases. And so what the Court is -- what the
23 Court is looking to do is make sure that the
24 scope and manner of the search are reasonable
25 in balancing the privacy interests at stake.

1 JUSTICE SOTOMAYOR: I -- I actually
2 don't see any -- them addressing the
3 reasonableness of the manner in which this
4 occurred.

5 And I pointed to things, Justice
6 Barrett was right, you're not going to send
7 medical personnel into a room with an armed
8 person, but you do call medical personnel
9 to make calls or to talk to someone who's
10 suicidal on the phone. It happens quite often.

11 MR. CORRIGAN: They could do that.
12 Now, as -- as --

13 JUSTICE SOTOMAYOR: You could put a
14 megaphone out there and tell him: I'm a
15 doctor, please come out.

16 MR. CORRIGAN: I will -- I will point
17 out the time exigency here is that they -- they
18 did call medical personnel when Case -- after
19 the injury and he had been shot, but the
20 officers here --

21 JUSTICE SOTOMAYOR: Yes, after he had
22 been shot, when they had a great probability
23 of knowing that he was seeking to be --

24 MR. CORRIGAN: But there --

25 JUSTICE SOTOMAYOR: -- suicide by cop.

1 MR. CORRIGAN: There's no
2 indication that -- that EMTs would be able to
3 talk down Mr. Case. In fact, Chief Sather, who
4 had known Case for 30 years, testified that
5 based on prior incidents, he actually thought
6 that he could talk Case down and get him out of
7 the house.

8 It was only after they received the
9 reliable indicia that Case had actually
10 suffered a gunshot wound that the Chief arrives
11 and says: We have to go in.

12 JUSTICE KAGAN: Am I right, just to go
13 back to where you ended with Justice Barrett,
14 that you're not equating the City of Brigham
15 standard with our Terry stop standard?

16 MR. CORRIGAN: Correct.

17 JUSTICE KAGAN: You -- you think that
18 those are two different things?

19 MR. CORRIGAN: I think they're two
20 different things.

21 JUSTICE KAGAN: Okay. And, as to the
22 difference between the City of Brigham standard
23 and the probable cause standard, is your
24 position that the City of Brigham standard
25 is laxer, or is your position that it's just

1 different?

2 MR. CORRIGAN: I think it's more
3 flexible. And I think it answers a different
4 question.

5 So, as -- as the Court recognized when
6 my -- when my friend was up here earlier,
7 it's -- probable cause isn't just about
8 reaching a specific threshold. It's -- it's
9 fixed to criminality. But objective
10 reasonableness says, given the totality of the
11 circumstances, would an officer taking a
12 specific action be reasonable?

13 And I think one way to think of
14 it might be probable cause is a single
15 determination about whether a quantum of proof
16 has been satisfied. But objective
17 reasonableness, as in this case, can be a
18 progressive analysis.

19 And what I mean by that is, when
20 officers --

21 JUSTICE KAGAN: So it would help me,
22 I think, because that's a lot of words, and --
23 but, like, what's the -- what's -- what's the
24 case in the gap between the two? Like, what is
25 it where a police officer would not have

1 probable cause but can satisfy the Brigham City
2 standard? What are the kinds of things you're
3 talking about?

4 MR. CORRIGAN: So I think, if you take
5 this particular case and subtract perhaps
6 Mr. Case's history, which -- which we actually
7 think -- I actually think supports the
8 officer's reasonable determination, or if they
9 had not obtained the other reliable indicia,
10 so if -- if -- if Case's ex-girlfriend had
11 called him, she had heard the cocking of the
12 gun, heard what she thought to be a gunshot,
13 police arrive, they knock on the door, they
14 know -- they don't receive any response, but
15 they hadn't found the -- hadn't been able to
16 see the suicide note which might have been
17 upstairs with him, they hadn't seen the beer
18 cans or the empty paddle holster, I think
19 that's a much closer call, but we think that's
20 still objectively reasonable.

21 And I would point out that our friends
22 on the other side believe that even the very
23 strong facts in this case don't satisfy
24 probable cause.

25 And so I think, if the Court -- to

1 Justice Alito's questioning earlier, if the
2 Court were to determine that the facts in this
3 case do not satisfy probable cause, that is
4 going to have very detrimental effects down the
5 road for law enforcement.

6 JUSTICE KAGAN: Thank you.

7 JUSTICE JACKSON: They say they don't
8 satisfy probable cause because they're
9 reducing. That was my question to him at the
10 end, which is, without the suicide-by-cop
11 information, do you think we get there?

12 I thought he suggested we did, but
13 it was the fact that the cops also had this
14 additional information that made it less likely
15 or objectively less likely that Mr. Case would
16 actually commit suicide.

17 MR. CORRIGAN: Well, I -- I think it's
18 important to put the suicide-by-cop in context.
19 So some of what's happening at the scene, I
20 think, is cop talk of Sergeant Pasha's clearly
21 very concerned about suicide-by-cop.

22 The context of suicide-by-cop came --
23 first came up when Case was on the phone with
24 his ex-girlfriend and -- and he says: I'm
25 going to kill myself. And she responds: Well,

1 if you -- if you threaten that, I'm going to
2 have to call the police, and she says: I'm
3 going to -- or he says: I'll shoot it out with
4 them.

5 Chief Sather responds to Sergeant
6 Pasha's concern about that comment by saying:
7 He doesn't have the guts.

8 So I think the -- the dissent is
9 incorrect at the Montana Supreme Court to say
10 all the officers believed.

11 And our point is, is, certainly,
12 suicide-by-cop was a possibility, but that
13 was -- I think the officers ruled that out
14 based on his escalating history of violence
15 going back to 2015 and the incident that was
16 18 months earlier. And particularly once they
17 found the note, Chief Sather is convinced that
18 he actually has hurt himself this time.

19 In -- in terms of the test of
20 reasonableness, we -- we admit that a
21 reasonableness -- objective reasonableness is
22 an easy test, but it may not be an easy rubric
23 to always apply where the Court is taking the
24 privacy interest versus the nature of the
25 exigency.

1 But I think the Court just did this in
2 Barnes. And the Court admitted that it's a
3 fact-bound morass that demands careful
4 attention to the facts and circumstances,
5 including the facts and circumstances leading
6 up to the climactic moment. And the Court has
7 to consider all relevant circumstances.

8 And I think that the excessive force
9 context makes a lot of sense here when we're
10 talking about, at its apex in this context, the
11 sanctity of human life versus the sanctity of
12 the home.

13 And the excessive force context also
14 involves two very -- two strong competing
15 interests of the safety of the officer versus
16 the use of deadly force. And the logic of
17 Barnes makes sense here. The application of it
18 makes sense.

19 And in terms of Brigham City, in terms
20 of hybrid scenarios that have been brought up,
21 I think that Brigham City and other cases that
22 involve underlying criminal activity recognize,
23 though, that first responders are first
24 responders first.

25 When they arrive on the scene of an

1 emergency, they're not necessarily concerned
2 about underlying crime. Their first instance
3 when they respond to someone yelling "help" is
4 to provide aid to someone in need. They can
5 worry about arresting someone for a crime or
6 worry -- or other criminal activity later on.
7 We treat hybrid cases the same as all other
8 exigencies.

9 And what's important to remember is,
10 as I -- I was articulating to Justice Kagan is,
11 the objective reasonableness standard allows a
12 progressive analysis. And so, when the
13 officers arrive and do a knock and announce,
14 they may not have -- it may not be objectively
15 reasonable right away for them to go through
16 the front door, but it allows them to go around
17 the curtilage, to yell through an open window,
18 to take progressive steps to alert the
19 individual and give them every opportunity to
20 respond and let them know that they are okay.

21 And I don't think that probable cause
22 allows that sufficient flexibility and doesn't
23 differentiate between going through a door and
24 breaking down a window, whereas the Barnes
25 standard and the -- and the reasonableness

1 standard differentiates between the facts that
2 make it reasonable to handcuff a suspect versus
3 to tackle a suspect or what -- or to use deadly
4 force.

5 And that's why we think that the
6 Montana Supreme Court appropriately applied
7 this Court's test in Brigham City. This Court
8 meant what it said in Brigham City, meant what
9 it said in Fisher, that officers may enter when
10 they have an objectively reasonable basis to
11 believe someone inside is in need of immediate
12 aid.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 Justice Sotomayor?

18 JUSTICE SOTOMAYOR: Counsel, our entry
19 into the home cases, and it's been paramount
20 that a person's home, we don't enter without a
21 warrant except in recognized exceptions.

22 And I understand the instinct that
23 says that we don't want someone in real need
24 not to have the police enter quickly, but we're
25 always balancing interests, aren't we? And not

1 requiring enough proof also costs -- costs
2 lives.

3 Petitioner cites reports that people
4 with serious mental illness are 16 times more
5 likely to be killed by police during a police
6 encounter. An investigation found at least 178
7 cases in a two-year period where calls for
8 help, not a crime, like a 911 call or a
9 wellness check, resulted in the police shooting
10 and killing the people they were called on to
11 assist. It's a fine balance, but shouldn't we
12 make sure that the courts below are at least
13 following the right standard?

14 MR. CORRIGAN: So I --

15 JUSTICE SOTOMAYOR: And you keep
16 telling us that Montana -- that this state is,
17 despite using words that sound very similar to
18 reasonable suspicion, despite a case, Lovegren,
19 that says it's less than a Terry stop, I mean,
20 there's some value in clarifying what we have
21 said the standard is. If you're asking us to
22 describe what the quantum of proof, it sounds
23 like you want us to -- to accept what the --
24 the Solicitor General is saying, some
25 possibility is enough. But that's never been

1 the standard. It's a reasonable suspicion --
2 reasonable belief, not a probable belief.

3 MR. CORRIGAN: So I agree that --
4 clarification from the Court, and I think the
5 Court can clarify that it meant what it said in
6 Brigham City, it meant what it said in Fisher,
7 and that an objectively reasonable basis is
8 what it is. And that --

9 JUSTICE SOTOMAYOR: And it's not
10 reasonable suspicion?

11 MR. CORRIGAN: It's -- it's not
12 necessarily reasonable suspicion, I think, in
13 some cases.

14 JUSTICE SOTOMAYOR: Ah, there's the
15 qualifier.

16 MR. CORRIGAN: In some -- it's -- in
17 some cases, the standard can look like
18 reasonable suspicion, and in some cases, the
19 flexibility makes it look more like probable
20 cause. But there's where we're getting to the
21 degree of certainty of the exigency. It takes
22 a -- the legal --

23 JUSTICE SOTOMAYOR: You want it to be
24 reasonable suspicion.

25 MR. CORRIGAN: Well, the --- the

1 objective reasonableness standard is the most
2 faithful to the text, history, and tradition of
3 the Constitution. If given a binary choice, we
4 would take reasonable suspicion over probable
5 cause.

6 But objective reasonableness is much
7 more flexible and -- and faithful to the text,
8 and it accounts for situations like this one or
9 others where there is -- there is some doubt as
10 to whether an individual is in need because --

11 JUSTICE SOTOMAYOR: So we might as
12 well just say what the court below said. It's
13 less than a Terry stop.

14 MR. CORRIGAN: Well, I think I'd look
15 to the language in Fisher where the Court says
16 officers, of course, are going to have less
17 than perfect information, but that doesn't mean
18 they should walk away from potentially
19 dangerous situations. And all we're asking is
20 that they use their common sense.

21 Officers, as well as reviewing courts,
22 are more than capable of figuring out when the
23 facts don't add up and when an objectively
24 reasonable belief doesn't exist. And I
25 think -- I go back to this Court could apply

1 whatever standard it articulates to the facts
2 in this case to provide ample guidance to lower
3 courts.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: I think I'm confused,
6 General, because I thought you told me that the
7 City of Brigham standard is not the same as the
8 Terry stop standard and that you were not
9 asking for the latter here.

10 MR. CORRIGAN: It -- it's not. It's
11 not in all cases. The Brigham City standard is
12 the Brigham City standard. In terms of the
13 degree of certainty, it may -- it can vacillate
14 between probable cause and reasonable
15 suspicion.

16 JUSTICE KAGAN: Okay.

17 MR. CORRIGAN: The text is just more
18 complex than that.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 Justice Kavanaugh?

23 Justice Barrett?

24 JUSTICE BARRETT: You might be better
25 off just sticking with Brigham City. I think

1 what you -- maybe what you're saying is that in
2 some circumstances, applying reasonable
3 suspicion or objective reasonableness in the
4 Brigham City sense might yield the same result,
5 just like sometimes applying Brigham City and
6 probable cause, whatever it might mean in this
7 context, might yield the same result. But are
8 you really saying that we should do something
9 different than in Brigham City or -- or muddy
10 the waters by saying, oh, you know, objectively
11 reasonable basis but could be reasonable
12 suspicion?

13 MR. CORRIGAN: You're -- you're
14 correct on -- on the first part, on your -- on
15 the former. We are not saying that they
16 should -- that the Court -- that Brigham City
17 means reasonable suspicion. What -- what we're
18 saying is, in some instances, it could, as you
19 said Justice Barrett, yield a result like
20 reasonable suspicion, just like it could yield
21 a result like probable cause.

22 JUSTICE BARRETT: Well, we don't need
23 to say that. I think that would be confusing.
24 I think we could just say Brigham City,
25 objectively reasonable basis to believe, and

1 put a period on that.

2 MR. CORRIGAN: I -- I agree, Justice
3 Barrett.

4 JUSTICE BARRETT: Okay. Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 Thank you, counsel.

8 MR. CORRIGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Ms. Jacoby.

10 ORAL ARGUMENT OF ZOE A. JACOBY
11 FOR THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE RESPONDENT

13 MS. JACOBY: Mr. Chief Justice, and
14 may it please the Court:

15 This Court should adhere to the
16 objective reasonableness standard for emergency
17 aid entries set out in Brigham City rather than
18 require what Petitioner calls probable cause of
19 a danger. Petitioner's theory has no basis in
20 the Fourth Amendment's text, which links
21 probable cause to warrants, not to searches in
22 general. History doesn't support Petitioner's
23 theory either. The framers adopted the Fourth
24 Amendment to guard against overzealous criminal
25 investigation, not to hamstring officers from

1 providing life-saving aid to people in need.

2 Yet, Petitioner's rule would make it
3 harder for government officials to help people
4 in crisis, from victims of domestic violence to
5 older people who have fallen and can't get up.
6 This Court should instead reaffirm that
7 emergency aid entries are assessed for
8 reasonableness, a flexible determination that
9 accounts for both the severity of a danger and
10 its likelihood. States are always free to
11 craft their own rules above that constitutional
12 floor, but the Fourth Amendment does not
13 categorically require probable cause of a
14 danger for an emergency entry.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Should we apply this
17 rule here or send it back?

18 MS. JACOBY: We think you should apply
19 this rule here. I think there has been some
20 question about the Montana Supreme Court's use
21 of the word "suspect" in its test, but I would
22 urge this Court not to read a decision like a
23 statute, especially because elsewhere in the
24 decision, the Montana Supreme Court said that a
25 test -- its test largely mirrored the Ninth

1 Circuit's test, which uses the "objectively
2 reasonable basis for believing" language and
3 because it used other verbs elsewhere besides
4 "suspect." I think Pet. App. 14a, Footnote 5,
5 they say there was an objectively reasonable
6 basis for finding a danger.

7 So I -- I would avoid sending it back
8 just on the basis of the word "suspect" or a
9 citation to Lovegren.

10 JUSTICE SOTOMAYOR: I'm sorry, but
11 what the dissent -- when they -- when they
12 addressed the dissent's accusation that they
13 were using reasonable suspicion, nowhere did
14 they say we're not. It would have been the
15 easiest thing to do. We're not using
16 reasonable suspicion. Instead, they said we
17 don't have to because it's more -- it's a
18 different purpose than an arrest.

19 It seems to me that that's not a
20 disavowal.

21 MS. JACOBY: I do read them to sort of
22 disavow that they're applying a reasonable
23 suspicion standard, but I --

24 JUSTICE SOTOMAYOR: No. They said
25 we're not giving open license, but they didn't

1 disavow it.

2 MS. JACOBY: I -- I think, even if you
3 disagree with me about that, the reason not to
4 send it back is the one that Justice Alito
5 articulated earlier, which is, if you give sort
6 of officers and lower courts the impression
7 that there is any doubt about whether the facts
8 here satisfy the Brigham City test, I think
9 that's going to lead to a lot of confusion and
10 a lot of concern that officers can't make
11 entries based on the type of information --

12 JUSTICE SOTOMAYOR: If we --

13 MS. JACOBY: -- that they would think
14 they could.

15 JUSTICE SOTOMAYOR: -- if we apply it
16 here, are we ignoring the countervailing
17 factors of why they shouldn't have gone in? We
18 have a number of officers on tape saying he has
19 no guts, he won't kill himself. We have others
20 saying -- of officers saying he's waiting for
21 suicide by cops. There's no attention paid by
22 the officers to trying the father or to calling
23 a doctor to call out to him, not go into the
24 place. All they decide to do is go in.

25 Are we then inviting a carte blanche

1 to say don't think of more reasonable way or
2 manner to enter?

3 MS. JACOBY: I don't think so, Justice
4 Sotomayor. I'd point to a couple things. One,
5 I'd avoid relying too much on the cop talk
6 that's on the tape, especially because, in the
7 record, in the JA, at the suppression hearing,
8 several of the officers did testify, sworn
9 testimony, that -- that they were subjectively
10 afraid that he had -- had, in fact, injured
11 himself. So this was a situation --

12 JUSTICE SOTOMAYOR: Did they get a
13 basis for that? Did they give a basis for
14 that?

15 MS. JACOBY: I think the call and the
16 suicide note and the empty holster. So I think
17 this is a situation in which there were risks
18 of multiple outcomes, and the fact that they
19 articulated a concern about one of those
20 outcomes doesn't mean there wasn't also an
21 objectively reasonable basis for believing that
22 the other outcome might have happened as well.

23 JUSTICE JACKSON: So I take it that
24 you agree with Montana that the degree of
25 certainty can vacillate under the Brigham City

1 test and that that's really the work of your
2 sliding scale, is that right?

3 MS. JACOBY: I -- I think that's
4 right. What I would say is it's not so much,
5 like, in one case, you need probable cause, in
6 another case, you need reasonable suspicion.
7 Our point is just that there is not a fixed
8 prescribed quantum of certainty of danger that
9 needs to apply in all cases. The amount of
10 information, the reliability of information,
11 the corroboration of information that an
12 officer would need to make their entry reliable
13 in one instance may not be the same as in
14 another instance.

15 JUSTICE JACKSON: But those are the
16 key factors that -- would it be helpful for us
17 to kind of say that kind of thing? In other
18 words, you know, I understood your sliding
19 scale to have a matrix essentially that related
20 to the severity and the amount of information.

21 MS. JACOBY: I think so. To be clear,
22 I think the sliding scale, you know, it's just
23 a metaphor. We don't mean it sort of strictly
24 formulaic or a matrix or anything like that,
25 just that these are relevant considerations

1 that can make an entry reasonable and --

2 JUSTICE GORSUCH: Yeah, I don't
3 understand the sliding scale thing at all, I'll
4 be honest, so help me out. I understand lots
5 of different facts can lead to an objectively
6 reasonable basis, okay, and it's almost
7 impossible to catalogue them all.

8 But, on the other end, on the
9 severity, we said in Brigham Young what we
10 meant -- Brigham City, sorry. I am tired.
11 That it has to be a severe risk of harm to the
12 occupant. I'm -- I'm paraphrasing, but life or
13 limb was the classic formulation in Blackstone.
14 That's -- that's -- that's -- the severity is
15 the severity. It doesn't -- there's no sliding
16 scale. You don't get to go in with lots of
17 evidence to -- to deal with a hangnail.

18 MS. JACOBY: I absolutely agree with
19 that. There's sort of -- I mean, I think what
20 we would think of with the sliding scale
21 there's -- there's an outer bound on the
22 sliding scale formed by Brigham City's use of
23 that serious injury. But not all serious
24 injuries are alike and our point is that based
25 on sort of the degree of the exigency, the

1 severity of the injury being complained about,
2 it may be reasonable in some instances for
3 officers to rely on less information or less
4 reliable information and in other instances it
5 may be reasonable -- it may not be reasonable
6 to rely on --

7 JUSTICE GORSUCH: I understand --

8 MS. JACOBY: -- some of that
9 information.

10 JUSTICE GORSUCH: -- that point.

11 MS. JACOBY: So that's -- that's the
12 only --

13 JUSTICE GORSUCH: Do you have any
14 thoughts about the common law of necessity?

15 MS. JACOBY: Yeah, I think our -- our
16 point is that that's a -- a useful guidepost
17 here for the reasons that Your Honor
18 articulated, the fact that private individuals
19 were able to enter when life and limb were at
20 stake, we think provide some helpful guidance
21 about what the Framers would have thought was
22 reasonable here.

23 I -- I don't think that we think of it
24 as a direct one-to-one analog but I don't
25 really think it's our -- our burden to come up

1 with a direct one-to-one historical analog here
2 given that we have the -- the text of the
3 amendment on our side.

4 And it's really Petitioner who's
5 asking to graft on to the Fourth Amendment's
6 reasonableness standard, this uniform probable
7 cause requirement that is not compelled by the
8 text --

9 JUSTICE GORSUCH: Thank you.

10 MS. JACOBY: -- of the amendment
11 itself.

12 JUSTICE JACKSON: Would -- would you
13 object to the Court specifically saying that --
14 that the officers have to have more than
15 reasonable suspicion that an emergency is
16 occurring?

17 MS. JACOBY: I -- I -- I think we
18 would object to it for a couple of reasons. I
19 mean, one, I think because reasonable suspicion
20 is a standard from the criminal law, just as
21 probable cause is for the reasons that Justice
22 Kagan was -- was just articulating with my
23 friend, just pegging it to any one of these
24 criminal investigation standards I think does
25 more harm than good, because --

1 JUSTICE JACKSON: But why isn't
2 that -- isn't that familiar? I mean they're
3 used to those standards. And so I appreciate
4 that they do it in the criminal context when
5 they're looking for crimes but they understand
6 I would think the difference between probable
7 cause and -- and -- and I'm more focused on
8 reasonable suspicion in that context and so why
9 couldn't we just say you have to have more than
10 reasonable suspicion that an emergency is
11 occurring?

12 MS. JACOBY: Well, two points. First
13 of all, police officers may be familiar with
14 reasonable suspicion but your standard here
15 will also apply to firefighters, paramedics,
16 all of whom may have no more familiarity with
17 reasonable suspicion than with probable cause.
18 And reasonableness is I think an easier
19 standard to understand.

20 Second of all, I -- I do think just
21 given how varied emergencies are, it's best not
22 to sort of set either, like set a floor at --
23 at reasonable suspicion just because this Court
24 can't really predict all manner of emergencies
25 that could arise.

1 And rather than hamstringing courts or
2 officers with setting a floor on this, better
3 to just stick with the objectively reasonable
4 basis test from Brigham City.

5 MS. JACOBY: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE SOTOMAYOR: In Brigham City,
8 I'm quoting from the SG's brief, "One way to
9 conceptualize the emergency aid situation is
10 that the basic requirement that the police have
11 an objectively reasonable belief, i.e.,
12 probable cause - does not change, but the
13 object of the probable cause does change.

14 "Rather than requiring an objectively
15 reasonable basis for an officer to believe a
16 crime has been or is about to occur, the
17 officer needs an objectively reasonable basis
18 to believe that an emergency need for
19 assistance exists."

20 Have you changed your position?

21 MS. JACOBY: Yes, after the Court's
22 decision in Brigham City which used the
23 objectively reasonable basis language but did
24 not draw that connection to probable cause that
25 we had sort of floated in a footnote, we did

1 rethink that. And in Caniglia or Caniglia,
2 our -- our brief five years ago we -- we made
3 clear that our view is that probable cause is
4 not the correct standard.

5 JUSTICE SOTOMAYOR: May not be but
6 Brigham is?

7 MS. JACOBY: Yes, Brigham City is the
8 correct standard and -- and we -- we sort of
9 disavow that equivalence that we --

10 JUSTICE SOTOMAYOR: And reasonable
11 suspicion is not.

12 MS. JACOBY: Not -- not the correct
13 standard either. Objectively reasonable basis
14 just from Brigham City is -- is the correct
15 standard.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 Justice Barrett?

20 Justice Jackson?

21 Thank you, counsel.

22 Rebuttal, Mr. Rowley?

23 REBUTTAL ARGUMENT OF FRED A. ROWLEY, JR.

24 ON BEHALF OF THE PETITIONER

25 MR. ROWLEY: Thank you, Mr. Chief

1 Justice.

2 I think it's critical to remember that
3 what we're dealing with here is an entry into
4 the home and there are these default
5 constitutional rules that are decades and
6 decades old.

7 As the Court has repeatedly said at
8 the very core of the amendment stands the right
9 of a man to retreat -- to retreat into his home
10 and there be free from unreasonable government
11 intrusions. In Payton, the Court said that the
12 Fourth Amendment is drawn a firm line at the
13 entrance to the house.

14 And so these rules do not require if
15 you -- if you apply a probable cause standard
16 some kind of fundamental tweaking of -- of
17 Fourth Amendment jurisprudence. We think that
18 they are a natural -- an application of -- of
19 these basic Fourth Amendment principles.

20 I would also stress that in a lot of
21 these situations where the emergency-aid
22 exception arises, you have not just potential
23 safety implications but also criminal
24 implications. Think of domestic violence
25 situations or the -- the situation that the

1 officers faced here.

2 And so having a parallel standard of
3 probable cause to think a crime is being
4 committed but also probable cause to think that
5 somebody is seriously injured or imminently
6 threatened with such injury, makes good sense.

7 Conversely, if you adopted a standard
8 that was a sliding scale as the government has
9 suggested or a lower standard for the
10 emergency-aid exception, there is the potential
11 for abuse. You could back door your way into
12 a -- into a criminal investigation.

13 I'd just note that while the state now
14 has expressed concern about applying a probable
15 cause standard, in its brief in opposition, it
16 noted that the -- that a significant number of
17 lower courts apply a probable cause standard
18 even -- and -- and they say it's functionally a
19 probable cause standard -- even if what they
20 say in terms of the standard, the -- the words
21 used, is different.

22 And the Court didn't suggest that that
23 was a problem whether that stopped police
24 officers and other first responders from going
25 in and helping with an emergency.

1 And so we don't think that -- that
2 applying a probable cause standard, which is
3 the default standard, would prevent officers
4 from -- from stopping in a -- or -- or
5 intervening in an emergency.

6 On the common law, because Justice
7 Gorsuch asked about that, I just note that the
8 cases that my friend features in the
9 Respondent's brief, best cases presumably, do
10 say that the -- that the defendant or the
11 potential tortfeasor has to be right.

12 In Scott v. Wakem, the -- the Court
13 says, and I quote, "the question was not
14 whether the defendant sincerely believed he was
15 right but whether he was so."

16 So this reasonableness clause is a
17 restatement clause. I think the more
18 fundamental point, though, is that when you
19 were asking about Constable authority, the
20 focus is what the rules that -- that governed
21 Constable power and what they could do are the
22 cognate rules, and the closest one is the
23 affray rule. It actually applies to the same
24 set of circumstances that were at issue in
25 Fisher and in Brigham City.

1 Both of those involved what I think
2 the Court called a melee or a fracas, that is
3 essentially an affray. And we know what the
4 common law thought about that. What the common
5 law thought was that the Constable had to see
6 or hear the affray if he wanted to break down
7 doors and part the affray.

8 That standard is fundamentally
9 inconsistent with a standard below probable
10 cause. The necessity defense and none of the
11 other specific rules that the state and the
12 United States outline supports a standard below
13 probable cause.

14 And so we think that the common law is
15 more supportive of our position than theirs.
16 And -- and that it echoes not just the language
17 in Brigham City but it also underscores other
18 exigent circumstances cases like Minnesota v.
19 Olson where the Court has said that probable
20 cause for an exigency is essentially the
21 correct or the proper legal standard.

22 And also in Santana, which involved an
23 exigent circumstance after all, a hot pursuit,
24 and the Court applied a probable cause
25 standard, not just for the underlying crime but

1 to think that an exigent -- exigency existed.

2 The -- the -- the last thing I would
3 say is that the United States says that
4 reasonableness is an easier standard to -- to
5 understand than probable cause, but as Justice
6 Jackson observed, probable cause is a settled
7 formulation as you're going to find in the
8 Fourth Amendment.

9 It's a standard that -- that officers
10 have applied that the courts have developed
11 over decades and decades. As the court said in
12 Dunaway, the familiar threshold standard of
13 probable cause for Fourth Amendment seizures
14 provides the relative simplicity and clarity
15 necessary to the implementation of a working
16 rule.

17 A balancing test, particularly a
18 sliding scale test will not only be unfamiliar
19 to first responders but -- but particularly
20 unfamiliar to -- to -- to officers and --
21 and -- and other first responders.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 1:54 p.m., the case was
25 submitted.)

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