No. 15-1485

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,
Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

CHARLES W. THOMPSON, JR.
Executive Director
International Municipal Lawyers Association
7910 Woodmont Ave.
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

KYMBERLY K. EVANSON
Counsel of Record
TANIA M. CULBERTSON
Pacifica Law Group LLP
1191 2nd Ave., Ste 2000
Seattle, WA 98101
(206) 245-1700
Kymberly.Evanson@pacificalawgroup.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BEFORE THE COURT'S CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI

The International Municipal Lawyers Association (IMLA), by its undersigned counsel, hereby moves the Court for an order granting leave to file an amicus curiae brief before the Court's consideration of the District of Columbia, Andre Parker, and Anthony Campanale's Petition for a Writ of Certiorari, pursuant to Supreme Court rule 37.2(b). Respondents Theodore Wesby, *et al*., have withheld their consent to the filing of the amicus curiae brief.

As detailed below, members of IMLA regularly provide advice to municipalities and their law enforcement agencies regarding probable cause and qualified immunity. Amicus requests the opportunity to present an amicus curiae brief in this case because its members are keenly interested in the chilling effect the court of appeals' decision will have on municipalities' ability to provide effective and responsible law enforcement.

Respectfully submitted,

KYMBERLY K. EVANSON
Counsel of Record
TANIA M. CULBERTSON
Pacifica Law Group LLP
1191 Second Ave.
Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Kymberly.Evanson@pacificalawgroup.com

CHARLES W. THOMPSON
Executive Director
International Municipal
Lawyers Association
7910 Woodmont Ave.
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amicus Curiae
International Municipal
Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

INTEREST OF *AMICUS CURIAE*[1]

IMLA is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Members of IMLA regularly advise municipalities and their law enforcement agencies on issues pertaining to probable cause and qualified immunity.

---

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than Amicus and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.6. Counsel of Record for Petitioners were provided with notice of Amicus' intent to file an amicus curiae brief on June 1, 2016 which is more than 10 days before the July 8, 2016 due date for this brief. Consent was granted. Counsel of Record for Respondents was provided with notice of Amicus' intent to file an amicus curiae brief on June 20, 2016 which is more than 10 days before the due date for this brief. Respondents did not respond to Amicus' notice.

Therefore, IMLA has a strong interest in this dispute. As a representative of local governments committed to effective and responsible policing, IMLA urges this Court to grant certiorari and reverse the court of appeals' decision.

SUMMARY OF ARGUMENT

Should a police officer arrest a person based on a shopkeeper's cry of theft; a woman's claim of rape; a burglar alarm sounding; or, as in this case, a group of people partying in what for all the evidence appears to be an abandoned dwelling when the owner asserts no permission for its use had been given? Could an officer and society be placed in a more precarious position than one in which the officer loses immunity from suit by exercising the discretion to believe one but not the other of two conflicting claims? The court below chose a strange path to follow in articulating the standard for determining probable cause and applying qualified immunity, ultimately deciding this case in conflict with both this Court's precedent and authority from other courts across the country.

Thus, the questions presented by this appeal are 1) whether law enforcement officers must credit a suspect's non-credible claim of an innocent mental state over other circumstantial evidence of culpability in assessing probable cause for arrest; and 2) whether, even if an officer is not entitled to do so, the law was clearly established in this regard. Amicus asserts that the answer to both of these questions is no.

The facts of this case are not in dispute. Officers were called to the scene after complaints by neighbors of a loud party at a house known to be vacant.

App. 119a. When the officers arrived, the partiers scattered and some hid. Officers observed what appeared to be strippers and smelled marijuana. *Id.* The house was virtually unfurnished. Upon inquiry, the partiers gave conflicting statements about the nature of the gathering: some said it was a birthday party, some said it was a bachelor party, but no one could identify the guest of honor. App. 4a. A few of the partiers stated they had been invited by a woman named Peaches, though when reached on the phone, Peaches ultimately admitted she did not have authority to invite anyone to the house and refused to come to the house upon fear of arrest. App 5a. The owner of the house likewise told the officers on the phone that no one should be in the house at all. *Id.* The officers eventually arrested the partiers for trespass, though the charges were ultimately dropped.

This Section 1983 action for false arrest followed. The district court denied the officers' motion for summary judgment on the basis of qualified immunity and the officers appealed. The majority and dissenting opinions of the court of appeals agreed that the only issue in dispute was the partiers' mental state at the time of the arrest: namely, did the partiers know, or *should they have known*, that their presence was unauthorized in the home?[2] In finding no probable

[2] While the question of the partiers' objective and subjective intent informs the determination of guilt in a trespass case, it cannot be the question in determining whether officers had sufficient probable cause to arrest as it is the officers' judgment that matters. Indeed, under Fourth Amendment jurisprudence the question of whether the seizure was reasonable and based on probable cause controls.

cause for their arrest, the majority held that the objective evidence of criminal activity was insufficient to support probable cause when weighed against the partiers' assertion of an invitation. As a result, the court determined that the officers were personally liable in damages for false arrest.

The court of appeals' decision creates an unworkable standard for local law enforcement whereby officers are precluded from discrediting unreliable assertions of innocence, even in the face of objective circumstantial evidence of criminal activity. This result is directly contrary to the flexible probable cause and qualified immunity standards repeatedly articulated by this Court and other federal and state courts that allow officers to consider circumstantial evidence of a culpable mental state and discount a suspect's "innocent explanation" when objectively reasonable to do so. Effective and responsible law enforcement depends on this "breathing room" afforded to officers to make judgment calls, even if they are ultimately reasonably mistaken in fact or law. Here, even if the officers were ultimately mistaken about the partiers' defense of an invitation, their mistake was objectively reasonable such that qualified immunity should have applied.

Though the court of appeals characterized the decision below as "fact-bound", the repercussions of its opinion extend far beyond the trespassing context in which it was made, and impose an impossible standard under which officers in the field must take the place of prosecutors and juries in determining whether a suspect is guilty, and face personal liability if they believe the wrong person. This heightened standard

will chill enforcement of other crimes beyond trespassing, ultimately impeding effective law enforcement via threat of damages. For these reasons, Amicus respectfully requests this Court grant the District's petition and reverse.

ARGUMENT

I. Officers Are Not Required To Credit One Set of Conflicting Statements Over Other Evidence of Criminal Activity.

A. The *Wesby* Opinion Conflicts With Established Law Recognizing the Sufficiency of Circumstantial Evidence of Mens Rea in Determining Probable Cause.

In *Wesby*, the majority held that the partiers' assertions of an invitation from Peaches vitiated the intent requirement for the offense, and as a result, the officers had no probable cause on which to base their arrests. App. 11a. Implicit in this holding was the rejection of the circumstantial evidence of criminal activity that suggested the partiers knew or at least should have known that their entry was unlawful. This evidence included the vacant state of the house, the marijuana smell, the admission of Peaches that she lacked authority to invite anyone to the house and her statement that she would be arrested if she came to the house, the guests scattering and hiding when the police arrived, the partiers' conflicting statements about the reason for the party (and not knowing who the guest of honor was), and the owner's statement that no one was allowed to be at the house. What if instead of a party, the police caught a person with burglary tools in the

vacant house after a burglar alarm sounded but when confronted the person claimed "Peaches" told him he could enter the home and take whatever "wasn't tied down" while the owner of the home asserted the contrary? While the seemingly harmless nature of a marijuana party may make the lower court's decision seem inconsequential, its holding can cause substantial damage to law enforcement by imposing personal liability on the basis of "in the field" mens rea-related judgment calls. In doing so, the decision changes immunity analysis in cases involving probable cause from determining what the arresting officer legitimately perceived to determining what is on the mind of the subject of an arrest converting officer liability from matters over which the officer has control to those within the sole control of a plaintiff.

Moreover, the *Wesby* decision is at odds with the opinions of numerous circuit courts holding that "[a]n assessment of intent frequently depends on circumstantial evidence." *Zalaski v. City of Hartford*, 723 F.3d 382, 393 (2d Cir. 2013) (citing *United States v. MacPherson,* 424 F.3d 183, 189–90 (2d Cir. 2005) (collecting cases recognizing that mens rea elements of knowledge and intent are often proved through circumstantial evidence)). This Court has likewise long recognized that police officers are allowed "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744 151 L. Ed. 2d 740 (2002). When drawing these inferences, the "availability of alternative inferences does not prevent a finding of probable cause so long as the inference upon which the

officer relies is reasonable." *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004).

The officers here reasonably inferred from the circumstantial evidence available to them at the time that the partiers knew or should have known their presence was unauthorized. Considering this evidence over the partiers' asserted invitation is consistent with trespassing law. As the Third Circuit has acknowledged, nearly all suspected trespassers are likely to claim an innocent mental state, observing, "[a]bsent a confession, the officer considering the probable cause issue in the context of crime requiring a *mens rea* on the part of the suspect will always be required to rely on circumstantial evidence regarding the state of his or her mind." *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000). The Second Circuit recently agreed, holding that an arresting officer had arguable probable cause to arrest (and thus qualified immunity) where the circumstantial evidence demonstrated the plaintiff protestors' intent to commit defiant trespass, despite their claim of innocent state of mind. *Zalaski*, 723 F.3d 382. In each of these cases, the courts applied the proper "totality of the circumstances" analysis to the presence of probable cause. And, in each case, the officers were not required to accept the statements of suspected trespassers over other circumstantial evidence of criminal activity. As observed in the dissent from the denial of rehearing en banc, in light of the higher burden of proof for a conviction as compared to the probable cause standard, "[i]f juries in trespassing cases can refuse to credit defendants' explanations for their unlawful presence in buildings, police officers surely can do the same." App. 136a.

Despite this authority, the *Wesby* court concluded that the officers' observations of apparent criminal activity did not amount to the type of information sufficient to overcome the partiers' assertion of an invitation. The opinion is thus out of step with the bulk of authority that recognizes that police must make "judgment calls" in determining a suspect's state of mind for purposes of probable cause and that those calls necessarily involve a practical assessment of the totality of the circumstances. *See Paff*, 204 F.3d at 437.

B. Arresting Officers Should Be Afforded Latitude to Consider All the Evidence of Mens Rea Crimes.

The ramifications of the *Wesby* opinion are brought into sharper focus by examining its potential impact on municipal law enforcement in areas other than trespassing offenses. Specifically, viewing the *Wesby* standard in the context of other offenses illustrates the importance of an officer's ability to assess all the facts and circumstances at the time of arrest and highlights the potential chilling effect of requiring officers to discount such evidence or face personal liability. As the First Circuit observed in *Cox v. Hainey*, 391 F.3d at 34, the "practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great."

For example, circumstantial evidence of culpability is frequently considered in property crimes like theft and possession of stolen goods. In *Conner v. Heiman*, 672 F.3d 1126 (9th Cir. 2012), the Ninth Circuit reversed the district court's finding of a lack of

probable cause on an arrest for theft, where the circumstances suggested that a casino patron who refused to return an overpayment "knowingly controlled the [casino's] property and intended to deprive [the casino] of that property." *Id.* at 1133. Though as in *Wesby*, the actus reus of the crime was complete (the defendant had refused to return the money), the district court nonetheless refused to apply qualified immunity because "a reasonable jury could find that there was no probable cause to believe that plaintiff had the requisite mens rea for theft." *Id.* at 1130. The district court posited that the suspect behaved in a manner "consistent with" an innocent person and reserved the qualified immunity question for the jury. Reversing, the court of appeals held that the district court should have decided the qualified immunity question, and held that the officers "could have reasonably concluded that they had probable cause" of a culpable mental state based on circumstantial evidence. The court considered that the nature of the overpayment "would have been obvious to most players" and that the suspect was rude and defensive when confronted by employees about the overpayment. *Id.* at 1133. In light of this evidence of the suspect's mental state, the officers had probable cause for the arrest.[3]

---

[3] *See also State in Interest of D.M.*, 91 So. 3d 296, 299-300 (La. 2012) (circumstantial evidence demonstrated that the defendant "knew or reasonably should have known" the vehicle in which he was riding was stolen and considering defendant's "flight, concealment, and initial resistance to arrest" and that he had observed damage to the steering column and the ignition of the stolen van); *Moore v. United States*, 757 A.2d 78, 83 (D.C. 2000) (a jury may infer the requisite state of mind for the offense of receiving stolen property

Drug crimes also often require evaluating circumstantial evidence of mens rea at the time of arrest. In *State v. McKnight*, 737 So.2d 218 (1999), the trial court found no probable cause to hold a suspect for "knowing" possession of cocaine. The Court of Appeal of Louisiana reversed, holding that the suspect's possession of a crack pipe with cocaine residue was sufficient to support the probable cause determination that "it was more probable than not that the defendant [knowingly] possessed cocaine." *Id.* at 220 n.2. Quoting *State v. Maxwell*, 699 So.2d 512, 514 (1997), the court stated "the issue is **not** a finding beyond a reasonable doubt that the defendant was aware of the residue in the pipe. That issue must be decided at trial." *McKnight*, 699 So.2d at 219 (emphasis in original). Likewise, in *Cox v. Hainey*, the First Circuit determined that, based on the circumstantial evidence, the arresting officer reasonably inferred that the suspect had intentionally furnished prescription drugs to his minor son. 391 F.3d at 33-34. Thus, despite the suspect's assertions that he scrupulously guarded his pills, the officer appropriately considered the son's statement about his ability to procure marijuana from his father, "tending to suggest that the appellant was consciously abetting his son's drug-trafficking activities." *Id*. Though acknowledging the inference between the son's offer of marijuana and the prescription drug charge was "somewhat attenuated", the court concluded that the difficulty of ascertaining intent in the field warranted greater latitude for

---

where evidence reveals defendant's unexplained (or unsatisfactorily explained) possession of recently stolen property) (collecting cases).

arresting officers engaged in making mens rea "judgment calls." As noted in the dissent from denial of rehearing en banc, "the drugs aren't mine" is undoubtedly a common assertion in drug arrests. App. 126a. While this may in fact be true, an officer must at least be permitted to evaluate and consider circumstances suggesting otherwise to determine whether probable cause exists to support an arrest.

Finally, consider a scenario where the police respond to a call and a man asserts that an unconscious woman was raped by another man still at the scene. The accused claims consent, but the officer perceives some evidence of rape present; is that enough to support an arrest? Sexual assault and other sex crimes often require officers to make probable cause determinations on the basis of circumstantial and conflicting evidence of mens rea. For example, in *State v. Midell*, 798 N.W.2d 645 (N.D. 2011), the defendant was charged with engaging in sexual activity with a victim who the person "knows or has reasonable cause to believe" is unaware that a sexual act is being committed upon her. *Id.* at 648 (citing N.D.C.C. § 12.1-20-03(1)(c)). The victim claimed she awoke to find the suspect having sex with her, while the suspect claimed the sex was consensual. In reversing the lower court's failure to find probable cause for arrest, the Supreme Court of North Dakota held that the suspect's knowledge "is a classic question of fact for the jury that rests almost completely on the credibility of witnesses." *Id.* at 649. Thus, the statement of the victim and other circumstances were sufficient to establish probable cause, notwithstanding the suspect's claim to the contrary.

The *Wesby* majority opinion discounted circumstantial evidence of culpability at the time of arrest that is at least as probative—if not more so—than the mens rea evidence relied upon in the above authorities. For example, the obviously vacant condition of the house, (further corroborated by the neighbor's statement that the house was known to be vacant), is at least as probative as the "obvious" nature of the overpayment considered knowledge of theft by the Ninth Circuit in *Connor v. Heiman.* Similarly, the conflicting stories offered by the partiers, along with hiding from the officers, should have been given consideration here just as the *Connor* court considered the suspect's rude and defensive response to the casino employee's inquiries. 672 F.3d at 1133.

In sum, the officers here rightly considered the totality of the circumstances in evaluating probable cause, including the requisite mens rea of the partiers. In so far as the *Wesby* opinion requires officers to credit conflicting statements over other evidence of criminal activity, this Court should reverse.

II. Qualified Immunity Should Protect Officers Who Reasonably Discount a Suspect's Non-Credible Explanation for Apparent Criminal Activity.

As discussed above, the probable cause standard is less than that imposed at trial, but the qualified immunity standard is lesser still. As the First Circuit observed in *Cox*, the "reasonableness standards underlying the probable cause and qualified immunity standards are not coterminous." *Cox*, 391 F.3d at 31. This is because the qualified immunity doctrine is "designed to afford officials an added measure of

protection against civil liability." *Id.*; *see also Figueroa v. Mazza*, No. 14-4116-CV, -- F.3d -- , 2016 WL 3126772, at *6 (2d Cir. June 3, 2016) (qualified immunity inquiry is not whether the officer *should have* acted as he did, but whether *any* reasonable officer *could have* determined that the challenged action was lawful) (emphasis in original) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). As such, even if this Court determines that the officers here were required to accept the partiers' claim of an invitation to the exclusion of all other evidence of unlawful entry, qualified immunity would still attach because this standard was not "clearly established" at the time of the arrests. *See Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015).

To the contrary, numerous cases hold that an officer may discount a suspect's version of events, unless a suspect's claim of innocence is such that "any reasonable officer would understand that an arrest under the circumstances would be unlawful." *Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2015)[4]. This standard

---

[4] As the *Garcia* court explained:

> We are not concerned with whether plaintiffs' asserted belief that the officers' behavior had given them implied permission to violate traffic laws otherwise banning pedestrians from the roadway would constitute a defense to the charge of disorderly conduct; that issue would be presented to a court adjudicating the criminal charges against plaintiffs. Instead, we are faced with the quite separate question of whether any such defense was so clearly established as a matter of law, and whether the facts establishing that defense were so clearly apparent to

gives adequate leeway for officers to discredit non-credible assertions at the time of arrest. Moreover, it is well-established that "[o]nce an officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Curley v. Village of Suffern,* 268 F.3d 65, 70 (2d Cir. 2001); *see also Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) ("The fact that an innocent explanation may be consistent with the facts alleged ... does not negate probable cause.") (citation omitted). The *Wesby* opinion is contrary to this and other authority applying qualified immunity where an officer reasonably rejects a suspect's claim of an innocent state of mind.

For example, in *Romero v. Fay*, 45 F.3d 1472, 1477-78 (10th Cir. 1995), the Tenth Circuit reversed a district court's refusal to apply qualified immunity for a false arrest claim that arose out of a murder investigation. The plaintiff murder suspect alleged that the officer had failed to investigate his alibis and thus the suspect's arrest was unlawful for lack of probable cause. Applying qualified immunity, the court of appeals held that police officers are not required to forego making an arrest based on facts supporting probable cause simply because the arrestee offers a different explanation. 45 F.3d at 1478 n.3. Likewise, in *Curley v. Village of Suffern*, the Second Circuit found

---

> the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs.

Garcia, 779 F.3d at 93.

probable cause to uphold the arrest of a bar owner, and thus hold the officers immune from suit, even in the face of conflicting stories about the origins of the subject bar fight, and over the owner's protestations of innocence. 268 F.3d at 70. Finally, in *Reynolds v. Jamison*, 488 F.3d 756, 768 (7th Cir. 2007), the plaintiff sued for wrongful arrest over violation of a protective order. The plaintiff alleged that the protective order provided an exception for the location where the plaintiff was arrested and the arresting officer "should have either believed him or allowed him to retrieve a copy of the order from his home." *Id.* at 768. The Seventh Circuit rejected this claim, reiterating that once the officer "had probable cause, he was under no constitutional obligation to further investigate Reynolds' possible innocence." *Id.* at 768; *see also Panetta*, 460 F.3d 388 (applying qualified immunity to officer who arrested horse owner for animal neglect, despite owner's innocent explanation of horse's condition and offer to call veterinarian to corroborate).

All told, a suspect's version of events is only one piece of the puzzle. Where conflicting other evidence makes it reasonable to do so, courts have held that officers can discount a suspect's explanation for apparent criminal activity. As such, the *Wesby* court's conclusion to the contrary does not represent "clearly established law" sufficient to impose personal liability on officers. The court of appeals should be reversed.

III. The Standard Created By the Court of Appeals Will Chill Law Enforcement.

Law enforcement officers are tasked with making "in the moment" assessments of criminal activity, often in dangerous situations where facts are unclear and emotions are high. Victims, witnesses and the general public depend on officers to use good and reasonable judgment, calling on their expertise and experience to evaluate the situation on the ground, without constant fear of personal liability. The law recognizes that an officer's determination of probable cause is not the same calculus conducted by courts and lawyers from the comfort of their desks. Rather, as this Court has held:

> As early as *Locke v. United States*, 7 Cranch 339, 348 (1813), Chief Justice Marshall observed, "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." . . . . While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.

Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (internal citations and quotations omitted).

Following this Court's directive, the circuit courts have likewise explained that probable cause is a "fluid"

standard that "does not demand hard certainties or mechanistic inquiries"; nor does it "demand that an officer's good-faith belief that a suspect has committed or is committing a crime be correct or more likely true than false." *Zalaski*, 723 F.3d at 389-90 (citations and internal quotation marks omitted). As such, probable cause for arrest requires only facts establishing "the kind of fair probability" on which a "reasonable and prudent" person, as opposed to a "legal technician[ ]," would rely. *Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61 (2013) (internal quotation marks omitted). This level of flexibility applies equally to the determination of probable cause for the necessary mental element of a crime, and permits an officer in the field to evaluate the "totality of the circumstances" in assessing probable cause with respect to culpability. In making this evaluation, officers who reasonably discount non-credible explanations of otherwise apparent criminal activity should be granted qualified immunity.

By denying qualified immunity here, the court of appeals' decision suggests that officers must reject circumstantial evidence of a culpable mental state if the suspect offers a contrary explanation or face personal liability. The majority opinion conflicts with numerous state and federal court decisions holding that circumstantial evidence may be properly considered in determining mens rea, both at the arrest stage and under the significantly higher burden applied at trial. As exemplified by the decisions discussed above, this means that officers should be able to consider circumstantial evidence that tends to support a suspect's mental state, but also disregard conflicting evidence when reasonable to do so. For the

purposes of qualified immunity, the touchstone for determining probable cause lies, not in the mental state of the accused, but in the totality of the circumstances available to and considered by the arresting officer. As the Seventh Circuit explained in *Reynolds*, "[l]aw enforcement officers often encounter competing and inconsistent stories. If officers were required to determine exactly where the truth lies before acting, the job of policing would be very risky financially as well as physically." *Id.* at 768-69 (citing *Askew v. City of Chicago,* 440 F.3d 894, 896 (7th Cir. 2006)). "Police would respond by disbelieving witnesses (or not acting on allegations) lest they end up paying damages, and the public would suffer as law enforcement declined." *Id.* Imposing monetary damages on public servants should be reserved for those instances of "plain incompetence" or "knowing violation of the law." *Malley*, 475 U.S. at 341. Here, the officers demonstrated neither. The court of appeals should be reversed.

CONCLUSION

It is well-established that officers can (and should) consider circumstantial evidence of mens rea at the probable cause stage and be given the latitude to discount a suspect's conflicting explanations when objectively reasonable to do so. There is no "clearly established" law to the contrary. The *Wesby* opinion contradicts this authority in so far as it directs officers to ignore circumstantial evidence of culpability or face personal liability in damages. To be clear, Amicus does not promote an "arrest first, ask questions later" approach. To the contrary, officers should be free to thoughtfully consider all of the evidence before them in

making an arrest, including circumstantial evidence of the requisite mental state. Because the *Wesby* opinion detours from this Court's qualified immunity analysis and conflicts with it and the decisions of courts throughout the United States, Amicus respectfully urges this Court to grant certiorari and summarily reverse.

DATED this 8th day of July, 2016.

Respectfully submitted,

KYMBERLY K. EVANSON
Counsel of Record
TANIA M. CULBERTSON
Pacifica Law Group LLP
1191 Second Ave.
Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Kymberly.Evanson@pacificalawgroup.com

CHARLES W. THOMPSON
Executive Director
International Municipal
Lawyers Association
7910 Woodmont Ave.
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amicus Curiae
International Municipal
Lawyers Association