No. 11-430

IN THE

# Supreme Court of the United States

SHARON BOGAN,
*Petitioner,*

v.

CITY OF CHICAGO,
MATTHEW BREEN, and WILLIAM LANGLE,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether this Court should decline to review the Seventh Circuit's holding that, in a section 1983 civil action alleging a Fourth Amendment violation arising from a warrantless search, the plaintiff bears the burden of proving the challenged search was unreasonable, where that decision accords with every other circuit that has decided this question, and where shifting the burden to the defendant would depart from the customary burden of proof in civil trials.

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## STATEMENT

### *Factual Background*

Around 2:30 a.m. on May 9, 2009, respondents Chicago Police Officers Matthew Breen and William Langle went to the apartment of Nicole Evans ("Evans"), in response to a 911 call from an eight-year-old child reporting that his mother was being beaten. Pet. App. 2a. Upon arriving at the second floor apartment, the officers knocked on the door and announced their office, and a male voice from inside the apartment yelled back, "What the f*** do you want?" *Ibid.* The officers also heard a woman

screaming for help, and when they followed her voice, they found Evans, distraught and partly undressed, on the building's roof. *Ibid.* Evans told the officers that her boyfriend, Antonio Pearson ("Pearson"), had been drinking all day, and that when she tried to wake him, he began to beat and choke her. *Ibid.* The officers helped Evans inside through a window into a stairwell, and Evans told them she wanted Pearson arrested. *Ibid.* The officers went back onto the roof to find a way into the apartment. *Ibid.*

From the roof, Officer Langle saw an African-American man inside a bedroom, and when the man noticed Officer Langle, he ran out of the bedroom to the rear of the apartment. Pet. App. 3a. The officers entered through a window and searched the apartment, but could not find Pearson. *Ibid.* While the officers were in the apartment, they received a "flash message" over the police radio informing them that there was a black male on the building's rear porch. *Ibid.* The officers then went to the rear of the apartment and passed through an open door into a short hallway or landing area, at the other end of which was a closed door. *Id.* at 3a, 16a. Although there was a stairwell to the right, the officers did not think Pearson could have escaped down the stairs because several other officers had arrived and surrounded the building. *Ibid.* The officers believed the closed door led to a porch or a mudroom, and, given the flash message about a man on the rear porch, they thought Pearson had fled through that door. *Ibid.* In fact, unbeknownst to the officers, the door led to another apartment, occupied by petitioner, Sharon Bogan. *Id.* at 3a. The officers tried the handle on the

door, but it was locked; Officer Breen then tried to force the door open by kicking it. *Ibid.*

In response to the kicking, petitioner opened the door from the inside and asked the officers what they were doing. Pet App. 3a. The officers told petitioner they were looking for Evans's boyfriend, and petitioner replied, "That's my son." *Ibid.* At the time petitioner opened her door, there were already between ten and twelve other officers inside her apartment, whom petitioner had let in through the back door. *Ibid.* Officers Breen and Langle then searched the apartment for Pearson, but did not find him. *Ibid.*

***District Court Proceedings***

Petitioner brought this lawsuit, claiming that Officers Breen and Langle violated her Fourth Amendment rights by entering and searching her apartment without a warrant. Pet. App. 3a-4a. The case was tried to a jury, and at trial, the officers asserted that their entry into petitioner's home was reasonable because their pursuit of a fleeing felon constituted exigent circumstances. *Id.* at 4a-6a.

Both during the court's preliminary instructions and at the close of evidence, the court instructed the jury that:

> As a general rule, a police officer must have a search warrant before he may enter a person's home or search a person's home. However, the law establishes certain exceptions to the requirement of a search warrant. One of those exceptions is referred to as the hot pursuit exception.

> Under this exception, a police officer may enter a person's home if, under all the circumstances, a reasonable officer would believe that entry is necessary to prevent the escape of a person who is suspected of a crime and there is insufficient time to obtain a search warrant. The question is what a reasonable officer would believe, not what the particular officers in this case actually believed.
>
> To succeed on [her] claim in this case as to the particular defendant you're considering, Ms. Bogan must prove by a preponderance of the evidence that a reasonable officer in the defendant's position would not have believed that a crime suspect was in Ms. Bogan's home.

Pet. App. 5a-6a. The jury returned a verdict for the defendants. *Id.* at 6a. The district court denied petitioner's motion for judgment as a matter of law and entered judgment on the verdict. *Ibid.*

***Decision Below***

Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-17a. As relevant here, the court held that the district court did not err by instructing the jury that petitioner bore the burden of proving that the officers' entry into her home was not justified by exigent circumstances. *Id.* at 6a-13a. Petitioner had contended that because a warrantless search is presumed invalid absent circumstances establishing a recognized exception to the warrant requirement, defendants in a section 1983 warrantless search action should bear the burden of proving such an exception.

*Ibid*. The court recognized that in criminal cases, the government bears the burden of proving that a warrantless search was justified by exigent circumstances, but held that employing that burden of proof in a section 1983 action would be contrary to the established principle that the plaintiff in a civil trial bears the ultimate burden of proof on all elements of her claim. *Id.* at 10a-11a.

The specific question which party in a section 1983 unlawful search case bears the burden of proving the existence or absence of exigent circumstances was one of first impression in the Seventh Circuit. Pet. App. 7a. But the court found guidance in its prior decision in *Valance v. Wisel*, 110 F.3d 1269 (7th Cir. 1997), which addressed another exception to the warrant requirement – consent – in the context of section 1983 litigation. Pet App. 7a-11a. *Valance* adopted the holding of *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991), that when a defendant to a section 1983 unlawful search claim presents evidence that the plaintiff consented to the search, the plaintiff bears the burden of proving either that he never consented or that the consent was invalid because it was the result of duress or coercion. See 110 F.3d at 1278-79. In *Ruggiero*, the Second Circuit concluded that the presumption that a warrantless search is invalid "cannot serve to place on the defendant the burden of proving that the official action was reasonable." 928 F.2d at 563. The court reasoned that although the presumption may require the defendant to produce "evidence of consent . . . or other exceptions to the warrant requirement[,] . . . the ultimate risk of nonpersuasion must remain squarely on the plaintiff in

accordance with established principles governing civil trials." *Ibid.* (citations omitted).

In the decision below, the Seventh Circuit agreed with the reasoning of *Valance* and *Ruggiero*, and found no basis to allocate the burden of proof differently in a case where the asserted exception to the warrant requirement is exigent circumstances rather than consent. Pet. App. 9a. The court acknowledged that some circuits, in cases involving civil actions pursuant to section 1983, have stated that police officers bear the burden of proving that exigent circumstances justified a warrantless search. *Id.* at 10a. But the court observed that each of the cases petitioner cited (*Armijo v. Peterson*, 601 F.3d 1065 (10th Cir. 2010); *Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009); *Hardesty v. Hamburg Township*, 461 F.3d 646 (6th Cir. 2006); and *Parkhurst v. Trapp*, 77 F.3d 707 (3d Cir. 1996)), simply recites this proposition "*without discussion*," and "relies on a *criminal* case for support." Pet. App. 10a (emphasis in original). Accordingly, the court found petitioner's reliance on these cases unpersuasive, in contrast to *Valance* and *Ruggiero*, which specifically examined the different allocation of the burden of proof in civil and criminal cases. *Id.* at 10a-11a.

## REASONS FOR DENYING THE PETITION

Petitioner's claim that the respondent officers violated her Fourth Amendment rights when they entered her home was tried to a jury, which found in favor of respondents. Petitioner seeks review, claiming the district court erred by instructing the jury that she bore the burden of proving by a preponderance of the

evidence that the officers' entry into her home was not justified by exigent circumstances. But this instruction simply reflected the well-established principle that a plaintiff seeking damages in a civil lawsuit bears the ultimate burden of persuasion on every element of her claim. Indeed, the decision below is in accord with the holdings of the Second, Fifth, and Ninth Circuits, which, as far as we have been able to determine, are the only other courts of appeals to have decided the specific question at issue here: whether, in a civil action asserting a violation of the Fourth Amendment based on a warrantless search, the plaintiff or the defendant bears the ultimate burden of persuasion at trial on the question whether the search was justified by an exception to the warrant requirement.

Petitioner claims that the decision below conflicts with the approach of four other circuits, relying on civil cases stating that the government bears the burden of demonstrating exigent circumstances. But, as the Seventh Circuit recognized here, these decisions offer such statements only in passing, and for support cite criminal cases, where the government unquestionably bears the burden of establishing the validity of a search. Moreover, no circuit has purported to apply that rule to govern the burden of persuasion at trial in a civil case. None of the decisions petitioner cites concerns that issue, and, for that matter, there is no indication in any of the civil cases reciting the criminal burden of proof that this burden played any role in the court's decision. Thus, despite the apparently contradictory language in some cases, there is no true conflict among the circuits that might warrant this

Court's review.

**The Decision Below Comports With Established Principles Governing Civil Trials And With The Decisions Of The Other Circuits.**

1. Section 1983 establishes a civil remedy to redress violations of rights guaranteed by the Constitution or federal law (see, *e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 483 (1994)), and as such, the statute "should be read against the background of tort liability" (*Monroe v. Pape*, 365 U.S. 167, 187 (1961)). Accordingly, the principle that a plaintiff in a civil suit bears the burden of establishing the elements of her claim by a preponderance of the evidence (see, *e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983)), applies fully in section 1983 actions (see, *e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998)), as the federal circuits uniformly recognize.[1] And, in

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[1] See, *e.g.*, *McCarty v. Gilchrist*, 646 F.3d 1281, 1285-86 (10th Cir. 2011); *McBride v. Grice*, 576 F.3d 703, 706 (7th Cir. 2009); *Parsons v. City of Pontiac*, 533 F.3d 492, 500 (6th Cir. 2008); *Pavao v. Pagay*, 307 F.3d 915, 918-19 (9th Cir. 2002); *Cuesta v. School Board of Miami-Dade County*, 285 F.3d 962, 970 (11th Cir. 2002); *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002); *Merkle v. Upper Dublin School District*, 211 F.3d 782, 789 (3d Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998); *Sorenson v. Ferrie*, 134 F.3d 325, 330 (5th Cir. 1998); *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998); *American Federation of Government Employees, AFL-CIO v. Skinner*, 885 F.2d 884, 894 (D.C. Cir. 1989); *Clark v. Mann*, 562 F.2d 1104, 1117 (8th Cir. 1977).

particular, a plaintiff asserting a Fourth Amendment claim arising from a warrantless search "must prove . . . that the search was unlawful." *Heck*, 512 U.S. at 487 n.8.

Despite this settled law, petitioner contends that in a section 1983 action arising from a warrantless search, the plaintiff should not be assigned the burden of proving the search was unreasonable. Instead, petitioner argues, defendants seeking to avoid liability for such a search should be required to prove the search was justified by a recognized exception to the warrant requirement. To support allocating the burden of proof in this manner, petitioner relies on the principle that a warrantless entry into a private residence is "'per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions.'" Pet. 7 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971)).

2. Four circuits have explicitly rejected the proposition, advanced by petitioner, that this presumption of invalidity shifts the burden of persuasion in a civil case involving a warrantless search, such that the defendant must prove by a preponderance of the evidence that an exception to the warrant requirement applies. In this case, the Seventh Circuit re-affirmed its approval, previously expressed in *Valance v. Wisel*, 110 F.3d 1269 (7th Cir. 1997), of the Second Circuit's decision in *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991). Pet. App. 7a-11a. *Ruggiero* rejected the argument that the jury should have been instructed that the burden of proving exceptions to the warrant requirement – there, consent and "plain view" – rested on the defendants. See 928

F.2d at 562-63. The court reasoned that although the presumption that a warrantless search is invalid "may cast upon the defendant the duty of producing evidence" of an exception to the warrant requirement, "the ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials." *Id.* at 563. In so holding, the Second Circuit aligned itself with the Fifth Circuit (see *ibid.*), which held in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989) (abrogated on other grounds by *Horton v. California*, 496 U.S. 128 (1990)), that it was error to instruct the jury that defendants bore the burden of proving by a preponderance of the evidence that seized items fell within the "plain view" exception (884 F.2d at 824-26). The Ninth Circuit is also in accord. *Larez v. Holcomb*, 16 F.3d 1513 (9th Cir. 1994), citing *Ruggiero*, found error in an instruction that the defendant bore the burden of proving consent was voluntary. *Id.* at 1517-18. Although *Larez* involved a false arrest claim – an unusual context for the issue of consent to arise, as the court noted (see *id.* at 1517) – the court has applied the same burden to claims of unlawful search (see *Pavao v. Pagay*, 307 F.3d 915, 918-19 (9th Cir. 2002)).[2]

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[2] Although the cases cited above involved exceptions to the warrant requirement other than exigent circumstances, the court of appeals found unpersuasive petitioner's argument below that the burden of proof should vary depending on the particular exception asserted as justification for a search (Pet. App. 9a), and petitioner does not press this distinction as a basis for review. Indeed, petitioner does not disagree that the decision below aligns with *Ruggiero* (see Pet. 6), and she does not even acknowledge *Crowder* and

These decisions simply reflect the customary burden of proof in civil cases. In none of these cases did the court doubt the firm rule, emphasized by petitioner, that "[i]n criminal cases, 'the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.'" Pet. 5 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984)). Rather, the decisions cited above recognize the critical distinctions between the burdens of proof in criminal and civil cases. See, *e.g.*, *Pavao*, 307 F.3d at 919; *Valance*, 110 F.3d at 1278; *Crowder*, 884 F.2d at 824 n.27. In a criminal case, of course, the government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970). The interests at stake in a civil damages action are fundamentally different, even if the injury alleged is a deprivation of a constitutional right. Accordingly, a civil plaintiff needs only a preponderance of the evidence in her favor to prevail, but it remains the plaintiff's burden to come forward with evidence sufficient to establish the elements of her claim and to persuade the finder of fact. See, *e.g.*, *Herman & MacLean*, 459 U.S. at 387. Adhering to these principles, those circuits that have specifically addressed the question have held that the burden the

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*Larez*, which, although not cited by the court of appeals, were addressed in the parties' briefs below (see Brief of Defendants-Appellees 19-20; Reply Brief of Plaintiff-Appellant 8-9, *Bogan v. City of Chicago*, 644 F.3d 563 (7th Cir. 2011)).

Fourth Amendment imposes on the government of proving an exception to the warrant requirement in a criminal case does not shift to officers defending against section 1983 actions the ultimate burden of proving the reasonableness of a warrantless search.[3]

It bears emphasis that the decision below and similar decisions from other circuits do not altogether excuse an officer sued in connection with a warrantless search from establishing circumstances excusing the need for a warrant. As we have noted, *Ruggiero* observed that because a warrantless search is presumed invalid unless shown otherwise, a defendant in a civil case involving such a search will likely have

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[3] Although the First, Third, Eighth, and Tenth Circuits are among those that have not published an opinion addressing this particular issue, and the Fourth Circuit has found it unnecessary to resolve which party in a section 1983 case bears the ultimate burden of proof as to whether a plaintiff's consent to search was voluntary (see *Trulock v. Freeh*, 275 F.3d 391, 401 n.4 (4th Cir. 2001)), district courts in these circuits have followed the holdings of the Second, Fifth, Seventh, and Ninth Circuits (see, *e.g.*, *Der v. Connolly*, No. 08-6409, 2011 WL 31498, *1-*2 (D. Minn. Jan. 5, 2011); *Copar Pumice Co. v. Morris*, No. 07-0079, 2009 WL 2431981, *1 (D.N.M. July 8, 2009); *Wilson v. Damon*, No. 08-186, 2009 WL 426018, *4 (W.D. Okla. Feb. 19, 2009); *Wells v. Brigman*, No. 07-0025, 2008 WL 536614, *6 (E.D. Ark. Feb. 25, 2008); *Hogan v. City of Easton*, No. 04-759, 2006 WL 2645158, *11 n.9 (E.D. Pa. Sept. 12, 2006); *Bailey v. McCarthy*, No. 01-82, 2002 WL 91886, *6-*7 (D. Maine Jan. 25, 2002); *Guseman v. Martinez*, 1 F. Supp. 2d 1240, 1254 (D. Kan. 1998); *Amato v. City of Richmond*, 875 F. Supp. 1124, 1133-34 (E.D. Va. 1994)).

to come forward with evidence to rebut the presumption. See 928 F.2d at 563. The Seventh Circuit likewise recognizes this burden of production. See Pet. App. 8a; *Valance*, 110 F.3d at 1279). Under this approach, defendants have the burden to "demonstrate" that an exception to the warrant requirement applies, as petitioner contends the rule should be (*e.g.*, Pet. 7), in the sense that they must present evidence that if credited could support a finding that the search was reasonable notwithstanding the absence of a warrant.[4] But a presumption requiring a party to come forward with evidence "does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301. While the burden of production concerns "which party bears the obligation to come forward with the evidence at different points in the proceeding," the burden of persuasion concerns "which party loses if the evidence is closely balanced." *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). That burden ordinarily falls "upon the party seeking relief." *Ibid.*

3. And, indeed, no circuit has approved of departing from this allocation of the burden of persuasion in section 1983 unlawful search cases. Petitioner claims that the Third, Sixth, Ninth, and

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[4] Petitioner does not and could not contend that respondents failed to meet this burden here. The court of appeals rejected petitioner's argument below that she was entitled to judgment as a matter of law, holding that respondents presented sufficient evidence to support the verdict in their favor (Pet. App. 16a-17a), and petitioner does not seek review of that holding.

Tenth Circuits have held, contrary to the decision below, that "the burden of proof in a Section 1983 damages action is on the police to establish exigent circumstances." Pet. 5-6. But each of the cases petitioner cites to illustrate this supposed conflict simply recites, without discussion or apparent relevance to the court's analysis, slight variations on the proposition that the government bears the burden of showing the existence of circumstances justifying a warrantless entry, and each cites a criminal case in support of this proposition. See *Armijo v. Peterson*, 601 F.3d 1065, 1070 (10th Cir. 2010) (citing *United States v. Reeves*, 524 F.3d 1161, 1169 (10th Cir. 2008)); *Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009) (citing *United States v. Stafford*, 416 F.3d 1068, 1074 (9th Cir. 2005)); *Hardesty v. Hamburg Township*, 461 F.3d 646, 655 (6th Cir. 2006) (citing *United States v. Bates*, 84 F.3d 790, 794 (6th Cir. 1996)); *Parkhurst v. Trapp*, 77 F.3d 707, 711 (3d Cir. 1996) (citing *Vale v. Louisiana*, 399 U.S. 30 (1970)).

None of these cases holds that the defendant in a section 1983 warrantless search case bears the burden of persuasion at trial on the question of exigent circumstances, much less opines about how the jury should be instructed in such a case. All were decisions reviewing summary judgment rulings, and *Armijo* and *Hardesty* were decided in favor of the defendants. See *Armijo*, 601 F.3d at 1075 (reversing denial of summary judgment for defendants on grounds of qualified immunity); *Hardesty*, 461 F.3d at 656 (affirming

summary judgment for defendants).[5] And, although *Hopkins* and *Parkhurst* held that the defendants in those cases were not entitled to summary judgment (see *Hopkins*, 573 F.3d at 760; *Parkhurst*, 77 F.3d at 713), there is no indication in either case that the court's passing statement concerning the burden of showing exigent circumstances affected the resolution of the appeal. Rather, these statements appear to be nothing more than boilerplate. And they would seem to be poorly considered, to the extent they suggest that the government's burden of proving exigent circumstances in a criminal cases generally applies in civil cases, with no discussion whether that result is proper in light of the different burdens in criminal and civil cases. On the other hand, such statements about police officers' obligation to justify a warrantless search might fairly be read to reflect only the burden of production the Second and Seventh Circuits have recognized. Either way, none of the decisions petitioner cites actually conflicts with the decision below; the only "conflict" is linguistic.

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[5] Petitioner's claim of a split between the Tenth and Seventh Circuits is further undermined by one district court's observation that although "[t]he Tenth Circuit has not squarely held whether a defendant in a section 1983 case has the burden of proving that an exception to the warrant requirement applies," two of that court's unpublished decisions "indicate . . . that the burden of proof remains with the plaintiff." *Copar Pumice*, 2009 WL 2431981 at *1 (citing *Snider v. Lincoln County Board of Commissioners*, 313 Fed. Appx. 85 (10th Cir. 2008), and *Reid v. Hamby*, 124 F.3d 217 (10th Cir. 1997)).

In fact, petitioner's reliance on *Hopkins* to support her claim of a conflict illustrates the error in reading isolated boilerplate passages about the burden of proof to represent a particular circuit's stance. As we have explained, the Ninth Circuit expressly held in *Larez* and *Pavao* that the plaintiff in a civil case bears the ultimate burden of proving lack of justification for a search. Certainly *Hopkins*, which merely quoted in passing a criminal case for the proposition that "the Government bears the burden of demonstrating that the search at issue" falls into an exception to the warrant requirement (573 F.3d at 764), did not purport to repudiate the court's own prior holdings in *Larez* and *Pavao*. Moreover, that the latter cases remain controlling in the Ninth Circuit is reflected in that circuit's model civil jury instructions for section 1983 unlawful search cases. Those instructions, after setting forth the elements of various exceptions to the warrant requirement, state that: "In order to prove the search in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply." 9th Cir. Civ. Jury Instr. 9.12, 9.13, 9.14, 9.15 (West 2010).[6] It is thus plain that petitioner is

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[6] In the comments to these model instructions, the judicial committee, perceiving a conflict among the circuits "concerning which party in a § 1983 civil action has the burden to prove the factual basis for an exception" to the warrant requirement, cites *Larez* as controlling this burden in the Ninth Circuit. 9th Cir. Civ. Jury Instr. 9.12, 9.13, 9.14, 9.15 comment. We submit that the committee, in perceiving a conflict, was misled by loose language in some circuits' decisions concerning the burden of proof. Some

incorrect in holding out Ninth Circuit precedent as an example of conflict with the decision below.

For that matter, even in the Second and Seventh Circuits – which petitioner concedes reject her contention about the proper allocation of the burden of proof – it is not difficult to find decisions with language of the sort petitioner relies on to try to show a conflict with those circuits. See *Anobile v. Pellegrino*, 303 F.3d 107, 124 (2d Cir. 2002) ("The official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntarily."); *Jacobs v. City of Chicago*, 215 F.3d 758, 770 (7th Cir. 2000) ("[T]he burden is on the Defendant Officers to show" that a search was justified, rather than "on plaintiffs to show that their apartment should not have been searched."); *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc) (abrogated on other grounds by *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991)) ("The burden of proof should be placed on the police to establish the existence of an emergency that prevented them from obtaining a warrant."). Given the explicit holdings of the Second Circuit in *Ruggiero*, and the Seventh Circuit in *Valance* and the decision below, it is obvious that the seemingly contrary statements in *Anobile*, *Jacobs*, and *Llaguno* do not establish that these circuits place the burden of proof at trial on defendants. As the Seventh Circuit explained in the decision below, such

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courts have similarly read isolated passages in other courts' decisions to suggest a conflict (see, *e.g.*, *Trulock*, 275 F.3d at 401 n.4; *Amato*, 875 F. Supp. at 1134), where, for the reasons we have explained, no true conflict exists.

statements "must be placed in the procedural context in which [they] arise[]." Pet. App. 12a n.4.

In sum, only a very few decisions have addressed the question of which party bears the burden of persuasion in a civil trial on the absence or existence of exceptions to the warrant requirement, and those that have are in agreement that the burden is the plaintiff's. Other decisions remarking generally that the government has the burden to establish an exception to the warrant requirement, such as those relied on by petitioner, do not establish any true conflict. Indeed, although only the Second, Fifth, Seventh, and Ninth Circuits have expressly held that the plaintiff bears the burden of proving that an exception to the warrant requirement does not apply, as we have noted, in nearly every other circuit, district courts – which far more frequently must address questions of trial burdens – have followed the holdings that accord with the decision below.

4. Additionally, that so few of the multitude of section 1983 unlawful search cases decided every year have addressed jury instructions on the burden of proof suggests either that the issue arises infrequently or that when it does, the burden of proof is rarely determinative. Either way, an opinion from this Court would have very limited impact on the administration of section 1983 litigation in the lower courts. Nor have the lower courts that have addressed the issue expressed a need for guidance from this Court; even those decisions perceiving a conflict have had little difficulty finding the considered holdings of the Second, Fifth, Seventh, and Ninth Circuits persuasive, in contrast to passing statements in other decisions that

did not affect the outcome in those cases.

5. Finally, the decision below and similar decisions from other circuits correctly adhere both to this Court's Fourth Amendment jurisprudence and to well-established principles governing civil trials. The decision below, in recognizing that section 1983 defendants must ordinarily come forward with evidence to rebut the presumption that a warrantless search is invalid, accommodates the importance that the Fourth Amendment has been interpreted to place on the warrant requirement. At the same time, holding that the plaintiff retains the ultimate burden of proving that the search was unjustified comports with the ordinary rule that the burden of persuasion rests upon the party seeking relief.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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