UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY BATT, LUANN BATT, and JOSEPH BATT; *Plaintiffs,*	)	
v.	)	**CIV No. 12-cv-01198-G(F)**
JOSEPH BUCCILLI, in his personal capacity, *Defendant.*	)	

OBJECTIONS OF PLAINTIFFS
TIMOTHY BATT, LUANN BATT, AND JOSEPH BATT
TO THE MAGISTRATE'S REPORT AND RECOMMENDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional Provisions Cited

Statutes Cited

Rules Cited

INTRODUCTION

On April 17, 2012, Lt. Joseph Buccilli of the Orchard Park Police Department forcibly entered the home of Timothy, LuAnn, and Joseph Batt. Docket No. 35.2 ¶¶ 20, 22-23, 55-61, 86. Just moments before, Joseph had asked Lt. Buccilli to wait outside while he made a private call, and had told Lt. Buccilli that he did not have permission to enter. *Id.* at ¶¶ 46-47, 50-53. Once inside, Lt. Buccilli refused to leave and demanded access to Fred Puntoriero, Joseph's grandfather, who was resting in the family living room. *Id.* at ¶¶ 62, 75, 84.

Relying on facts starkly different from these, the Magistrate concluded that Lt. Buccilli did not violate the Fourth Amendment, Mag. R&R at 14-19, or any other clearly established law, Mag. R&R at 19-22, because Lt. Buccilli was conducting a "police welfare check."[1] But a "welfare check" is not a talisman against the Fourth Amendment. "[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. Hassock,* 631 F.3d 79, 84 (2d Cir. 2011). Even "welfare checks" must be justified by "exigent circumstances requiring prompt entry," if police "enter a dwelling without a warrant." *Montanez v. Sharoh*, 444 Fed.Appx. 484, 486-87 (2d Cir. 2011) (UNREPORTED).

The Magistrate's recommendation is both clearly erroneous and contrary to law. First, there are material factual disputes as to (1) whether Lt. Buccilli forced his way into the home, and (2) what he knew when he did so. Second, the Magistrate resolves these factual disputes in Lt. Buccilli's favor, contrary to *Tolan v. Cotton,* __ U.S. __, 134 S.Ct. 1861 (2014). Third, in April 2012, no reasonable officer would have believed that the facts—viewed in the light most favorable to the Batts—created the exigency needed to forcibly enter a private home.

[1] The Magistrate unorthodoxly defines "welfare check" using reference.com, an online encyclopedia that draws its definition from the webpage of a Chicago law firm created for the purpose of expanding the firm's clientele. *See* Mag. R&R at 4 n. 4, *citing* reference.com/ government-politics/police-welfare-check-351b1aea09018746?qo=cdpArticles, *sourced by* srhunterlaw.com/Police-Wellness-Checks (accessed July 26, 2016).

ARGUMENT

I. STANDARDS OF REVIEW

A. Reconsideration of the Magistrate's Report and Recommendation.

A Magistrate's recommendation on a pretrial matter may be reconsidered if the proposed order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A) (2016). The court reviews the record *de novo*. *Williams v. Beemiller, Inc.*, 527 F.3d 259, 266 (2d Cir. 2008).

B. Summary Judgment.

A pretrial grant of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-8 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Magistrate neglects to note that in "articulating the factual context of the case," the "'evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *C.f.* Mag. R&R at 11-12 *with Tolan*, 134 S.Ct. at 1863, *quoting Anderson*, 477 U.S. at 255. Under either qualified immunity prong, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment" and "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions" when evaluating the plaintiffs' claims. *Tolan*, 134 S.Ct. at 1866.

C. Qualified Immunity.

Qualified immunity turns on whether the *contours* of the right are clear. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "[I]t has never been required that the right be defined so narrowly as to require precedent that is 'on all fours' . . ." *Vega v. Miller*, 273 F.3d 460, 477 (2d Cir. 2001). On the contrary, "[a] prior judicial decision holding conduct such as [Lt. Buccilli's] to be a basis for suit [is] not necessary to apprise [him] of a rule which should come as no surprise. . . ." *Selzer v. Fleisher*, 629 F.2d 809, 812 (2d Cir. 1980); *see also Poe v. Leonard*, 282 F.3d 123, 137–139

(2d Cir. 2002) (holding that while the cases cited by Poe were "not on all fours with Poe's claim," they were nevertheless "instructive" in determining whether there were triable issues); *Jeffries v. Harleston*, 21 F.3d 1238, 1248 (2d Cir. 1994) *vacated on other grounds*, 115 S.Ct. 502 (Mem) (1994) ("The defendants, in effect, believe they can act as they choose until there is a case on all fours. We reject such jural insouciance. The defendants should have known their actions were illegal from the decisions reproving closely analogous conduct").

II. THE MAGISTRATE RELIED ON THE EVIDENCE MOST FAVORABLE TO LT. BUCCILLI TO OBFUSCATE CRITICAL DISPUTES OF MATERIAL FACT

Contrary to *Tolan*, *Anderson*, and *Adickes*, both Lt. Buccilli and the Magistrate urge this Court to ignore genuine issues of material fact and to resolve clear factual disputes in Lt. Buccilli's favor. These objections are explained at length in the Batts' Rule 56(a)(2) Opposing Statement of Uncontested Facts and Statement of Additional Material Facts (hereinafter "Docket No. 35.2"). Here, the Magistrates' two most egregious errors are more than enough to merit reversal.

First, the evidence most favorable to the Batts proves that Lt. Buccilli forced his way into the Batts' home without consent or prior judicial approval. This invalidates the Magistrate's legal conclusions on both the Fourth Amendment and qualified immunity, because the Magistrate failed to follow the stringent legal analysis demanded whenever government officials invade the home. Second, Lt. Buccilli did not know ***any*** of Annette Puntoriero's allegations—or even that Annette was the reporter—and everything he learned upon arrival mitigated any emergent concerns. Clearly established law prohibited police from invading a home in those circumstances.

A. Lt. Buccilli forcibly entered the Batts' home.

The Magistrate describes the events leading rise to Lt. Buccilli's entry as follows:

> When Buccilli and Kadi replied that they still needed to check on Puntoriero's welfare, Joe Batt stated he first needed to make a telephone call and ***asked the officers to remain outside***. Buccilli asked Joe Batt to bring Puntoriero outside or to a window but Joe Batt continued to refuse to allow Buccilli and Kadi to see his grandfather, Puntoriero. Buccilli

> also asked Joe Batt to provide a telephone number for a parent or homeowner for the residence, but Joe Batt did not cooperate with the request and instead walked back toward the home. ***Joe Batt entered the home through a side door and attempted to slam the door on the officers who were closely following, but was prevented by Buccilli who stuck his foot in the door***. Buccilli and Kadi then entered through the side door of the Batt's home into the kitchen. . . .

Mag. R&R at 8 (emphasis added).

The key allegation—Joseph Batt "attempted to slam the door" on Lt. Buccilli—is contrary to Joseph's account: Lt. Buccilli "***pushed the wooden door against my will*** and entered the home" immediately after Joseph told him that "I was going to make a phone call, asked him not to come into the house, and walked back to the side door." Docket No. 35.2 ¶¶ 22-23. Joseph "didn't know how close [Lt. Buccilli] was behind me" when he "tried to shut the door"; his intention was to "shut[] the door for privacy" so he could make a private phone call, that he did not turn around to see Lt. Buccilli behind him. *Id.* Just moments before, Joseph had asked Lt. Buccilli to wait outside. He had no reason to think Lt. Buccilli would be close enough on his heels to be over the threshold as he shut the kitchen door behind him. *Id.* The Magistrate ignores all this.

Tolan commands that "'[t]he evidence of the ***nonmovant*** is to be believed, and all justifiable inferences are to be drawn in his favor.'" 134 S.Ct. at 1863 (emphasis added). Here, there is no need for any inferences: Joseph's clear, unambiguous testimony was that he did not "slam the door" on Lt. Buccilli. Docket No. 35.2 ¶¶ 22-23. On the contrary, it was Lt. Buccilli who was the aggressor, "putting his foot between the door and the door frame" as Joseph tried to retreat into the privacy of his own home. *Id*. The Magistrate believed Lt. Buccilli instead.

This dispute is material. All parties agree that Lt. Buccilli entered the Batt home without prior judicial approval or consent. Mag. R&R at 8, 10, 21; Docket No. 35.2 ¶ 24, 31-32, 46-49, 51-53, 60-61. If Lt. Buccilli also ***forcibly entered*** the home, the constitutional fallout is severe. Because "the physical entry of the home is the ***chief evil*** against which the wording of the Fourth

Amendment is directed," *Hassock*, 631 F.3d at 84 (emphasis added), "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *see also Payton v. New York*, 445 U.S. 573, 585 (1980); *United States v. Simmons*, 661 F.3d 151, 156 (2d Cir. 2011). Any officer who wishes to invoke one of the "few specifically established and well delineated exceptions" to the warrant requirement, *Coolidge*, 403 U.S. at 454-55, bears the "heavy" burden of proving that there was an "'***urgent need***' to render aid or take action" which precluded prior judicial approval. *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (emphasis added); *see also Harris v. O'Hare*, 770 F.3d 224, 234 (2d Cir. 2014).

The Fourth Amendment "has never been tied to measurement of the quality or quantity of information obtained. . . . ***any physical invasion*** of the structure of the home, 'by even a fraction of an inch,' [is] too much, and there is certainly no exception to the warrant requirement for the officer who ***barely cracks open the front door*** and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, ***all details are intimate details***, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001), *citing Silverman v. United States*, 365 U.S. 505, 512 (1961) (emphasis added). Joseph testified that Lt. Buccilli invaded his home. The Magistrate relied on Lt. Buccilli's deposition to resolve this dispute, ignoring Joseph's account. This is clear legal error. *Tolan*, 134 S.Ct. at 1863, 1866.

B. Lt. Buccilli did not know any specific allegations or encounter any emergent circumstances when he arrived at the Batts' home.

The Magistrate also errs by conflating facts that were known to Lt. Buccilli ***at the time*** he entered the home with facts that were only ***subsequently discovered*** during litigation, and by relying on Lt. Buccilli's account to find "facts" that are contradicted by Lt. Buccilli's own contemporaneous statements, as well as the testimony of multiple other witnesses.

1. The Magistrate colored Lt. Buccilli's "contemporaneous" knowledge with hindsight.

There is a material distinction between facts that are contemporaneously-known versus subsequently-discovered. The Magistrate correctly points out that the Fourth Amendment will not "replace th[e] objective inquiry into appearances with its hindsight determination that there was in fact no emergency." Mag. R&R at 16, *citing United States v. Andino*, 768 F.3d 94, 98 (2d Cir. 2014). In the same vein, the Fourth Amendment also does not permit the use of hindsight to artificially ***increase*** the "emergency" at the scene. On the contrary, "[t]he core question is whether the facts, as they ***appeared at the moment of entry***, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." *United States v. Klump*, 536 F.3d 113, 117-18 (2d Cir. 2008) (emphasis added); *see also Plumhoff v. Rickard*, __ U.S. __, 134 S.Ct. 2012, 2020 (2014); *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964).

This distinction is underscored by *Kerman v. City of New York*, 261 F.3d 229 (2d Cir. 2001), *discussed at* Docket No. 35 at 15-16, 23-24. Even though the officers invoked the "emergency-aid exception," the Second Circuit carefully separated what the officers knew from the ***initial report*** and what they learned ***on the scene*** from what they learned ***after-the-fact***. *Id.* at 232-34. The Court held that the officers acted "unreasonably," the circumstances at the scene did not constitute an "emergency," and the officers failed to "conduct any investigation to confirm the call" before storming into Kerman's residence. *Id.* at 235-6.[2]

The Magistrate admits that some information was probably lost during the transfer from Annette Puntoriero, to Ms. Locicero, to the dispatcher, to Lt. Buccilli. *See* Mag. R&R at 7 ("Buccilli and Kadi had been advised by Orchard Park Police dispatch ***only that*** a call had been received from APS which had received a call from a family member who was 'gravely concerned'

[2] The *Kerman* court granted qualified immunity because the law on anonymous tips changed between 1995 and 2001. *Id*. at 235-7. As the following section shows, the governing law in this case was clear in 2012.

about having been denied access to an elderly male family member for 'almost two weeks'") (emphasis added). Accordingly, *Kerman* required that much finer factual distinctions be drawn.

2. The Magistrate erred by ignoring a corpus of contradictory evidence about what Lt. Buccilli knew and observed when he arrived at the Batts' home.

The Magistrate decided to "limit[] its consideration of the facts to those circumstances confronting Defendant upon responding to the police dispatch," specifically that APS called for "a welfare check on an elderly man whose relative had been denied access to the day before and who had been known to suffer from lethargy and dehydration." Mag. R&R at 16. Even though there is great dispute over what Lt. Buccilli knew and encountered on April 17th, the Magistrate relies solely on Lt. Buccilli's account. *See* Mag. R&R at 7, *citing* Buccilli Deposition Tr. at 36. This is clearly impermissible. *Tolan*, 134 S.Ct. at 1863, 1866; *Anderson*, 477 U.S. at 255.

a. Lt. Buccilli did not know any of Annette Puntoriero's allegations to APS.

After Lt. Buccilli had entered the Batts' home, he told Joseph Batt that APS had asked the police to perform a welfare check, but that he had no idea ***why***:

> I'll tell you why we're here. Somebody contacted -- and keep [the video] rolling, please. Somebody contacted Adult Protective Services -- Erie County Adult Protective Services. And they contacted us, a social worker, requesting that we do a welfare check on [Fred]. ***I don't know the basis or the allegations of what the welfare concerns are***. But as I have been trying to explain to your grandson, Joe, and the other two individuals out there, that we do have a right to come in here when an allegation is made. And notice how I used the word 'allegation' that somebody's welfare may be in jeopardy. I don't need a search warrant. I don't need to ask permission to Joe and anybody else. . . . ***All I know is a county agency called***. And based on their request, I have a right to enter the house and forcibly [sic], if need be, when somebody's welfare is possibly in question. And that's why I'm here. ***The allegation was made that they wanted a welfare check done on you***.

Docket No. 35.2 ¶¶ 14, 51-52, 60-61 (emphasis added).

Lt. Buccilli admits this recording depicts him saying things he really said on April 17, 2012. *Id.* at ¶¶ 54-59. Thus, "[a]ll [he] kn[e]w [was] a county agency called" requesting that he "do a welfare check on [Fred Puntoriero]." He did not "know the basis or the allegations of what

the welfare concerns [we]re," other than that "somebody's welfare [wa]s possibly in question." The Magistrate ignores this admission entirely, even though *Tolan* says he ***cannot*** do that when "articulating the factual context of the case." 134 S.Ct. at 1863.

The Magistrate also assumes that Lt. Buccilli knew that Mr. Puntoriero was "known to suffer from lethargy and dehydration," Mag. R&R at 16, but the police dispatcher claims that APS only said "there was a concern over [Fred Puntoriero's] well-being," and the dispatch call itself—attached as an exhibit to the dispatcher's affidavit— contains no reference to dementia, dehydration, or any other specific health condition. Docket No. 35.2 ¶ 12. This is consistent with Lt. Buccilli's admission that he did not "know the basis or the allegations" for the welfare check.

There is even a dispute over whether Lt. Buccilli knew the identity of the reporter. In the kitchen, Lt. Buccilli said he did not know the identity of the reporter. He told Joseph "I can't give you information that I don't have," and invoked the "law protecting anonymous callers." *Id.* at ¶¶ 19, 52, 60-61. Ms. Locicero also testified that she "always say[s]" that the source of the report is a "call of concern," does not disclose the reporter's identity to the police, and that she ***cannot*** disclose the identity to the police because that information is confidential. *Id.* at ¶ 12. If Ms. Locicero ***cannot*** and ***does not*** disclose a reporter's identity, it is more than fair to infer that Lt. Buccilli could not and did not know the reporter's identity, either.

b. Nothing Lt. Buccilli saw required an immediate, forcible, or warrantless entry.

Officers may enter a dwelling to administer "emergency aid" only if there is reason to suspect an "emergency" within, and that belief is not mitigated or dispelled by the circumstances at the scene. *See Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); *Ryburn v. Huff*, __ U.S. __, 132 S.Ct. 987 (Jan. 23, 2012). The Magistrate describes the scene at the Batts' home as follows:

> Upon arriving at the Batts' home, Buccilli and Kadi were met in the driveway by Joe Batt who had no idea why the police were there and identified himself only as "Joe" who lived

> in the house. In response to Buccilli and Kadi's explanation that they were there to conduct a welfare check on Puntoriero in response to a request by APS based on a confidential call, Joe Batt maintains he advised that a nurse's aide had just left, thereby confirming that Puntoriero lived there. When Buccillo and Kadi replied that they still needed to check on Puntoriero's welfare, Joe Batt stated he first needed to make a telephone call and asked the officers to remain outside. *Id*. at 48-49, 55. Buccilli asked Joe Batt to bring Puntoriero outside or to a window but Joe Batt continued to refuse to allow Buccilli and Kadi to see his grandfather, Puntoriero. Buccilli also asked Joe Batt to provide a telephone number for a parent or homeowner for the residence, but Joe Batt did not cooperate with the request and instead walked back toward the home.

Mag. R&R at 7-8.

As an initial matter, only four of these "circumstances" are undisputed.[3] For the rest, the Magistrate either ignored stark and irreconcilable factual disputes, or resolved them incorrectly:

1) Lt. Buccilli says he told Joseph Batt he was there to conduct "a welfare check of Fred Puntoriero based on a request of Adult Protective Services," but Joseph testified that Lt. Buccilli did not tell him who the subject of the check was. Docket No. 35.2 ¶ 17. Joseph's story should be believed under *Tolan*; the Magistrate believes Lt. Buccilli.
2) Lt. Buccilli maintains that he told Joseph the call was "confidential," but the record shows that he in fact said he did not know the identity of the reporter, and couldn't disclose it because of the "law protecting anonymous callers." *Id.* at ¶¶ 19, 52, 60-61. Joseph's account should be controlling, but the Magistrate sides with the movant.
3) Lt. Buccilli says that "Joseph Batt refused to allow the officers to see his grandfather, and started walking back into the house, and tried to slam the door on the officers." *Id.* at ¶ 22. The Batts say that Lt. Buccilli was the aggressor who forced the door open, and that Joseph told the officers "I'm making a phone call, please don't come inside," instead of refusing to bring Mr. Puntoriero to the window. *Id.* at ¶¶ 22-23.

[3] The parties agree that Joseph Batt spoke with Lt. Buccilli and Officer Kadi on the driveway, Docket No. 35.2 ¶ 15, identified himself as "Joe," *id.* at ¶ 16, confirmed that Fred Puntoriero was on the premises, *id.* at ¶ 18, and was asked to bring Fred Puntoriero to a window. *Id.* at ¶ 21. All other "facts" are disputed.

Following *Tolan*, none of the circumstances Lt. Buccilli confronted outside the home created an "urgent need" to administer "emergency aid." The undisputed facts are entirely innocuous: there was nothing threatening about Joseph talking in the driveway, *id.* at ¶ 15, identifying himself as "Joe," *id.* at ¶ 16, or confirming that Mr. Puntoriero was on the premises, *id.* at ¶ 18, and nothing nefarious in Joseph's request that the officers remain outside while he made a private call. *Id.* at ¶¶ 19, 22-23, 52, 60-61. Indeed, the recommendation ignores the ***undisputed*** fact that Lt. Buccilli was not threatened by Joseph's words, Joseph had nothing in his hands, and Joseph did not lay hands on Lt. Buccilli or initiate any physical contact with him. *Id.* at ¶¶ 65-67.

The Magistrate also adds a fourth contested fact later in his analysis: that "Joe Batt ***essentially refused to speak*** with Buccilli and Kadi other than to tell the officers to leave the property." Mag R&R at 16, *citing* Joe Batt Dep. Tr. at 42-45 (emphasis added). This picture of an "uncooperative" Joseph Batt is a false one. The very testimony cited by the Magistrate reveals that Joseph ***initiated*** the conversation with the officers, Joe Batt Dep. Tr. at 39:11-17; 41:5-14, telling them that he lived in the home, *id.* at 45:7-14; 55:16-19, his grandfather was in the home, *id.* at 46:8-13, LuAnn was a nurse, *id.* at 45:7-14; 46:21-47:2, and a nurse's aide had just left a few hours earlier. *Id.* at 45:7-14; 46:8-13; 46:21-47:2. Joseph also asked Lt. Buccilli why he was in the Batts' driveway, *id.* at 41:5-11, and who had made the call to APS. *Id.* at 47:18-23. Finally and critically, Joseph told Lt. Buccilli he was going inside to make a phone call, and very clearly asked Lt. Buccilli not to enter the house. *Id.* at 48:18-49:1; 49:4-11; 54:22-55:8. The only way a factfinder could conclude that Joseph "essentially refused to speak" to Lt. Buccilli would be to cherry-pick from the record, ignoring all evidence favorable to the Batts. The Magistrate begrudgingly admits that "Joe Batt ***maintains*** he advised that a nurse's aide had just left." Mag.

R&R at 7 (emphasis added). *Tolan* says that Joseph's disagreement is not only ***relevant***, but ***essential*** to "articulating the factual context of the case." 134 S.Ct. at 1863.

In *Harris v. O'Hare*, the Second Circuit held that the "core question" whenever officers enter a home pursuant to the "emergency aid exception" was "whether the facts, as they ***appeared at the moment of entry***, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." 770 F.3d at 235, *citing Simmons,* 661 F.3d at 157 (emphasis in *Harris*). Here, nothing Lt. Buccilli knew "at the moment of entry" would have "led a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." *Id.* at 235. By his own admission, Lt. Buccilli knew only that APS had requested a welfare check. Docket No. 35.2 ¶¶ 10, 14, 51-52, 71-72. When he arrived at the Batt home, nothing he learned or observed suggested there was an immediate need for him to enter the home. *Id.* at ¶¶ 20, 48-49, 82-83. On the contrary, everything he learned at the home reduced the level of "emergency." These facts are both material and essential to both the Fourth Amendment and qualified immunity. By ignoring conflicting evidence, and resolving material disputes in Lt. Buccilli's favor, the Magistrate committed clear legal error.

III. THE MAGISTRATE ERRED IN FAILING TO HOLD LT. BUCCILLI TO THE CLEARLY ESTABLISHED COMMANDS OF THE FOURTH AMENDMENT

"[R]egardless of whether Buccilli lawfully entered the Batts' home on April 17, 2012, a reasonable police officer confronted with similar circumstances would not have believed his entry, without a warrant, into the Batts' home to check on the welfare of Puntoriero was in violation of the Fourth Amendment." Mag. R&R at 21. The magistrate says there is no "precedent clearly establishing a right to traditional Fourth Amendment protections during the type of police entry at issue here," and even if there were, Lt. Buccilli was following a "standard policy" that a "responding officer would proceed to the designated home" for a welfare check "provided some

allegation of reasonable concern had been made." Mag. R&R at 21. Summary judgment's nuanced analysis is dispatched in less than two hundred words—and with it, the Batts' suit.

In fact, a reasonable officer had plenty of "contrary authority" telling him not to forcibly enter the Batts' home, and the Magistrate's suggestion that Lt. Buccilli's actions can be saved by an inherently unconstitutional "policy" has no place in our constitutional system.

A. On April 17, 2012, Lt. Buccilli's forcible entry violated no less than twenty (20) precedents in the Western District of New York.

The Magistrate stresses that Lt. Buccilli performed a "welfare check." But a "welfare check" is not a *sui generis* talisman against the Fourth Amendment; it is a subset of exigent circumstances that must be predicated on a belief of both probable cause and an actual emergency. At least twenty precedents put Lt. Buccilli on notice that it was illegal to force his way into the home, "welfare check" or no "welfare check." The Magistrate follows ***none*** of these opinions.

1. A reasonable officer would have known that the Fourth Amendment applies to the forcible entry of a home, whether or not the police call it a "welfare check."

No less than nine opinions of the Supreme Court, Second Circuit, and the Western District of New York put Lt. Buccilli on ***specific notice*** that even warrantless "welfare checks" in the home are subject to traditional Fourth Amendment analysis. In 1978, the Supreme Court explicitly held that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). "Welfare checks" have been subject to this general rule since the Supreme Court's 2006 "emergency aid" decision, *Brigham City*, 547 U.S. at 403, and the Second Circuit's unanimous decision in November 2011 which held that a warrantless "welfare check" fails the "emergency aid" test unless "[t]he objective circumstances at the time of [the officers]'

entry could cause a reasonable officer to believe that there were exigent circumstances requiring prompt entry." *Montanez*, 444 Fed.Appx. at 486-87.

Brigham City also held in May 2006 that the "emergency aid" exception is only available if there is "an objectively reasonable basis for believing ***both*** that the injured adult might need help ***and*** that the violence in the kitchen was just beginning." 547 U.S. at 406 (emphasis added). In other words, the officer must reasonably believe that the "emergency" is sufficient to validate a warrantless entry, which is "otherwise illegal." When the Supreme Court again invoked the "emergency aid" exception in January 2012, it did so only because there was an "imminent threat of violence" which could justify a warrantless entry that "would be otherwise illegal absent an exigency or emergency." *Ryburn*, 132 S.Ct. at 990.

The Second Circuit unanimously reached the same conclusion as early as 1998, holding that the "emergency aid" exception only applies when the circumstances at the scene make it reasonable to believe that "someone inside had been injured or was in danger." *Tierney v. Davidson*, 133 F.3d 189, 197-98 (2d Cir. 1998). This was reiterated in 2001, when another unanimous Second Circuit panel held that officers could not claim the "emergency aid" exception when no circumstances at the scene suggested an emergency inside the home. *Kerman*, 261 F.3d at 235-37. Finally, it was clearly established in 2006 that officers could not invoke the "emergency aid" exception when there is neither "an urgent need to render aid or take action" nor "evidence to warrant the application of the exigent circumstances exception." *Harris*, 770 F.3d at 233-34.

Finally, Lt. Buccilli acted in the shadow of two local opinions. In *United States v. Paige*, 493 F.Supp.2d 641 (W.D. N.Y. 2007) and *United States v. Sikut*, 488 F.Supp.2d 291 (W.D. N.Y. 2007), the Western District of New York suppressed evidence seized by officers under the

"emergency aid" exception because their home invasion was based on "***mere surmise***, not objective facts reasonably suggesting that an actual emergency involving human safety then existed in Defendant's apartment." *Paige*, 493 F.Supp.2d at 647 (emphasis added). There must be "specific and articulable facts" which "cause a person of 'reasonable caution' to believe that the intrusion was necessary." *Sikut*, 448 F.Supp.2d at 307.

It does not matter whether ***Lt. Buccilli*** believed that the Fourth Amendment did not apply to "welfare checks," *see* Docket No. 35.2 ¶¶ 51-52, 60-61, because no ***reasonable officer*** would have agreed. The Fourth Amendment clearly ***applied*** in April 2012, and it applied ***forcefully***. A warrantless entry into a home is unconstitutional unless justified by a "clearly defined" exigency.

2. A reasonable officer would have known that the Fourth Amendment applies to ***any*** invasion of a home, no matter how "minor" it is cast in retrospect.

A reasonable officer in April 2012 would also have had access to at least ***eleven*** precedents which made it clear that ***any forcible entry*** into the Batts' home would have been illegal. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970). The root of this rule—"no man can set his foot upon his neighbour's close without his leave"—predates even the formation of our union, and would have been "undoubtedly familiar" to "every American statesman" at the founding. *See Florida v. Jardines*, __ U.S. __, 133 S.Ct. 1409, 1415 (2013), *quoting Boyd v. United States,* 116 U.S. 616, 626 (1886) *and Entick v. Carrington,* 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765). Any entry into a home, without prior authorization from an impartial magistrate, is both presumptively and *per se* unreasonable. *Payton,* 445 U.S. at 585; *Coolidge*, 403 U.S. at 454-55; *Simmons*, 661 F.3d 151 at 156. By failing to apply this principle, the Magistrate deviated from law that was both clearly established and axiomatic. *See* Docket No. 36 at 7-8, 23-24; Docket No. 42 at 7-8, 9 n. 3.

The Magistrate tries to minimize this departure, arguing that "aside from briefly speaking with Puntoriero, Buccilli did not conduct any search of the premises or of any person within the house." Mag. R&R at 10. Two errors quickly emerge. First, the Magistrate's conclusion rests entirely on ***hindsight***, instead of the facts "as they ***appeared at the moment of entry***." *Klump*, 536 F.3d at 117-18 (emphasis added). Whether or not Lt. Buccilli ultimately "only" talked to Fred Puntoriero, at his "moment of entry" he claimed an unqualified right to enter the home solely because APS had asked that he do so. Docket No. 35.2 ¶¶ 51-52, 60-61. Second, the Magistrate's implication that Lt. Buccilli's actions were less "outrageous" than they could have been misses the point of the Fourth Amendment entirely. Even "minor" invasions of the home transgress the Fourth Amendment's most sacred promise:

> The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. . . . ***any physical invasion*** of the structure of the home, 'by even a fraction of an inch,' [is] too much," and there is certainly ***no exception to the warrant requirement for the officer who barely cracks open the front door*** and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, ***all details are intimate details***, because the entire area is held safe from prying government eyes.

Kyllo, 533 U.S. at 37, *citing Silverman*, 365 U.S. at 512 (emphasis added).

Lt. Buccilli had other precedents besides *Kyllo*'s bright-line rule. *Florida v. Jardines*, __ U.S. __, 133 S.Ct. 1409 (March 26, 2013), which held that police detectives unreasonably intruded on the privacy of Jardines' home, summarized the law as it existed in 2006. The Court noted that the Fourth Amendment, by its very terms, "indicates with some precision the places and things encompassed by its protections," including the "houses" of the people. *Id.* at 1414, *citing Oliver v. United States*, 466 U.S. 170, 176 (1984). That in itself provides notice to officers that to cross the threshold is to enter an intimately private—and protected—sanctum. Moreover, an entire body of law has formed around not only invasions of the ***home***, but also invasions of the home's ***curtilage***, where "an officer's leave to gather information is sharply circumscribed."

Jardines, 133 S.Ct. at 1415, *citing California v. Ciraolo*, 476 U.S. 207, 213 (1986). The "'conception defining the curtilage' is at any rate familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 133 S.Ct. at 1415, *citing Oliver*, 466 U.S. at 182 n. 12.

Even without the nine cases that explicitly involve "emergency aid" "welfare checks," a reasonable officer would still have been "familiar enough" with the fact that the Batts' home, threshold, and curtilage were subject to special constitutional protection, and that a warrantless, forcible trespass thereupon would be ***presumptively and per se unconstitutional***.

3. A reasonable officer would have known that he was conducting a Fourth Amendment "search" by forcibly invading a home—even to perform a "welfare check."

The Magistrate also implies that no "search" occurred because Lt. Buccilli only talked briefly to Mr. Puntoriero. *See, e.g.*, Mag. R&R at 8 ("Buccilli and Kadi then entered through the side door of the Batts' home into the kitchen and explained they were there to conduct a ***welfare check*** on Puntoriero and ***did not intend to search the home***") (emphasis added). But in April 2012, no reasonable officer would have parsed the Fourth Amendment's prohibition on warrantless "searches" so finely. On the contrary, every "welfare check" case cited above applied traditional Fourth Amendment analysis—a warrantless welfare check was only constitutional if there was an "exigency" that was both serious ***and*** precluded prior judicial review. That fully discredits any theory that "welfare checks" fall outside the Fourth Amendment's broad swath. Moreover, *Kyllo* makes it plain that "[t]he Fourth Amendment's protection of the home has ***never been tied*** to measurement of the quality or quantity of information obtained," and that "all details" extracted from the home are "intimate details" in a constitutional sense. *Kyllo*, 533 U.S. at 37 (emphasis added).

United States v. Jones is equally clear: "[w]here, as here, the Government obtains information by ***physically intruding on a constitutionally protected area***, such a search ["within the

original meaning of the Fourth Amendment"] has ***undoubtedly occurred***." 132 S. Ct. 945, 951 n. 3 (January 23, 2012) (emphasis added). The rule is as broad as it reads: even a "momentary reaching into the interior of a vehicle . . . constitute[s] a search." *Id.* at 952, *citing New York v. Class*, 475 U.S. 106, 114-115 (1986). No one disputes that Lt. Buccilli's sole reason for "physically intruding" into the Batts' home was to "obtain[] information" about Mr. Puntoriero. That intrusion—however brief—was a "search" under *Jones*.

B. Lt. Buccilli's home invasion cannot be saved by Orchard Park's alleged "standard policy," which is both speculative and inherently unconstitutional.

The Magistrate says Lt. Buccilli entered the Batts' home "pursuant to standard policy, to wit, whenever the Orchard Park Police Department dispatched a welfare check, the responding officer would proceed to the designated home provided some allegation of reasonable concern had been made." Mag. R&R at 21. This is both clearly erroneous and a constitutional anathema.

1. For purposes of this motion, Orchard Park has no such "standard policy."

There is only one undisputed "policy" in the record: an "***APS policy*** for a case manager or case worker to try to see the subject of an 'urgent' report within 24 hours." Docket No. 35.2 ¶ 30 (emphasis added). Lt. Buccilli says another ***APS policy*** requires that APS "request[] a welfare check when there is an urgent concern for the person's health or safety," but its contours are sharply disputed, and it would not govern Lt. Buccilli, who was not in APS's employ. *Id.* at ¶ 10.

This "policy"—at least as conceived by the Magistrate—is entirely fictitious. Lt. Buccilli did testify that there is a "standard policy that police officers responding to a welfare check dispatch would ***proceed to the designated home*** so long as some allegation of reasonable concern had been made," Mag. R&R at 8 (emphasis added), but this falls well short of the Magistrate's claim that a "policy" requires officers to ***enter*** every home to which they are dispatched. Liability cannot rise or fall on a fictional policy. On that basis alone, the Magistrate clearly erred.

2. An unconstitutional policy cannot free officers from constitutional restraints.

The Magistrate implies that this fictitious policy gave Lt. Buccilli a measure of cover from the basic, clearly established, well-settled, and damning Fourth Amendment precedents cited above. But the Magistrate's reliance on *Dodd v. City of Norwich* is curious, as *Dodd*'s only reference to a "policy" is in the context of a negligence claim; the policy makes no appearance in the Court's constitutional analysis; and compliance with a policy was not grounds for immunity.

The better precedent is *Security and Law Enforcement Employees, Dist. Council 82, v. Carey*, which held that a correctional institution which randomly searched its correction officers pursuant to a general policy violated the Fourth Amendment. 737 F.2d 187, 209-10 (2d Cir. 1984). The defendants asked for qualified immunity because the searches were "pursuant to the Department's random-search policy." The court agreed, but only because the defendant's "good-faith reliance on the Department's rules and regulations" occurred in an "area in which the law was not charted clearly." *Id.* at 211. The policy would ***not*** have provided a "good faith" qualified immunity defense had clearly established law rendered ***the policy itself unconstitutional***. *Id.* at 210-11; *see also McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983) (rejecting "good faith" immunity because "[a]lthough the defendants were not required to anticipate future developments in the field of inmates' due process rights, neither could they narrow the holding of each of the previously decided cases to the particular facts presented to the court in those cases, and claim that the details of the present situation are different in some minor or insignificant way").

Even if Orchard Park had a policy that authorized police to enter a home every time they were dispatched to perform a welfare check, that policy would have been clearly and patently unconstitutional in April 2012. Even Lt. Buccilli did not believe that such a policy could justify a clear Fourth Amendment violation, testifying that "he, as a police officer, cannot enter a private

home to do a premise check or a welfare check ***simply because Adult Protective Services requests police assistance***." Docket No. 35.2 ¶ 62 (emphasis added). After all, it is the Constitution that "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. A municipal policy cannot obviate the Fourth Amendment.

3. This fictitious policy violated New York's controlling statute on welfare checks.

Finally, Lt. Buccilli's reliance on this non-existent policy would not have been objectively reasonable because it is contrary to New York's controlling statute governing warrantless "welfare checks." N.Y. [Social Services] Law § 473-c was enacted in 1986, and has not been amended since 2011. Subsection (1) states that when a social service official wants to assess whether an adult is "in need of protective services" and is "refused access by such person or another individual," the appropriate response is ***not*** to forcibly enter the home. Rather, the "official who is refused access ***shall*** assess, in consultation with a person in a supervisory role, whether or not it is appropriate to apply for an order to gain access to such person," and if it is appropriate, may "***apply to the supreme court or county court*** for an ***order to gain access***." § 473-c(1) (emphasis added). The statute then specifies the information that must be provided to the court, § 473-c(1), all of which must be based on either "personal knowledge" or "supported by affidavits." § 473-c(2). The statute grants all such applications "***preference*** over all other causes" before the court to ensure their prompt review. § 473-c(3) (emphasis added). Finally, the legislature expressly says that "[t]he standard for proof and procedure for such an authorization shall be ***the same as for a search warrant under the criminal procedure law***." § 473-c(1) (emphasis added).

The nonexistent policy described by the Magistrate is the very antithesis of what the Legislature decreed. New York says that if access to a home is refused, the official is ***required*** to assess whether prior judicial approval shall be obtained, based on personal knowledge or affidavits;

at no time is the officer authorized to forcibly enter the home, much less in blind response to another agency's request for a "welfare check." The policy ***commands*** that officers follow the same standards of proof and procedure that apply to criminal search warrants: in other words, the standards required by the Fourth Amendment.

C. Lt. Buccilli violated the Batts' clearly established Fourth Amendment rights.

In light of the above, there can be no doubt that on April 17, 2012, any reasonable officer in the Western District of New York would have known that Lt. Buccilli's actions transgressed the clearly established boundaries established by the Fourth Amendment, in the following ways:

First, when Lt. Buccilli came to the Batts' home, he claimed an absolute right to enter it without the consent of its occupants, Docket No. 35.2 ¶¶ 51-52, 60-61 ("I don't need a search warrant. I don't need to ask permission to Joe and anybody else . . ."), even though:

- The Fourth Amendment extends special protection to the "houses" of citizens, U.S. CONST. amend IV; *Jardines*, 133 S.Ct. at 1414-15; *Oliver*, 466 U.S. at 176; and
- Without consent, a warrant is required to search a home. *Mincey*, 437 U.S. at 393-94.

Second, Lt. Buccilli forcibly entered the home without prior judicial approval or consent, Docket No. 35.2 ¶¶ 22-23 (Joseph Batt told Lt. Buccilli "I was going to make a phone call, asked him not to come into the house, and walked back to the side door," but Lt. Buccilli "***pushed the wooden door against my will*** and entered the home"), despite clear law which held:

- The constitution extends special protection from the curtilage to the home itself, where "an officer's leave to gather information is ***sharply circumscribed***," *Jardines*, 133 S.Ct. at 1415; *Ciraolo*, 476 U.S. at 213; *Oliver*, 466 U.S. at 182 n. 12;
- ***Any invasion***, "by even a fraction of an inch," which "obtains information" about the interior of a home constitutes a "search," *Kyllo*, 533 U.S. at 37; *Silverman*, 365 U.S. at 512; *Jones*, 132 S. Ct. at 951 n. 3; *Class*, 475 U.S. at 114-115; and
- Any ***warrantless invasion*** of a home— "welfare check" or otherwise—is both ***presumptively*** and ***per se unreasonable*** under the Fourth Amendment. *Payton*, 445 U.S. at 585; *Coolidge*, 403 U.S. at 454-55; *Simmons*, 661 F.3d 151 at 156; *Jardines*, 133 S.Ct. at 1415; *Boyd*, 116 U.S. at 626; *Rowan*, 397 U.S. at 737.

Third, Lt. Buccilli forced his way into the home to perform a "welfare check" without knowing anything specific about Mr. Puntoriero's health or welfare, Docket No. 35.2 ¶¶ 14, 51-52, 60-61 ("***I don't know the basis or the allegations*** of what the welfare concerns are. . . . ***All I know is a county agency called***. And based on their request, I have a right to enter the house and forcibly [sic], if need be, when somebody's welfare is possibly in question. And that's why I'm here. The allegation was made that ***they wanted a welfare check done on you***"), even though:

- Warrantless "welfare checks" are only permissible if they satisfy the "emergency aid" exception, *Brigham City*, 547 U.S. at 403; *Montanez*, 444 Fed.Appx. at 486-87; and
- The "emergency aid" exception only applies if there is an "emergency" that precludes prior judicial review. *Brigham City*, 547 U.S. at 406; *Ryburn*, 132 S.Ct. at 990; *Tierney*, 133 F.3d at 197-98; *Kerman*, 261 F.3d at 235-37; *Harris*, 770 F.3d at 233-34.

Fourth, Lt. Buccilli forced his way into the Batts' home even though nothing he learned at the home elevated any "cause for concern," Docket No. 35.2 ¶¶ 65-67 (Lt. Buccilli did not feel threatened by Joseph Batt's words, Joseph did not have anything in his hands, or that Joseph did not lay hands on Lt. Buccilli or initiate any physical contact with him), and in fact he learned much that mitigated any concern about Fred Puntoriero's health. Joe Batt Dep. Tr. at 45:7-14; 46:8-13; 46:21-47:2 (Fred was in the home; Fred was being cared for by LuAnn Batt, who was a nurse; and a nurse's aide had just left the home a few hours earlier). On the contrary:

- The "emergency aid" exception ***must*** be based on "specific and articulable facts" which would "cause a person of 'reasonable caution' to believe that the intrusion was necessary," *Sikut*, 448 F.Supp.2d at 307; and
- The "emergency aid" exception ***cannot*** be invoked if an officer forcibly enters a home based on "***mere surmise***, not objective facts reasonably suggesting that an actual emergency involving human safety then existed." *Paige*, 493 F.Supp.2d at 647.

Similarly, the Magistrate ignores clearly established law by repeatedly resolving material factual disputes in Lt. Buccilli's favor, even though:

- In "articulating the factual context of the case," the "'evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor,'" *Tolan*, 134 S.Ct. at 1863; *Anderson*, 477 U.S. at 255; and

- Courts are affirmatively barred from "defin[ing] a case's 'context' in a manner that imports genuinely disputed factual propositions" and from "resolv[ing] genuine disputes of fact in favor of the party seeking summary judgment," even during qualified immunity analysis. *Tolan*, 134 S.Ct. at 1866; *Adickes*, 398 U.S. at 157.

The Magistrate found that Lt. Buccilli knew that Mr. Puntoriero was "known to suffer from lethargy and dehydration," Mag. R&R at 16, even though this is contrary to Lt. Buccilli's contemporaneous testimony, Docket No. 35.2 ¶¶ 14, 51-52, 60-61 ("I don't know the basis or the allegations of what the welfare concerns are. . . . All I know is a county agency called"), the police dispatcher's affidavit, Docket No. 35.2 ¶ 12, and the text of APS's call to the police dispatcher. Docket No. 35.2 ¶ 12. "Exigency" must come from the circumstances as they "***appeared at the moment of entry***." *Klump*, 536 F.3d at 117-18. It cannot be culled from hindsight.

The Magistrate would grant Lt. Buccilli qualified immunity because of a fictitious "standard policy" authorizing "Buccilli's entry into the Batts' home" so long as "some allegation of reasonable concern had been made," Mag. R&R at 21, even though:

- There is absolutely no evidence of such a policy in the record;

- Even Lt. Buccilli recognizes that a generalized "welfare check" policy would not have allowed him to enter the Batts' home, Docket No. 35.2 ¶ 62;

- An officer cannot claim "good faith" qualified immunity by invoking a policy that is inherently unconstitutional under clearly established law, U.S. CONST. art. VI, cl. 2; *Carey*, 737 F.2d at 210-11; *McCann*, 698 F.2d at 125; and

- Any such policy would have clearly conflicted with New York law, which commands that officers must comply with the Fourth Amendment if they are denied access to a home when performing a welfare check. N.Y. [Social Services] Law § 473-c.

CONCLUSION

Lt. Buccilli transgressed the Fourth Amendment when he forcibly entered the Batts' home. The contours of the Batts' Fourth Amendment rights were clearly established law in this

district, this circuit, and this country in April 2012. No less than twenty (20) precedents "reproving closely analogous conduct" put reasonable officers on notice that "their actions were illegal." *Jeffries*, 21 F.3d at 1248. These cases preclude Lt. Buccilli from raising any credible qualified immunity defense. *Hope*, 536 U.S. at 739; *Selzer*, 629 F.2d at 812; *Poe*, 282 F.3d at 137–139.

Nor can there be any doubt that the Magistrate's recommendations are contrary to this vast body of precedent. Of the thirty-three (33) cases and statutes referenced above—twenty-four (24) of which were raised by the Batts before the Magistrate— only two received even the barest citation in the Magistrate's recommendation: *Anderson*, Mag. R&R at 11, and *Brigham City*. Mag. R&R at 15. Not even ***Tolan*** makes an appearance, even though it is the controlling precedent on motions for summary judgment ***and*** was decided in the context of qualified immunity for a Fourth Amendment claim. Lt. Buccilli is not entitled to qualified immunity

Lt. Buccilli violated the Fourth Amendment's most sacred promise when he forcibly entered the Batts' home. The Magistrate's recommendations that he violated no law, and should receive qualified immunity, are manifestly contrary to law and should be rejected. The Batts are entitled to their day in court on their Fourth Amendment claims.

DATED: August 19, 2016

Submitted on behalf of

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