EXHIBIT B

In The
Supreme Court of the United States

No. 12-1460

RYAN MCFADYEN; MATTHEW WILSON; BRECK ARCHER,
Petitioners,

v.

CITY OF DURHAM, NORTH CAROLINA, ET AL.,
Respondents.

AFFIDAVIT OF SERVICE

I, Bianca Gianfrate, of lawful age, being duly sworn, upon my oath state that I did, on the 17th day of October, 2013, hand file with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Reply Brief in Support of Petition for Writ of Certiorari, and further sent, via, U.S. Mail, postage prepaid, three (3) copies and one electronic copy of said Brief to:

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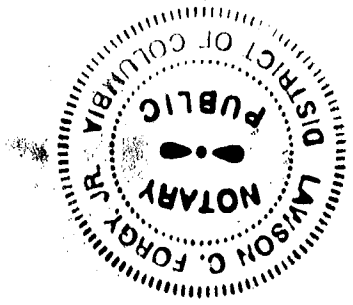

Dated: October 17, 2013

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Supreme Court of the United States

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AFFIDAVIT OF COMPLIANCE

This Reply Brief in Support of Petition for Writ of Certiorari has been prepared using:

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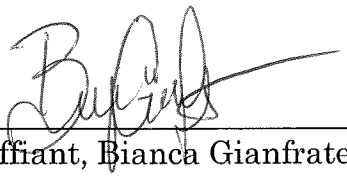
As required by Supreme Court Rule 33.1(h), I certify that the Reply Brief in Support of Petition for Writ of Certiorari contains 2,972 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.



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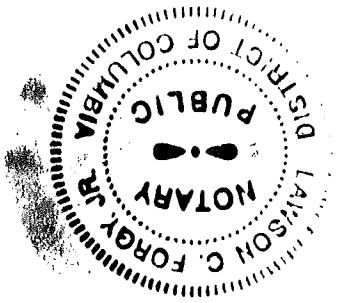

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that probable cause is no longer required to justify station-house detentions of citizens to collect their DNA and compel them to disrobe to search their bodies for investigative purposes. Pet. App. 36a. The court replaced the Fourth Amendment's probable cause requirement with "reasonable grounds" which, the court explained, is "a significantly lower standard than probable cause." *Id.* That decision contradicts over four decades of this Court's settled precedent; it conflicts with the unanimous authority of the other circuits; and it creates a circuit split on a significant issue that arises every time a law enforcement officer is investigating a crime but lacks probable cause to arrest. Thus, the decision strips the Fourth Amendment's core protection from "the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations." *Maryland v. King*, 133 S. Ct. 1958, 1989 (June 3, 2013) (Scalia, J., dissenting). The decision is too important to leave unreviewed. Respondents' arguments to the contrary lack merit. The Petition should be granted.

A. The Issue *Actually Presented* by the Petition Was Raised and Decided Below.

1. Respondents' contention (Opp. 7-12) that the question presented was not raised or passed upon in the court of appeals is incorrect. An issue is properly before this Court if it was *either* "pressed in" *or*

"passed upon by" the court whose opinion is under review. *United States v. United Foods*, 533 U.S. 405, 417 (2001). The rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992); *accord Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991) ("It suffices for our purposes that the court below passed on the issue presented . . ."). The question presented here meets that standard on both counts.

2. Respondents misstate the issue presented by the petition to argue (Opp. 7) that it was not raised or decided in the court of appeals, recasting it as a challenge to the constitutionality of North Carolina's NTO statute. But that is not the question this petition presents. The petition asks (Pet. i):

> Is "a significantly lower standard than probable cause" sufficient under the Fourth Amendment to justify a court order authorizing police to detain 46 young men at a police station to collect their DNA, compel them to disrobe, and submit to close examination and photographing of their bodies for evidence in a criminal investigation.

3. The court of appeals squarely decided that issue (Pet. App. 36a) by dismissing Petitioners' Section 1983 claim for searches and seizures in violation of the Fourth Amendment, holding that:

> These facts *might not demonstrate probable cause, but certainly meet the NTO "reasonable grounds" standard.* For these facts state more than an 'unparticularized suspicion' that the

> parties named in the NTO may have raped Mangum. "[R]easonable grounds" requires only "a minimal amount of objective justification, something more than an 'unparticularized suspicion or hunch,'" and is *a "significantly lower" standard than probable cause* ... Therefore, we reverse the district court's denial of defendants' motions to dismiss these § 1983 unlawful seizure claims.

Pet. App. 36a (emphasis supplied) (internal citations and parenthetical marks omitted).

4. Petitioners raised the issue from the outset by asserting it in their complaint's first cause of action (C.A. App. 851-53 ¶¶ 904-17) which states a § 1983 claim for *search and seizure without probable cause* in violation of the Fourth and Fourteenth Amendments pursuant to an NTO Respondents obtained by making false statements and concealing material facts to mislead a judicial official into authorizing the station-house detentions and searches Petitioners allege, knowing that "the requisite grounds did not exist." C.A. App. 852 ¶ 910; see also *id.* at 858 ¶ 939.

And Petitioners pressed the issue in the court of appeals by arguing that Respondents violated their Fourth Amendment rights by subjecting them to searches and seizures for investigative purposes without *either* "probable cause or reasonable grounds, reasonable suspicion, or any lesser quantum of proof." Brief of Appellees' at 53, *McFadyen v. Baker*, No. 11-1458 (4th Cir. Sept. 21, 2011) (ECF 69) (reproduced at Opp. App. 116a)

(parenthetical marks omitted); see also *id.* at 69 (reproduced at Opp. App. 134a).

B. The Decision Below is Incorrect.

1. Respondents do not contend that the court of appeals' decision is correct, nor could they, for three, very good reasons. First, the decision contradicts nearly a half-century of this Court's precedent requiring probable cause to justify station-house detentions and searches of citizens for investigative purposes. See Pet. 24-29 (documenting the conflict between the decision below and *Davis v. Mississippi*, 394 U.S. 721 (1969), *Dunaway v. New York*, 442 U.S. 200 (1979), and *Hayes v. Florida*, 470 U.S. 811 (1985)). Each of those decisions hold that individualized probable cause is required under the Fourth Amendment to subject citizens to station-house detentions to conduct searches of their persons for investigative purposes. Pet. 24-29. Indeed, this Court has never required anything less than probable cause to justify such detentions and searches for evidence of ordinary criminal wrongdoing. *King*, 133 S. Ct. at 1978-80 (majority); *id.* at 1980-81 (Scalia, J., dissenting).

Second, the decision contradicts the Court's decision in *Maryland v. King*,[1] decided after entry of the judgment below, authorizing a State to collect DNA profiles of inmates charged with committing "serious crimes" *because the justifying purpose of the searches was not investigative.* 133 S. Ct. at 1980

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[1] Because *King* was decided after the court of appeals entered the judgment below, the Petition suggests (Pet. 33) that the Court may wish to grant the petition, vacate the judgment, and remand for reconsideration (GVR) in light of its decision in *King*.

(majority). This case presents the mirror image of the issue in *King*. Both cases involve Fourth Amendment seizures and searches to collect identification evidence, including DNA profiles, without probable cause. But in *King*, the justifying purpose of collecting DNA was not "to detect evidence of ordinary criminal wrongdoing." 133 S. Ct. at 1978-80 (majority). Here, the *only* justifying purpose of the detention and searches of Petitioners was to detect evidence of ordinary criminal wrongdoing. And in the Fourth Amendment analysis, that distinction makes all the difference. *Id.* at 1978 (majority opinion); *id.* at 1980 (Scalia, J., dissenting). Thus, in *King*, not one justice suggested that Maryland's DNA collection program could be squared with the Fourth Amendment unless its justifying purpose was something other than to investigate crime. 133 S. Ct. 1978-80 (majority); *id.* at 1980-81 (Scalia, J., dissenting).

Third, the decision conflicts with the unanimous authority of the other circuits. See discussion *infra* § C.

2. Respondents do not even try to argue that the court of appeals' decision is supported by any *holding* of this Court. Instead, they pluck phrases from *dicta* amounting to a mere "suggestion" and contend (Opp. 15-17) that the judgment below is "consistent with" it. For example, Respondents rely on *Davis' dictum*:

> *We have no occasion in this case, however, to determine whether* the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the

> fingerprints of individuals for whom there is no probable cause to arrest.

394 U.S. at 728 (emphasis supplied to indicate text Respondents omit). Likewise, Respondents' assertion (Opp. 17) that this Court has "thrice repeated" that dictum is unpersuasive since the Court *thrice refused* to hold that anything less than probable cause justified the investigative, station-house detentions at issue in those cases. See *Dunaway*, 422 U.S. at 215-16, *Hayes*, 470 U.S. at 817, and *Kaupp v. Texas*, 538 U.S. 626, 630 (2003) ("we have never sustained against Fourth Amendment challenge the involuntary removal of a suspect ... to a police station and his detention there for investigative purposes absent probable cause") (internal quotations omitted).

3. Respondents' attempt (Opp. 17) to distinguish *Davis*, *Dunaway*, and *Hayes* on the ground that they obtained "judicial authorization" is unavailing because Respondents obtained that judicial authorization by making false statements and concealing material facts to mislead a judge into giving it. See Pet. App. 144a-145a. A police officer violates the Fourth Amendment if, in order to obtain judicial authorization to search or seize a citizen, the officer knowingly makes material false statements or omits material facts to obtain judicial authorization to search or seize a citizen. *Franks v. Delaware*, 438 U.S. 154, 155, 164-65 (1978).

C. The Decision Below Creates a Circuit Split on a Significant and Recurring Issue.

1. Respondents concede that they cannot identify a court of appeals' decision, other than the decision

below, holding that a station-house detention to search a citizen for DNA or other evidence for investigative purposes was justified under the Fourth Amendment by anything less than probable cause. But that does not mean, as Respondents contend (Opp. 12-13), that "there is no circuit split on the issue." To the contrary, it confirms Petitioners' point (Pet. 24, 32) that the court of appeals' decision has created a circuit split by contradicting the *unanimous* authority in the other circuits on the question presented in this petition.

The court of appeals' decision conflicts with the settled precedent of, for example, the D.C., Fifth, Eighth, and Ninth Circuits. See *United States v. Askew*, 529 F.3d 1119, 1134 (D.C. Cir. 2008) (*en banc*) (declining the government's invitation to create an "investigative identification search exception" to the probable cause requirement, noting that "[t]here is no Supreme Court or federal appellate case law" authorizing an investigative search of a person "only on reasonable articulable suspicion after a pat down of that individual has produced no evidence of a weapon"); *id.* (holding police violated Fourth Amendment by unzipping suspect's jacket solely to facilitate a "show-up identification procedure"); *Kohler v. Englade*, 470 F.3d 1104, 1109-13 (5th Cir. 2006) (probable cause required to collect DNA from man suspected of being "a serial killer who terrorized south Louisiana ... over the span of a year"); *Pace v. City of Des Moines*, 201 F.3d 1050, 1053-54 (8th Cir. 2000) (even "assum[ing] *arguendo*" that officer had "reasonable suspicion" to believe suspect committed violent assault, the officer nevertheless "violated clearly established law" by ordering suspect, without

probable cause, "to take off [his] shirt" to search for a tattoo matching one the victim saw on her assailant's torso); and *Friedman v. Boucher*, 568 F.3d 1119 (9th Cir. 2009) (reversing dismissal of plaintiff's Section 1983 claim for search and seizure in violation of the Fourth Amendment, holding probable cause is required to collect a suspect's DNA).

D. This Case Is an Excellent Vehicle to Resolve the Question Presented, and Respondents' Arguments to the Contrary Have No Merit.

1. This case is a particularly good vehicle to squarely answer the important and recurring question presented. There is no dispute that Petitioners were seized and searched without probable cause. Nor is there any dispute that the sole purpose of the searches and seizures Petitioners allege was to collect evidence of ordinary criminal wrongdoing. Thus, this case squarely presents the question whether dragnet station-house detentions of citizens to collect their DNA and search them for investigative purposes still requires individualized probable cause. The Fourth Circuit held that it does not. But that is not all. Respondents add (Opp. 2) that "[n]one of the Petitioners ... was ever arrested, charged, or indicted with any crime," which helpfully underscores the absence of probable cause and places Petitioners within "the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations." *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting). Thus, this case provides an

excellent vehicle to answer the important question presented.

2. Respondents' arguments to the contrary have no merit:

a. Respondents' various contentions (Opp. 13, 25-27) that this is not a suitable case to address the constitutionality of North Carolina's NTO statute all come to nothing because the question presented (Pet. i) does not challenge the statute's constitutionality. Nor are Petitioners required to challenge the NTO statute's constitutionality to state a claim for violation of their Fourth Amendment rights. *Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("We are aware of no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted."); *Friedman*, 568 F.3d at 1125 ("adherence to a state statute does not guarantee compliance with the Fourth Amendment"). Indeed, North Carolina's Supreme Court has held NTOs unconstitutional without declaring the NTO statute unconstitutional. *See, e.g.*, *State v. Welch*, 342 S.E.2d 789, 794 (N.C. 1986) (holding NTO complied with the NTO statute but violated Fourth Amendment).

b. Respondents' assertion (Opp. 25) that "no final judgment has been entered" is no basis to deny the petition. The Court has repeatedly decided issues raised in interlocutory appeals. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 549 (2007); *Hartman v. Moore*, 547 U.S. 250, 256-57 (2006). Otherwise, the Court could not review important questions that often arise only in interlocutory appeals, such as qualified immunity. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("qualified immunity

questions should be resolved at the earliest possible stage of a litigation"). Moreover, as to the claims at issue here, the court of appeals' decision is final.

c. The petition does not seek an advisory opinion, and Respondents' contention (Opp. 26) to the contrary has no merit. For the first time in this litigation, Respondents claim (Opp. 26) that, even though there was no probable cause to believe Petitioners committed the crimes listed in the NTO, they may have been accomplices. In all the proceedings below, Respondents conceded that the NTO lacked probable cause; arguing instead that the Fourth Amendment requires mere "reasonable suspicion" to justify the searches and seizures Petitioners allege. See, e.g., Def. Gottlieb's Mem. Supporting Mot. to Dismiss at 8, *McFadyen v. Duke University*, 1:07-CV-953 (M.D.N.C. July 2, 2008) (ECF 54) ("[T]he Fourth Amendment governs [Petitioners'] claim, and *the constitutional standard governing their claim is the 'reasonable suspicion' standard.*") (emphasis supplied). Respondents' new contention is also contradicted by the facts Petitioners allege, which they must accept as true, and Respondents' own NTO Affidavit, which asserts that "reasonable grounds exist" to subject "all [46] of the white male Duke Lacrosse Team Members" to station-house detentions and searches of their bodies for DNA and other evidence solely because they were "aware of the party and *could have been* present." C.A. App. 58 (emphasis supplied). Further, Respondents do not explain how DNA testing and close examination of Petitioners' bodies could possibly produce evidence of accomplice liability. Moreover, the court of appeals did not pass on Respondent's new theory, finding only "reasonable

grounds" to believe that "the parties named in the NTO *may have raped* Mangum." Pet. App. 36a (emphasis supplied).

d. Respondents' contention (Opp. 26-27) that summary reversal of the court of appeals' judgment would not affect the outcome of the case is incorrect. Summary reversal would change the outcome in at least three ways. *First*, a summary reversal based on *Davis* would restore Petitioners' Section 1983 claim against the individual Respondents by clarifying that the right they violated has been clearly established since *Davis* was decided in 1969. *Second*, summary reversal would restore Petitioners' Section 1983 claim against the City of Durham, which the court of appeals dismissed based on its holding (Pet. App. 36a, 40-42a) that the searches and seizures Petitioners allege did not violate the Fourth Amendment. *Third*, summary reversal would restore Petitioners' Section 1983 claim against the private parties who conspired with Respondents to violate Petitioners' Fourth Amendment rights by, for example, fabricating medical evidence and altering medical records to corroborate the false rape allegation and mislead a judicial official into issuing the NTO.

e. Finally, Respondents' contentions (Opp. 19) regarding the NTO statute's "circumscribed procedures" are unpersuasive because Respondents honored them only in the breach. For example, contrary to the requirement that an NTO be served at least 72-hours before any procedures take place, Petitioners were notified of the NTO *less than one hour* before the station-house detention and searches were ordered to commence. Nor were the detentions "circumscribed" in duration; the NTO authorized

police to detain Petitioners at the police department for one hour, and, as it happened, Respondents detained Petitioners there far longer than that. C.A. App. 49; Pet. 20. And contrary to the statute's requirement that Respondents provide Petitioners with reports of all tests conducted with their DNA and photographic evidence as soon as they are available, to this day, more than 7 years later, Respondents have still not done so. C.A. App. 803 ¶ 764; see also *id.* 801-805 ¶¶ 758-72. Further, Respondents violated the Court's admonition in *Davis*, 394 U.S. at 726, that such procedures must never be used to subject citizens to "harassment and ignominy" by circulating their fabricated NTO affidavit to representatives of the media so they could broadcast the station-house detentions and searches of Petitioners and their teammates to their local and national television audiences. C.A. App. 696 ¶ 414(c); Pet. 17. As a result, within hours, Petitioners were subjected to public ignominy so ubiquitous that this Court could take judicial notice of it.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted. In the alternative, the Court may wish to grant the petition and summarily reverse the judgment of the court of appeals based on the Court's decisions in *Davis*, 394 U.S. 721, *Dunaway*, 442 U.S. 200, and *Hayes*, 470 U.S. 811; or grant the petition, vacate the judgment of the court of appeals and remand the case for further consideration in light of *Maryland v. King*, 133 S. Ct. 1958 (June 3, 2013).

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