No. 18-339

IN THE

Supreme Court of the United States

JUNE HARPER,

Petitioner,

v.

ARTHUR LEAHY, DANIEL KIRK, CHRISTOPHER TEHAN CHING NIEH, *and* CITY OF NEW YORK,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the holding in *Payton v. New York,* 445 U.S. 573, 603 (1980), that officers may enter a suspect's residence to execute an arrest warrant when they have "reason to believe the suspect is within" requires probable cause to believe that the suspect is inside.

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INTRODUCTION

Petitioner June Harper asserts claims under 42 U.S.C. § 1983 stemming from her arrest after she forcibly tried to block NYPD officers from entering her Brooklyn apartment in the course of executing an active bench warrant for her son, Kedar Harper, who also lived there.

In *Payton v. New York*, 445 U.S. 573 (1980), the Court ruled that an arrest warrant naming an individual that is founded on probable cause implicitly includes the authority to enter a home where a suspect lives when there is "reason to believe" that the suspect is home. The Second Circuit has held that this test does not demand probable cause, but requires "specific and articulable facts that, taken together with rational inferences drawn therefrom, provided a particularized and objective basis for thinking that the arrest-warrant subject may be present." *United States v. Bohannon*, 824 F.3d 242, 255 (2d Cir. 2016).

Posing a question that she never presented to the lower courts, petitioner now asks the Court to review whether *Payton*'s "reason to believe" standard requires a showing equivalent to probable cause. Certiorari should be denied for the following reasons.

First, the question that petitioner seeks to present is unpreserved, because she never raised it in either of the lower courts.

Second, the question presented is academic in this case. Qualified immunity would defeat the § 1983 claims against the arresting officers, regardless of how the question were resolved, since that resolution would not constitute clearly established law at the pertinent time. And even setting that aside, the Court's resolution of the question still would not affect the outcome of the case, because the facts would support a finding of probable cause if that were the correct standard.

Third, even if the question presented were preserved and relevant to the case's outcome, there would be no reason to grant review. While authorities are divided on the question, the disagreement is largely theoretical, with little apparent impact on outcomes. Thus, the Court has consistently denied petitions for certiorari on the issue, most recently in *Bohannon,* 824 F.3d 242, *cert. den.,* ___ U.S. ___, 137 S. Ct. 628 (2017). And in any event, the court of appeals below is on the correct side of the split: "reason to believe" review does not demand probable cause, so the court applied the proper legal standard here.

STATEMENT

1. This case involves the respondent police detectives' execution of a bench warrant for Kedar Harper, a male in his mid-twenties, at his residence at 910 Caton Avenue, Apartment 52, in Brooklyn, New York, at 7 am on Tuesday, July 28, 2015. Petitioner June Harper, who is Kedar's mother, acknowledges that the apartment has been his only residence since moving to the United States from Trinidad as a child, except for periods when he has been incarcerated (A98-101).[1]

An NYPD detective investigating a burglary in which Kedar Harper was a suspect had located the bench warrant from late 2014, which was issued as a result of Kedar's failure to appear on a disorderly conduct charge (A83, 209). The warrant listed 910 Caton Avenue as Kedar's residence (A84, 209, 216). The officer found three additional sources in police records confirming that address for Kedar and further specifying his residence as Apartment 52 in that building. An extensive database search turned up no other address for Kedar, save for a 2009 document reflecting that he was briefly associated with a nearby address on Caton Avenue (A210-11).

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[1] "A" refers to the Appendix that petitioner filed with the Second Circuit.

After knocking on the door of 910 Caton Avenue, Apartment 52, to execute the warrant, a detective heard a male voice inside the apartment (A211). The detective and his partner knocked a second time (*id.*). Petitioner opened the door, admitted that Kedar was her son, and claimed he "wasn't home" (A86, 111, 115, 212; Pet. 4).

Petitioner then asked if she could retrieve her eyeglasses to review the warrant and closed the apartment door for several minutes (A86, 112-14, 212). After reopening the door, petitioner told Leahy and Kirk that they would need a search warrant if they wanted to enter the apartment to look for Kedar, and she then repeatedly tried to physically block the officers from entering (A86, 112-16, 120-27, 212). The detectives eventually subdued and handcuffed petitioner (A213). Thereafter, they entered the apartment but did not find Kedar (A192-95, 200-05).

One detective testified that once he was able to enter the apartment, petitioner's husband, as well as another person, told him that Kedar had escaped through the apartment window (A194-95, 205). And while petitioner claims that Kedar had left the apartment the night before and was not expected to return until later in the day, she admits that his then-four-year-old daughter, who lived in the Bronx, was at the Brooklyn apartment visiting him when the detectives arrived (A103-05).

Following her arrest for obstruction of governmental administration and other charges, petitioner was acquitted at a bench trial (A88-89, 167-80, 213, 220-26).

2. Petitioner then commenced this civil action. The district court granted summary judgment to defendants on all of petitioner's § 1983 claims, as well as her state-law claims for false arrest and false imprisonment, and declined to retain jurisdiction over her remaining state-law claims (Pet. App. 6a-19a).

In opposing the motion, petitioner accepted the Second Circuit's view that *Payton's* "reason to believe" standard did not require probable cause to believe that the dwelling was the suspect's residence and that the suspect was therein (Pet. App. 9a-14a; A248-52). She neither argued nor purported to reserve any argument that the standard required a showing of probable cause.

On the *Payton* issue, the district court concluded that no reasonable jury could find that the officers lacked a reasonable belief that Harper lived in the apartment and was there at 7 am on the Tuesday morning in question, because the officers had "plenty of corroborative evidence" (Pet. App. 9a, 12a).

3. The United States Court of Appeals for the Second Circuit affirmed. In her appeal, petitioner again did not argue that *Payton*'s "reason to

believe" standard required a showing of probable cause or purport to reserve that question for further review. (Pet'r's 2d Cir. Br. 15-42).

By summary order, the court of appeals affirmed the district court's judgment, concluding that the undisputed facts, when viewed in their totality and in a commonsense manner, provided the officers with "ample reason to believe" that Kedar would be present at the apartment at the time of the attempted arrest (Pet. App. 1a-5a). The court pointed to multiple factors supporting the officers' reasonable belief: the bench warrant and three additional police department records that all consistently identified the apartment as Harper's residence; the search of eight computerized databases that uncovered no other address for Harper; petitioner's acknowledgement to detectives after opening the apartment door that she was Harper's mother; and the early morning timing of the warrant's execution (Pet. App. 3a-4a).

REASONS FOR DENYING THE PETITION

The petition should be denied on the threshold grounds that the question presented is neither preserved nor outcome-determinative in this case. Even beyond those points, the case presents no cert-worthy question. The longstanding split in authority outlined by petitioner is exceedingly narrow in practice, and the Court has repeatedly denied certiorari on the same issue. *See United States v. Bohannon,* 137 S. Ct. 628 (2017); *see also*

Weeks v. United States, 566 U.S. 924 (2012); *Tiewloh v. United States,* 559 U.S. 941 (2010); *Barrera v. United States,* 550 U.S. 937 (2007); *Pruitt v. United States,* 549 U.S. 1283 (2007). In any event, the Second Circuit is on the correct side of the split.

A. The question presented is unpreserved.

This first reason why the Court should deny review is that petitioner failed to raise in either lower court the issue that she now asks this Court to review. She never argued that *Payton's* "reason to believe" language demands probable cause, never suggested that the Second Circuit's contrary holdings were incorrect, and never urged that the detectives' actions must be measured against a standard of probable cause. Quite the opposite: petitioner affirmatively relied on Second Circuit precedent without ever disputing its correctness or reserving any question about it for further review (Pet'r's 2d Cir. Br. 15-42).

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Thornton v. United States,* 541 U.S. 615, 624 n.4 (2004) (citations omitted). By failing to challenge the lower courts' interpretation and application of *Payton*'s "reason to believe" standard, petitioner has forfeited that argument, and this Court should decline to review the issue for that reason. *See also Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206,

212-13 (1998); *United States v. Bohannon,* 824 F.3d at 254 (noting that plaintiff waived the issue whether the "reason to believe" standard demanded probable cause by failing to raise it).

B. The question presented is academic here.

Were the proposed question preserved, it would nonetheless be academic in this case for two reasons. First, even assuming that the question would be resolved in favor of requiring probable cause, the respondent detectives would plainly be entitled to qualified immunity against Harper's § 1983 claim.[2] Harper acknowledges that the claim from her amended complaint that is relevant to her petition is the one alleging that "the individual respondents violated her Fourth Amendment rights" by forcibly entering the apartment and then arresting her.[3] And the petition does not contest

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[2] Unlike the question petitioner proposes to raise, the qualified immunity defense is preserved (A48, 76-79; Resp.'s 2d Cir. Br. 17-18). It admittedly was not a focus of prior proceedings, largely because petitioner never previously contested the legal standard governing the *Payton* issue.

[3] The petition appropriately does not rely on the *Monell* claim against the City included in Harper's amended complaint. Harper's *Monell* allegations were wholly conclusory (A22-23, 81-82), and she declined to respond to defendants' *Monell* arguments in her opposition to summary judgment (A254 n.11). The petition also concedes (at 7 n.3) that the state-law claims resolved against Harper "are not implicated here."

the Second Circuit's application of its own prior precedent in determining that the respondent detectives had a sufficient basis to enter the apartment to look for Kedar. A decision from this Court resolving the split in authority now would have no bearing on qualified immunity, since it would not represent clearly established law as of the time of the detectives' actions. *See, e.g.*, *White v. Pauly,* ___ U.S. ___, 137 S. Ct. 548, 551-52 (2017).

Second, even ignoring qualified immunity, the proposed question would not be outcome-determinative, because the detectives had probable cause to conclude that Kedar was present in his residence here, if that were required. While the petition asserts that "there is … no doubt" that the outcome here would be different in a court following a probable-cause rule (Pet. 20), it offers scant analysis to support that claim.

Indeed, it points to only one case—*United States v. Jackson*, 576 F.3d 465 (7th Cir.), *cert. den.,* 558 U.S. 1062 (2009) (Pet. 20). While the facts of this case differ from those in *Jackson*, where officers received an anonymous tip and then an admission from the suspect's girlfriend that he was inside an acquaintance's dwelling, that does not mean that probable cause is lacking here. In *Jackson*, the arrestee was apprehended in a third party's home, not his own residence. And the Seventh Circuit held that the facts were "more than enough" and "easily satisf[ied] probable cause," *id.* at 469; it did not suggest that anything less would be

insufficient, particularly where a warrant is executed at the arrestee's own place of residence.[4]

This Court recently reiterated that probable cause "is not a high bar." *District of Columbia v Wesby*, ___ U.S. ___ , ___, 138 S. Ct. 577, 586 (2018) (quotation marks omitted). It is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v Gates*, 462 U.S. 213, 232 (1983). And it requires consideration of the facts in their totality, not in isolation. *Wesby,* 138 S. Ct. at 586, 588.

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[4] In *Jackson*, the Seventh Circuit held, as have several other courts of appeals, that the *Payton* test governs an unlawful entry challenge brought by the subject of an arrest warrant, even where the subject is apprehended while visiting a third-party's residence, on the theory that the Constitution should not afford one greater protection in another's home than in one's own. 576 F.3d at 468 (collecting cases); *see also Bohannon*, 824 F.3d at 249-53. Those courts have thus reserved the requirement of a search warrant set forth in *Steagald v. United States*, 451 U.S. 204 (1981), for circumstances where suppression is sought by the third-party resident. In cases involving an arrest-warrant subject apprehended in a third-party's residence, *Payton* may generally require more or different proof targeted at showing the subject's presence within, because the strong common-sense expectation that persons will be at their usual residence, particularly at certain times of day, is not in play.

Harper wrongly downplays the strength of the facts here when measured against this standard. The detectives' information consistently pointed to the Caton Avenue apartment as Kedar's sole residence, and they received further confirmation when Kedar's mother opened the apartment door and referred to the apartment as his "home." Indeed, Harper does not appear to contest that the detectives had adequate basis to conclude that the Caton Avenue apartment was Kedar's residence, even under a probable cause standard. But she fails to recognize the significance of that showing for the second prong of the *Payton* test—asking whether officers had a sufficient basis to believe the subject was present at the time of the warrant's execution. As the Third Circuit, a court on the probable-cause side of the split, has noted: "[O]nce the predicate of residency is established, that alone carries significant weight in establishing probable cause to believe the arrestee is present, necessarily reducing the quantum of proof needed to meet *Payton*'s second prong in the totality of the circumstances analysis." *United States v. Vasquez-Algarin*, 821 F.3d 467, 481 (3d Cir. 2016).

Much of the remaining required support is supplied by the common-sense reality that people are ordinarily at their homes very early on weekday mornings—the detectives here executed the warrant at 7 am on a Tuesday.[5] "Officers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule." *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir.), *cert. den.,* 516 U.S. 869 (1995); *accord United States v. Veal*, 453 F.3d 164, 168 (3d Cir. 2006). Harper submitted no such contrary evidence here. Indeed, she herself claimed that everyone in the apartment, except her teenage daughter, was still sleeping when the detectives arrived (A102, 106-08).

Add to the early morning hour that a detective reported hearing a male voice coming from inside the apartment after the detectives' first knocks on the door, and that petitioner closed the door and

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[5] The New York metropolitan area has the latest median time for work arrival in the nation—8:24 am. See Nate Silver, *Which Cities Sleep In, And Which Get To Work Early*, Apr. 24, 2014, https://fivethirtyeight.com/features/which-cities-sleep-in-and-which-get-to-work-early (visited November 30, 2018).

appeared to stall for several minutes following presentation of the bench warrant when she eventually spoke to the detectives after their second knocks, and the totality of the circumstances established a "fair probability" that Kedar was present within the apartment when the warrant was executed. And that is what probable cause requires—a "fair probability," not certainty or even a preponderance of the evidence. *Gates*, 462 U.S. at 238; *see also id.* at 235.[6]

Thus, applying a probable-cause standard would make no difference to the bottom-line conclusion whether a constitutional violation occurred. Nor, even more clearly, would announcing a probable-cause standard now defeat the respondent detectives' entitlement to qualified immunity in this civil action for actions occurring in 2015. These are especially strong reasons to deny review, given that petitioner asserts that the question presented "arises with tremendous frequency," and often "in criminal … cases" (Pet. 2), where qualified immunity is not implicated. The

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[6] The petition mistakenly assumes that a probable cause standard would require a showing that Kedar was "*probably*" in the apartment (Pet. 20). *See United States v. Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014), *cert. den.,* ___ U.S. ___, 135 S. Ct. 2064 (2015) ("Probable cause doesn't require proof that something is more likely true than false."); *accord Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality op.). But if that were the standard, it too would be met here.

Court will surely have other opportunities to grant review on this issue if it is deemed worthy of certiorari.

C. The split of authority is exceedingly narrow, and the Second Circuit is on the correct side of it in any case.

The petition not only fails to address the lack of preservation or show that question presented is material in this case, but also fails to demonstrate that the question would be worthy of the Court's review even if those deficiencies were absent.

While there is a split in authority on the question whether *Payton*'s "reason to believe" language should be taken at face value or translated to mean probable cause, the division is quite narrow and appears to have little practical significance. Both standards rely on the totality of the circumstances and inferences rooted in common sense, *see Magluta*, 44 F.3d at 1535, and neither is readily reducible to a fixed formula. The differences between the two are thus elusive in practice.

Indeed, a striking number of the cases petitioner cites have made a version of the same point. The most direct have been the Fifth Circuit, labeling the disagreement "more about semantics than substance," *United States v. Barrera*, 464 F.3d 496, 501 (5th Cir. 2006), *cert. den.,* 550 U.S. 937 (2007), and the Eleventh, noting that it is "difficult

… to compare the quantum of proof the ['reason to believe'] standard requires with the proof that probable cause requires," *Magluta*, 44 F.3d at 1535.

Several other courts have observed that the answer to the question made no difference on the facts before them. *Denson*, 775 F.3d at 1217 ("nothing turns on" answer); *United States v. Exum*, 657 Fed. App'x 153, 155 (4th Cir. 2016) (affirming denial of suppression motion "[a]ssuming, without deciding, that probable cause is required"); *United States v Hill*, 649 F.3d 258, 263 (4th Cir. 2011) ("declin[ing] to reach a conclusion" because the proof was insufficient under either standard); *compare United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006), *cert. den.,* 549 U.S. 1283 (2007) (rejecting probable cause standard), *with id.* at 489-91 (Clay, J., concurring) (opining that probable cause should be standard, but agreeing with outcome); *United States v. Hardin*, 539 F.3d 404, 416 (6th Cir. 2008) ("[T]his case, too, does not require that we adopt one standard or the other."); *Jackson*, 576 F.3d at 469 ("[W]e need not decide whether 'reasonable belief' requires probable cause or something less than probable cause.").

Against this steady record of courts affirming the question's lack of practical significance, petitioners offer no specific example where the opposite was true. And while petitioner's amici assert that the issue arises with some regularity, they too fail to show that its resolution frequently

carries practical significance, resorting to mere speculation on the point. Br. for *Amici Curiae* N.Y. State Ass'n of Criminal Defense Lawyers *et al.*, at 3-4, 7-8.[7]

The Second Circuit also has the better of the argument, however slim its import. In *Payton*, the Court held that the Fourth Amendment permits officers who possess a valid arrest warrant "to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within." 445 U.S. at 603 (emphasis added). The Court presumably would have used the common phrase "probable cause" if it had intended to impose that standard. And in reaching its holding, the *Payton* Court expressly rejected the precept that officers must have "a search warrant based on probable cause to believe the suspect is at home at a given time." *Id.* at 602. The Court reasoned that "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-03.

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[7] Nor does amici's stated concern about third parties provide a reason to grant review (see Br. at 2-4, 8-11, 14), because those parties' rights are already protected by the rule in *Steagald v. United States,* 451 U.S. 204, 205-06, 221-22 (1981), that officers must have a search warrant to enter third-party residences to execute an arrest warrant.

The Second Circuit has rightly held that *Payton*'s "reason to believe" standard does not demand probable cause, but does require "specific and articulable facts that, taken together with rational inferences drawn therefrom, provided a particularized and objective basis for thinking that the arrest-warrant subject may be present within specific premises." *Bohannon*, 824 F.3d at 255. Thus, even if the question were preserved, if it were material here, and if it had been shown to have any broader practical significance, there would be no reason to grant review because the Second Circuit has answered it correctly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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