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

REPLY BRIEF FOR PETITIONER

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Respondents do not deny that the lower courts are deeply divided on the question presented. Nor do they dispute that numerous courts have called for this Court's intervention. They do not disagree that the question arises frequently. And they do not dispute that a standard less than probable cause is an invitation for abuse, particularly in light of the ubiquity of outstanding arrest warrants. Against this background, what respondents *do* say is unpersuasive.

First, respondents take the startling position that the split is insignificant because there is no practical difference between reasonable suspicion and probable cause. That is plainly wrong. This Court has repeatedly stressed the importance of the differences between the two standards—differences that are the very foundation of the Court's *Terry* jurisprudence and that frequently dictate the outcomes of cases, as here.

Second, respondents are wrong that the issue was not preserved below. In fact, the *Payton* issue was squarely raised at each stage, and the outcome below turned solely on the question whether the facts known to the officers at the time were sufficient to satisfy *Payton*'s "reason to believe" standard.

Third, respondents attempt to hide behind qualified immunity. But petitioner raised a *Monell* claim, as to which immunity is unavailable. Regardless, the court of appeals did not address qualified immunity, and respondents dedicated just a single sentence to the issue in their brief below. The possibility that a logically independent question might be raised on remand is no basis for denying review of an important Fourth Amendment issue over which the lower courts are deeply split.

Finally, respondents dedicate a scant two paragraphs to defending the Second Circuit's legal rule. But their breezy treatment of the merits disregards our arguments. And respondents are wrong that the supposed correctness of the lower court's rule would be a basis for letting stand an entrenched conflict.

A. The question presented is an important one over which the lower courts are split

1. Respondents candidly acknowledge (Opp. 2, 14) that "authorities are divided" and that "there is a split in authority" on the question presented in the petition. They nonetheless insist (Opp. 2) that "the disagreement is largely theoretical, with little apparent impact on outcomes." In their view, there is no real daylight between reasonable suspicion and probable cause. Opp. 14-16. That is obviously incorrect; were it otherwise, any officer with mere suspicion for a *Terry* stop would

also always have probable cause to make an arrest. That is not the law.[1]

This Court has repeatedly affirmed that reasonable suspicion is "a less demanding standard than probable cause" (*Illinois* v. *Wardlow*, 528 U.S. 119, 123 (2000)) and is "established with information that is different in quantity or content than that required to establish probable cause" (*Alabama* v. *White*, 496 U.S. 325, 330 (1990)). Thus, "the level of suspicion required for a *Terry* stop is obviously less demanding than for probable cause." *Ibid.* Whereas probable cause requires specific, reliable, corroborated facts,[2] reasonable suspicion may be founded on information "that is less reliable" and not fully corroborated. *Ibid*. Thus, as the Pennsylvania Supreme Court recognized, resolution of the question presented "frequently will make the difference between a lawful home entry and an unlawful one." *Commonwealth* v. *Romero*, 183 A.3d 364, 371 (Pa. 2018).

Respondents cite *United States* v. *Barrera*, 464 F.3d 496, 501 n.5 (5th Cir. 2006), for the proposition that "[t]he disagreement among the circuits has been more about semantics than substance." Opp. 14. But the Fifth Circuit suggested so only because its own cases are muddled (see Pet. 14-15 & n.5); it has held that *Payton* demands less than "the standard for probable cause" (*Barrera*, 464 F.3d at 501) but also that it requires officers "to determine that the suspect

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[1] Respondents do not dispute that in the Second Circuit and those jurisdictions aligned with it, the *Terry* standard and *Payton* standard are the same. See Pet. App. 42a-43a.

[2] See, *e.g.*, *United States* v. *Quezada-Enriquez*, 567 F.3d 1228, 1234 (10th Cir. 2009) (expounding the kind of robust, concrete corroboration necessary for probable cause); *United States* v. *Allen*, 211 F.3d 970, 976 (6th Cir. 2000) (similar).

is *probably* within" (*United States* v. *Route*, 104 F.3d 59, 62 (5th Cir. 1997) (emphasis added)).

Regardless what label is used, the standard announced in *Route* squarely conflicts with the standard applied in this case, according to which reasonable suspicion requires "less than a probability." Pet. App. 43a. The disagreement is therefore undeniable.

2. Respondents cite a string of cases (Opp. 15) in which they say the outcomes would be have been the same regardless of the standard applied. They accuse us in turn (*ibid.*) of "offer[ing] no specific example where the opposite was true." That is misguided for multiple reasons.

For starters, respondents' observation is no more than the obvious point that, in some cases, police officers *will have* probable cause (in which case their conduct will be lawful regardless of the standard) or *will lack* reasonable suspicion (in which case their conduct will be *un*lawful regardless of the standard). That describes every case that respondents cite on page 15 of their opposition. *E.g.*, *United States* v. *Hill*, 649 F.3d 258, 263 (4th Cir. 2011) ("[P]olice entry was not justified even under the less stringent interpretation of the standard.").

That superficial observation says nothing about cases like this one, where a court concludes that the officers satisfied only reasonable suspicion, not probable cause. Contrary to respondents' suggestion, we cited many such cases.

For example, courts have sometimes concluded that officers have reasonable suspicion merely because they arrive at a time "when the occupants of the house could reasonably be expected to be present." *Verdine* v. *State*, 2015 WL 6121370, at *3 (Tex. App. 2015). Accord *Brand* v. *Casal*, 2015 WL 9304036, at *11 (N.D. Ga.

2015). Even accepting that mere time of day is sufficient to support a reasonable suspicion that the suspect is at home, it is manifestly inadequate for probable cause, which would require specific and concrete corroboration that the particular individual was at home at that time. See *United States* v. *Denson*, 775 F.3d 1214, 1218 (10th Cir. 2014) ("the time of the day" is alone "insufficient to give rise to probable cause").

In other cases, courts have concluded that officers have reasonable suspicion that the suspect is at home on the basis that the officers observed someone inside the residence, but without knowing the person's identity. *E.g.*, *United States* v. *Bowen*, 2015 WL 3460530, at *8 (W.D. Mo. 2015) (reasonable suspicion satisfied where an unknown person appeared in an upstairs window of a home with multiple residents). In those cases, probable cause would require reliable information indicating that the person present was the individual for whom the officers had an arrest warrant. *E.g.*, *United States* v. *Exum*, 657 F. App'x 153, 155 (4th Cir. 2016) (probable cause satisfied because a reliable informant told officers that the person seen in the window was the suspect).

We cited these cases (Pet. 16 n.7) as examples of outcomes that turned on the question presented, but respondents disregard them.

Beyond all that, respondents fail to acknowledge (let alone respond to) *Romero*, which requires officers not only to have probable cause to believe the suspect is at home, but also to obtain a search warrant for the person. 183 A.3d at 405-406. This approach has much to recommend it, including that it eliminates the often tricky question of whether the dwelling is a third-party's residence (in which case heightened protections apply under *Steagald* v. *United States*, 451 U.S. 204

(1981)) or the suspect's residence (in which case *Steagald* does not apply). Every forced entry into a private residence to execute an arrest warrant without an accompanying search warrant will be held unconstitutional in Pennsylvania state court. The conflict accordingly could not be more concrete.

3. Respondent's identification of five previously-denied petitions over the course of 11 years (Opp. 6-7) is no reason to deny certiorari here.

We explained why the Court denied review in *Bohannon* (Pet. 20-21), including that the appeal was interlocutory. That problem is not present here.

The other four denials are also readily explicable. *Weeks* was an unpublished decision that neither established nor applied binding Eleventh Circuit precedent. See *United States* v. *Weeks*, 442 F. App'x 447 (11th Cir. 2011). So was *Tiewloh*, which was ambiguous as to the standard applied in any event. See *United States* v. *Tiewloh*, 319 F. App'x 178 (3d Cir. 2009). This case, by contrast, involves an express application of doubly settled circuit precedent.

As for *Barrera* and *Pruitt* (Opp. 7), the denials of certiorari in those cases predated *Hatchie*, *Vasquez-Algarin*, and *Romero*. See Pet. 10-12. Before those cases, the Ninth Circuit stood alone in requiring probable cause. The split was therefore shallow and in theory could have resolved itself, without this Court's intervention. That can no longer be said; the need for this Court's immediate review is now undeniable.

B. This is a clean vehicle for review

1. Respondents are flat wrong that petitioner failed to preserve the *Payton* issue for this Court's review. Opp. 7-8.

a. From the start, the central question in this case has been whether the facts known to the officers at the

time of their forced entry into petitioner's home satisfied *Payton*'s reason-to-believe standard. As the district court explained, "[o]ne fundamental legal point" drove the outcome below: "[I]f police officers have a reasonable belief that a person subject to an arrest warrant may be in his home, they have the right to enter to see if the suspect is there and attempt to make the arrest." Pet. App. 9a.

Before the Second Circuit, petitioner "claimed, and continues to maintain, that the defendant officers did not have authority to enter her home under the standard articulated in *Payton*." C.A. Appellant's Br. 7.

The Second Circuit considered and rejected that argument: "When '[v]iewed in their totality and in a commonsense manner,' the undisputed facts in the record provided the officers with reason to believe that Kedar would be present at the Apartment at the time of the attempted arrest," sufficient to satisfy *Payton*. Pet. App. 3a (quoting *United States* v. *Bohannon*, 824 F.3d 242, 257 (2d Cir. 2016)). On its way to that conclusion, moreover, the Second Circuit stressed that "[o]ur reason-to-believe review here does not demand probable cause," and the "reasonable suspicion" standard "is not a particularly high [one]." *Ibid.* (quoting same). Thus, "[o]ur precedents have rejected the contention that the police must first conduct a thorough investigation to obtain evidence of an arrestee's actual presence before entering his residence." *Ibid.* (quotation marks omitted).

The *Payton* issue is therefore doubly preserved for this Court's review: Not only was the proper application of *Payton* to the undisputed facts of this case expressly raised before the lower court, but the Second Circuit passed upon all aspects of the *Payton* issue, including the standard required for entry.

b. Respondents assert (Opp. 7) that petitioner nonetheless waived the issue because she did not argue that *Bohannon* and the case it reaffirmed, *United States* v. *Lauter*, 57 F.3d 212 (2d Cir. 1995), were wrongly decided and should be overturned. Nonsense.

Petitioner's decision to limit her argument by not expressly asking the panel to overturn binding circuit precedent "does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). The Second Circuit's holdings in *Bohannon* and *Lauter* foreclosed any contention that the officers were required to have probable cause, and the panel was without authority to overrule those cases. See *Gelman* v. *Ashcroft*, 372 F.3d 495, 499 (2d Cir. 2004). Respondents cannot read waiver into a decision not to press an argument twice foreclosed by circuit precedent. Cf. *Rodriguez* v. *United States*, 542 F.3d 704, 709 (9th Cir. 2008) (an argument that is "foreclosed by binding precedent" is "frivolous"); *United States* v. *Bove*, 888 F.3d 606, 610 & n.24 (2d Cir. 2018) (similar).

Anyway, the contention that *Lauter* and *Bohannon* were wrongly decided is only an "argument" concerning petitioner's fully preserved "claim" that the officers' entry into her home was unlawful under *Payton*. See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Ibid.* (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)).

2. Respondents say (Opp. 8) that review is unwarranted because, even if this Court reversed on the con-

stitutional issue, they might alternatively win qualified immunity on remand. There are two responses.

First, as respondents acknowledge (Opp. 8 n.3), petitioner raised a *Monell* claim against the City of New York predicated on the same Fourth Amendment theory that underlies her individual claims. See Dist. Ct. Dkt. 20 ¶¶ 98-105. Because "the municipality may not assert the good faith of its officers or agents as a defense to liability under [Section] 1983" (*Owen* v. *City of Indep.*, 445 U.S. 622, 638 (1980)), her claim against the city necessarily survives respondents' immunity argument.

Second, qualified immunity is a logically independent issue[3] that has not been fully briefed before, much less decided by, the court of appeals.[4]

This Court routinely grants certiorari to resolve important legal questions that controlled the decision below, while "remand[ing] for resolution of any claims the lower courts' error prevented them from addressing" in earlier proceedings. *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). See, *e.g.*, *Department of Transp.* v. *Association of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009).

That is an especially appropriate course in cases where the alternative ground asserted is qualified immunity. This Court has recognized that "the district courts and the courts of appeals are in the best position to determine" under the two-step qualified immunity

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[3] As respondents stated, "qualified immunity is independent from the merits of the underlying action and must be examined independent of the underlying claims." Dist. Ct. Dkt. 30, at 17.

[4] Respondents dedicated just one sentence to the issue before the Second Circuit. See C.A. Appellees' Br. 17-18.

framework "the order of decisionmaking that will best facilitate the fair and efficient disposition of each case." *Pearson* v. *Callahan*, 555 U.S. 223, 242 (2009). That prerogative is essential to ensuring that the qualified immunity doctrine does not choke off the "development of constitutional precedent." *Id*. at 237.

The Court should thus review the legal issue that controlled both lower courts' decisions; if it reverses, it can and should leave the question of qualified immunity for the lower courts to address on remand in the first instance.[5]

3. Respondents make a half-hearted effort to suggest (Opp. 9-13) that the officers had probable cause to believe Kedar was in petitioner's home at the time of their forced entry. Once again, they ignore *Romero*, which would have required the officers to have not only probable cause, but a search warrant—which they plainly did not. Setting that aside, all respondents offer is an unadorned recitation of the same facts that the Second Circuit (Pet. App. 3a-4a) and district court (Pet. App. 7a-9a) recounted, along with a naked assertion that those facts establish probable cause.

That gets respondents nowhere. Neither of the lower courts thought that probable cause was satisfied here; they concluded only that the officers had reason

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[5] Respondents suggest (Opp. 13-14) that, because the issue arises frequently in the criminal context, the Court should simply await a criminal appeal. Not so. If the government loses a suppression motion, it must bring an interlocutory appeal under 18 U.S.C. 3731, which is a disfavored context for review, as in *Bohannon*. See Pet. 20-21. If the government wins the suppression motion, by contrast, the defendant will almost always plead guilty, the great majority of the time with an appeal waiver. See Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209 (2005).

to believe that Kedar "might" be inside the apartment at the time. Pet. App. 13a. In truth, the officers barely had more than a hunch that Kedar would be present at petitioner's home—they had a stale, six-month-old bench warrant with petitioner's address on it, they knocked on the door at 7:00 a.m., and they heard an unidentified male voice (who could have been anyone) inside the apartment. This is not remotely the stuff of probable cause. See Pet. 19-20; *supra* at 2-5.

Nor was it petitioner's burden to rebut a presumption of probable cause merely because the officers arrived early in the morning. See Opp. 12. Time of day does not itself establish probable cause (*Denson*, 775 F.3d at 1218), and the burden was at all times on the government. See *United States* v. *Vasquez-Algarin*, 821 F.3d 467, 481 (3d Cir. 2016).

C. The Second Circuit's "reasonable suspicion" standard is indefensible

We demonstrated in the petition (at 22-24) that *Payton* cannot and should not be read to permit a forced entry into a private residence based on the mere chance that the subject of an arrest warrant is within. Particularly because outstanding bench warrants are ever-present in modern society—a fact that respondents tellingly do not deny—the Fourth Amendment cannot tolerate invasions of homes on the basis of anything less than probable cause to believe that the suspect is within—or, better yet, a search warrant.

Respondents do not engage the substance of our arguments; they merely assert without elaboration that the Second Circuit "rightly held" that *Terry*-like suspicion is all that is needed. See Opp. 16-17.

That is wrong for all the reasons given in the petition. But more to the point, the question of the merits is one for the Court *after* it grants certiorari. It

is no basis for denying review in a case that cleanly presents an important Fourth Amendment issue that has deeply divided the lower courts.

Respectfully submitted.

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