No. 19-1059

In the Supreme Court of the United States

ANGELA HAMM AND DAVID HAMM,

Petitioners,

v.

STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed, and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties, which many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

SUMMARY OF THE ARGUMENT

Tennessee police entered the marital home of the petitioners unannounced and searched it. The police had no warrant for the search, nor even reasonable suspicion. Their justification for entry was simply that petitioner Angela Hamm was on probation at the time. But that is no justification at all.

The law has held the private home in special regard for centuries. The King's failure to honor this tradition was among the factors that moved the American colonists to rebel against his rule. Once they had won

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[1] All parties to this matter have provided written consent for this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

their independence, the Founders committed themselves, through the Fourth Amendment, to the ancient protection of the home. The Tennessee Supreme Court's decision offends this tradition. By sanctioning the police's suspicionless search of a probationer's family home, the decision robs countless citizens of the "sanctity of [their] home and the privacies of life." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

The lower court purported to balance the competing personal and governmental interests at stake here. In truth, however, it placed a heavy thumb on the government's side of the scale by discounting the strong personal interest in the home and its "roots deep in the common law." *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001). It also overlooked the important differences between probationers and parolees. Along the way, the court deepened a division among state high courts and federal courts of appeals on the lawfulness of suspicionless searches of probationers. That split is evident even within geographical boundaries, with federal courts and state courts in the same circuit reaching different conclusions.

The Court should resolve this split among state high courts and the circuits and undo the harm caused by the Tennessee Supreme Court's misinterpretation of the Fourth Amendment's protection of the home.

ARGUMENT

I. THE TENNESSEE SUPREME COURT FAILED TO GIVE APPROPRIATE REGARD FOR THE SPECIAL STATUS OF THE HOME.

A. Citizens' homes have special status under the Fourth Amendment.

The home is special. For four hundred years, the Anglo-American tradition has promised that a person's

home is "his castle." *Semayne's Case*, 77 Eng. Rep. 194, 194 (KB 1604). Sir Edward Coke traced the origin of the home's unique character to the Magna Carta. See Laura K. Donohue*, The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1212 (2016). Describing the special status of the home in a speech to parliament, William Pitt proclaimed:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 299 n.3 (1868).

Because of that long-recognized inviolability of the home, the Crown's officers needed a warrant to enter it, which required some level of suspicion. See William Blackstone, 4 *Commentaries on the Laws of England* 288 (Clarendon 1769). To circumvent this protection, the English monarchs sought general warrants, devices that afforded officers limitless entry because they required no suspicion and specified no person, no crime, and no particular location to be searched.

The American colonists particularly abhorred general warrants. Outrage over the King's suspicionless entry into homes "spark[ed] the Revolution itself." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018). In 1761, the Massachusetts Bay Superior Court considered a challenge to writs of assistance, a kind of general warrant. *Paxton's Case*, 1 Quincy 51 (Mass. 1761). Arguing the case, James Otis warned that suspicionless searches threatened to "totally annihilate"

"one of the most essential branches of English Liberty," namely "the freedom of one's house." M. H. Smith, *The Writs of Assistance Case* 553-554 (1978). John Adams, who witnessed the proceedings, later recalled that all in the audience left "ready to take arms against writs of assistance. * * * Then and there the child Independence was born." *Letter from John Adams to William Tudor* (Mar. 29, 1817), *in* 10 *The Works of John Adams, Second President of the United States* 248 (1856). Indeed, the Boston Committee of Correspondence included among its 1772 list of grievances the "unconstitutional" power of customs commissioners to "under color of law and the cloak of a general warrant, break through the sacred Rights of the Domicil." *The Votes and Proceedings of the Freeholders and other Inhabitants of The Town of Boston, In Town Meeting assembled, According to Law* 15–17 (1772).

"Historians agree that the Framers had the English writs of assistance on their mind when they wrote the Fourth Amendment." George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 Wm. & Mary Bill of Rts. J. 85, 88 (2018). Thus, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972); accord *Payton* v. *New York*, 445 U.S. 573, 596 (1980) ("The common-law sources," with their "zealous and frequent repetition of the adage that a 'man's house is his castle,'" "display a sensitivity to privacy interests that could not have been lost on the Framers.").

Observing "the overriding respect for the sanctity of the home" that "has been embedded in our traditions since the origins of the Republic," this Court has long recognized the special role played by the home in

American life and law. *Payton*, 445 U.S. at 601. This Court has thus held time and time again that "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

B. The lower court improperly weighed the interests at stake

The decision below cannot be squared with the special status of the home.

1. Probationers retain privacy interests in their homes.

"A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). In probationer search cases, such as this one, this Court has instructed the lower courts to determine the reasonableness of a search "by assessing, on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States* v. *Knights*, 534 U.S. 112, 118–119 (2001) (internal quotation marks omitted). This requires examination of both *who* is being searched and *where* the search occurs.

a. The status of the person. A person's status informs the expectation of privacy. Public employees, for example, have different expectations of privacy from private citizens when it comes to work-related searches of their belongings. *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987). So do school students on a public school campus, as opposed to non-students. *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 658 n.2 (1995).

One's status as a criminal convict serving some form of sentence is also relevant. But criminal sentences (and their associated statuses) come in different degrees that exist along a "continuum." *Knights*, 534 U.S. at 119 (quoting *Griffin*, 483 U.S. at 870-871). On one end of the spectrum, prisoners are imprisoned and have highly limited expectations of privacy. In the middle, is parole, which "is more akin to imprisonment than probation is to imprisonment." *Samson* v. *California*, 547 U.S. 843, 850 (2006). And at the opposite end are probationers, with the least diminished expectations of privacy. In consequence, "parolees have fewer expectations of privacy than probationers." *Ibid*.

b. The status of the place. Although "the Fourth Amendment protects people, not places," *Katz* v. *United Sates*, 389 U.S. 347, 351 (1967), the degree of protection it affords additionally "requires reference to a 'place,'" *id.* at 361 (Harlan, J., concurring). Put another way, an individual may carry different expectations of privacy in different places.

At the bottom of the hierarchy are places where one has no reasonable expectation of privacy—places like open fields (*Oliver* v. *United States*, 466 U.S. 170, 179 (1984)) and prisons (*Hudson* v. *Palmer*, 468 U.S. 517, 525–526 (1984)).

In the middle of the hierarchy are vehicles. The Court's "automobile exception" rests on the notion that "one has a lesser expectation of privacy in a motor vehicle." *Caldwell* v. *Lewis*, 417 U.S. 583, 590, 597 (1974).

The apex of citizens' recognized expectations of privacy is in the home. That is because "the zone of privacy" is nowhere "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Payton*, 445 U.S. at 589; *supra*, at 3-5.

Indeed, the special status of the home is itself the basis for distinguishing other contexts. Open fields support no privacy interests because, unlike a home, they "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver*, 466 U.S. at 179. And the reason "[o]ne has a lesser expectation of privacy in a motor vehicle" is because "*it seldom serves as one's residence* or as the repository of personal effects." *Caldwell*, 417 U.S. at 590 (emphasis added).

Against this backdrop, the Court must consider not only petitioner's status as a probationer, but also the status of the place searched—here, the home. Although students may have a diminished expectations of privacy in the classroom, for example, their expectations of privacy at home remain intact. The question here is whether a probationer's expectation of privacy—although diminished in other contexts—likewise remains intact in the home. It assuredly does, for "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). The decision below would liken probationers' homes to prison cells. That position is at odds both with the differences between probationers and parolees and with our Nation's longstanding regard for the home.

2. The Tennessee Supreme Court incorrectly assessed the importance of the place and person being searched.

The court below erred in its application of the reasonableness test here. "In balancing the diminished expectation of privacy attending a probationer with the State's interests," the court "conclude[d] that it is logical to extend the same reduced expectation of privacy

to probationers as we do to parolees." Pet. App. 21a–22a. It therefore held that the "slight intrusion upon [the Hamms'] privacy" caused by the suspicionless search of their home was constitutional. *Id.* at 22a. In so holding, the court made two errors.

First, it ignored the "centuries-old principle of respect for the privacy of the home." *Wilson* v. *Layne*, 526 U.S. 603, 610 (1999). Astoundingly, the court reasoned that the "intrusion upon * * * privacy" resulting from the search of petitioners' *home*—which they share with their child—was "slight." Pet. App 22a. Characterizing the intrusion on *any* private home—and particularly a family home shared with others (*Oystead* v. *Shed*, 13 Mass. 520, 523 (1816))—as slight is antithetical to the "special protection" to which the "home is entitled" as the "center of the private lives of our people." *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

Second, the court incorrectly ignored this Court's explanation that on the privacy "continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Samson*, 547 U.S. at 850.

The lower court thus ignored the distinction between the privacy interests of parolees and probationers that this Court previously has recognized. *Samson*, 547 U.S. at 850; cf. *Knights*, 534 U.S. at 119. And making matters worse, it ignored how the location of a search—particularly when that location is the home—can affect its reasonableness.

3. The lower court's error would permit general warrants to pervade again.

By permitting suspicionless searches, the probation condition that Tennessee imposed on Mrs. Hamm is

the equivalent of a standing general warrant—the "reviled" instrument that led the founders to adopt the Fourth Amendment in the first place. *Carpenter*, 138 S. Ct. at 2213. General warrants "retained for the Crown the particulars of suspicion, making them vulnerable to abuse." Donohue, *supra* at 1212. Here, the particulars of suspicion have been discarded altogether: The conditions of Mrs. Hamm's probation required no suspicion at all. Nor did the police possess reasonable suspicion of wrongdoing on the day they searched the Hamms' home. If the decision below stands, Tennessee's courts may impose a probation condition "[s]o open-ended" that it "can only be described as a general warrant." *United States* v. *Stefonek*, 179 F.3d 1030, 1033 (7th Cir. 1999) (quoted with approval in *Groh* v. *Ramirez*, 540 U.S. 551, 563 (2004)). That cannot be.

The effect of such a rule on probationers' family members is especially perverse. Since the founding, courts have shaped Fourth Amendment rules "to preserve the repose and tranquillity of families within the dwellinghouse" *Oystead*, 13 Mass. at 523. Yet according to the court below, children and other family members of probationers are equally disentitled to the Fourth Amendment's protections as the probationers themselves.

The Tennessee Supreme Court's ruling has many more disturbing effects. To begin with, once a probationer's home ("first among equals") falls to suspicionless search, the police have free rein to search all contents of the home and its curtilage. That also means the police can search a probationer's car at whim. Gone as well is the warrant requirement to search a cell phone, so long as the phone belongs to a probationer. Cf. *Riley* v. *California*, 573 U.S. 373, 388 (2014). A phone may carry more personal information than a

trunk full of documents, *id.* at 393-394, but that is no matter because a house contains far more intimate details than a trunk—and a probationer's home is already fair game. Using her cell phone data, the government likewise would have no trouble accessing a probationer's whereabouts for months (or years) at a time. Cf. *Carpenter*, 138 S. Ct. at 2217. Tracking a person's location may reveal her "familial, political, professional, religious, and sexual associations," *id.* (quoting *United States* v. *Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring))—just like rummaging through her home.

Finally, these concerns are not limited to probationers. If police unlawfully search the home of a *non-probationer*, find incriminating evidence, and later discover that a roommate is a probationer, the constitutional violation will be forgiven. Cf. *Utah* v. *Strieff*, 136 S. Ct. 2056, 2063 (2016). This Court can and should bring an end to this parade of horribles by granting review and reversing.

II. THE COURT SHOULD DISCARD THE "EXPECTATION OF PRIVACY" STANDARD FOR HOME SEARCHES.

The lower court held that the search here was constitutionally acceptable because probationers and their housemates have no expectation of privacy in their homes. That is wrong. "[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Carter*, 525 U.S. at 99 (Kennedy, J., concurring). But more fundamentally, this Court should discard the ill-conceived "expectation of privacy" construct, at least as it concerns searches of homes. For if the Founders understood anything, it was that the expectation of privacy in the home was inviolable.

"What 'unreasonable' meant" at the time of the founding "was 'against reason,' which translated into 'against the reason of the common law.'" Donohue, *supra* at 1192; see also *id.* at 1270-1276. In the 20th Century, the Court strayed from this understanding, and the tests for reasonableness multiplied. Today "[t]he Court chooses from at least five principal models to measure reasonableness," and "cases decided within weeks of each other have had fundamentally different—and irreconcilable—approaches to measuring the permissibility of an intrusion." Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977, 978 (2004).

When it comes to the home, weighing a citizen's "expectation of privacy" and balancing that interest with the state's (*Knights*, 534 U.S. at 118–120) is inappropriate. As an initial matter, the expectation of privacy analysis is "notoriously unhelpful" as an analytical tool. *Carter*, 525 U.S. at 97 (Scalia, J., concurring). "In fact, we still don't even know what [the] 'reasonable expectation of privacy' test *is*." *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting). Because it asks the Court to consider expectations of privacy once to determine whether a search occurred and then a second time to determine whether that search was reasonable, the approach used in *Knights* and *Samson* is "*Katz*-squared." *Id.* at 2272 (Gorsuch, J., dissenting).

Rather than continuing to labor under the *Katz* framework, the Court should instead "look to a more traditional Fourth Amendment approach." *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting). This case presents a prime opportunity for doing so.

The traditional approach asks simply whether a search of a home was illegal as common law at the time of the Fourth Amendment's adoption. It also avoids the

impenetrable balancing of personal and government interests in which the Tennessee Supreme Court lost its way. "The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis* v. *United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in the judgment). Though the government's "job of ferreting out crime will become marginally more difficult * * * obedience to the Fourth Amendment always bears that cost and surely brings with it other benefits." *United States* v. *Carloss*, 818 F.3d 988, 1015 (10th Cir. 2016) (Gorsuch, J., dissenting). It is not the job of the courts to "weigh those costs and benefits but to apply the Amendment according to its terms and in light of its historical meaning." *Ibid.*

Under the correct test, this case is easy. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." *Payton*, 445 U.S. at 590. And a State cannot use blanket probation conditions to "shrink the realm of guaranteed privacy" any more than it can use statutes or new technology to do the same. *Kyllo*, 533 U.S. at 34. Because founding-era history makes clear that suspicionless searches of homes were illegal at common law, the Tennessee Supreme Court's decision permitting such searches violates the Constitution.

* * *

The historical meaning of the Fourth Amendment is well understood. The founding generation waged the Revolution to secure for itself the right to be free of suspicionless government intrusion into the home. And by placing that right in the constitution, they secured it for future generations.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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