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 a Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tennessee Supreme Court correctly held that the Fourth Amendment did not require law enforcement officers to have reasonable suspicion to search the home of a felon on supervised probation when the officers knew that the probationer had unambiguously agreed to a warrantless search condition.

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INTRODUCTION

In *United States v. Knights*, 534 U.S. 112 (2001), this Court held that "no more than reasonable suspicion" was required for officers to search the home of a probationer who was "unambiguously informed" that he was subject to a search condition. *Id.* at 119, 121. Because reasonable suspicion existed in *Knights*, this Court did not decide whether the search condition "so diminished, or completely eliminated, [the defendant's] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id.* at 120 n.6. But this Court considered that question in *Samson v. California*, 547 U.S. 843 (2006), "in the context of a parolee search" and concluded that the suspicionless search of a parolee who was subject to and clearly informed of a search condition likewise satisfied the Fourth Amendment. *Id.* at 850, 857.

The petition urges this Court to grant certiorari in this case to resolve a purported conflict of authority "over whether police may constitutionally conduct suspicionless searches of probationers." Pet. 9. For any one of four reasons, however, the petition should be denied. *First*, this Court lacks jurisdiction to review this case in its current posture because the Tennessee Supreme Court's decision is not a "[f]inal judgment[]." 28 U.S.C. § 1257(a). Petitioners—Angela and David Hamm—prevailed on their motion to suppress in the trial court and the indictment

against them was dismissed. Pet. App. 116a-120a. The Tennessee Supreme Court reversed on the suppression issue and remanded to the trial court for further proceedings, which are ongoing. *Id.* at 30a. Because the decision below is not a final judgment, this Court has no jurisdiction to review it.

Second, even if this Court had jurisdiction, review would not be warranted because there is no genuine conflict of authority on the question presented. The Tennessee Supreme Court applied the same general balancing test this Court applied in *Knights* and *Samson* to the "totality of the circumstances" presented in this case and concluded, based on those circumstances, that it was "logical to extend the same reduced expectation of privacy" to Tennessee probationers as is applied to parolees. Pet. App. 21a-22a, 26a. To the extent that other courts have reached a different conclusion with respect to probationers in their respective jurisdictions, they have done so only because the circumstances in those cases were materially different. Any disagreement among the lower courts is thus due not to a lack of guidance from this Court, but to the diversity of probation regimes across the country. And the question presented is of little practical significance because the Fourth Amendment reasonableness standard is only a baseline; probationers may seek additional protection from searches through legislation, regulations, or challenges under more protective state constitutional provisions.

Third, this case is a poor vehicle to review the question presented. In addition to the jurisdictional defect already discussed, this case involves an undecided antecedent question about whether the officers had reasonable suspicion to conduct the search. If this Court is inclined to decide the question presented, it should await a case like *Samson* in which it is undisputed that officers lacked reasonable suspicion. It would also be preferable to await a case that, unlike this one, cleanly presents consent as an alternative rationale for upholding the search and involves a standard search condition that applies uniformly to all probationers.

Fourth, the decision below does not warrant review because it is correct. In Tennessee, the interests that courts must balance in determining whether reasonable suspicion is required are the same whether the supervised individual is a probationer or a parolee. Probationers face the same conditions and restraints as parolees; they are supervised by the same entity and are even more likely than parolees to recidivate. The Tennessee Supreme Court correctly held that, given these circumstances, the search of petitioners' residence was reasonable under the Fourth Amendment even if lacking reasonable suspicion.

STATEMENT OF THE CASE

A. Tennessee's Probation System

Tennessee requires a sentencing court to consider a suspended sentence of probation as a "sentencing alternative" for eligible defendants. Tenn. Code Ann.

§ 40-35-303(b). Eligible defendants include, with specified exceptions, all individuals convicted of felonies or misdemeanors if the "sentence actually imposed upon the defendant is ten (10) years or less." *Id.* § 40-35-303(a). If a sentencing court determines probation is appropriate, it "shall sentence the defendant to a specific sentence but shall suspend the execution of all or part [of that sentence] and place the defendant on supervised or unsupervised probation either immediately or after a period of confinement." *Id.* § 40-35-303(c)(1).

When a court sentences a defendant to probation, it must "specify the terms of the supervision and may require the offender to comply with certain conditions." *Id.* § 40-35-303(d); *see also id.* § 40-28-304 (the judge "shall determine the conditions of community supervision" for probationers). The conditions of probation are not statutorily mandated. Rather, Tenn. Code Ann. § 40-35-303(d) provides a non-exhaustive list of potential conditions that includes fulfilling family responsibilities; completing appropriate treatment, educational, or vocational training programs; refraining from possessing a weapon; maintaining employment; performing community service; submitting to supervision; and making restitution, among other things. That provision does not specifically mention submitting to searches, but the sentencing court may require a defendant to "[s]atisfy any . . . other conditions reasonably related to the purpose of the offender's sentence and not

unduly restrictive of the offender's liberty or incompatible with the offender's freedom of conscience." *Id.* § 40-35-303(d)(9).

Probationers, like parolees, are supervised by the Tennessee Department of Correction. See Tenn. Code Ann. §§ 40-28-602, -605; Tenn. Dep't of Correction, *Types of Release*, www.tn.gov/correction/cs//types-of-release.html. The Department monitors the compliance of probationers and parolees with the conditions of their release and has the authority to impose a system of graduated sanctions for any non-criminal, technical violations of those conditions. *See* Tenn. Code Ann. §§ 40-28-303, -305. Failure to abide by the conditions of probation can also result in revocation of probation and incarceration, if the sentencing court determines it is appropriate. *Id.* § 40-35-310.

B. Factual Background

In 2013, an Obion County jury convicted petitioner Angela Hamm of manufacturing a controlled substance, a class C felony. Pet. App. 2a; R., Vol. I at 30. The trial court sentenced Angela to six years' imprisonment but suspended the sentence and placed her on supervised probation. Pet. App. 2a. As a condition of her probation, Angela "agree[d] to a search, without a warrant, of [her] person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time." *Id.* (internal quotation marks omitted). The search condition was included in Angela's probation order, and she signed the order

indicating that she had "read . . . the conditions[,] . . . fully underst[oo]d them[,] and agree[d] to comply with them." R., Vol. II, Ex. 2.

About two years later, when Angela was still on probation, law enforcement officers in Obion County received tips from two different individuals that the officers believed established reasonable suspicion that Angela was again committing drug offenses. Officer Ben Yates received a tip from a "reliable informant" that Angela and her husband, petitioner David Hamm, were "doing it big in Glass," a community in Obion County. Pet. App. 76a (internal quotation marks omitted). Although the informant had not personally observed the Hamms sell any drugs, Officer Yates considered the informant reliable because he "had provided information in the past that led to the seizure of narcotics in numerous cases." *Id.* at 77a.

Officer James Hall received a tip while serving a drug-related arrest warrant on Lindsey Gream. *Id.* at 72a. Gream informed Officer Hall that "heavy players" were bringing methamphetamine to Obion County from across the river. *Id.* at 2a (internal quotation marks omitted). She said the traffickers made frequent trips and had purchased more drugs just a few days earlier. *Id.* at 72a-73a. Although Gream did not expressly identify the traffickers by name, she told Officer Hall that the traffickers were located in Glass and "smiled and nodded" when Officer Hall asked if one of them was David Hamm. *Id.* at 2a, 72a. Gream was not an informant, paid or otherwise. *Id.* at 74a. She was a "known methamphetamine user" with a pending

drug charge, but Officer Hall found her credible because she did not receive compensation or a deal in exchange for the information. *Id.* (internal quotation marks omitted).

Officers Yates and Hall knew that Angela was on supervised probation and subject to a warrantless search condition. *Id.* at 5a. They also knew that her husband, David, was not on probation. *Id.* Although the officers did not believe the information they had received established probable cause to obtain a search warrant for petitioners' residence, they thought it was sufficient to establish reasonable suspicion for a warrantless "probation search" of Angela. *Id.* at 3a (internal quotation marks omitted).

One day after Officer Hall received the tip from Gream, he, Officer Yates, and other members of the Obion County drug task force conducted a warrantless search of petitioners' residence. The officers knocked on the front and side doors of the house when they arrived, but no one answered. *Id.* at 3a, 75a. A teenage boy who was standing in the front yard told the officers that petitioners had just left and that others were in a detached shop behind the house. *Id.* The officers walked behind the house to the shop and encountered three men—including the teenage boy's father, Clifton Hamm—watching what appeared to be footage "from four security cameras set up around the property." *Id.* at 3a, 78a. When Officer Yates asked the men how they were doing, Clifton quickly turned off the television. *Id.* When

Officer Yates asked Clifton why he was acting nervous and why had had turned off the television, he denied it had been on. *Id.* at 78a. Clifton confirmed that petitioners were not at home. *Id.*

The officers returned to the house and learned from Clifton's son that he, Clifton, and petitioners resided there. *Id.* at 78a. Officer Yates was unaware until that time that Clifton lived with petitioners, but he was familiar with Clifton because an informant who was cooperating with the drug task force had previously attempted to purchase drugs from him. *Id.* The officers also learned that petitioners shared a bedroom at the back of the house. *Id.* at 75a, 78a.

The officers entered the house through an unlocked side door and conducted a warrantless search. *Id.* at 3a. Although the officers searched the entire house, except for a child's bedroom, the only evidence seized was from the bedroom shared by petitioners. *Id.* at 76a. There, the officers found pills, two glass pipes, two bags of ice methamphetamine, and weighing scales. *Id.* at 3a, 76a.

C. Procedural Background

Petitioners were jointly indicted on six counts of possession of controlled substances with intent to sell or deliver and one count of possession of drug paraphernalia. Pet. App. 3a. Represented by separate attorneys, petitioners each filed a motion to suppress the evidence seized during the warrantless search. *Id.* Angela argued that the search violated her Fourth Amendment rights because

officers lacked reasonable suspicion to conduct the search. *Id.* at 72a. David argued that the search violated his Fourth Amendment rights because he had not consented to the search and retained a reasonable expectation of privacy despite Angela's status as a probationer. *Id.*

The trial court granted the motion to suppress. *Id.* at 118a-120a. The trial court interpreted existing case law as establishing that "an officer can search a probationer's residence . . . if the officer has reasonable suspicion of criminal activity or violation of the order" and rejected the State's argument that reasonable suspicion existed. *Id.* at 119a, 120a. The State informed the court that it was unable to proceed with the prosecution without the suppressed evidence, and the trial court granted petitioners' motion to dismiss the indictment. *Id.* at 117a.

The State appealed as of right under Tennessee Rule of Appellate Procedure 3(c), and a divided panel of the Court of Criminal Appeals affirmed. Pet. App. 70a-115a. The majority concluded that "the information possessed by the officers at the time of the search was insufficient to establish reasonable suspicion that Angela Hamm was engaged in illegal drug-related activity." *Id.* at 89a. Although the majority acknowledged that neither this Court nor the Tennessee Supreme Court had "squarely addressed whether something less than reasonable suspicion would permit searches of probationers," it followed an earlier Court of Criminal Appeals decision holding that reasonable suspicion is required. *Id.* at 90a. The majority distinguished

the Sixth Circuit's decision in *United States v. Tessier*, 814 F.3d 432 (6th Cir. 2016), which held that reasonable suspicion is not required, because the Sixth Circuit had described the search condition at issue in that case as "standard," despite the fact that "there is not a uniform warrantless search provision to which every probationer in Tennessee is subject." Pet. App. 92a. The majority found it unnecessary to address the State's argument that Angela Hamm had "consented to the search of her home by agreeing to the warrantless search provision," *id.*, but Judge Williams filed a concurring opinion in which he rejected that argument, *id.* at 105a-111a.

Judge Glenn dissented. In his view, the officers "clearly had reasonable suspicion that Angela Hamm had returned to the drug business" and could search her residence under the terms of the probation order. *Id.* at 115a. He therefore "d[id] not believe it [wa]s necessary" to decide whether the Fourth Amendment requires reasonable suspicion. *Id.* at 114a.

The Tennessee Supreme Court granted discretionary review and, in a divided opinion, reversed. *Id.* at 1a-69a. After considering this Court's precedents, its own precedents, the Sixth Circuit's *Tessier* decision, and decisions from other jurisdictions, the majority concluded that it was "logical to extend the same reduced expectation of privacy to probationers that we do to parolees." *Id.* at 21a-22a. The majority found that "the State's interests in reducing recidivism and promoting reintegration and positive citizenship" outweighed the "diminished expectation of

privacy attending a probationer" who is "unquestionably" aware that she is subject to a warrantless search condition. *Id.* The majority thus held that "probation search conditions that permit a search, without a warrant, of a probationer's person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time, do not require law enforcement to have reasonable suspicion." *Id.* at 22a.

The majority held that the search of petitioners' residence was reasonable under the totality of the circumstances because the officers conducting the search were "aware of [Angela's] status as a probationer," and Angela's signature on the probation order demonstrated that she "was 'unambiguously' aware of the search condition." *Id.* at 23a. The majority stressed, however, that its decision did "not afford law enforcement unfettered and unreviewable discretion." *Id.* "[A] warrantless and suspicionless search of a probationer could be deemed unreasonable and therefore unconstitutional under circumstances indicating that it was conducted for reasons other than valid law enforcement concerns" or "without knowledge that the person searched was a probationer who was subject to warrantless and suspicionless searches." *Id.* at 23a-24a. The majority also concluded that, because petitioners shared a bedroom, "the search of David Hamm's personal belongings located within that bedroom" was constitutionally permissible under "the doctrine of common authority." *Id.* at 30a. Because the trial court's erroneous decision to

grant the motion to suppress resulted in the dismissal of the indictment, the Tennessee Supreme Court "remand[ed]" the case "to the trial court for proceedings consistent" with its opinion. *Id.* at 30a.

The majority emphasized that its opinion concerned a "felon placed on supervised probation" and did not address "[t]he expectation of privacy of misdemeanants placed on probation." *Id.* at 22a n.8. Nor did the majority address whether the officers had reasonable suspicion, *id.* at 22a n.9, or whether Angela's "acceptance of the search condition in her probation agreement constituted consent," *id.* at 16a n.5.

Justices Clark and Lee issued separate dissenting opinions. Both would have held that the Fourth Amendment requires officers to have reasonable suspicion to search a probationer and that the State had failed to establish reasonable suspicion in this case. *Id.* at 32a, 66a, 69a.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review the Tennessee Supreme Court's Decision Because It Is Not a Final Judgment.

This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Section 1257(a) "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). The rule "is not one of those technicalities to be easily scorned," but rather "an important factor

in the smooth working of a federal system." *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Enforcement of the finality requirement promotes judicial efficiency and comity by "avoid[ing] piecemeal review of state court decisions" and "minim[izing] federal intrusion in state affairs." *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

"To be reviewable by this Court, a state-court judgment must be final in two senses." *Jefferson*, 522 U.S. at 81 (internal quotation marks omitted). First, "it must be subject to no further review or correction in any other state tribunal." *Id.* (internal quotation marks omitted). Second, it must be "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* (internal quotation marks omitted). "The general rule is that finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989); *see also Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (per curiam); *Parr v. United States*, 351 U.S. 513, 518 (1956).

The Tennessee Supreme Court's decision is not final in the second sense because it did not conclude the litigation. After the trial court granted the motion to suppress, it dismissed the indictment based on the State's representation that it could not proceed with the prosecution without the suppressed evidence. Pet. App. 117a. When the Tennessee Supreme Court reversed the trial court's ruling on the

suppression motion, it remanded to the trial court for further proceedings. *Id.* at 30a. This Court has no jurisdiction to review the issue presented until those further proceedings result in a final judgment, which in this context means a conviction and sentence.

"A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment." *Johnson v. California*, 541 U.S. 428, 431 (2004) (per curiam). Here, the petition fails to satisfy that threshold requirement. Petitioners summarily assert that they are invoking this Court's jurisdiction under § 1257(a), Pet. 1, but they make no attempt to explain how the Tennessee Supreme Court's interlocutory decision is final.

Nor could they. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified "four categories of . . . cases in which the Court has treated" an interlocutory decision on a federal issue "as a final judgment . . . without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477. Yet this case does not fall into any of these "exceptional categories." *Johnson*, 541 U.S. at 429.

The first category consists of "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. But this Court has applied that

exception in the criminal context only in the extreme situation where the defendant had "concede[d] that he" committed the conduct of which he was accused and that he "therefore ha[d] no defense" in the trial court other than the federal constitutional claim the state court had rejected. *Mills v. Alabama*, 384 U.S. 214, 217 (1966). No such concessions have been made in this case. While the trial court's suppression of the evidence was conclusive for the State—in that it made it impossible for the State to proceed with its prosecution—the Tennessee Supreme Court's reversal on that issue is not conclusive of and does not preordain petitioners' guilt. That issue remains to be adjudicated on remand, and petitioners will be free to raise any other defenses they may have at that time.

The second category includes cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. That exception does not apply either. If the outcome of the proceedings on remand is dismissal of the indictment on a different ground or acquittal by the jury, then there will be no need for further review of the Fourth Amendment issue.

Nor does this case fall into the third category—"those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. If petitioners are convicted

on remand, they "could once more seek review of [their Fourth Amendment] claim in [the Tennessee appellate courts]—albeit unsuccessfully—and then seek certiorari on that claim from this Court." *Johnson*, 541 U.S. at 431 (holding that third exception did not allow the Court to review an interlocutory decision on a *Batson* claim). That holds true even if petitioners plead guilty. *See* Tenn. App. P. 3(b) (allowing appeal as of right following a guilty plea if the defendant "explicitly reserved the right to appeal a certified question of law dispositive of the case").

Finally, this is not a case in which "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. The Court has refused to apply this fourth *Cox* exception when doing so "would permit the . . . exception to swallow the rule." *Flynt*, 451 U.S. at 622. As was the case when this Court declined review of an interlocutory suppression issue in *Florida v. Thomas*, 532 U.S. 774, 780 (2001), and an interlocutory *Batson* issue in *Johnson*, 541 U.S. at 430, petitioners "can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's [Fourth Amendment] claim," *id.*

Because the Tennessee Supreme Court's decision is not final and does not fit within any of the *Cox* exceptions, this Court lacks jurisdiction to review the decision at this time. The petition must be denied for that reason alone.

II. There Is No Genuine Conflict on the Question Presented.

Even if this Court had jurisdiction, review should be denied because there is no genuine conflict of authority that warrants this Court's attention. Courts that have directly considered whether the suspicionless search of a probationer is reasonable under the balancing test applied in *Knights* and *Samson* have reached different conclusions on that question only because the cases involved materially different circumstances. And the other cases petitioners cite in support of a purported conflict of authority either did not decide the question presented or decided it before this Court's decision in *Samson*.

The petition contends that fourteen state high courts "have held reasonable suspicion is required before searching a probationer," Pet. 14, but none of the decisions the petition cites directly conflicts with the Tennessee Supreme Court's decision in this case. Five of the decisions reached different results only because they involved materially different circumstances from the decision below. *North Dakota v. Ballard*, 874 N.W.2d 61 (N.D. 2016), which petitioners erroneously describe as "strikingly similar" to this case, Pet. 14, in fact involved the search of a defendant on *unsupervised* probation. The North Dakota Supreme Court's holding that the search violated the Fourth Amendment turned on its finding that the defendant's "minimal unsupervised probation conditions st[oo]d in stark contrast" to the "extensive" restraints imposed on parolees. *Ballard*, 874 N.W.2d at 72. The

very next year, that court upheld a warrantless search of a *supervised* probationer and distinguished *Ballard* on the ground that it involved only "[t]he issue . . . whether a suspicionless search of an unsupervised probationer was constitutional." *North Dakota v. White*, 890 N.W.2d 825, 829 (N.D. 2017). The decision below, by contrast, "concerns a felon placed on supervised probation." Pet. App. 22a n.8.

Although *Kansas v. Bennett*, 200 P.3d 455 (Kan. 2009), held that a suspicionless probationer search violated the Fourth Amendment, it did so at a time when the Kansas legislature had not authorized suspicionless searches of probationers or parolees, and even Kansas *parolees* were informed that searches would not be conducted without reasonable suspicion. *Id.* at 462-63. The court reasoned that "parolees in Kansas ha[d] an expectation that they w[ould] not be subjected to suspicionless searches," and it "logically follow[ed] from this conclusion that because probationers have a greater expectation of privacy than parolees, searches of probationers in Kansas must also be based on a reasonable suspicion." *Id.* at 463. After *Bennett* was decided, however, the Kansas legislature amended the law to require both parolees and probationers to submit to suspicionless searches, and the Kansas Supreme Court recently upheld a suspicionless search of a parolee who had agreed to a search condition. *See Kansas v. Toliver*, 417 P.3d 253, 261 (Kan. 2018). As the Kansas Court of Appeals has recognized, because "the legal

landscape that led to the result in *Bennett* no longer exists," *Bennett* no longer controls with respect to probationers either. *Kansas v. Hinnenkamp*, 446 P.3d 1103, 1113 (Kan. Ct. App. 2019).

The defendant in *Murry v. Virginia*, 762 S.E.2d 573 (Va. 2014), challenged a warrantless and suspicionless search condition under the Fourth Amendment *before* he had signed "any document agreeing to terms of probation." *Id.* at 581. In holding that the condition was unreasonable under the *Knights* balancing test, the court distinguished its earlier decision in *Anderson v. Virginia*, 507 S.E.2d 339 (1998), which upheld the suspicionless search of a probationer who agreed to waive his Fourth Amendment rights as part of a plea agreement. *Murry*, 762 S.E.2d at 580-81. That the defendant in *Murry* "clearly ha[d] not consented to the probation condition" at issue was a "significant factual difference[]" that justified a different result. *Id.* The Virginia Court of Appeals recently relied on that distinction in rejecting a Fourth Amendment challenge to the suspicionless search of a probationer who "voluntarily accepted [a] Fourth Amendment waiver limited to the search and seizure of his person as a condition to his two-year probation period." *Blanton v. Virginia*, No. 1834-14-4, 2016 WL 787950, at *2 (Va. Ct. App. Mar. 1, 2016).

Vermont v. Cornell, 146 A.3d 895 (Vt. 2016), similarly involved a challenge brought by a defendant who objected to a search condition before any search occurred. And although *Cornell* "continue[d] to hold," after *Samson*, that

"reasonable suspicion for search and seizure imposed on probationers is required by the Fourth Amendment," *id.* at 909, the Vermont Supreme Court had already required reasonable suspicion under the Vermont Constitution, *see State v. Lockwood*, 632 A.2d 655, 663 (Vt. 1993) (adopting a "reasonable grounds" standard for probationer searches under Vt. Const. art. 11). Indeed, in a recent case upholding a search condition allowing continual electronic monitoring of a probationer, the Vermont Supreme Court distinguished earlier cases requiring reasonable suspicion for searches of a probationer's home or possessions on the ground that the Vermont Constitution "affords a special sanctity to the home." *State v. Kane*, 169 A.3d 762, 776 (Vt. 2017).

Sierra v. Delaware, 958 A.2d 825 (Del. 2008), concerned a suspicionless search performed by probation officers pursuant to Delaware regulations that *expressly required reasonable suspicion*. *Id.* at 829, 832-33. The Delaware Supreme Court recently affirmed a decision explaining that *Sierra* "is limited to administrative searches of probationers' residences and vehicles pursuant" to those regulations. *Doe v. Coupe*, 143 A.3d 1266, 1280 (Del. Ch. 2016), *aff'd*, 158 A.3d 449 (Del. 2017).

Three of the decisions cited by petitioner *upheld* warrantless searches on different grounds and did not decide whether a suspicionless search of a probationer would violate the Fourth Amendment. In *Moran v. Georgia*, 805 S.E.2d 856

(Ga. 2017), the Georgia Supreme Court upheld a warrantless search under *Knights* because "at the time authorities were examining [the probationer's] cell phone, there was reasonable suspicion that [the probationer] was involved in a murder." *Id.* at 859. The court did not decide the question left open in *Knights*, and previous Georgia decisions have recognized that "the extent to which *Samson* applies to probationers rather than parolees is unclear" in the Georgia courts. *Hess v. State*, 674 S.E.2d 362, 364 (Ga. Ct. App. 2009).

In *Montana v. Moody*, 148 P.3d 662 (Mont. 2006), the Montana Supreme Court upheld a probation condition requiring a defendant to "keep her home open and available for the Probation & Parole Officer to visit" on the ground that "a 'home visit' to a probationer's residence does not qualify as a 'search'" under the Montana Constitution. *Id.* at 664-65 (internal quotation marks omitted). In dicta, the court stated that "[i]n Montana, a probation officer may search a probationer's residence without a warrant so long as the officer has reasonable cause." *Id.* at 665. But both *Moody* and the earlier Montana precedents cited for that proposition turned on the fact that Montana regulations allow searches of probationers only "upon reasonable cause." *Id.* (internal quotation marks omitted).

The Idaho Supreme Court's decision in *Idaho v. Garnett*, 453 P.3d 838 (Idaho 2019), is even farther afield. The question presented in that case was what standard should apply "to determine the permissible bounds of a search of a

probationer's belongings that has already begun." *Id.* at 841. In deciding that distinct question, the court borrowed the "no more than reasonable suspicion" standard from *Knights* and upheld the search in that case because the probation officer who conducted the search "had reasonable suspicion" that the property in question was owned by the probationer. *Id.* at 843.

Six of the decisions cited by petitioners were decided before *Samson* and have not been revisited. *See Parks v. Kentucky*, 192 S.W.3d 318, 330 (Ky. 2006); *Illinois v. Lampitok*, 798 N.E.2d 91, 106 (Ill. 2003); *Connecticut v. Smith*, 540 A.2d 679, 691 (Conn. 1988); *Massachusetts v. LaFrance*, 525 N.E.2d 379, 380 (Mass. 1988);[1] *Hawaii v. Fields*, 686 P.2d 1379, 1390 (Haw. 1984); *Grubbs v. Florida*, 373 So. 2d 905, 910 (Fla. 1979). For that reason alone, they cannot be said to directly conflict with the decision below. Indeed, the Kentucky Supreme Court has acknowledged that, "[i]n view of *Samson*, it remains undecided" in that jurisdiction "whether a warrantless search without reasonable suspicion of a probationer, rather than a parolee, is consistent with the Fourth Amendment." *Bratcher v. Kentucky*, 424 S.W.3d 411, 415 (Ky. 2014).

[1] Petitioners maintain that the Massachusetts Supreme Court "reaffirmed" *LaFrance* in *Massachusetts v. Feliz*, 119 N.E.3d 700, 711 (Mass. 2019). Pet. 17. But *Feliz* merely described the holding of *LaFrance* in concluding that an entirely different search condition—GPS monitoring—violated the Massachusetts Constitution. *See Feliz*, 119 N.E.3d at 701 & n.19.

Two of those decisions would not conflict in any event because they were decided under state constitutional provisions that provide greater protection against searches and seizures than the Fourth Amendment. *See LaFrance*, 525 N.E.2d at 382 (deciding issue under Massachusetts Constitution); *Fields*, 686 P.2d at 1390 (deciding issue under Hawaii Constitution). And the Illinois Supreme Court has confined *Lampitok* to its facts in upholding suspicionless searches of probationers in other contexts. *See, e.g.*, *Illinois v. Absher*, 950 N.E.2d 659, 667-68 (Ill. 2011).

Petitioners contend that "the federal courts of appeals are also confused," Pet. 20, but none of the decisions they cite conflicts with the decision below. In *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007), the Second Circuit considered whether a statute requiring felons to supply DNA samples for a national database violated the Fourth Amendment "when applied to individuals convicted of nonviolent crimes who were sentenced only to probation." *Id.* at 75. The court upheld the statute under the "special needs" exception to the Fourth Amendment after concluding that it was not required to extend the "general balancing test" from *Samson* to probationers. *Id.* at 79. The Second Circuit did *not* hold that the outcome of *Samson*'s balancing test should be different when applied to probationers; it simply declined to apply that balancing test altogether. *Id.* As petitioners acknowledge, *see* Pet. 23, whether a suspicionless search of a probationer is allowed in the Ninth Circuit depends on the specific facts of the case. And the Ninth Circuit has not addressed the issue in a case

involving facts similar to those here. *Cf. United States v. Job*, 871 F.3d 852, 859-60 (9th Cir. 2017) (holding that suspicionless search of individual "on probation for a nonviolent drug offense" was unconstitutional because "the officers were unaware of [the defendant's] Fourth Amendment search waiver").

In sum, courts that have directly considered whether suspicionless searches of probationers are reasonable under the balancing test applied in *Knights* and *Samson* have reached different conclusions only because those cases involved materially different circumstances. Because the proper application of that balancing test requires consideration of "the totality of the circumstances," *Samson*, 547 U.S. at 852, that result is neither surprising nor concerning. The outcome in these cases is necessarily driven by the particular circumstances at issue—the features of the probation system, applicable state laws and regulations, the specific probation conditions imposed, the extent to which the defendant and officers were aware of any search condition, the characteristics of the defendant, and the nature of the search. Granting review to consider whether the Tennessee Supreme Court properly applied the balancing test to the "totality of the circumstances" presented in *this case* thus would not settle the constitutionality of suspicionless probationer searches in *all cases*. *Cf. United States v. Freeman*, 479 F.3d 743, 748 (10th Cir. 2007) (noting that *Samson* did not grant a "a blanket approval" for suspicionless searches of parolees).

To the extent any conflict of authority exists, moreover, it is of little practical importance. The Fourth Amendment's reasonableness standard provides only a baseline for protection of privacy. Some jurisdictions have supplemented that baseline by enacting statutes or regulations requiring searches of probationers to be supported by reasonable suspicion. *See* Pet. 18 & n.2, 22-23. Categorical solutions of that sort may provide a more effective means to "balance privacy and public safety in a comprehensive way" than case-by-case adjudication by this Court. *United States v. Jones*, 565 U.S. 400, 430 (Alito, J., concurring in judgment); *see also* Pet. App. 53a (Clark, J., dissenting) (urging the Tennessee legislature to "enact[] a statute that requires law enforcement officials to establish reasonable suspicion for warrantless searches of probationers"). And state courts of course remain free to interpret their own constitutions to provide greater protection than the Fourth Amendment. *See* Pet. 18-19.

III. This Case Is a Poor Vehicle to Decide the Question Presented.

Even if this Court had jurisdiction and the question presented were worthy of review, this case is a poor vehicle for this Court to decide that issue. First, it would be preferable to await a vehicle in which it is undisputed that the officers lacked reasonable suspicion. Unlike *Samson*, this is not a case in which the officers' search was "based solely on [the defendant's] status" as a probationer or parolee. 547 U.S. at 846-47. The officers who searched petitioners' residence did so based on tips that

petitioners were engaged in drug trafficking. *See* Pet. App. 2a, 72a-80a. The State argued at every stage of the proceedings below that those tips established reasonable suspicion, and Judge Glenn on the Court of Criminal Appeals agreed and would have upheld the search on that basis. *Id.* at 113a-114a. Because the Tennessee Supreme Court held that reasonable suspicion was not required, it did not decide whether reasonable suspicion existed. *Id.* at 22a n.9. To reach the question presented, then, this Court would need to either decide that antecedent question adversely to the State or assume that no reasonable suspicion existed and issue a constitutional ruling that may not be outcome dispositive.

Second, because some courts have upheld suspicionless searches of probationers under a consent rationale rather than the general balancing test applied in *Knights* and *Samson*, *see, e.g.*, *United States v. Barnett*, 415 F.3d 690, 692-93 (7th Cir. 2005), the Court may wish to await a vehicle that more cleanly presents an opportunity to consider that distinct legal theory. Neither the Court of Criminal Appeals nor the Tennessee Supreme Court addressed the State's argument that Angela Hamm consented to the search by agreeing to the warrantless search condition. *See* Pet. App. 16a n.5, 92a. And this Court—"a court of review, not of first view," *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005))—typically declines to consider issues that were not decided below.

Finally, the Court may wish to await a case involving a standard search condition that applies to all probationers within a jurisdiction. To the extent review is needed to provide guidance and clarity to lower courts, the Court could better accomplish those goals in a case involving a search condition that applies uniformly to a substantial number of probationers. Although the Sixth Circuit characterized the search condition at issue in this case as a "standard" one in *Tessier*, 814 F.3d at 433, the condition is not statutorily required, *see* Tenn. Code Ann. § 40-35-303(d), and "there is not a uniform warrantless search provision to which every probationer in Tennessee is subject," Pet. App. 92a.

IV. The Decision Below Is Correct.

Whether a search is "reasonable" for purposes of the Fourth Amendment requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 119 (internal quotation marks omitted). In Tennessee, application of this balancing test to probationers on supervised release yields the same outcome as in *Samson*—that a search may be reasonable under the Fourth Amendment even if lacking reasonable suspicion.

In *Knights*, this Court considered whether the search of a probationer's home without a warrant was reasonable. 534 U.S. at 115. The defendant in that case had

agreed, as a condition of his probation, to "[s]ubmit his . . . person, property, place of residence, vehicle, [and] personal effects" to "search at anytime, with or without a search warrant, warrant of arrest or reasonable cause." *Id.* at 114 (alterations in original) (internal quotation marks omitted). This Court found it "reasonable to conclude that the search condition would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations." *Id*. at 119. And it found that, because the "probation order clearly expressed the search condition and [the defendant] was unambiguously informed of it," the condition "significantly diminished [the defendant's] reasonable expectation of privacy." *Id.* at 119-20. Because the Court found that the law enforcement officer had reasonable suspicion to conduct the search, it left open the question whether "the probation condition so diminished, or completely eliminated, [the defendant's] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id.* at 120 n.6.

In *Samson*, this Court directed its attention to the question left open by *Knights*, "albeit in the context of a parole search," and answered the question in the affirmative. 547 U.S. at 850. The Court examined the restrictions and conditions California law placed on parolees to conclude that "parolees . . . have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852. As

was the case in *Knights*, the Court also found "salient" the fact that the defendant had agreed to an "unambiguous search condition" that "significantly diminished" any privacy interest. *Id.* (internal quotation marks omitted). Based on these circumstances, the Court concluded that the defendant "did not have an expectation of privacy that society would recognize as legitimate." *Id.*

The Tennessee Supreme Court correctly concluded that "it is logical to extend the same reduced expectation of privacy" to Tennessee probationers. Pet. App. 21a. In Tennessee, the status of probationers reduces their expectation of privacy in a manner nearly identical to parolees. Parolees and probationers are potentially subject to the same conditions—the only difference is the entity that imposes the conditions. Parolees are subject to the conditions the board of parole deems necessary in their individual case, *see* Tenn. Code Ann. § 40-28-117(a)(1) (parole board may set conditions of parole); Tenn. Comp. R. & Regs 1100-01-.06(6) (parole board "may impose any conditions and limitations that [it] deems necessary"), while probationers are subject to the conditions the sentencing court deems necessary, *see* Tenn. Code Ann. § 40-35-303(d) (sentencing court may impose conditions of probation). Probationers, like parolees, face significant restraints on their liberty. In addition to the conditions imposed by the sentencing court, probationers may not "leave the jurisdiction of the probationer's probation officer without the express permission of the trial judge." *Id.* § 40-35-303(h). Both parolees and probationers

are supervised by the Tennessee Department of Correction. *Id.* § 40-28-605 ("The duties of probation and parole officers shall be to supervise, investigate and check on the conduct, behavior and progress of parolees and persons placed on probation[.]"); *see also* Tenn. Dep't of Correction, *Types of Release*, www.tn.gov/correction/cs//types-of-release.html.

Moreover, like the defendant in *Samson*, petitioner Angela Hamm signed a search condition agreeing to "a search, without a warrant, of [her] person, vehicle, property, or place of residence . . . at any time." Pet. App. 2a. "[T]hat acceptance of a clear and unambiguous search condition 'significantly diminished [her] reasonable expectation of privacy.'" *Samson*, 547 U.S. at 852 (quoting *Knights*, 534 U.S. at 120). Together, petitioner's status as a felon on supervised probation and the search condition to which she agreed deprived her of any "expectation of privacy that society would recognize as legitimate." *Id.*

The other side of the balancing test—the State's legitimate interests—is also identical whether a parolee or probationer is involved. Both probation and parole allow individuals convicted of crimes who would otherwise be incarcerated to remain free and participate in society, subject to certain conditions. The State has two "substantial" interests in closely supervising these individuals. *Id.* at 853. First, both probationers and parolees are more likely than average citizens to violate the law. *See id.*; *Knights*, 534 U.S. at 120. The State thus has an "overwhelming

interest" in supervising these individuals closely to ensure that does not occur. *Samson*, 547 U.S. at 853 (quoting *Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365 (1998)). Second, the State has an interest in rehabilitation and reintegration of the supervised individual. *Id.* at 853; *Knights*, 534 U.S. at 119. The strength of that interest does not vary with the technicalities of the individual's release.

In Tennessee, the privacy intrusion caused by a suspicionless search conducted pursuant to an agreed-to search condition is the same whether the supervised individual is a probationer or a parolee. And the degree to which such a search furthers the State's interests is the same no matter the supervised individual's status. Accordingly, "it is logical" to apply the same Fourth Amendment standard to probationers as to parolees. Pet. App. 21a. Under Tennessee law, there is simply no distinction between probationers and parolees that would justify different treatment.

Petitioners' arguments to the contrary are without merit. They contend that this was a "wide-ranging search of the [their] residence" and chastise the Tennessee Supreme Court for calling the search of their home a "slight intrusion." Pet. 25-26. But the Tennessee Supreme Court found the intrusion "slight" only because of the *search condition* to which Angela Hamm agreed, which, like the search conditions at issue in *Knights* and *Samson*, significantly reduced her expectation of privacy. Pet. App. 21a-23a.

Petitioners also rely on general statements about the differences between probation and parole to argue for different standards. Pet. 27-28. But the fact that parolees tend to have committed more serious crimes has little to do with their current expectation of privacy or the restraints imposed on their freedom. Tennessee probationers and parolees are both subject to various levels of supervision, depending on their particular circumstances. Tennessee law does not impose categorical conditions on either group but gives the parole board and sentencing court discretion to impose the conditions they deem necessary in each individual case. *See* Tenn. Code Ann. §§ 40-28-117(a)(1), 40-35-303(d).

Nor is it true that the State's "interest in monitoring parolees is heightened compared with those only on probation status." Pet. 28. In fact, the recidivism rate in Tennessee for felons released on probation is *higher* than for felon parolees. *See* Mary Karpos et al., *Tennessee Department of Correction Recidivism Study Felon Releases 2001-2007*, at 12-14 (Mar. 15, 2010), https://www.tn.gov/content/dam/tn/correction/documents/RecidivismStudy2001-2007.pdf (showing prison return rate of 64.7% after four years for probationers, compared to 59.3% for parolees). And, contrary to petitioners' assertion that probation is an "alternative to incarceration," Pet. 27, many probationers begin their sentence incarcerated and face the same reintegration challenges as parolees. *See* Tenn. Code Ann. § 40-35-303(c)(1) (providing that a sentencing court may place a defendant on probation either

immediately or after a period of confinement). On petitioners' view of the law, two individuals released from prison after the same amount of time—one on parole and one on probation—and subject to the very same search conditions would be subject to different constitutional search requirements. That result makes no sense. The balance of interests should not tip just because an individual is placed on supervised release by the sentencing court rather than the parole board.

Petitioners also inaccurately claim that the Tennessee Supreme Court "imposed a blanket rule that permits suspicionless searches of any probationer regardless of the severity of the underlying offense," including individuals convicted only of misdemeanors. Pet. 28-29. To the contrary, the Tennessee Supreme Court made it clear it was "not address[ing]" the "expectation of privacy of misdemeanants placed on probation." Pet. App. 22a n.8.

The Tennessee systems of probation and parole further identical state interests and penal functions and are implemented by the same agency. They allow individuals who would otherwise be incarcerated to live freely. But they also allow the sentencing court or parole board to impose conditions on that freedom appropriate to each individual defendant, including by conditioning probation or parole on the State's ability to conduct searches of the individual's person or property. The Tennessee Supreme Court correctly held that the search of a

supervised probationer conducted pursuant to such a condition is reasonable under the Fourth Amendment even if lacking reasonable suspicion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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