No. 19-1059

In the Supreme Court of the United States

ANGELA HAMM AND DAVID HAMM, PETITIONERS

v.

STATE OF TENNESSEE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REPLY BRIEF FOR THE PETITIONERS

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Without a warrant or reasonable suspicion—and without seeking consent—four police officers entered the home of petitioners Mr. and Mrs. Hamm and searched nearly every room of the house. This intrusive search violated the Hamms' Fourth Amendment rights. The U.S. Constitution does not subject Mrs. Hamm—and certainly not Mr. Hamm or his minor son—to a suspicionless search of the family's home merely because she was on probation for a non-violent drug offense.

The Tennessee Supreme Court therefore erred when it found that a suspicionless search of the Hamms' home was "constitutionally reasonable." Pet. App. 23a. This Court should grant review to resolve

the deep split over the question left open in *United States* v. *Knights*, 534 U.S. 112 (2001) and *Samson* v. *California*, 547 U.S. 843 (2006), and establish that the Fourth Amendment requires reasonable suspicion to search a probationer's home. If the Tennessee Supreme Court's Fourth Amendment holding is left intact, suspicionless searches, even where they invade the sanctity of the home, will cease being the exception: they will become the norm.

Tennessee tries to avoid review by claiming this Court lacks jurisdiction. But this jurisdictional argument fails because the decision below is a final judgment ripe for review now. The Hamms freely concede that the Fourth Amendment question presented is their sole defense. Conversely, Tennessee acknowledges that it cannot convict the Hamms without the disputed evidence seized during the suspicionless search of their residence. Because the Fourth Amendment question determines the outcome of the case, it constitutes a final judgment for purposes of this Court's review.

For these reasons, the Court should grant the petition for a writ of certiorari.

I. This Court Has Jurisdiction

This Court has jurisdiction because the decision below is outcome determinative: if the State may use the drugs seized during the suspicionless search of the Hamms' residence, the Hamms acknowledge they have no other defenses at trial. Conversely, without this evidence, the State of Tennessee concedes that it

cannot sustain the charges. Opp. 15. The answer to the Fourth Amendment question decided by the Tennessee Supreme Court therefore "preordain[s]" "the outcome of further proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975).

Although the Tennessee Supreme Court vacated the trial court's suppression order and remanded for further proceedings, denial of review by this Court will not avoid the important Fourth Amendment question presented. It simply will result in the case returning to this Court in the same form it appears today. There is no practical reason to await proceedings on remand because the Fourth Amendment issue has been fully and finally adjudicated. Tennessee is accordingly incorrect that the decision below is not a final judgment. *See* Opp. 12–16. Rather, in these circumstances, as Tennessee acknowledges, *see* Opp. 15, this Court has jurisdiction. *Cox*, 420 U.S. at 479.

A. This Court Has Always Emphasized a Practical Interpretation of the Final Judgment Rule

This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. 1257. The rule "serves several ends," including avoiding "piecemeal review" by federal courts "of state court decisions," and "giving advisory opinions in cases where there may be no real 'case' or 'controversy.'" *N.D. State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

To be final, the decision below "must be subject to no further review or correction in any other state tribunal" and serve as "an effective determination of the litigation." *Jefferson* v. *City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (internal quotation marks omitted).[1] The Court has long avoided a rigid interpretation of this rule, giving it a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). This practical construction of the final judgment rule requires jurisdiction when "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." *Ibid.* In these situations, "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox*, 420 U.S. at 477–78 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).

This Court has devised guidelines that "are helpful in giving direction and emphasis to decision from case to case." *Republic Nat. Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67–68 (1948). This Court in *Cox* described the four most common exceptions to the final judgment rule:

First, "are 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

[1] Tennessee only disputes whether the decision below effectively determines the litigation. Opp. 13.

proceedings preordained." *Cox*, 420 U.S. at 479. "In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." *Ibid*. *Second*, jurisdiction exists in 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." *Id.* at 480. *Third,* are cases "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. And *fourth*, are circumstances where "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482–83.

The first and fourth *Cox* categories are met here.

B. Jurisdiction Exists Because the Outcome of Proceedings Below is Certain

1. This case squarely falls under the first *Cox* category because "there are further proceedings—even entire trials—yet to occur in the state courts but * * * the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. This Court has recognized a final judgment where the pending trial proceedings will "have little substance, their outcome is certain, [and] they are wholly unrelated to the federal question." *Id*. at 478.

Here, the Hamms concede that, without Supreme Court review, they have no further legal or factual defenses and no reasonable prospect of acquittal.[2] This Court has exercised jurisdiction where, as here, counsel "has been both explicit and free with his concession that his case rests upon his federal claim and nothing more." *Pope* v. *Atl. Coast Line R.R.*, 345 U.S. 379, 382 (1953); *see also Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 74 n.1 (1946) (stipulated facts).[3] Likewise, Tennessee concedes that it cannot convict without the evidence. Opp. 15. This Court therefore has jurisdiction under *Cox* category one because the federal Fourth Amendment issue dictates the outcome.

The classic application of this principle was in *Mills* v. *Alabama*, 384 U.S. 214 (1966). There, a motion to dismiss a "criminal complaint was sustained on federal constitutional grounds," but the "State Supreme Court reversed, remanding for jury trial." *Cox*, 420 U.S. at 479. Finding no other defenses, the *Mills*

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[2] This Court has never considered possible plea bargains or settlements as relevant to the jurisdictional analysis, but, in any event, Tennessee permits an appeal of preserved issues "as a right" following a guilty plea. Opp. 16 (quoting Tenn. R. App. P. 3).

[3] A statement in briefing to this Court affirming the lack of other defenses is sufficient to qualify under this exception. *See, e.g.*, Pet. Br. at *2, *Pope* v. *Atl. Coast Line R.R.*, No. 322, 1952 WL 82499 (U.S. Nov. 25, 1952) (conceding that the Constitutional question is "the only question of law in the case" and that a "decision by this Court would conclude the entire case once and for all").

Court concluded that a "conviction seemed likely," and "to deny review at that stage would 'result in a completely unnecessary waste of time and energy.'" *N.D. State Bd. of Pharmacy*, 414 U.S. at 161 (quoting *Mills*, 384 U.S. at 217–18). Because the answer to the federal question was dispositive, a trial "would be no more than a few formal gestures leading inexorably towards a conviction," so "the case could then once more wind its weary way back" to this Court. *Mills*, 384 U.S. at 217. This case is in the same posture as *Mills*.

There is no practical reason to wait to revisit this important Fourth Amendment question after remand proceedings. The remand from the Tennessee Supreme Court will not clarify or avoid the Fourth Amendment issue. But if this Court declines to exercise jurisdiction now, the Hamms would be subject to an unnecessary and predetermined trial with possible imprisonment, which would require this same issue to wind its way through the state courts again—a process which, thus far, has taken over four years.[4] A *pro forma* trial, along with three more appeals, would do nothing more than serve the "mischief of economic waste and of delayed justice." *Radio Station WOW*, 326 U.S. at 124. As Chief Justice Taney put it, the "right of appeal is of very little value" if a petitioner "may be ruined before he is permitted to avail himself of the right." *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 205 (1848). Deferring decision will not aid this Court's

[4] The trial court's order on the motion to suppress came on May 2, 2016. Pet. App. 118a.

resolution of the case, nor will it serve the ends of the final judgment rule, but it surely will harm the Hamms. Thus, this Court should exercise jurisdiction now.[5]

2. This case also satisfies the fourth *Cox* category because the federal issue "has been finally determined by the [Tennessee Supreme Court]" and "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482–83. This Court has observed that delayed resolution of a Constitutional issue "might seriously erode federal policy," *ibid.*, especially when it has nationwide impact—as is the case here. *See Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989) (finding jurisdiction where the constitutional issue "call[ed] into question the legitimacy of the law enforcement practices of several States, as well as the Federal Government").

The *Cox* Court itself exercised jurisdiction under this set of circumstances, concluding that "even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court" on the proper scope of the First and Fourteenth Amendments. *Cox*, 420 U.S. at

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[5] Given the arguments supporting jurisdiction under *Cox*, any remaining question about jurisdiction should be addressed after briefing on the merits. *See*, *e.g.*, *Cox*, 420 U.S. at 476 (deferring jurisdictional question to be heard along with the merits); *Kansas* v. *Marsh*, 544 U.S. 1060 (2005) (same); *Howell* v. *Mississippi*, 542 U.S. 936 (2004) (same).

485; *see also Nat'l Socialist Party of Am.* v. *Vill. of Skokie, Ill.*, 432 U.S. 43, 44 (1977) (per curiam); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 246–47 (1974). The scope of the Fourth Amendment's protection of the home raises equally important federal concerns and warrants review.[6]

II. This Case is the Ideal Vehicle to Resolve This Issue

This is the ideal vehicle to resolve this important question—and now is the ideal time to do so. It is a single-issue case that is not confounded by state-law or preservation issues. Waiting for remand will not aid this Court in answering the question presented.

Tennessee claims that this Court should wait for a case where it is "undisputed that the officers lacked reasonable suspicion." Opp. 25. But this case does not turn on whether the police, in fact, had reasonable suspicion. Instead, it turns on whether reasonable suspicion is *even required* in the first place. That is why in *Samson*, this Court assumed a lack of reasonable suspicion to determine whether reasonable suspicion was required in the circumstances presented. *See Samson* v. *California*, 547 U.S. 843, 848 (2006). In

[6] Tennessee's belittles the fundamental importance of Fourth Amendment protections, claiming they are of "little practical significance" because States may impose more stringent legislative or constitutional protections. Opp. 2. Of course, the suspicionless entry into the Hamms' home in this case illustrates the critical need for the Fourth Amendment to serve as a bulwark against unreasonable governmental intrusion.

that vein, the Tennessee Supreme Court did not reach the question of whether reasonable suspicion existed only because it concluded "that reasonable suspicion is not required for the search of a probationer's residence." *See* Pet. App. 22a n.9.

In any event, the trial court determined, after an evidentiary hearing, that the police had no reasonable suspicion of criminal activity, a conclusion upheld by the Tennessee Court of Appeals. Tennessee has never claimed any error, much less clear error, in the facts found by the trial court, which provide no colorable basis for a finding of reasonable suspicion. Rather, after the police testified that they entered the Hamm residence based on a "wink" and "smile" from an unidentified tipster, the trial court correctly found "nothing by way of articulable facts to support the reasonable suspicion." Pet. App. 5a. The Tennessee Court of Appeals agreed. *Id*. at 70a–115a. That Tennessee continues to dispute the *legal* conclusion of the courts below is no basis to avoid review of the important Fourth Amendment question presented.

Tennessee is also incorrect that this case hinges on the particular probation conditions imposed on Mrs. Hamm. Tennessee suggests no Fourth Amendment issue is presented because "like the defendant in *Samson*, petitioner Angela Hamm signed a search condition." Opp. 30. First, even if the State's dubious "consent" rationale could justify a search, Mrs. Hamm's probation condition listed only *warrantless* searches. Pet. App. 2a. It said nothing about *suspicionless* searches, making the condition irrelevant to

this case. Moreover, Mr. Hamm was not subject to—and certainly did not agree to—Mrs. Hamm's probation terms. *Id.* at 5a.

Tennessee similarly attempts to avoid this Court's review by arguing that suspicionless search conditions are not "standard" probation conditions. Opp. 27. Although the Sixth Circuit disagrees with this bare assertion, *see United States* v. *Tessier*, 814 F.3d 432, 434 (6th Cir. 2016), it is of no moment. The question is whether the mere status of being a probationer—with or without a suspicionless search condition—is sufficient to eliminate any Fourth Amendment protection. That question is squarely presented here.

III. Tennessee's Attempts to Distinguish the Deep Split of Authority are Unavailing

Tennessee does not meaningfully dispute the deep and well-developed conflict among State high courts and the federal circuit courts on the question presented. Instead, Tennessee attempts to pick through certain cases to assert that they did not turn on the Fourth Amendment question, but rather on particular features of state-law such as the supervision level of probationers (Opp. 17), a subsequent state legislative enactment (Opp. 18), a defendant's purported "consent" to the probation agreement (Opp. 19), or the existence of a parallel protection under a State constitution (Opp. 20).

Tennessee's effort to distinguish these cases misses the question common to all: whether the mere status of being a probationer eliminates wholesale Fourth Amendment protections. For example, although Tennessee claims that *North Dakota* v. *Ballard*, 874 N.W.2d 61 (N.D. 2016) was cabined by *North Dakota* v. *White*, 890 N.W.2d 825, 830 (N.D. 2017), the cases are inapposite. The North Dakota Supreme Court in *Ballard* could not have been clearer in resolving the question presented in direct conflict with Tennessee: "the suspicionless search of an unsupervised probationer's home was unreasonable under the Fourth Amendment of the United States Constitution." 874 N.W. 2d at 62. The Court in *White*, by contrast, confronted a search supported by reasonable suspicion. 890 N.W.2d at 830.

In each case disputed by Tennessee, the State Court decided the exact Fourth Amendment question presented here, not a unique, fact-bound feature of state law. *See Idaho* v. *Garnett*, 453 P.3d 838, 847 (Idaho 2019) (resolving the "single question" at issue by holding that the Fourth Amendment requires probation searches to be supported by reasonable suspicion); *Vermont* v. *Cornell*, 146 A.3d 895, 909 (Vt. 2016) (holding—without qualification—that "reasonable suspicion for search and seizure imposed on probationers is required by the Fourth Amendment"); *Murry* v. *Virginia*, 762 S.E.2d 573, 581 (Va. 2014) (holding that "probation condition subjecting" probationer to "warrantless, suspicionless searches at any time by any probation or law enforcement officer is not reasonable" under the Fourth Amendment); *Kansas* v.

Bennett, 200 P.3d 455, 463 (Kan. 2009) (holding that "suspicionless searches violate [a probationer's] rights under the Fourth Amendment" irrespective of state law)[7]; *Sierra* v. *Delaware*, 958 A.2d 825, 833 (Del. 2008) (after finding the search impermissible under Delaware law, concluding that "[w]e also hold that the search of Sierra's residence without reasonable suspicion violated his Fourth Amendment rights as a probationer").

Tennessee's opposition brief also fails to address the intracircuit splits between the Sixth Circuit and the Kentucky Supreme Court, and between the Ninth Circuit and the Idaho Supreme Court. *See* Pet. 23–24. Nor does Tennessee meaningfully dispute the differing standards among different federal circuits, Opp. 23, or the six State Supreme Court decisions that still conflict with the decision below but pre-dated *Samson*, Opp. 22.

The division among courts on the important question presented is ripe for this Court's review and resolution.

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[7] Tennessee is incorrect that the Supreme Court of Kansas later repudiated *Bennett* in *Kansas* v. *Tolliver*, 417 P.3d 253 (2018). *Tolliver* involved the search of a parolee not a probationer. *Ibid.* The Court in *Tolliver* noted that, while the rule for parolees was settled by this Court in *Samson*, "courts have split over whether probationers can be subjected to suspicionless searches." *Id.* at 258.

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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