No. 20-5589

IN THE

Supreme Court of the United States

WALI ROSS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This case raises a fundamental Fourth Amendment question: What quantum of proof must police officers have before they may enter a residence to execute an arrest warrant? As the petition explains (pp. 11-14), that question has divided the courts of appeals: Some hold that officers do not have the requisite "reason to believe" that a suspect resides in a location and is present within it, under *Payton v. New York*, 445 U.S. 573, 603 (1980), unless the facts are sufficient to give rise to probable cause. Others hold that a lesser quantum of proof, below probable cause, is required. Here the Eleventh Circuit applied its precedents adopting a lower standard and held that police officers had "reason to believe" that petitioner Wali Ross was in his hotel room mere minutes after he had fled the hotel, crossed a service road, jumped a fence, and run across a busy interstate highway.

The government acknowledges the circuit split. BIO 12-13. It nevertheless urges this Court to let the confusion stand, claiming that the competing standards "have not proved to be materially different in practice." BIO 13. The courts of appeals disagree: They have repeatedly found that the standards are different, and that they cannot resolve the constitutionality of a search without knowing which standard applies. Indeed, though nowhere mentioned in the government's brief, the split has grown even in the short time since Ross filed his petition. The Fourth Circuit, which had previously "declined to join either camp," found that it could "[]not reach a conclusion … without first determining the quantum of proof that reasonable belief requires." *United States v. Brinkley*,

980 F.3d 377, 384-85 (4th Cir. 2020). It then deepened the split, weighing in on the probable cause side of the ledger. *Id.* at 386. Because the persistent circuit conflict concerns the core of the Fourth Amendment's protection—the home—and has only deepened over time, it warrants resolution.

The petition also presents a second question warranting certiorari: Does a hotel guest lose all Fourth Amendment privacy interests in a room the second checkout time arrives, even if the guest has not checked out? In holding that the second search police conducted of Ross's hotel room was constitutional, the court below adopted a categorical rule that "a short-term hotel guest … has no reasonable expectation of privacy in his room after checkout time." Pet. App. 15. In insisting that this holding implicates no conflict, the government ignores all the decisions, documented in the petition, holding that state laws governing removal of a holdover tenant may give rise to reasonable expectations of privacy. *See* Pet. 18-19. And the Eleventh Circuit's categorical rule that any privacy expectation in a hotel room evaporates at checkout time is undeniably significant: If this Court does not correct it, the rule would authorize police to barge in on guests and sack their room a minute after checkout time, without a warrant, probable cause, or even reasonable suspicion.

ARGUMENT

I. Certiorari Is Warranted To Determine How Much Proof Is Necessary To Enter A Residence To Execute An Arrest Warrant.

A. There is a clear, acknowledged, and deepening split on the issue.

The government acknowledges that the circuits are split on how much proof police must have to enter a residence to execute an arrest warrant. BIO 12-13. While the government tries to play down the split, it has significantly deepened over time. As the Third Circuit has explained: "Although the Courts of Appeals once overwhelmingly interpreted reasonable belief as less stringent than probable cause, they are now nearly evenly divided on this point." *United States v. Vasquez-Algarin*, 821 F.3d 467, 474 (3d Cir. 2016).

Notably, the government's assertion that "[o]nly the Third and Ninth Circuits" have adopted the probable cause standard, BIO 13, ignores the Fourth Circuit's recent opinion in *Brinkley*. There, the Fourth Circuit "join[ed] those courts 'that have held that reasonable belief in the *Payton* context embodies the same standard of reasonableness inherent in probable cause.'" *Brinkley*, 980 F.3d at 386 (quoting *Vasquez-Algarin*, 821 F.3d at 480) (additional quotation marks omitted).

The government also mischaracterizes the Fifth Circuit as having rejected a probable-cause standard, when that court has expressly held that "reasonable

belief embodies the same standards of reasonableness as probable cause." *United States v. Barrera*, 464 F.3d 496, 501 (5th Cir. 2006) (alterations and quotation marks omitted); *see also Vasquez-Algarin*, 821 F.3d at 474 (the Fifth Circuit construes "reasonable belief as the equivalent, or functional equivalent, of probable cause"); *United States v. Bohannon*, 824 F.3d 242, 254 (2d Cir. 2016) (same). And the government ignores two other circuits that, while declining definitively to resolve the issue, have indicated they believe "probable cause is the correct standard." *United States v. Hardin*, 539 F.3d 404, 416 n.6 (6th Cir. 2008); *United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) ("Were we to reach the issue, we might be inclined to adopt the view of the narrow majority of our sister circuits that 'reasonable belief' is synonymous with probable cause.").

The government is also wrong to downplay the importance of the circuit split. The government insists that, "[d]espite those different articulations, the courts of appeals' standards have not proved to be materially different in practice," and "have not produced materially divergent outcomes." BIO 13, 14. But the lower courts have recognized the competing standards to be fundamentally different. The Second Circuit, for instance, has likened the less-than-probable-cause standard that it adopted to the "reasonable suspicion" required for an investigative stop. *Bohannon*, 824 F.3d at 255. This Court has made clear that that is "a less demanding standard than probable cause" not only in the "quantity or content" of the information required to satisfy it, but also in how "reliable" that information must be. *Alabama v. White*, 496 U.S. 325, 330 (1990). There is simply no basis to posit that

the difference between these standards matters in an encounter on the street, *id.*, but suddenly ceases to matter in the graver context of police entry into a residence.

It is precisely because the distinction can be outcome determinative that courts have increasingly felt compelled to take sides on the split. It certainly was in the Fourth Circuit, which had initially declined to take a side in the split, but ultimately, in *Brinkley*, held that it could "[]not reach a conclusion as to" the permissibility of the search "without first determining the quantum of proof that reasonable belief requires." 980 F.3d at 384-85; *see also Vasquez-Algarin*, 821 F.3d at 474 (though the court previously saved the question for "another day[,] [t]hat day has arrived").

B. Circuits err in rejecting a probable cause standard.

The courts of appeals that have rejected a probable cause standard generally offer "scant explanation" for doing so. *Brinkley*, 980 F.3d at 385. As the petition explained, Pet. 16-17, this Court has regularly used the term "reason to believe" to refer to the probable cause standard. *See, e.g.*, *Berger v. State of N.Y.*, 388 U.S. 41, 59 (1967) ("The purpose of the probable cause requirement of the Fourth Amendment [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed."); *Cardwell v. Lewis*, 417 U.S. 583, 592 (1974) ("police had probable cause to search Lewis' car" where they had "reason to believe that the

car was used in the commission of the crime"); *Gerstein v. Pugh*, 420 U.S. 103, 115 (1975) (an "initial determination of probable cause" occurs when a judge determines "whether there was reason to believe the prisoner had committed a crime").

There is every indication that *Payton*'s use of "reason to believe" carries the same meaning. Indeed, in his dissent, Justice White described the majority's decision as requiring "probable cause … to believe that the suspect is within the dwelling." 445 U.S. at 616 n.13 (White, J., dissenting). And in the years following *Payton*, this Court has assumed it embodies a probable cause standard. *See Maryland v. Buie*, 494 U.S. 325, 332-33 (1990) (police "were entitled to enter" a suspect's residence where they had "an arrest warrant and *probable cause* to believe [he] was in his home" (emphasis added)).

A probable cause standard serves essential Fourth Amendment purposes. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585 (internal quotation marks omitted). In line with that principle, this Court has held that, absent exigent circumstances or consent, police officers must demonstrate probable cause before they can search a third party's home for the subject of an arrest warrant. *Steagald v. United States*, 451 U.S. 204, 213-14 (1981). The government's position, however, would create a loophole in that framework: While searching for a suspect inside a third party's residence requires probable cause, searching for a suspect within what officers believe to be his own residence requires a much weaker showing, amounting to mere suspicion.

The result allows "an end-run around the stringent baseline protection established in *Steagald* and render[s] all private homes—the most sacred of Fourth Amendment spaces—susceptible to search by dint of mere suspicion or uncorroborated information." *Vasquez-Algarin*, 821 F.3d at 480. Neither the government nor the courts of appeals that have adopted this lower standard have offered a rationale for this anomaly.

C. This case presents a suitable vehicle for resolving the split.

The government contends that review should be denied because Ross did "not argue for a probable cause standard until his petition for rehearing en banc." BIO 15. The issue was, however, raised in a timely manner. Notably, before the three-judge panel, binding circuit precedent foreclosed Ross from arguing probable cause was required. *See United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011) ("We are bound by prior panel decisions unless or until we overrule them while sitting *en banc*....."). In *United States v. Magluta*, the Circuit rejected the argument that "the *Payton* standard is the functional equivalent of probable cause." 44 F.3d 1530, 1534-35 (11th Cir. 1995).[1] Thus, the en banc petition—where the government concedes Ross argued that the proper standard

[1] The government misconstrues the certiorari petition's reference to *Magluta* as "noncommittal." BIO 15. The Eleventh Circuit was clear in holding that *Payton* sets forth a distinct standard and in rejecting the argument that this standard is the "functional equivalent of probable cause." *Magluta*, 44 F.3d at 1534. It was "noncommittal" only in the sense that the court observed that "it is difficult to define the *Payton* 'reason to believe'

requires probable cause—was Ross's first opportunity to overcome that binding circuit precedent. The issue, therefore, was properly "raised and preserved." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (no waiver where "panel below had no authority to overrule" circuit precedent).

Moreover, at trial and every stage after, Ross raised a Fourth Amendment challenge to the entry of the hotel room. That permits this Court to entertain "any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *See also Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (holding it proper to reach "a new argument to support what has been his consistent claim").

Accordingly, contrary to the government's assertion, the requirement of probable cause was timely raised and there is no preservation issue.

Likewise baseless is the government's contention that "petitioner would not prevail even if a probable cause standard applied." BIO 15. That would, of course, be a question on remand. But the claim that the police had probable cause to believe that Ross was in the hotel room, when they entered, is unjustified.

After the officers approached Ross's hotel room, he fled on foot. Pet. App. 9. Only *10 minutes* later, the police entered his hotel room, without consent and without a search warrant. For him to be back in his room in less than 10 minutes, he would have had to

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standard, or to compare the quantum of proof the standard requires with the proof that probable cause requires." *Id.* at 1535.

been able to cross a service road, scale an eight-foot fence, traverse a busy interstate highway, and then, while eluding the police, double back (again crossing a busy interstate highway, jumping the eight-foot fence, and navigating over to the hotel). Pet. App. 9; C.A. App. 25. No objectively reasonable officer could think that there was probable cause to believe that all of that occurred in less than 10 minutes.

Moreover, the rationale for the superhuman-speed return to the hotel room is flawed. It would make no sense for Ross to return to the hotel to take "refuge," as the court found, when he knew the officers had been looking for him there and he could not have known they had left the hotel unguarded while chasing him. Pet. App. 14.

Only a standard significantly weaker than probable cause would indulge far-fetched speculation that Ross was in the room when the police entered. *Cf. Bohannon*, 824 F.3d at 255 ("reason to believe is not a particularly high standard"). Because this case starkly demonstrates the effects of embracing such a diluted standard, it is the ideal vehicle for resolving the acknowledged and deepening circuit split.

II. The Eleventh Circuit's Determination That A Guest Loses Any Fourth Amendment Interest In A Hotel Room The Moment Checkout Time Arrives Implicates A Conflict And Warrants This Court's Review.

The petition also raises a second question, on which the validity of the second search of the hotel

room hinges: Does a hotel guest's reasonable expectation of privacy immediately and inevitably disappear the moment checkout time arrives, even when the guest has not checked out, and regardless of any legal protections the guest may have (such as under the Florida hotel eviction statute)?

The Eleventh Circuit held that, even when a guest has not checked out, "a short-term hotel guest like Ross has no reasonable expectation of privacy in his room after checkout time, and thus no standing to object to a room search that police conduct with the consent of hotel management after checkout time has passed." Pet. App. 15. The only "minor caveat" to the categorical rule the court recognized applies when "a guest asks for and receives a late checkout." Pet. App. 18.

As outlined in the petition, *see* Pet. 18-20, the court's holding conflicts with a long line of precedent holding that state statutes inform whether a person's expectation of privacy is reasonable and explaining that a holdover tenant retains a reasonable expectation of privacy until lawfully evicted. The government brushes that conflict aside, asserting that Ross "does not identify any conflict … on whether, and under what circumstances, a short-term motel guest retains a reasonable expectation of privacy in his room after checkout time." BIO 19. But this Court has decisively rejected the government's insistence that "short-term motel guest[s]" should be treated differently, for Fourth Amendment purposes, from other time-based tenancies. *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Stoner v. California,* 376 U.S. 483, 490 (1964).

Moreover, in the specific context of hotels, the Eleventh Circuit's categorical checkout-time rule conflicts with other circuits that recognize there can be ongoing privacy expectations when a hotel tenant has not yet checked out of the room. *See United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001) (though "as a general rule a defendant's expectation of privacy in a hotel room expires at checkout time[,] … the policies and practices of a hotel may result in the extension past checkout time of a defendant's reasonable expectation of privacy"); *United States v. Kitchens*, 114 F.3d 29, 32 (4th Cir. 1997) ("A guest may still have a legitimate expectation of privacy even after his rental period has terminated, if there is a pattern or practice which would make that expectation reasonable.").

The government also offers up several arguments why Florida's hotel eviction statute could not provide a reasonable expectation of privacy. But the Eleventh Circuit's decision did not rest on any specific aspect of the Florida law, with which it acknowledged the hotel did not comply, but on the court's categorical answer to what it termed the "'checkout time' question." *See* Pet. App. 15, 19. In any event, none of the government's arguments about the Florida statute have merit. The argument that the statute "speaks only to when a 'guest' may be 'removed' from the premises or 'arrest[ed]' for refusing to leave," BIO 18, is wrong. The statute's plain terms dictate the form of notice that must be provided to guests in a range of contexts, including when a guest "fails to check out by the time agreed upon in writing by the guest and public lodging establishment at check-in." Fla. Stat. § 509.141.

And the government cites no support for its suggestion that only the person named on the registration "qualifie[s] as a 'guest'" under the statute, BIO 18—an interpretation that would irrationally prevent hotels from expelling anyone not named on the reservation. *Cf. Byrd v. United States*, 138 S. Ct. 1518, 1529 (2018) (rejecting the government's argument that a driver lacks a reasonable expectation of privacy in a rental car because he was driving the vehicle in violation of the rental agreement).

Lastly, there is no merit to the government's "inevitable-discovery" argument. BIO 20-21. The Eleventh Circuit did not base its decision on the doctrine. This Court has held that inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984). Yet the government's "inevitable-discovery" argument rests on a chain of unsupported speculation: "the hotel staff in the ordinary course would have entered the room to clean," would have then examined and gone through the guest's bags, and then would have "contacted the police." BIO 20-21. Such speculation, reflecting multiple assumptions, cannot absolve the constitutional violations involved in the two searches.

CONCLUSION

This Court should grant the petition.

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