No. 22-

In the Supreme Court of the United States

TRACY RENEE PENNINGTON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court recognized that an arrest warrant permits entry into a house only if there is "reason to believe" the arrestee lives there and is present. Courts are deeply divided on whether "reason to believe" requires probable cause or a lesser degree of suspicion. The Third, Fourth, and Ninth Circuits, as well as seven state supreme courts, all hold that probable cause is required. The Second, Tenth, and D.C. Circuits, as well as seven additional state supreme courts, hold that probable cause is not required and a lesser showing is sufficient. In this case, the State conceded that probable cause did not exist, but the West Virginia Supreme Court held that the entry was permissible by joining the side of the split rejecting a probable cause standard. Further, it did so in a state that is within a federal circuit, the Fourth Circuit, that has held the opposite.

The Question Presented is: "When the police have an arrest warrant for a person, can they enter a home without probable cause that the person resides there and is present within?"

PARTIES TO THE PROCEEDING

Petitioner Tracy Pennington was the sole appellant before the West Virginia Supreme Court of Appeals. In the trial court, petitioner's co-defendant was G.W.

RELATED PROCEEDINGS

Supreme Court of Appeals of West Virginia

State of West Virginia v. *Tracy Pennington*,

Case No. 21-0396 (Nov. 14, 2022)

Circuit Court of Jackson County, West Virginia

State of West Virginia v. *Tracy Pennington*,

Case No. CC-18-2019-F-83 (Aug. 7, 2020)

State of West Virginia v. *G.W.*,

Case No. CC-18-2019-F-81 (Aug. 7, 2020)

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INTRODUCTION

This case is the ideal vehicle to resolve a broad, entrenched split over an important constitutional question left open by *Payton* v. *New York*, 445 U.S. 573 (1980): When officers enter a home based on an *arrest* warrant, and without exigent circumstances, must they have probable cause to believe that the warrant's target resides and is present there? As both the majority and dissenting opinions stressed below, this question "has been frequently debated" among the lower courts (Pet.App.13a (Op. 11)), and has "'divided the circuits, with some construing 'reason to believe' to demand less than probable cause and others equating the two standards'" (Pet.App.32a (Dissent 9)).

The Third, Fourth, and Ninth Circuits have all squarely held that *Payton* requires probable cause to believe the suspect resides and is present at the home, and the Sixth and Seventh Circuits incline toward the same standard. In contrast, the Second, Tenth, and D.C. Circuits have all squarely rejected a probable cause requirement in favor of a lower standard. This confusion is underscored by at least three other circuits that have either flip-flopped or adopted nebulous formulations of the *Payton* standard. The state courts are equally divided on this question, with at least seven states on the probable cause side and six states (plus the District of Columbia) adopting a lower standard. Indeed, the fault-line over *Payton* runs so deep that several state courts have diverged from their respective Circuits.

The West Virginia Supreme Court's decision highlights these divisions over *Payton*—including the jurisdictional conflict between states and their Circuits—and presents the choice between probable

cause and a lower standard in the cleanest and starkest of postures.

As the State has conceded, police officers entered Tracy Pennington's home without a search warrant, without consent, without exigent circumstances, and critically—without probable cause for the presence of any wrongdoing or wrongdoer. They searched her home because her sixteen-year-old daughter, S.W., was a truant, and they believed they might find S.W. there, even though her legal residence was elsewhere. S.W. was the subject of a pickup order, equivalent to an arrest warrant, for her truancy. Based on that warrant and an uncorroborated, anonymous tip, several officers entered Pennington's home, weapons drawn, and dug through dressers and hampers, under a mattress, and inside a medicine cabinet. Ultimately, they found S.W. hiding behind a chest of drawers and took her away, as she wept, "Mommy, please! I'm so scared!" For sheltering her daughter, the State charged Pennington with child concealment.

The West Virginia Supreme Court upheld the officers' entry into Pennington's apartment, holding that *Payton*'s "reason to believe" standard requires a "less stringent" showing than probable cause. Pet.App.17a n.18 (Op. 14-15). Over a dissent, the court explicitly broke from the Fourth Circuit, which had joined those courts "interpreting reasonable belief to require probable cause." *United States* v. *Brinkley*, 980 F.3d 377, 386 (4th Cir. 2020). This choice undisputedly determined the constitutionality of the entry and search here. Because the State conceded that the officers lacked probable cause to believe that S.W. was

in the home, the Fourth Circuit would have deemed their entry into Pennington's apartment unlawful under *Payton*.

No case could present the split over *Payton* more starkly. It is undisputed that if probable cause is required, the search was unconstitutional. And it is undisputed that Pennington's Fourth Amendment rights turned on the fact that her case was adjudicated in state, rather than federal, court. The officers were not in hot pursuit or facing exigent circumstances, or even executing a felony arrest warrant. The sole basis for upholding the search is a bare rule that any arrest warrant permits entry into a home, *even without* probable cause to believe the warrant's subject resides and is present there.

Petitioner submits it is time for this Court to resolve the split and vindicate what *Payton* itself called "one of the most vital elements of English liberty": "'the freedom of one's house.'" 445 U.S. at 597. The Court should grant certiorari and make clear that officers may only enter a home to execute an arrest warrant if they must have probable cause to believe the arrestee is resident and present there.

OPINIONS BELOW

The West Virginia Supreme Court's opinion (Pet.App.1a-39a) is reported at 2022 WL 16918841. The circuit court's decision denying Pennington's motion to suppress (Pet.App.40a-48a) is unreported.

JURISDICTION

The West Virginia Supreme Court filed its decision on November 14, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Factual Background

On July 30, 2018, Petitioner Tracy Pennington's and G.W.'s minor daughter, S.W., was adjudicated "as a status offender for truancy" for missing too much school. Pet.App.3a, 41a-42a (Op. 1; Order 2). At that time, Pennington, G.W., and S.W. lived together in Pennington's apartment in Ripley, West Virginia. *Ibid.* In November 2018, after S.W. had more unexcused absences from school, S.W. was compulsorily placed in the temporary custody of her paternal grandparents. *Ibid.* A month after their home became S.W.'s legal residence, S.W.'s grandparents informed the Department of Health and Human Resources (DHHR) that S.W. had stopped attending

school and run away. Pet.App.4a, 42a (Op. 1-2; Order 2).

The following month, the State moved to take S.W. into custody as an "'active runaway, whose current whereabouts are unknown.'" Pet.App.4a (Op. 2). The state court granted the motion and issued an order directing that S.W. be taken into custody forthwith (the "Pickup Order"). *Ibid.* It is undisputed that the Pickup Order is the equivalent of an arrest warrant issued upon probable cause. Pet.App.9a-10a (Op. 7-8).

For several months, DHHR and local law enforcement attempted to locate S.W. by pursuing sporadic tips but were unsuccessful. Pet.App.5a (Op. 3). DHHR workers received tips that S.W. had been seen at Pennington's apartment or at her maternal grandparents' house. *Ibid.*; see also Pet.App.37a (Dissent 13) (noting that "other 'sporadic tips regarding her whereabouts' were investigated"). They also spoke with Pennington and G.W. by phone and made several trips to Pennington's home in an unsuccessful effort to locate S.W. Pet.App.5a (Op. 2-3).

On May 16, 2019, Chief Deputy Ross Mellinger of the Jackson County Sheriff's Department called Deputy Ben DeWees and related a purported anonymous tip about S.W.'s whereabouts. *Ibid.* Mellinger said that at 8:30 p.m., he received a tip from a woman who reported seeing S.W. at Pennington's home and speaking with Pennington afterward. *Ibid.* According to the anonymous tipster, Pennington said she intended "to keep [S.W.] hidden until she was 18, so all this juvenile stuff would go away." *Ibid.* Mellinger told Dewees that the source of this tip was credible (*ibid.*),

but Dewees did not try to corroborate it (Pet.App.35a (Dissent 14)). Dewees later admitted that he himself knew nothing about the tip's source or whether she was credible. Pet.App.37. Nevertheless, he decided to act on the uncorroborated, anonymous, second-hand tip. *Ibid.*

Deputy Dewees obtained and reviewed a copy of the Pickup Order for S.W. Pet.App.5a, 42a (Op. 3; Order 3). He contacted the Jackson County Prosecuting Attorney and asked whether he needed a search warrant to enter Pennington's home. Pet.App.5a (Op. 3). The Prosecuting Attorney told DeWees that he did not need a search warrant. *Ibid.*

Deputy Dewees contacted two West Virginia State Troopers who had visited Pennington's apartment earlier that evening in an unsuccessful attempt to speak with her about an unrelated criminal matter. Pet.App.5a-6a (Op. 3). The two State Troopers met Dewees at Pennington's home, and Dewees knocked on the door. Pet.App.6a (Op. 3). Nobody answered, but Dewees heard footsteps from inside the apartment. Pet.App.6a (Op. 4) Dewees then obtained a key to Pennington's home from her landlord, who lived next door. *Ibid.*

Deputy Dewees and the State Troopers used the key to enter Pennington's home. Pet.App.6a, 43a (Op. 4; Order 3). The ensuing search of her home was captured in a bodycam video included in the record on appeal. Pet.App.6a n.2 (Op. 4). The video shows an officer entering with a drawn weapon (apparently a taser), and officers opening underwear drawers, rummaging through laundry (including underwear), and

searching between mattresses and box springs. The officers also searched inside a small wall-mounted medicine cabinet. One of the officers remarked, to responses of laughter, "[t]he woman was like, whatever you do, please don't break my door."

The officers found Pennington and G.W. in their bedroom lying in bed. Pet.App.6a, 43a (Op. 4; Order 3). After Pennington and G.W. denied that S.W. was there, the officers searched the apartment for her. *Ibid.* They eventually found S.W. in a second bedroom, hiding behind a hollow chest of drawers that had been placed against the wall. *Ibid.* The officers took S.W. into custody in accordance with the Pickup Order, and arrested Pennington and G.W. for "child concealment," in violation of West Virginia Code § 61-2-14d, because of "[t]he way [S.W.] was hidden in the room." Pet.App.6a-7a, 43a (Op. 4; Order 3).

B. Procedural Background

Pennington and G.W were indicted on felony charges of child concealment and conspiracy. Pet.App.41a (Order. 2).

1. Pennington moved to suppress "any and all evidence obtained as a result of the illegal, warrantless search of [her] home." Pet.App.7a (Op. 5).

At the suppression hearing, Deputy Dewees and the DHHR youth service worker for S.W.'s case testified. Dewees acknowledged that in executing the Pickup Order for S.W., "[w]e didn't know where she was." Pet.App.7a (Op. 5). He admitted that he never saw S.W. around or near Pennington's home before he

entered; that Pennington never consented to his entry; that he had no reason to think evidence was going to be destroyed if he did not enter the home; and that he had no reason to think that S.W. was in harm's way. Pet.App.37a-38a (Dissent 14); see also Tr. 28-29. When asked why he did not obtain a search warrant, Deputy DeWees testified that the prosecutor had said "it was okay" to enter Pennington's home without one. Pet.App.37a; see also Tr. 30.

The DHHR case worker testified that she visited Pennington's apartment several times after S.W. ran away from her grandparents' home, but never found S.W. there. Pet.App.38a (Dissent 15). And while "'people would say they had seen [S.W.]' at the grandparents' house or at [Pennington's] home, *** these 'tips' never prompted law enforcement or the worker to enter either home." *Ibid.*

The trial court denied Pennington's motion in a written order. Pet.App.40a-48a. Noting that the facts were "essentially uncontested" (Pet.App.41a n.1 (Order 2)), the court concluded that the officers' "entry into the Apartment for the limited purpose of taking S.W. into custody was not an unreasonable intrusion into [G.W.'s] and Pennington's home." Pet.App.46a (Order 5). The court reasoned that Deputy DeWees had "good cause to believe S.W. was inside the Apartment," and that he "had knowledge of and possessed this Court's [Pickup] Order." *Ibid.*

Pennington subsequently entered into a conditional plea agreement, under which she pleaded guilty to one count of child concealment and the State dismissed the other charges. Pet.App.8a & n.5 (Op. 5).

Under the terms of the plea agreement, she retained the right to appeal the suppression ruling. Pet.App.8a.

2. Pennington exercised that right. Invoking *Payton*, she appealed to the West Virginia Supreme Court of Appeals, arguing that the officers needed "reason to believe" S.W. resided in Pennington's apartment and was present at the time of entry, and that this standard required probable cause. Pet.App.11a-12a (Op. 8); see also Pet. Br. 5. After noting that "[s]everal federal courts of appeal and state courts of last resort have differed over the 'reason to believe' standard," Pennington urged the court to follow the Fourth Circuit's decision in *United States* v. *Brinkley*, 980 F.3d 377 (4th Cir. 2020), and adopt a probable cause requirement. Pet. Br. 8-12. The facts known to the officers were inadequate for probable cause, Pennington explained, because they rested on an uncorroborated, anonymous tip. Pet. Br. 6; see also Pet.App.12a (Op. 9).

On appeal, the State conceded that the officers lacked probable cause. When asked at oral argument if it was "the State's position that probable cause was not met in this case," the Assistant Attorney General replied: "that is the State's position based on the record we have," and "the State would concede that." See Oral Argument (Sept. 27, 2022), https://youtu.be/2tzFiUgkrAc?t=3736 (at 1:18:18-1:18:42); see also Pet.App.35a (Dissent 12).

But the State argued that the officers could nevertheless enter Pennington's home without a search warrant and without probable cause because *Payton*

required a lower level of suspicion. Pet.App.12a-13a (Op. 9). Like Pennington, the State recognized that "both federal and state courts have issued conflicting decisions regarding the 'reason to believe' standard that was originally announced in *Payton*." Resp. Br. 13. The State asked the court to reject the probable cause requirement in favor of a "less stringent" standard. Pet.App.12a (Op. 9); see also Resp. Br. 16. Under that lesser standard, the State insisted, the facts and circumstances known to the officers were enough to justify entering Pennington's home without a search warrant. Resp. Br. 18.

In a divided decision, the West Virginia Supreme Court affirmed, holding that under *Payton*, "[r]eason to believe requires less proof than probable cause." Pet.App.2a-3a (Op. i). The court acknowledged that "[t]he issue of what quantum of proof is necessary to satisfy the reason to believe standard in the context of executing a lawful arrest warrant has been frequently debated." Pet.App.13a (Op. 9). In rejecting probable cause and adopting a "less stringent" standard, the court read *Payton* to contemplate "'different standards'" for entering a home to execute an arrest warrant and for obtaining the arrest warrant itself. Pet.App.13a-14a (Op. 10-11) (quoting *United States* v. *Pruitt*, 458 F.3d 477, 484 (6th Cir. 2006)). While recognizing that the Fourth Circuit had adopted a probable cause standard in *Brinkley*, the court declined to follow suit, noting that it was "'not bound to adopt [the Circuit's] approach' on this issue." Pet.App.19a n.18 (Op. 14).

3. Justice Wooten dissented, warning that the majority opinion "diminishes the protections afforded by the Fourth Amendment." Pet.App.24a (Dissent 2). By allowing officers executing an arrest warrant to enter a home on less than probable cause, he explained, the majority gave the State "'a new permission slip for entering the home without a warrant.'" Pet.App.26a (Dissent 4) (quoting *Lange* v. *California*, 141 S. Ct. 2011, 2019 (2021)).

In Justice Wooten's view, "the quantum of proof standard adopted by the Fourth Circuit [in *Brinkley*]—reason to believe is tantamount to probable cause—should have controlled the resolution of this case." Pet.App.35a (Dissent 11). Under that standard, the facts known to the officers were inadequate to justify their warrantless entry into Pennington's home. Pet.App.38a-39a (Dissent 15). Because Pennington's home was not S.W.'s legal residence, and "the testimony about the various 'tips' received during [the] period [when S.W. legally resided with her grandparents] demonstrated that the juvenile was, at a minimum, bouncing around perhaps to avoid being found," there was significant "uncertainty as to where the juvenile was." *Ibid.* In these circumstances, "a single anonymous, unsubstantiated tip relayed to a deputy is wholly insufficient to justify a law enforcement officer's entry into, and search of, a private residence." Pet.App.39a.

REASONS FOR GRANTING THE WRIT

Because the sanctity of the home is a central Fourth Amendment tenet, the baseline rule is that law enforcement cannot enter a home without a

search warrant issued by a magistrate upon probable cause. E.g., *Lange*, 141 S. Ct. at 2017. There are some exceptions to the search-warrant requirement—for instance, exigent circumstances and hot pursuit—but these are "'jealously and carefully drawn.'" *Id.* at 2018. Thus, even when officers have an arrest warrant and know to a certainty that the subject of that warrant is in someone else's home, they cannot enter that home to effectuate that arrest unless they are in hot pursuit. See *Steagald* v. *United States*, 451 U.S. 204, 218-23 (1981).

Payton creates a narrow exception under which an arrest warrant confers "limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. The decision below confirms and deepens an entrenched split over this standard. Three Circuits (the Third, Fourth, and Ninth) have held, and two others (the Sixth and Seventh) have suggested, that *Payton* requires officers to have probable cause to believe the arrest warrant's subject resides in the home and is present. Three other Circuits (the Second, Tenth, and D.C.) have held that probable cause is *not* required, and some lesser level of suspicion suffices. Adding to the confusion, at least three other Circuits (the Fifth, Eleventh, and Eighth) have all adopted nebulous formulations of *Payton*'s standard.

The state courts are likewise deeply divided. Seven state high courts require probable cause, while at least seven others hold that some lesser form of suspicion suffices. Others vacillate on the controlling standard under *Payton*.

This case presents an ideal opportunity to resolve the split and clarify *Payton*'s standard. After recognizing the division among the courts, the West Virginia Supreme Court joined the group of courts adopting a relaxed standard of suspicion. In rejecting a probable cause standard, the court expressly parted ways with the Fourth Circuit, meaning that the very same arrest-warrant-based search can lead to exclusion in a federal prosecution but not in a state prosecution. Nor is this the only express, inter-jurisdictional conflict over *Payton*, for many other states and their respective Circuits have disagreed on whether *Payton* requires probable cause.

This case also highlights why the split carries real-world consequences and is no mere matter of "semantics." Cf. *United States* v. *Barrera*, 464 F.3d 496, 501 (5th Cir. 2006). The State conceded that there was no probable cause, consent, or exigent circumstances. If West Virginia followed the Fourth Circuit and other courts requiring probable cause, the officers would have needed greater evidence regarding S.W.'s residence and whereabouts. Instead, however, they entered and searched Pennington's home, to include laundry and underwear, "by dint of mere suspicion" and "uncorroborated information." *Brinkley*, 980 F.3d at 386. Absent this Court's intervention, residents like Pennington will continue to be denied the Fourth Amendment's "'very core'" protections in many jurisdictions. *Lange*, 141 S. Ct. at 2018. That is especially so given the millions of outstanding arrest warrants for misdemeanor offenses (like truancy) and the pervasiveness of transient and uncertain living situations (like S.W.'s).

This Court should finally settle the split and clarify the *Payton* standard means probable cause.

I. Federal and state courts are deeply divided on the quantum of proof necessary to justify non-consensual entry into a home to execute an arrest warrant.

1. Despite the fact that West Virginia is within the Fourth Circuit, the West Virginia Supreme Court explicitly rejected the Fourth Circuit's holding in *United States* v. *Brinkley*, 980 F.3d 377, 385 (4th Cir. 2020), that *Payton*'s "reason to believe" standard requires probable cause to believe the target of the arrest warrant resides at and is currently present in the home. Pet.App.18a-19a & n.18 (Op. 14).

The Fourth Circuit grounded *Brinkley* in two rationales. First, this Court's precedents often use the phrase "reason to believe" when discussing probable cause. *Brinkley*, 980 F.3d at 385. Second, "interpreting *Payton*'s reasonable belief to amount to probable cause is most consistent with the special protections that the Constitution affords to the home." *Ibid.* "*Payton* itself reiterated that 'the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Ibid.* (quoting *Payton*, 445 U.S. at 585). But that "chief evil" would arise often if law enforcement could enter a home based on mere suspicion that the subject of an arrest warrant both resided and was present there. See *ibid.*

2. *Brinkley* echoed decisions by the Third and Ninth Circuits requiring probable cause. The Third Circuit, for example, agrees that "the Supreme

Court's use of the phrase 'reason to believe,' when considered in the context of *Payton* and more generally the Court's Fourth Amendment jurisprudence, supports a probable cause standard." *United States* v. *Vasquez-Algarin*, 821 F.3d 467, 477 (3d Cir. 2016). "[M]ore fundamentally, requiring that law enforcement officers have probable cause to believe their suspect resides at and is present within the dwelling before making a forced entry is the only conclusion commensurate with the constitutional protections the Supreme Court has accorded to the home." *Ibid.* A lesser standard would require "so little evidence *** as to expose all dwellings to an unacceptable risk of police error and warrantless entry." *Id.* at 479. The Ninth Circuit has similarly held that "the 'reason to believe,' or reasonable belief, standard of *Payton* *** embodies the same standard of reasonableness inherent in probable cause." *United States* v. *Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002).

In *dicta*, the Seventh Circuit has indicated that it would likely join the probable cause side of the split. *United States* v. *Jackson*, 576 F.3d 465, 469 (7th Cir. 2009). And while the Sixth Circuit has not yet resolved the issue, it has expressed the "belie[f] that probable cause is the correct standard and that the Supreme Court in *Payton* did not intend to create, without explanation or elaboration, an entirely new standard of 'reason to believe.'" *United States* v. *Hardin*, 539 F.3d 404, 416 (6th Cir. 2008).

3. By contrast, the Second, Tenth, and D.C. Circuits have rejected a probable cause standard, holding

that *Payton* instead requires a lesser level of suspicion. As the Third Circuit has noted, "those courts have offered little by way of explanation for this interpretation." *Vasquez-Algarin*, 821 F.3d at 474. The leading rationale, as advanced by the D.C. Circuit and embraced by the decision below, is "that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'" *United States* v. *Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005), *on reh'g in part*, 179 F. App'x 60 (D.C. Cir. 2006). The Second Circuit adopted lesser suspicion by simply declaring that probable cause is "too stringent a test." *United States* v. *Lauter*, 57 F.3d 212, 215 (2d Cir. 1995); accord *United States* v. *Bohannon*, 824 F.3d 242, 254 (2d Cir. 2016) ("This panel is, of course, bound by *Lauter* and, thus, our reason-to-believe review here does not demand probable cause."). The Tenth Circuit also endorsed a lower standard. See *Valdez* v. *McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999). Despite a 2014 suggestion "to reconsider *Valdez*," *United States* v. *Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014) (Gorsuch, J.), the Tenth Circuit has retained its less-than-probable-cause standard; the D.C. and Second Circuits have likewise not reconsidered their longstanding precedent, despite criticism.[1]

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[1] Although the First Circuit has sometimes "implicitly" accepted the lesser suspicion standard, it has never "explicitly decided the issue." *United States* v. *Young*, 835 F.3d 13, 20 n.6 (1st Cir. 2016) (citing *United State*s v. *Werra*, 638 F.3d 326, 337 (1st Cir. 2011)).

4. Other circuits have flipped sides or adopted nebulous tests, adding to the confusion.

The Fifth Circuit: Over several cases, the Fifth Circuit has (1) "distinguish[ed]" the "reasonable belief" standard from probable cause, and rejected the requirement of probable cause; (2) stated that "'[r]easonable belief embodies the same standards of reasonableness [as probable cause]'"; and (3) called its own distinction "more about semantics than substance." *Barrera*, 464 F.3d at 501 & n.5 (internal citations omitted). The Fifth Circuit purports to distinguish "reasonable belief" from "probable cause" by saying the former requires the same level of suspicion as the latter "'without an additional trip to the magistrate and without exigent circumstances.'" *Ibid.* (internal citation omitted). But none of the "probable cause" Circuits requires a second trip to the magistrate, either, leading numerous courts to place the Fifth Circuit alongside other "probable cause" jurisdictions. See *Vasquez-Algarin*, 821 F.3d at 477 (Fifth Circuit has held that "*Payton*'s 'reason to believe' language amounts to a probable cause standard"); *Bohannon*, 824 F.3d at 254 (Fifth Circuit has "construed *Payton*'s reasonable-belief standard as equivalent to probable clause").

The Eighth Circuit: Shortly after *Payton* was decided, the Eighth Circuit construed the decision to "authorize[] entry on the basis of the existing arrest warrant for the defendant *and probable cause* to believe that the defendant was within the premises." *United States* v. *Clifford*, 664 F.2d 1090, 1093 (8th Cir. 1981) (emphasis added). That holding was relied on

in later opinions. See, e.g., *United States* v. *McIntosh*, 857 F.2d 466, 468-69 (8th Cir. 1988) ("*Payton* authorizes entry on the basis of the existing arrest warrant for the defendant and probable cause to believe that the defendant was within the premises.") (quoting *Clifford*, 664 F.2d at 1093).

Then the Eighth Circuit seemingly flipped. See *United States* v. *Risse*, 83 F.3d 212, 216 (8th Cir. 1996). Without mentioning *Clifford*, *Risse* did not apply a probable cause requirement, invoking Eleventh Circuit authority to hold that officers "need only 'reasonably believe' that the suspect resides at the dwelling to be searched and is currently present at the dwelling." *Ibid.* (citing *United States* v. *Magluta*, 44 F.3d 1530, 1533-36 (11th Cir. 1995)). Because the Eighth Circuit follows the prior-panel rule, *Clifford*—having never been overruled—should still govern. See *United States* v. *Betcher*, 534 F.3d 820, 823 (8th Cir. 2008). But later cases, focusing on *Risse* and its progeny, say that the Eighth Circuit has declined to pick a side by "simply treat[ing] reasonable belief as its own standard for purposes of applying the *Payton* test." *Vasquez-Algarin*, 821 F.3d at 476; *Brinkley*, 980 F.3d at 395 n.2 (suggesting Eighth Circuit had "sidestepped the problem"). The Eighth Circuit's latest explanation is that it has "not decided whether the reasonable belief standard amounts to something akin to probable cause, reasonable suspicion, or something else entirely." *United States* v. *Thabit*, 56 F.4th 1145, 1150 (8th Cir. 2023).

The Eleventh Circuit: Noting that the "'reason to believe' standard was not defined in *Payton*," the Eleventh Circuit has declined to expressly adopt a position on the circuit split. *Magluta*, 44 F.3d at 1534. Instead, it has employed what it calls a "practical interpretation of *Payton*," holding that the facts known to the officers, "when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry." *Id.* at 1535.

Because it sidestepped the level of suspicion required, *Magluta* and its progeny are routinely cited in support of both the probable cause and lesser suspicion standards. Based on *Magluta*, several courts now place the Eleventh Circuit in the probable cause category. E.g., *Thabit,* 56 F.4th at 1151 (Eleventh Circuit has "held that reasonable belief amounts to probable cause"); *Jackson*, 576 F.3d at 469 (Eleventh Circuit has held "that 'reasonable belief' amounts to the same thing as 'probable cause'"). Conversely, because *Magluta* ducked the "probable cause" label, other courts—like the court below—cite it in favor of a lesser suspicion standard. See Pet.App.13a n.13 (Op. 9-10) (citing *Magluta* in support of lesser suspicion); see also *Thomas*, 429 F.3d at 286. Finally, some courts maintain that the Eleventh Circuit "simply treat[s] reasonable belief as its own standard for purposes of applying the *Payton* test." *Vasquez-Algarin*, 821 F.3d at 476.

In sum: "there is a circuit split over the meaning of 'reason to believe' under *Payton*," *United States* v. *Maley*, 1 F.4th 816, 820 (10th Cir. 2021), but there is no momentum among the courts to resolve that split. Only this Court can do so.

5. State high courts are likewise intractably divided. The Supreme Court of Washington has held that *Payton*'s standard "hinges on whether the deputies had probable cause to believe that [the subject of the warrant] both resided there and was present" at the time the home was entered. *State* v. *Ruem*, 313 P.3d 1156, 1160 (Wa. 2013); see also *State* v. *Hatchie,* 166 P.3d 698, 706 (Wa. 2007). The Supreme Court of Pennsylvania has likewise held that *Payton* requires probable cause. See *Commonwealth* v. *Romero*, 183 A.3d 364, 394 (Pa. 2018) (plurality op.) ("[T]he authority contemplated by the *Payton dictum* cannot operate upon anything less than probable cause."); *id.* at 407 (Mundy, J., concurring) (agreeing that "'reasonable belief' must mean probable cause"); *id.* at 410 (Dougherty, J., concurring in part and dissenting in part) (similar). The high courts of Alaska,[2] Illinois,[3]

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[2] *Davenport* v. *State*, 568 P.2d 939, 949 (Alaska 1977) ("A police officer may not enter a dwelling in search of a suspect for whom he has an arrest warrant unless, at a minimum, he has probable cause to believe the suspect is within."); accord *Siedentop* v. *State*, 337 P.3d 1, 3 (Alaska Ct. App. 2014) (finding no probable cause that suspect resided at the location or was present).

[3] *People* v. *White*, 512 N.E.2d 677, 682 (Ill. 1987) ("to enter the suspect's home the police need only an arrest warrant and probable cause to believe the suspect is within").

Kansas,[4] New Jersey,[5] and Oregon[6] all agree, as does the leading decision in Arizona.[7]

By contrast, a second group of states has rejected the probable cause requirement. The Supreme Court of Kentucky, for example, has held that *Payton*'s "reason to believe" standard "requires less proof than does the probable cause standard." *Barrett* v. *Common-*

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[4] *State* v. *Thomas*, 124 P.3d 48, 52 (Kan. 2005) (*Payton* requires "probable cause to believe the subject [is] present in the home").

[5] *State* v. *Jones*, 667 A.2d 1043, 1047 (N.J. 1995) (Under *Payton*, "the police have the right to execute an arrest warrant on a defendant at his or her home, and they may enter the home to search for the defendant when there is probable cause to believe that he or she is there").

[6] *State* v. *Davis*, 834 P.2d 1008, 1014 (Or. 1992) ("The Fourth Amendment does not invalidate an arrest based on a valid arrest warrant and probable cause to believe that the subject of the warrant is present on the premises.").

[7] *State* v. *Smith*, 90 P.3d 221, 224 (Ariz. Ct. App. 2004) ("[T]he explicit commands of the United States and Arizona Constitutions, the language of the *Payton* standard, and the weight of relevant case authority all compel the conclusion that the reason-to-believe standard requires a level of reasonable belief similar to that required to support probable cause.")

wealth, 470 S.W.3d 337, 342 (Ky. 2015). Massachusetts,[8] the District of Columbia,[9] Indiana,[10] Colorado,[11] North Dakota,[12] and now, West Virginia, agree. Additionally, the high courts of South Carolina[13] and New Mexico[14] have upheld searches that likely would not satisfy a probable cause standard, suggesting that those states apply a lesser suspicion standard.

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[8] *Commonwealth* v. *Gentile*, 2 N.E.3d 873, 884 (Mass. 2014) ("The reasonable belief standard is not very demanding, and certainly less demanding than probable cause").

[9] *Brown* v. *United States*, 932 A.2d 521, 529 (D.C. 2007) ("[The] reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant.").

[10] *Duran* v. *State*, 930 N.E.2d 10, 16 (Ind. 2010) ("'reasonable belief' required by *Payton* requires a lower degree of confirmation than probable cause").

[11] *People* v. *Aarness*, 150 P.3d 1271, 1276 (Colo. 2006) (adopting reasonable belief standard).

[12] *State* v. *Schmidt*, 864 N.W.2d 265, 268-69 (N.D. 2015) (explaining that North Dakota applies the "reasonable belief" standard and rejecting the Ninth Circuit's decision in *Gorman*).

[13] *State* v. *Asbury*, 493 S.E.2d 349, 351-52 (S.C. 1997) (observation that "a light was on inside the residence and the kitchen window was open" was "sufficient to establish a reasonable belief [the subject of the warrant] was within the residence at the time the officers entered")

[14] *State* v. *Krout*, 674 P.2d 1121, 1123 (N.M. 1984) (arrest warrant gave officer "legitimate authority" to search property "to see if [subject of warrant] was there" despite lack of evidence that subject was actually present).

6. Highlighting the severity of the split, several state courts have repudiated the approach of their encompassing federal circuit, so that a search's lawfulness turns on whether the criminal case is brought in state or federal court. For example, Kansas requires probable cause, but the Tenth Circuit accepts lesser suspicion. Compare *Thomas*, 124 P.3d at 52, with *Valdez*, 172 F.3d at 1225. If police enter a home in Wichita based on an arrest warrant but without probable cause that the suspect resides and is present there, the fruits of that search will be suppressed if the case is charged in state court, but admitted if it is charged in federal court. Conversely, the West Virginia Supreme Court below explicitly rejected the Fourth Circuit's probable cause requirement. Pet.App.19a n.18 (Op. 14). If police enter a home in Morgantown based on an arrest warrant but without probable cause, the fruits of the search will be suppressed in federal court, but not in state court.

Intermediate courts in Maryland have likewise rejected the Fourth Circuit's requirement of probable cause, holding that the "term 'reason to believe' in the context of the execution of an arrest warrant is akin to reasonable suspicion." *Cunningham* v. *Balt. Cnty.*, 232 A.3d 278, 306-07 (Md. Ct. Spec. App. 2020); see also *Witherspoon* v. *State*, 2022 WL 17729247, at *5 (Md. Ct. Spec. App. Dec. 16, 2022) ("We find unpersuasive appellant's invitation to adopt the Fourth Circuit's position that the reasonable belief standard is the equivalent of probable cause."). Similarly, intermediate courts in Idaho have rejected the Ninth Circuit's requirement of probable cause and accepted mere "reasonable suspicion." *State* v. *Bromgard*, 79

P.3d 734, 738 (Idaho Ct. App. 2003) (reasonable belief, "like reasonable suspicion," may "be established using information provided by an anonymous source when the officer has corroborated significant details of the tip"). Finally, the California Court of Appeal has rejected the Ninth Circuit's position—calling it "unpersuasive"—and held that "an officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only a 'reasonable belief,' falling short of probable cause to believe, the suspect lives there and is present at the time." *People* v. *Downey*, 130 Cal.Rptr.3d 402, 405, 409 (Cal. Ct. App. 2011). And *Downey* called this "the standard adopted by the [California] Supreme Court." *Ibid.*

In other words, for 53 million Americans living in those states, their most fundamental Fourth Amendment right can be nullified by the investigating officers referring the matter to the right prosecutor.

7. The split over the "reason to believe" standard is now pervasive and openly recognized by the courts. E.g., *Maley*, 1 F.4th 816 at 820; *Brinkley*, 980 F.3d at 384 ("the quantum of proof necessary to satisfy *Payton* has divided the circuits"); *Vasquez-Algarin*, 821 F.3d at 474 (same); *State* v. *Delap*, 913 N.W.2d 175, 180 (Wis. 2018) (same); *State* v. *Ancke*, 2018 WL 2470675, at *9 (Minn. Ct. App. June 4, 2018) (same). Nor do this Court's subsequent cases create any momentum to resolve it.

While this Court emphasized the sanctity of the home in *Lange* and *Caniglia* v. *Strom*, these decisions addressed different exceptions allowing warrantless

entries into the home and cannot resolve the *Payton* split. *Lange* declined to categorically treat a misdemeanor suspect's flight as exigent circumstances, 141 S. Ct. at 2023, while *Caniglia* refused to extend the "community caretaking" justification for searching an impounded automobile to the home, 141 S. Ct. 1596, 1600 (2021). In emphasizing "the sanctity of the home," the dissent quoted a long passage from *Lange*, which in turn quoted *Caniglia*, (Pet.App.25a-26a (Dissent 4)), but the majority was unmoved by them.

To resolve the split, the Court must directly address the applicable standard for entering a home with only an arrest warrant, and this case is the optimal vehicle for doing so.

II. This case presents the Court with a clean and clear opportunity to clarify *Payton*'s "reason to believe" standard.

The debate over *Payton* arises frequently in the lower courts, and the issue has been presented to this Court several times. Each of those cases, however, suffered from problems of framing or preservation. This case presents the issue on a uniquely clear record and a uniquely clean posture. Pennington expressly raised the split and urged the court below to adopt a probable cause standard. The State conceded there was no probable cause, consent, or exigency, and urged a "less stringent" standard. The court acknowledged the split and adopted the lesser standard, over a dissent, in a fully reasoned decision. Finally, reversal would require vacatur of the final criminal judgment against Pennington. In sum, this case turns on a pure, preserved question of law.

1. The *Payton* question was fully preserved and is squarely presented.

Pennington expressly argued that *Payton*'s reason to believe standard required a probable cause showing. Pet.App.11a (Op. 9). Noting that "[s]everal federal courts of appeal and state courts of last resort have differed over the 'reason to believe' standard," Pennington urged the court to follow the Fourth Circuit's *Brinkley* decision in "adopt[ing] the probable cause standard." Pet. Br. 8-12. The choice between probable cause and a lower standard was "an important one" and "not simply arguing over semantics." *Id.* at 9. Indeed, that choice was dispositive to this case.

The State did not argue forfeiture or any other procedural bar, agreed there was a split, recognized that it mattered, urged a standard "less stringent" than probable cause, and conceded that the officers lacked probable cause here, such that the State would lose if the court followed *Brinkley* and required probable cause.

In a divided, thoroughly reasoned decision, the West Virginia Supreme Court recognized that the issue was preserved and presented, acknowledged there was a "debate[]" among the courts over *Payton*'s standard and that its decision would worsen that split, and then adopted the "less stringent" standard urged by the State. Pet.App.13a-15a (Op. 9-11). Far from suggesting there were any factual or procedural impediments to resolving the legal question before it, the court treated the issue as a legal question of first

impression, unimpeded by factual or procedural disputes. Pet.App.2a (Op. i).

2. This case not only clearly presents the question whether probable cause is required, but also is controlled by the answer to that question. If the decision is affirmed, Pennington's conviction will stand. If this Court reverses and adopts a probable cause standard, it would require reversal of the suppression ruling and Pennington's conviction, which was entered under a conditional guilty plea. Pet.App.8a (Op. 5). Indeed, without evidence that S.W. was living with her parents, there would be no basis for charging her parents with harboring her.

3. The vehicle problems in recent cases raising the meaning of *Payton* demonstrate both why the Court could not grant *certiorari* to resolve the split in the past, and why it will not see a better vehicle for doing so in the future:

a. In *United States* v. *Ross*, 964 F.3d 1034 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021), the petitioner did not press for a probable cause standard until his petition for rehearing en banc. See Pet. for Reh'g En Banc, 2020 WL 2216618, at *6, n.1 (11th Cir. May 5, 2020); accord U.S. Br. in Opp. 15. Thus, the Eleventh Circuit had not addressed whether *Payton*'s "reason to believe" standard requires probable cause. *Ross*, 964 F.3d at 1041. That question was also complicated by the facts and posture of the case: officers did not enter a home but a motel room, *ibid.*; the facts known to the officers would have satisfied a probable cause standard, see U.S. Br. in Opp. 16; and the Petition also challenged a second search of the motel room

conducted with the motel's consent, see *ibid.*; Pet. i, because only by suppressing both searches would the evidence of wrongdoing be eliminated.

b. In *Harper* v. *Leahy*, 738 F. App'x 716 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 795 (2019), a Section 1983 action involving qualified immunity, the *Payton* question was similarly unpreserved and only obliquely addressed. In the court of appeals, the petitioner did not challenge Second Circuit precedent holding that *Payton* "does not demand probable cause" and "is not a particularly high standard." *Bohannon*, 824 F.3d at 254-55. To the contrary, the petitioner affirmatively relied on *Bohannon*, CA2 Opening Br., 2017 WL 6336714, at *19, paving the way for the Second Circuit's straightforward, and unpublished, application of that precedent, *Harper*, 738 F. App'x at 718.

c. A similar forfeiture problem precluded this Court's review of the *Payton* question in the Second Circuit's earlier *Bohannon* decision. See 824 F.3d 242, *cert. denied*, 580 U.S. 1049 (2017). There, the court of appeals explained that the petitioner had "cite[d] approvingly," and had not challenged, Second Circuit precedent holding "that reason to believe is a lesser standard" than probable cause. See 824 F.3d at 253-54. Even apart from that forfeiture, the *Payton* question was presented on interlocutory review (by way of government appeal), which the United States identified as a further vehicle problem. See Br. in Opp. 8.

d. In other cases, the *Payton* issue was preserved but inconsequential because the court of appeals held that the probable cause standard, if it applied, would be met. E.g., *Fialdini* v. *Cote*, 594 F. App'x 113, 117

(4th Cir. 2014), *cert. denied*, 577 U.S. 824 (2015) (declining to "enter into the midst of this debate [over *Payton*] because, even if we assume that the 'reason to believe' standard requires a showing equivalent to probable cause, that standard is met here"). And as in *Bohannon*, the *Payton* question was bound up with qualified immunity. Pet. i; Br. in Opp. 6.

4. As these cases demonstrate, the *Payton* issue seldom arises as a cleanly preserved, isolated legal question, with both sides and the court recognizing it as controlling. Typically, a thicket of procedural, factual, or substantive issues stands between the Court and the issue presented.

Not so here. The question presented and the split over *Payton* were expressly raised; the court of appeals answered the question and took sides in this "debate[]" (Pet.App.13a (Op. 9)); and its choice was outcome-determinative.

III. This Court should grant review because the standard for entering a home to execute a warrant implicates foundational Fourth Amendment interests, and only a probable cause standard adequately protects those interests.

The *Payton* standard governs a core right in a common context. Arrest warrants are endemic, and so are fluid or itinerant living arrangements. Police officers often execute arrest warrants in the face of uncertainty over whether someone else's home is the suspect's residence. To vindicate the "'centuries-old principle' that the 'home is entitled to special protection,'"

Lange, 141 S. Ct. at 2018, this Court should grant review and hold that officers seeking to enter a home to execute an arrest warrant must have probable cause.

A. This Court should hold that officers cannot enter a home to execute an arrest warrant absent probable cause to believe the suspect resides and is present there.

1. Core Fourth Amendment principles support the probable cause rule. The Fourth Amendment explicitly requires "probable cause" to protect "the right of the people to be secure in their *** houses," embodying "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton*, 445 U.S. at 601. Even the dissenters in *Payton* acknowledged that the common law supported a "stringent probable-cause requirement" to "ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view." 445 U.S. at 617 (White, J., dissenting).

In *Steagald*, the Court recognized that an arrest warrant may preclude the warrant's target from complaining of an entry into *his* home to effect his arrest, but does not permit the police to enter *someone else's* home without a search warrant. 451 U.S. at 218-23. And if Deputy Dewees had followed his instincts and sought a fugitive search warrant, he would have needed to show the magistrate probable cause that the "fugitive *will be* on the described premises *** when the warrant is executed." *United States* v.

Grubbs, 547 U.S. 90, 96 (2006) ("anticipatory warrants are *** no different in principle from ordinary warrants" in this regard). *At most*, an arrest warrant (or pickup order) can substitute for a search warrant in satisfying the need for a magistrate's review. But it cannot displace the substantive requirement of probable cause. Otherwise, an officer seeking to enter a home based on a fugitive's presence in it could avoid the showing required for a search warrant by seeking an *arrest* warrant instead.

Probable cause is required not only by the Constitution's text and analogy to fugitive search warrants, but also by the Fourth Amendment's solicitude for the home. Without a probable cause requirement, officers can enter a home based on "so little evidence that an arrestee resides at a dwelling as to expose all dwellings to an unacceptable risk of police error and warrantless entry." *Vasquez-Algarin*, 821 F.3d at 473. The dissent below made just this point, explaining that majority Opinion "weakens citizens' Fourth Amendment rights by allowing as a matter of routine" warrantless searches "based solely on a 'dint of mere suspicion or uncorroborated information.'" Pet.App.35a (Dissent 11) (quoting *Brinkley*, 980 F.3d at 386). That risk is well illustrated by the search here: Deputy Dewees relied on an "anonymous, unverified tip" that S.W. was at Pennington's apartment, against the background of other tips indicating she was "bouncing around." Pet.App.38a-39a (Dissent 15). This amounts to a mere suspicion about S.W.'s whereabouts, "wholly insufficient" to justify entering a home (Pet.App.39a (Dissent 15))—especially to find a "scared teenager" guilty of a "minor offense[]" who is

hiding from law enforcement. Cf. *Lange* 141 S. Ct. at 2021.

2. The risk that third parties will suffer the "chief evil" of "physical entry of the home" is particularly acute because arrest warrants are frequently executed at places other than the target's "legal" residence. Cf. *Payton*, 445 U.S. at 585. Here, for example, Pennington's "home was not [S.W.'s] legal residence," and the tips "demonstrated that [S.W.] was, at minimum, bouncing around." Pet.App.38a-39a (Dissent 15). In other cases, courts have upheld warrantless entries under *Payton* where the subject of the warrant was "staying at the home for the past three or four days," *McIntosh*, 857 F.2d at 467; where a cell phone "pinged" from a house where the suspect sometimes "stayed," *City of Akron* v. *Conkle*, 2019 WL 5212581, at *3 (Ohio Ct. App. Oct. 16, 2019); and even, in a capital case, based on stray indicia that the defendant was staying "in [a] tent city," *Eggers* v. *State*, 914 So. 2d 883, 896 (Ala. Crim. App. 2004).

With such a low standard for what constitutes residence and what evidence is necessary, it is unsurprising that officers often enter homes that are *not* the residence of the arrest warrant's target. In one egregious example, the defendant moved into a house where the subject of an arrest warrant previously resided. See *United States* v. *Powell*, 379 F.3d 520, 521 (8th Cir. 2004). Even though the arrest warrant correctly identified the suspect's new address, the police entered his old home without a search warrant and

found drugs, which were used to convict the new resident (against whom no warrant, arrest or search, had issued). See *id.* at 524.

3. Courts holding that probable cause is *not* required "have offered little by way of explanation" for adopting a lower standard. *Vasquez-Algarin*, 821 F.3d at 474. The court below reasoned that *Payton*'s "reason to believe" formulation must mean "something other than 'probable cause.'" Pet.App.13a (Op. 10). But this Court *often* uses the phrase "reason to believe" or comparable formulations to explain probable cause, *Brinkley*, 980 F.3d at 385, and "has sometimes seemed to employ the term 'reasonable ground for belief' as part of the very definition of 'probable cause,'" *Denson*, 775 F.3d at 1217 (Gorsuch, J.). In *Maryland* v. *Pringle*, for example, this Court explained "that 'the substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'" 540 U.S. 366, 371 (2003) (citation and alteration omitted). And in *Maryland* v. *Buie*, this Court concluded that *Payton*'s reason to believe standard was satisfied where officers possessed "an arrest warrant and probable cause to believe [the suspect] was in his home." 494 U.S. 325, 332-33 (1990).

B. Forgoing a probable cause requirement threatens the Fourth Amendment's special protection of the home.

The stakes of the *Payton* standard are magnified by the vast number of arrest warrants and their subjects' increasingly transient living arrangements.

Given those two trends, only a probable cause standard adequately protects third parties' homes from intrusion.

1. At any given time, millions of arrest warrants are open within the United States.[15] These warrants may issue for offenses as "minor as not paying a parking or traffic ticket or failing to obtain a dog license."[16] But even though the offenses may be trivial, many courts have held that *Payton* applies "regardless of whether th[e] warrant is for a felony, a misdemeanor, or simply a bench warrant for failure to appear." *United States* v. *Gooch*, 506 F.3d 1156, 1159 (9th Cir. 2007); accord *Shreve* v. *Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681, 689 (6th Cir. 2006). As noted, here the offense was S.W.'s truancy.

a. In dense, large cities, the volume of arrest warrants can be astonishing. In New York City, for example, 1.2 million people—"nearly one in seven residents"—"have open arrest warrants."[17] "Many of them have no idea that these warrants exist"; "many

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[15] David M. Bierie, *National Public Registry of Active-Warrants: A Policy Proposal* (June 2015), https://www.uscourts.gov/sites/default/files/79_1_5_0.pdf; see also Mike Wagner, *et al.*, *Wanted*, Columbus Dispatch and GateHouse Media (2018), https://stories.usatodaynetwork.com/warrants/wanted-suspects-run-free-while-authorities-drown-in-open-arrest-warrants/site/dispatch.com/#.

[16] Wagner, *supra.*

[17] Allegra Kirkland, *How 1.2 million New Yorkers ended up with arrest warrants*, Business Insider (Aug. 4, 2015), https://www.businessinsider.com/how-12-million-new-yorkers-ended-up-with-arrest-warrants-2015-8.

of the warrants themselves date back years, even decades"; and "[t]he vast majority of warrants occur when people who receive summons for minor violations, such as riding a bike on the sidewalk or drinking a beer in public, fail to appear in court."[18] "In Cincinnati, *** the ratio of outstanding warrants to residents is about one-to-three; in Baltimore, it is one-to-twelve."[19]

b. The risk of governmental intrusion into third-party homes is heightened yet more when this huge number of open arrest warrants intersects with many Americans' increasingly transient living arrangements. Over the past several decades, the percentage of young adults living with their parents[20] or "couch

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[18] *Ibid.*

[19] Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177, 183 n.29 (2008), https://www.yalelawjournal.org/comment/discovering-arrest-warrants-intervening-police-conduct-and-foreseeability.

[20] D'Vera Cohn et al., *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, Pew Research Center (March 24, 2022) (noting that nearly 31% of adults 25-29 live with their parents), https://www.pewresearch.org/social-trends/2022/03/24/financial-issues-top-the-list-of-reasons-u-s-adults-live-in-multigenerational-homes/; Richard Fry, *It's becoming More Common for Young Adults to Live at Home—and For Longer Stretches*, Pew Research Center (May 5, 2017), https://www.pewresearch.org/fact-tank/2017/05/05/its-becoming-more-common-for-young-adults-to-live-at-home-and-for-longer-stretches/.

surfing" among friends[21] and relatives has steadily increased, a trend accelerated by the COVID pandemic and economic dislocation.[22]

c. Further, the potential for abuse is extraordinary. As this Court has explained, "arrest warrant[s] may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Steagald*, 461 U.S. at 215. For example, police executing a warrant for a speeding citation may "refrain from arresting a suspect until the suspect has entered his home in the hope that, upon entry to arrest, they will discover evidence in plain view or during a search incident to arrest."[23] Such pretextual use of an arrest warrant is not itself grounds for suppression because an officer's "subjective reason for making [an] arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004).

2. Given those considerations, the probable cause requirement protects third parties' homes from being entered by officers who lack search warrants. Absent that requirement, courts routinely permit officers to

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[21] Susanna Curry et al., *Youth Homelessness and Vulnerability: How Does Couch Surfing Fit*, Am. J. of Community Psychology 1, 8 (August 2017), https://onlinelibrary.wiley.com/doi/10.1002/ajcp.12156.

[22] Cohn, *supra*.

[23] Joseph D. Harbaugh & Nancy Lesse Faust, "*Knock on Any Door"—Home Arrests After* Payton *and* Steagald," 86 Dick. L. Rev. 191, 205-206 n.89 (1982), https://ideas.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=2935&context=dlra.

enter based on anonymous tips or other unreliable information, further widening the gap in Fourth Amendment protections created by the warrant exception for officers executing an arrest warrant.

For example, in *United States* v. *Ford*, 888 F.3d 922 (8th Cir. 2018), an "untested" tipster told the police that the defendant lived in a home owned by someone named Dawn and used his cell phone to surveil the premises outside. The police then entered the home based on (1) an arrest warrant for the defendant and (2) the fact "that the home was owned by someone named Dawn" and a cell phone was visible in the window. *Id.* at 927. The court upheld the search. Other decisions have upheld searches based on inferences drawn from: the fact a "basement light was on and it was approximately 8:00 p.m.," *State* v. *Northover*, 991 P.2d 380, 384 (Idaho Ct. App. 1999); the fact a door "was ajar" at the residence, implying someone was home, *Commonwealth* v. *Silva*, 802 N.E.2d 535, 542 (Mass. 2004), coupled with "the late hour," "vehicles in the driveway," and the presence of "lights on at the residence," *Carpenter* v. *State*, 974 N.E.2d 569, 573 (Ind. Ct. App. 2012). These decisions substitute "generic evidence indicating merely that someone is inside the home" for specific evidence that *the intended arrestee* is inside the home. *Vasquez-Algarin*, 821 F.3d at 482.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

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