No. 22-747

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

Brief of National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to advance the fair and efficient administration of justice. It is the only nationwide professional bar association for public defenders and private defense lawyers, and its membership also includes military defense counsel, law professors, and judges. NACDL files *amicus* briefs in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

This is one such case. NACDL has a strong interest in the application of uniform standards for police entry into private homes. Ensuring that home entries are subject to a consistent and robust standard of constitutional review will promote predictability and basic fairness for criminal defendants, civil rights plaintiffs, and police officers alike. NACDL therefore asks this Court to grant certiorari to answer the important question presented here, and to hold that entries into a home in search of the subject of an arrest warrant must be supported by probable cause.

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[1] Counsel for *amicus curiae* certify that Petitioner and Respondent received timely notice of this *amicus* brief pursuant to Rule 37. No counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case squarely and cleanly presents an important constitutional question: When may police lawfully enter a home to search for the subject of an arrest warrant? State and federal courts of appeals are deeply divided on the question left open in *Payton* v. *New York*, 445 U.S. 573 (1980), whether, to enter a home to execute an arrest warrant, police must have probable cause to believe that the suspect resides there and will be found there, or whether some lesser degree of suspicion passes constitutional muster. The question is not academic. This case and numerous others demonstrate that the level of suspicion required to justify entry into a home is often outcome-determinative, with cascading consequences for the individuals whose homes are searched.

Disagreement on such an important question warrants this Court's review—especially where, as here, state and federal courts apply competing constitutional standards within the same geographic area. Intra-jurisdictional splits of authority create uncertainty and undermine the rule of law. Whether the people will be "secure in their . . . houses," as the Fourth Amendment guarantees, should not depend on which prosecuting authority develops a case or in which courthouse the case is heard, as it did here. U.S. Const. amend. IV.

This Court should grant review and reverse the West Virginia court's endorsement of a lesser standard that fails to protect core Fourth Amendment rights. Recognizing the unique sanctity of the home, this Court has long held that a home search executed without a warrant supported by probable cause is presumptively unreasonable. The same principle

should apply to law enforcement entry into a home in search of a suspect without probable cause to believe that the suspect resides in and will be found there. Any lesser standard would penalize individuals for their associations with suspected wrongdoers and create uncertainty for criminal defendants and police officers alike. The Court should hold that the Fourth Amendment does not permit police to enter a home to execute an arrest warrant absent probable cause to believe that the subject of the warrant resides in the home and will be found there.

ARGUMENT

I. The Court Should Resolve The Split On The Proper Test for Determining When Police May Lawfully Enter A Home To Execute An Arrest Warrant

In *Payton*, this Court stated that "an arrest warrant founded on probable cause implicitly carries with it the 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 602-03. Following *Payton*, a split has emerged among federal courts of appeal and state courts interpreting *Payton*'s "reason to believe" standard.

The Third, Fourth, and Ninth Circuits, along with at least seven states, require police to have probable cause that the suspect resides in the home and will be found inside to enter and execute an arrest warrant. The Second, Tenth, and D.C. Circuits, together with six states and the District of Columbia, require a lower standard. Pet. 12. Three other Circuits (the Fifth, Eleventh, and Eighth) and other state courts have vac-

illated on the standard. *Id.* Compounding the uncertainty, courts that have rejected a probable-cause standard are not always clear—and have at times disagreed—on what exactly that lesser standard entails. Compare *United States* v. *Bohannon*, 824 F.3d 242, 255 (2d Cir. 2016) ("borrow[ing]" from reasonable-suspicion precedent to interpret *Payton*'s "reason to believe" standard), with *United States* v. *Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001) ("To satisfy the *Payton* test the officers must have a 'reasonable belief' the arrestee lives in the residence, not a 'reasonable suspicion' necessary to justify a 'stop and frisk' . . . .").

The difference in standards changes case outcomes. This Court should grant review to ensure a uniform standard on this important constitutional issue.

A. The Difference Between Probable Cause And A Lesser Standard Is Often Dispositive

The difference between probable cause and a less stringent standard is "far from academic." *State* v. *Smith*, 90 P.3d 221, 225 (Ariz. Ct. App. 2004). This is not a split over "semantics." *United States* v. *Vasquez-Algarin*, 821 F.3d 467, 476 (3d Cir. 2016) (citation omitted). Whether the Fourth Amentment requires police to have probable cause to believe the subject of a warrant resides in a dwelling or some lesser degree of suspicion often determines not only the lawfulness of the entry but the admissibility of evidence that may be used in any ensuing prosecutions.

1. The level of suspicion required for police to enter a dwelling has proved dispositive in cases from multiple jurisdictions.

a. Courts requiring less than probable cause have upheld entry into dwellings while expressly

acknowledging the lack of probable cause. In *Commonwealth* v. *Silva*, the highest court in Massachusetts noted that the "police *did not have probable cause* to believe that [the arrestee] was in [an] apartment." 802 N.E.2d 535, 542 (Mass. 2004) (emphasis added). Nevertheless, the court held that police "did have a 'reasonable belief' that" the arrestee lived there and was present when "the officers sought to execute [the] arrest warrant" and upheld the entry under this lower standard. *Id.* at 542-43. The Tenth Circuit confirmed that this difference in standards is dispositive in *Valdez* v. *McPheters*, 172 F.3d 1220 (10th Cir. 1999), where it observed that the dissent would reach a different result by applying "a standard [seemingly] much closer to 'probable cause' than 'reasonable belief.'" *Id.* at 1227 n.5. Consistent with this, courts have suggested that their decision to require a lower level of suspicion was critical to the outcome. See *Waller* v. *City of Middletown*, 50 F. Supp. 3d 171, 181-82 (D. Conn. 2014) (noting that while "[t]he rule may be different in" circuits that require probable cause, officers had requisite reasonable belief under the Second Circuit's "less stringent standard"), *vacated in part on other grounds on reconsideration*, 89 F.Supp.3d 279 (D. Conn. 2015); *Cunningham* v. *Balt. Cnty.*, 232 A.3d 278, 305 (Md. Ct. Spec. App. 2020) (addressing "the scope of the 'reason to believe' standard" to determine whether it is "equivalent to probable cause, reasonable suspicion, or something else," and holding entry was lawful based on lower standard).

b. The standard is also outcome-determinative in jurisdictions that require probable cause, where courts routinely reject attempts to justify entry based on information that might suffice under a lower level of

suspicion.[2] For instance, in *State* v. *Ruem*, a trial court concluded that officers had a "reasonable basis to believe" that the arrestee was within a residence, but the Washington Supreme Court held that this was "insufficient" to justify the officers' entry, "as the standard . . . is probable cause, not a reasonable basis." 313 P.3d 1156, 1161 (Wash. 2013) (en banc). Likewise, in *Siedentop* v. *State*, an appellate court in Alaska held that although "officers may have had reason to believe that they might find" the arrestee in a house, "the officers did not have *probable cause* to believe that [the arrestee] was *currently inside* the house when they arrived." 337 P.3d 1, 3 (Alaska Ct. App. 2014) (finding Fourth Amendment violation on that basis). Other courts favoring the probable-cause standard have commented that the choice of standard is dispositive in jurisdictions that interpret *Payton* to require something less. See *Vasquez-Algarin*, 821 F.3d at 476 (noting that the D.C. Circuit "appears to require significantly less evidence to support a belief of residency than the other Courts of Appeals, *presumably in part as a result of its choice to depart from the probable cause standard* and the protections it affords" (emphasis added)); *United States* v. *Jackson*, 576 F.3d 465, 469 n.4 (7th Cir. 2009)

[2] Courts applying the probable-cause standard have rejected government attempts to justify entry into a residence based on analogies to facts from cases decided in jurisdictions that use a lower standard. See *United States* v. *Mott*, No. 1:21-CR-17, 2022 WL 2317280, at *3 (N.D. W. Va. May 27, 2022) (rejecting argument that entry was lawful under *Payton* where Government cited only 11th Circuit cases which "[c]rucially" did not apply "the heightened probable cause standard set forth by the Fourth Circuit"); *State* v. *Canfield*, No. 14-112610-A, 2015 WL 7162214, at *3 (Kan. Ct. App. Nov. 13, 2015) (distinguishing cases "deal[ing] with the reasonable basis standard as opposed to the more stringent Kansas standard of probable cause").

(observing that the D.C. Circuit in *Thomas* "upheld a search of a third party's residence based on something less than probable cause").

c. Even in jurisdictions where the standard is uncertain, courts have indicated that the choice between probable cause and a lesser degree of suspicion may determine the lawfulness of the police officers' entry. In *United States* v. *Kiner*, an Indiana district court stated that if it were "clear that reasonable belief amounts to something less than probable cause," the court "would have little doubt" that the officers lawfully entered the residence. No. 3:10-CR-87, 2011 WL 5408700, at *3 (N.D. Ind. Nov. 8, 2011). But because the Seventh Circuit had "implied that it is more likely to adopt a position defining reasonable belief as synonymous with probable cause," the court concluded "that something more than the mere early hour is required" to justify entry into a home to execute an arrest warrant. *Id.* (finding probable cause based on additional facts). And in *Allen* v. *Gillenwater* (a case decided before the Fourth Circuit adopted the probable-cause standard), a district court found that officers were entitled to qualified immunity because "officers applying a more relaxed standard than probable cause could have reasonably believed that they could enter lawfully," even though the facts were insufficient to give officers "probable cause to believe" that the arrestee was in the apartment. No. 1:10-CV-350, 2012 WL 3475583, at *12 (M.D.N.C. Aug. 15, 2012).

2. This deep fracture between the courts and the differing consequences it produces are underscored by the fact that many courts requiring less than probable cause for police entry into a dwelling to make an arrest have suggested that *Payton* requires only the "'reasonable suspicion' necessary for an investigative

'*Terry* stop.'" *Duran* v. *State*, 930 N.E.2d 10, 16 (Ind. 2010) (citation omitted); see also *Bohannon*, 824 F.3d at 255 ("borrow[ing] from reasonable-suspicion precedent to" interpret *Payton*'s "reason to believe" standard); *United States* v. *Denson*, 775 F.3d 1214, 1216 (10th Cir. 2014) (raising the possibility that *Payton* may "mean to invoke something closer to the more forgiving reasonable suspicion standard we use for investigatory detentions"); *Cunningham*, 232 A.3d at 306-07 (the "term 'reason to believe' in the context of the execution of an arrest warrant is akin to reasonable suspicion"); *State* v. *Bromgard*, 79 P.3d 734, 738 (Idaho Ct. App. 2003) (treating reasonable belief "like reasonable suspicion" in terms of type of evidence required); *Evans* v. *State*, 454 S.W.3d 744, 751 (Ark. 2015) (Hudson Goodson, J., concurring) ("Some courts hold that [*Payton*] requires something akin to probable cause, while others hold that the requisite showing is a lower standard more comparable to reasonable suspicion.").[3]

This Court has made clear that "reasonable suspicion" is a different and lower standard than probable cause: "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama* v. *White*, 496 U.S. 325, 330 (1990); see also, *e.g.*, *United States*

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[3] At least one court has held that *Payton*'s "'reasonable belief' standard" requires "*less* than the 'reasonable suspicion' required for an investigative stop." *United States* v. *Glover*, No. 4:12-CR-243, 2013 WL 639315, at *5 (E.D. Mo. Feb. 14, 2013) (emphasis added) (citing *United States* v. *Clayton*, 210 F.3d 841, 844 n.3 (8th Cir. 2000)).

v. *Sokolow*, 490 U.S. 1, 7 (1989) ("[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.").[4]

That some courts require probable cause for a home intrusion, while others permit entry under a reasonable suspicion approach, shows that this split matters practically. As *Terry* and its progeny make clear, the choice between probable cause and reasonable suspicion regularly determines the outcome of cases.

B. The Intra-Jurisdictional Splits On This Important Federal Question Especially Warrant Review

This Court has long emphasized "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 347-48 (1816) (emphasis omitted). The "public mischiefs" that arise from "jarring and discordant" judgments across federal jurisdictions, *id*., are especially pronounced when conflicts arise *within* a jurisdiction. Accordingly, intra-jurisdictional conflicts on "an important federal question" are a "compelling reason" to grant certiorari. Sup. Ct. R. 10(b).

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[4] This court has distinguished between probable cause and reasonable suspicion in multiple contexts. *E.g.*, *Maryland* v. *Buie*, 494 U.S. 325, 329, 335-37 (1990) (officers need only "reasonable suspicion of danger" to conduct a protective sweep, not probable cause); *Arizona* v. *Hicks*, 480 U.S. 321, 326-28 (1987) (seizure under plain view doctrine violated Fourth Amendment where the officers had only "reasonable suspicion" but not probable cause); *Adams* v. *Williams*, 407 U.S. 143, 147 (1972) ("unverified tip may have been insufficient for a[n] . . . arrest or search warrant," but sufficed to justify an investigatory stop).

That condition is met here. The Supreme Court of Appeals of West Virginia expressly broke with the Fourth Circuit by holding that probable cause is not required to enter a home and execute an arrest warrant. Cf. *United States* v. *Brinkley*, 980 F.3d 377 (4th Cir. 2020). In so concluding, the court joined the highest courts of Kansas and Maryland, and the intermediate courts of Idaho and California, in rejecting the standards that their respective federal circuit courts of appeals apply to arrest entries. Pet. 23-24. These splits are all but guaranteed to create the confusion this Court has long sought to avoid. See *Martin*, 14 U.S. at 347-48. Moreover, because the level of suspicion necessary to justify entry is frequently dispositive of cases and suppression motions, convictions in at least five states may turn on whether they were the product of a federal or state prosecution. That is arbitrary and untenable.

Indeed, review is especially warranted because the intra-jurisdictional conflict presented by this case concerns an important question of constitutional criminal procedure with sweeping consequences.[5] State-federal

[5] See, *e.g.*, *Alabama* v. *Shelton*, 535 U.S. 654, 660 (2002) (resolving split between Ninth Circuit and Montana Supreme Court on whether the Sixth Amendment requires that counsel be appointed prior to imposition of a conditional or suspended prison sentence); *Delaware* v. *Prouse*, 440 U.S. 648, 651 & nn.2-3 (1979) (resolving split between Eighth Circuit and Supreme Court of Nebraska and D.C. Circuit and D.C. Court of Appeals on whether the Fourth Amendment prohibits the seizure of an automobile on the basis of an uncorroborated tip); *United States* v. *Ash*, 413 U.S. 300, 300-02 & n.2 (1973) (resolving split between Third Circuit and Pennsylvania Supreme Court, Sixth Circuit and Michigan Supreme Court, and Ninth Circuit and Nevada Supreme Court on whether a post-indictment photo array constitutes a "critical stage" of proceedings for which the Sixth Amendment guarantees the right to assistance of counsel).

conflicts subvert "basic expectations of governmental consistency and even-handedness" and create "the risk of forum shopping as prosecutors strategically gravitate toward more prosecution-friendly doctrines." Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 Notre Dame L. Rev. 235, 240 (2014). Just as importantly, without clear guidance from this Court, "[a] person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York* v. *Belton*, 453 U.S. 454, 459-60 (1981).

Indeed, beyond affecting the outcome of individual prosecutions, disagreement within jurisdictions over *Payton* subjects police officers to competing standards for liability under civil rights law. Because the Fourth Circuit in *Brinkley* adopted a probable-cause standard, officers may face liability in federal court if they enter a home without probable cause. See *Deavers* v. *Martin*, No. 2:21-cv-423, 2022 WL 4348474, at *11 (S.D. W. Va. Sept. 19, 2022) (suggesting that probable cause standard is now "clearly established" in the Fourth Circuit). But under the decision below, state courts in West Virginia will assess an officer's entry to make an arrest under a standard that resembles the Circuit's pre-*Brinkley* "more relaxed standard." *Allen*, 2012 WL 3475583, at *12. This means that officers in West Virginia could be held liable in federal civil rights cases for entering a home without probable cause, even if they complied with the State court's lower standard for entry. Alternatively, citizens subjected to home entries unsupported by probable cause could be precluded from vindicating their civil rights in federal court because the State fails to recognize a violation that has been clearly established in federal court. "[C]onstitutional rights" should not "depend on the

courthouse in which they are prosecuted." Petition for Writ of Certiorari at 14-15, *Counterman* v. *Colorado*, No. 22-138 (U.S. June 27, 2022), *cert. granted* (Jan. 13, 2023). This Court's intervention is necessary to establish a single, consistent standard on a matter of constitutional importance.

II. This Case Presents An Ideal Vehicle To Resolve The Question Presented

This case is an ideal vehicle to resolve the persistent split over the meaning of *Payton*, because the difference between probable cause and a lesser degree of suspicion was dispositive. Below, "the State conceded that probable cause did not exist in this case, and that it could not prevail under that standard." Pet. App. 35a (Wooton, J., dissenting). Moreover, there are no confounding issues like exigent circumstances, hot pursuit, or a lack of Fourth Amendment "standing," as in *United States* v. *Ross*, 964 F.3d 1034 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021). Petitioner's conviction therefore rises or falls on whether the officers lawfully entered her home to execute an arrest warrant[6] without probable cause to believe the suspect resided there and would be found there. That makes this case an ideal vehicle for deciding the question presented.

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[6] Police in this case executed a "pick-up order," but it is undisputed that a "pick-up order" for a minor is "the functional equivalent of an arrest warrant." Pet. App. 10a-11a.

III. The Decision Below Erred In Allowing Entry Into A Home Based On An Unverified Tip That The Subject Of An Arrest Warrant Was Inside

The West Virginia court's decision that police may enter and search a home based on an unverified tip that the subject of an arrest warrant was inside, Pet. App. 38a-39a (Wooton, J., dissenting), contravenes the Fourth Amendment's core protection against unreasonable searches of the home.

A. An Arrest Warrant Does Not Give Police Broad License To Enter Dwellings Without Probable Cause

This Court's decisions in *Payton* and subsequent cases make clear that the Fourth Amendment requires police to have probable cause to believe that the suspect resides and will be found in the residence prior to entering.

1. The *Payton* Court was chiefly concerned with protecting the home from unreasonable entry by police. Thus, the Court held that, even if police have probable cause to believe that a person committed a crime, it is nevertheless presumptively unreasonable to enter the suspect's home without a warrant: "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. At the same time, the Court recognized that, once an arrest warrant has issued, it is "constitutionally reasonable" to require the suspect to "open *his* doors" to the police without first obtaining a search warrant for his home. *Id.* at 602-03 (emphasis added). The Court did not suggest that arresting officers may break down *any* door in search of a

suspect absent probable cause to search that home at that time for the suspect. Such a position would contravene the Court's premise that a showing of probable cause is required to "breach . . . the entrance to an individual's home." *Id.* at 589.

For this reason, this Court held in *Steagald* that arresting officers may not enter the home of a third party in search of a suspect without obtaining a search warrant supported by probable cause. "A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Steagald* v. *United States*, 451 U.S. 204, 213 (1981). This Court "[saw] no reason to depart from this settled course when the search of a home is for a person rather than an object." *Id.* at 214.

2. The dissenting opinions in *Payton* and *Steagald* confirm that the Court has not approved entry into homes absent probable cause that a suspect is presently inside. Although the dissenters in *Payton* (Justices White and Rehnquist and Chief Justice Burger) disagreed with the majority on the need for police to obtain a *warrant* to make an arrest inside a home, they agreed that entry into the home had to be supported by probable cause. The dissenters would have held that, "after knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is *probable cause* to believe that the person to be arrested committed a felony *and is present in the house*." *Payton*, 445 U.S. at 620 (White, J., dissenting) (emphasis added); see also *id.* at 606 (observing "the majority of commentators [on the common law] would

permit arrest entries on *probable suspicion*" without need for a search warrant (emphasis added)). It was undisputed in *Payton* that the officers had probable cause to believe that the defendants were present in their own homes. See *id.* at 617 ("[I]t is not argued that the police had no probable cause to believe that both Payton and Riddick were in *their dwellings* at the time of the entries." (emphasis added)).

Similarly, the dissenters in *Steagald* (Justices Rehnquist and White) would have held that a search warrant was not required to enter a third-party's dwelling to arrest a suspect for whom the police had an arrest warrant when the "fugitive" was "believed on the basis of *probable cause* to be in the dwelling." *Steagald*, 451 U.S. at 223 (Rehnquist, J., dissenting) (emphasis added). The dissenting Justices would not have suppressed evidence found in the dwelling in the prosecution of the third-party, but they did not suggest that the Fourth Amendment would have permitted entry into the home on lesser suspicion than probable cause that a criminal suspect would be found there.

3. This Court again agreed on the quantum of proof required to enter a home in search of a suspect in *Maryland* v. *Buie*, 494 U.S. 325 (1990). In *Buie*, the Court was divided on whether probable cause was required to conduct a protective sweep of a home incident to a lawful arrest but unanimously agreed that probable cause was required to enter the dwelling to execute the arrest in the first place. *Id.* at 332-33 ("Possessing an arrest warrant and *probable cause* to believe Buie was *in his home*, the officers were entitled to enter and to search anywhere in the house in which Buie might be found." (emphasis added)); *id*. at 341 n.3 (Brennan, J., dissenting) ("Here[,] the officers' arrest warrant for Buie and their *probable cause* to believe he

was present in the house authorized their initial entry." (emphasis added)). From *Payton* to *Buie*, this Court has made clear that warrantless police entries must be supported by probable cause. The decision below erred in concluding otherwise.

B. Only A Probable Cause Standard Provides Sufficient Protection For Citizens And Certainty For Law Enforcement

1. This Court has held that warrantless entries into a third party's home in search of a suspect are presumptively unreasonable. *Steagald*, 451 U.S. at 213. Were it otherwise, "arrest warrant[s] [could] 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." *Id.* at 215. Rather than supplant the requirement that police have probable cause to enter a home, the rule in *Payton* provides police with the flexibility to rely on an arrest warrant to enter a *suspect*'s home, rather than apply for a separate search warrant, so long as they have "reason to believe" the suspect is present. *Payton,* 445 at 603.

That is a sensible rule, provided that the arresting officers have probable cause to believe that the residence is, in fact, the suspect's and the suspect is within. "[I]nterpreting reasonable belief to require less than probable cause 'would . . . render all private homes . . . susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination.'" *Brinkley*, 980 F.3d at 385-86 (quoting *Vasquez-Algarin*, 821 F.3d at 480). Permitting police with an arrest warrant to enter any home with something less than probable cause is particularly troubling when as many as one-third of

a city's residents may have an outstanding warrant at any given time. See Pet. 34-35. The protections against warrantless searches would be severely undermined if police could bypass the requirement to show probable cause to enter a home any time they have an uncorroborated tip that the subject of some arrest warrant may be inside. Such an approach is irreconcilable with the Fourth Amendment's "overriding respect for the sanctity of the home." *Payton*, 445 U.S. at 601.

Terry's "reasonable suspicion" standard is particularly inapt. *Terry* applies only when the state's conduct—such as temporarily detaining an individual on the street—is "substantially less intrusive than arrests," for which probable cause is required. *Dunaway* v. *New York*, 442 U.S. 200, 210 (1979). That lesser standard does not apply, however, when the privacy invasion is "indistinguishable from a traditional arrest." *Id.* at 212. Here, the privacy invasion constitutes "physical entry of the home"—"the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *U.S. District Court (The Keith Case)*, 407 U.S. 297, 313 (1972). Probable cause should be required to justify that intrusion.

2. Applying a lesser standard of suspicion would also unfairly penalize individuals for associating with suspected wrongdoers, who may be wanted by the state for anything ranging from armed robbery, to truancy, to riding a bicycle on the sidewalk and failing to answer the summons.[7] Under West Virginia's standard, police could search the home belonging to the parents of the sidewalk-bicyclist who failed to appear in court,

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[7] 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.

solely on the basis of an unverified tip that he may be sleeping on their sofa. Failure to justify routine police entries by probable cause also penalizes those who live in multigenerational households, who are more likely to be Asian, Black, or Hispanic than White.[8] Such a regime is patently unreasonable and profoundly unfair.

3. This Court has emphasized a "preference to provide clear guidance to law enforcement through categorical rules." *Riley* v. *California*, 573 U.S. 373, 398 (2014). Probable cause is a familiar standard, and "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-14. By contrast, the "reasonable belief" standard adopted by the decision below "is not a finely-tuned standard." *United States* v. *Barrera*, 464 F.3d 496, 500 (5th Cir. 2006).

Unsurprisingly, the adoption of an amorphous, lesser-suspicion standard has led to arbitrary results. For example, the Eleventh Circuit "has refrained from specifying a precise quantum of proof for reasonable belief, [holding] that the standard requires something less than what is demanded for probable cause." *United States* v. *Farley*, No. 1:08-CR-378, 2009 WL 10689037, at *4 (N.D. Ga. Oct. 19, 2009). In one case attempting to apply Eleventh Circuit law, the Northern District of Georgia found that officers had reasonable grounds to enter a home where the arrest warrant listed the address, an informational packet prepared

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[8] D'Vera Cohn et al., *The Demographics of Multigenerational Households*, Pew Research Center (Mar. 24, 2022), https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/

by the Marshal's office listed the same address among other addresses, and the officer confirmed with the prosecutor and through a database that the packet contained current information. *United States* v. *Walton*, No. 1:12-CR-395, 2014 WL 3519176, at *2 (N.D. Ga. July 15, 2014). But in another case, applying the same Eleventh Circuit law, the Northern District of Alabama found that officers lacked reasonable grounds to enter a home where the warrant listed the address and the officer confirmed through a police database that the same address was listed on the suspect's current driver's license. The court there found that the Fourth Amendment violation was *so* "obvious" that the officer was "not entitled to qualified immunity." *R.R. by & through Rogers* v. *Eaton*, No. 2:17-cv-751, 2019 WL 1573207, at *10 (N.D. Ala. Apr. 11, 2019). The difference between *Walton* and *Rogers* is not so obvious that civil liability for government officials should rest upon it.

A "reason to believe" standard is vague and unpredictable. If this Court does not affirm that the Fourth Amendment requires probable cause, the amorphous "reason to believe" approach will continue to produce arbitrary and unfair results. "The people in their houses, as well as the police, deserve more precision." *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001).

CONCLUSION

The petition for a writ of certiorari affords the Court a clean vehicle to resolve an entrenched split among federal and state courts on an important question of Fourth Amendment interpretation. This Court should grant review.

Respectfully submitted,

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MARCH 9, 2023