

No. 22-747

In the Supreme Court of the United States

TRACY 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 THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Do police executing an arrest warrant need probable cause that the subject lives there and is present before entering a home?

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute’s Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

This case concerns *amicus* because it involves core questions of individual liberty protected by the Constitution and presents an opportunity to improve the administration of the Fourth Amendment and maintain that provision’s protections in the modern era.

SUMMARY OF THE ARGUMENT

Petitioner Tracy Pennington challenges the West Virginia Supreme Court of Appeals’s holding that officers need only “reason to believe” that the subject

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party’s counsel, and no person or entity other than *amicus* funded its preparation or submission.

of an arrest warrant lives there and is present before entering a home, and that this quantum of evidence is less than probable cause.² Ms. Pennington’s petition is not ultimately about protecting property—it’s about protecting people. Fourth Amendment limits on home entries protect human life (Part I). Entries based on underdeveloped or stale information needlessly threaten homeowners’ safety (Part II) and that of law enforcement officers. (Part III)

ARGUMENT

I. PROBABLE CAUSE PROTECTS HUMAN LIFE.

The probable-cause requirement protects human life. The Fourth Amendment safeguards “[t]he right of the people to be secure in their . . . houses.”³ The “immediate evils” motivating its enactment were “indiscriminate searches and seizures conducted under the authority of ‘general warrants’” during British rule.⁴ Physical intrusion into the home is “the chief evil” the Fourth Amendment is meant to limit and the requirement that police have an arrest warrant or a search warrant before entering a home “minimizes the danger of needless intrusions.”⁵

² Cert. Pet. App’x A at 18a–19a.

³ U.S. CONST. amend. IV.

⁴ *Payton v. New York*, 445 U.S. 573, 583 (1980).

⁵ *Id.* at 585–86; *see also id.* at 588–89 (“To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of

Restrictions on home entries protect several important constitutional values, including privacy.⁶ (Indeed, during the search of Ms. Pennington’s home, Dep. Ben DeWees and his fellow officers saw her on a bed with S.W.’s father in a private room.⁷) Another important Fourth Amendment value is the protection of property; as early as 1603, the Court of King’s Bench worried that the “destruction or breaking of any house” during an arrest could cause “great damage and inconvenience.”⁸

exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.”).
⁶ *See id.* at 589 (“In [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home”); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (“[E]lements of privacy and dignity . . . can be destroyed by a sudden entrance”); *see also id.* (observing that police officers may encounter people undressed or in bed); *Ker v. California*, 374 U.S. 23, 57 (1963) (Brennan, J., concurring in part and dissenting in part, joined by three other justices) (noting the “shock, fright or embarrassment attendant upon an unannounced police intrusion”); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.”).

⁷ *See* Cert. Pet. App’x A at 6a.

⁸ *Wilson v. Arkansas*, 514 U.S. 927, 935–36 (1995) (*quoting Semayne’s Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K.B. 1603)); *see also* Mayra Moreno, *Retired Officer, Family Startled by Deputies Serving Arrest Warrant at Wrong Home*, 6 ABC ACTION NEWS (Sept. 10, 2020), <https://6abc.com/harris-county-deputies-serve-warrant-at-wrong-house-retired-police-officer->

But the most important right protected by the Fourth Amendment is human life. This Court has repeatedly noted the importance of protecting homeowners’ lives and limbs from the perils of home entries. In 1948, this Court considered *McDonald v. United States*, where a police officer jimmied open a woman’s bedroom window and crawled inside to investigate an illegal lottery scheme operated from her boarding house.⁹ The officer lacked an arrest or search warrant, and the Court held that the subsequent search was illegal.¹⁰ Concurring, Justice Robert Jackson expressed concern for the woman’s safety, predicting “grave troubles” if police continued to carry out entries cavalierly.¹¹ He considered the lack of injury to anyone a matter of “luck more than [of] foresight.”¹² Many homeowners are armed, and a woman who “sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot.”¹³ For his part, an officer “seeing a gun being drawn on him might shoot first”—but under the circumstances, Justice Jackson

home-case-under-investigation-louis-rodriguez/6416554/ (“A retired Texas officer is calling deputies’ response unprofessional and intimidating after they broke down his front door to serve a warrant. . . . [T]hey were not at the correct house.”).

⁹ See 335 U.S. 451, 452–53.

¹⁰ See *id.* at 452–56.

¹¹ See *id.* at 459 (Jackson, J., concurring).

¹² *Id.* at 460.

¹³ *Id.* at 460–61.

wrote that he himself “should not want the task of convincing a jury that it was not murder.”¹⁴

Justice Jackson saw upholding the warrant requirement as a way to prevent “a method of law enforcement so reckless and so fraught with danger and discredit.”¹⁵ But warrants do not increase homeowners’ safety if police have unbridled discretion to determine whether a given subject lives at a home and is present there before entering. Indeed, this Court has held that the Fourth Amendment does not allow a warrant (akin to a colonial writ of assistance) that “specifies only the object of a search” and “leaves to the unfettered discretion of the police the decision as to which particular homes should be searched.”¹⁶

The test adopted below is only the very loosest of fetters. Officers can enter a home even if the subject of the warrant “may live somewhere else from time to time” and they can “take into consideration the possibility” that the subject is varying regular patterns to avoid detection.¹⁷ They can even enter based on the time of day when the same sort of person as the subject “would ordinarily be at home.”¹⁸

Home entries cannot constitutionally rest atop determinations that are so tenuous. As four justices wrote in *Ker v. California*, “practical hazards of law

¹⁴ *Id.* at 461.

¹⁵ *Id.*

¹⁶ *Steagald v. United States*, 451 U.S. 204, 220 (1981).

¹⁷ Cert. Pet. App’x A at 18a.

¹⁸ *Id.* at 20a.

enforcement militate strongly against any relaxation” of requirements for home entries.¹⁹ It is always possible that “the police may be misinformed as to the name or address of a suspect, or as to other material information.”²⁰ This is “a good reason for holding a tight rein against judicial approval of unannounced police entries into private homes.”²¹ And as the Third Circuit held in requiring probable cause that a suspect lives at and is present in a home, a “laxer standard would effect an end-run around” the Constitution, making “all private homes—the most sacred of Fourth Amendment spaces—susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination.”²²

II. HOME ENTRIES WITHOUT PROBABLE CAUSE NEEDLESSLY IMPERIL HOMEOWNERS.

Accepting the decision below and dispensing with probable cause would endanger homeowners. Tragic deaths have occurred at the hands of police officers who went to the wrong address or relied on stale information. Such cases (whether they involve arrest warrants or not) illustrate the risks posed by letting

¹⁹ 374 U.S. 23, 57 (1963) (Brennan, J., concurring in part and dissenting in part).

²⁰ *Id.*

²¹ *Id.*

²² *United States v. Vasquez-Algarin*, 821 F.3d 467, 480 (3d Cir. 2016).

officers without probable cause that a warrant subject lives there and is present enter homes.

The most infamous recent case may be that of Louisville EMT Breonna Taylor. A judge issued a search warrant after police said that they believed a drug dealer—her on-again-off-again former boyfriend who lived nearby—received packages at Ms. Taylor’s apartment. Officers arrived there shortly after midnight and knocked loudly, but Ms. Taylor and her boyfriend, Kenneth Walker, did not hear them identify themselves. While officers were using a battering ram to gain entry, Mr. Walker believed Ms. Taylor’s former boyfriend was breaking down the door. As Justice Jackson forewarned in *McDonald*, Mr. Walker struck an officer when he fired a pistol in self-defense. Police shot back, killing Ms. Taylor.²³ Her death triggered intense public protest. Later investigation showed that the warrant affidavit was based on false information.²⁴

But consider what would have happened had the officers instead sought an arrest warrant for Ms. Taylor’s ex-boyfriend—the actual subject of their investigation. Under the test adopted by the court below, they may have had “reason to believe” that he lived at her apartment and was there that night. It would not be dispositive that he sometimes lived elsewhere, especially as he still stayed in the

²³ See Richard A. Oppel Jr. et al., *What to Know about Breonna Taylor’s Death*, N.Y. TIMES (Dec. 12, 2022), <https://www.nytimes.com/article/breonna-taylor-police.html>.

²⁴ See *id.*

neighborhood. The police may have even considered his having moved out as evidence that he was trying to avoid detection. Thus, under the reasoning of the court below, officers would have been authorized to enter the apartment at a time when one who sometimes lived there would ordinarily be present—say, a little after midnight.

What if the test Ms. Pennington proposes applied instead, a test requiring probable cause that the subject lives in the home and is present? Would officers be allowed to enter Ms. Taylor’s apartment? No: probable cause requires fresh, detailed observation. “The stringent probable-cause requirement would help 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”²⁵—and imperiling residents like Ms. Taylor.

Common law contained an additional safeguard against residential intrusions: home arrests had to be done during daytime.²⁶ But now, dangerous nighttime raids like the one at Breonna Taylor’s apartment, featuring military-style equipment and weaponry, are commonplace. Consider the 2014 raid that nearly killed 19-month-old Bounkham “Bou Bou” Phonesavanh. Police raided his rural Georgia home at

²⁵ *Payton v. New York*, 445 U.S. 573, 617 (White, J., dissenting).

²⁶ *See id.* at 616–17.

around 2:15 a.m.²⁷ They had a no-knock search warrant based on informant's having supposedly bought \$50 of methamphetamine in the yard there.²⁸ Ten officers arrived in an armored Humvee with submachine guns, assault rifles, body armor, Kevlar helmets, a door-breaching shotgun, sledgehammers, and a ballistic shield.²⁹ As they splintered the door with a metal battering ram, one officer threw a flashbang grenade, which exploded in a playpen where Bou Bou was sleeping.³⁰ His throat and face were badly burned, nearly killing him, and he required more than 15 surgeries to save his life and repair the damage.³¹ His family received nearly \$4 million in settlements.³²

The target drug dealer turned out to be a relative of the Phonesavanh family who was not present at the home.³³ Bou Bou's mother acknowledged that the

²⁷ See Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html> [hereinafter "*Door-Busting Raids*"].

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*; Tyler Estep, *New \$1.65M Settlement for Parents of Georgia Toddler Injured in Raid*, ATL. J.-CONST. (Feb. 26, 2016), <https://www.ajc.com/news/crime--law/new-65m-settlement-for-parents-georgia-toddler-injured-raid/fqRsNpwZnOsJxwZtbXVLZP/> [hereinafter "*Estep, Settlement*"].

³² See Estep, *Settlement*, *supra* n.31.

³³ See *id.*

police didn't mean to harm her son, but said "they could've done a lot more to prevent this."³⁴ As with Ms. Taylor's case, a sheriff's deputy embellished the search-warrant application.³⁵ But on one crucial point, the deputy's lack of preparation proved especially dangerous to the residents, including Bou Bou. She didn't surveil the home, instead relying on one informant's denial that there was any evidence of a child living there other than a minivan.³⁶

Suppose officers had sought an arrest warrant for Bou Bou's relative. Under the test adopted below, they may well have had some "reason to believe" he lived in the home and would be present in the early-morning hours. But if they had undertaken the sort of observations that would have provided probable cause, they would have realized that the home contained children. Young children played in the front yard daily and the minivan had four child safety seats inside.³⁷ Having to develop probable cause makes officers slow down, observe carefully, and notice details that can minimize the risk to homeowners.

Cases like Ms. Taylor's and Bou Bou's are horrific, but not isolated. Warrant execution in drug cases involves danger as a matter of course. Between 2010

³⁴ *Door-Busting Raids*, *supra* n.27.

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See* Jacob Sullum, *How Cops Became Baby Burners*, REASON (June 4, 2014), <https://reason.com/2014/06/04/how-cops-become-baby-burners/>.

and 2014, over 90 percent of Maryland SWAT deployments were to serve search warrants; two-thirds of these involved forcible entries.³⁸ “Firearms were discharged in 99 operations, civilians were killed in nine and injured in 95 . . . and animals were killed in 14.”³⁹ Between January 2011 and March 2013, the Little Rock, Arkansas SWAT team “broke down doors and detonated flash-bangs in more than 90 percent of 147 narcotics search warrant raids.”⁴⁰ Nationwide, at least “47 civilians and five officers died as a result of the execution of knock-and-announce searches, while 31 civilians and eight officers died in the execution of no-knock warrants.”⁴¹

These risks do not affect all Americans equally. Raids happen most often in low-income and minority neighborhoods. Nearly half of SWAT search-warrant home entries target Black subjects and nearly half of civilians killed in police home-intrusions are non-white.⁴²

Figures for arrest-warrant executions specifically are harder to come by, but the hazard that flows from a lack of developed, fresh information applies to both sorts of operations. When police executing an arrest warrant entered the Southaven, Mississippi property of 41-year-old father Ismael Lopez, they saw him

³⁸ See *Door-Busting Raids*, *supra* n.27.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *id.*

holding a gun. They shot and killed him, then realized that his home was *next to* that of their actual target, Samuel Pearlman. Both homes had numbers on their exteriors and mailboxes; Mr. Pearlman's wall actually had a giant letter "P" on it. Mr. Lopez had no criminal history.⁴³

Other people have also died in police raids "on wrong addresses, including a 7-year-old girl in Detroit."⁴⁴ In August 2015, police in Worcester, Massachusetts secured a no-knock warrant for a suspected drug dealer's apartment based on one informant's word. They did not surveil the home. Motor vehicle and utility records *that they did review* indicated that the suspect had moved. But the SWAT team swept in, detaining three adults and two children at gunpoint. Eventually, officers realized that the residents didn't know the suspect, who had indeed left three months earlier.⁴⁵ Would they have had "reason to believe" he was present under the test adopted below? Possibly. Probable cause as proposed by Ms. Pennington? Certainly not: their evidence was stale.

More careful observation might also have prevented injury to Iyanna Davis of Hempstead, New York. She was shot by police who had a warrant for the

⁴³ See Kalhan Rosenblatt, *Mississippi Police Fatally Shoot Man at Wrong House While Serving Warrant*, NBC NEWS (July 26, 2017, 4:53 PM), <https://www.nbcnews.com/news/us-news/mississippi-police-fatally-shoot-man-wrong-house-while-serving-warrant-n786681>.

⁴⁴ *Door-Busting Raids*, *supra* n.27.

⁴⁵ *Id.*

other unit in her two-family residence. That's the sort of mistake that would likelier have been caught during the development of probable cause that the suspect lived there and was present.⁴⁶ Cases abound of risky police entries into the wrong homes.⁴⁷

⁴⁶ *See id.*

⁴⁷ *See, e.g.,* Joel Brown, "I Never Got an Apology" Raleigh Mom Still Devastated after RPD Tactical Team Raids Wrong Home, ABC11 (Feb. 1, 2022), <https://abc11.com/raleigh-police-raid-wrong-house-drug-botched-police-family-terrified/11531039/> (discussing Raleigh school-bus driver Yolanda Irving, held at gunpoint by officers who had a warrant for the house two doors down); Minyvonne Burke, *Black Woman Handcuffed Naked in Raid at Wrong Home Set to Get \$2.9 Million from Chicago*, NBC NEWS (Dec. 14, 2021), <https://www.nbcnews.com/news/us-news/black-woman-handcuffed-naked-raid-wrong-home-set-get-29-million-chicag-rena8701> (discussing Chicago social worker Anjanette Young, who secured a nearly-\$3 million settlement after being handcuffed naked by officers whose warrant targeted the home across the street); Nick Sibilla, *Cop Who Wrongly Led No-Knock Raid Against 78-Year-Old Grandfather Can't Be Sued, Court Rules*, FORBES (June 8, 2021), <https://www.forbes.com/sites/nicksibilla/2021/06/08/cop-who-led-accidental-no-knock-raid-against-78-year-old-grandfather-cant-be-sued-court-rules/> (discussing Onree Davis, a 78-year-old Georgia man whose home was raided by officers targeting his next-door neighbor, even though a captain "later testified he 'wasn't sure' this second house was actually their target and just assumed his subordinates 'acquired information'" justifying entry); Ashley Fantz, *Fatal Mistake*, SALON (Oct. 19, 2000), https://www.salon.com/2000/10/19/shooting_3/ (discussing the

Many of the dangerous cases discussed above involve the execution of search warrants. But at least those have to be backed by probable cause that contraband is inside. The ruling below requires no probable cause that the subject of an arrest warrant resides somewhere and is present before officers enter homes. It poses even more risk to homeowners' lives.

III. HOME ENTRIES WITHOUT PROBABLE CAUSE NEEDLESSLY IMPERIL LAW ENFORCEMENT OFFICERS.

Raids do not only imperil homeowners. They put officers at risk, as Justice Jackson observed in *McDonald*. Considering the homeowner in the hypothetical he posed, Justice Jackson expressed concern that she might shoot a policeman crawling through her window and that her subsequent plea of self-defense “might result awkwardly for enforcement officers.”⁴⁸ He considered entering homes without warrants backed by probable cause “reckless” and “fraught with danger and discredit to the law enforcement agencies themselves.”⁴⁹

His concerns are borne out by reality. “[O]fficers were injured in at least 30” Maryland SWAT raids between 2010 and 2014.⁵⁰ A homeowner who does not

fatal shooting of 64-year-old John Adams of Lebanon, Tennessee by officers who went to the wrong house).

⁴⁸ *McDonald*, 335 U.S. at 461 (Jackson, J., concurring).

⁴⁹ *Id.*

⁵⁰ *Door-Busting Raids*, *supra* n.27.

realize that the people invading his home are police has “a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.”⁵¹ One of the key reasons for the knock-and-announce rule is “to protect the arresting officers from being shot as trespassers.”⁵² But as Ms. Taylor’s case shows, residents do not always hear warnings; besides, no-knock warrants sometimes mean they aren’t given.

Unnecessary home entries needlessly endanger law enforcement officers. The police only fired into Breonna Taylor’s apartment after her boyfriend shot Sgt. Jonathan Mattingly in the thigh first, thinking the police were actually Ms. Taylor’s former boyfriend trying to break in.⁵³ Similarly, in a 2018 case, Prince George’s County, Maryland officers received a search warrant for a suspected drug dealer’s home based an informant’s tip. They attempted to serve it around 10 p.m. Although they knocked and announced their presence, the homeowner had fallen asleep watching television and didn’t hear them. He awoke as officers were entering. Not knowing who they were and fearing for his daughter’s safety, he fired a shotgun, wounding two officers (one of them seriously). He immediately surrendered once he realized who the entrants were,

⁵¹ *Ker*, 374 U.S. at 58 (op. of Brennan, J.) (quoting *Launock v. Brown*, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (1819)).

⁵² *Id.*

⁵³ See Oppel, *What to Know about Breonna Taylor’s Death*, *supra* n23.

“devastated” that he had pulled the trigger. Law enforcement realized that they had a bad tip, and their chief imposed a moratorium on serving warrants until he was sure each had been properly vetted.⁵⁴

Proper vetting is what Dep. DeWees sought here when he asked a prosecutor if he needed a warrant before entering Ms. Pennington’s home.⁵⁵ And it’s what Ms. Pennington’s petition is all about: making sure that homeowners and officers are only exposed to danger when they have to be.

CONCLUSION

Some police actions are unavoidably risky, but unlike exigent circumstances, arrest-warrant executions “are initiated by law enforcement.”⁵⁶ This means officers have the time to both secure a warrant backed by probable cause *and* develop probable cause that the subject is a resident and present before

⁵⁴ See Jack Pointer, *2 Prince George’s Co. Officers Shot after Warrant Served at Wrong Home: Police Chief*, WTOPNEWS (Sept. 20, 2018, 11:59 PM), <https://wtop.com/prince-georges-county/2018/09/prince-georges-chief-on-shooting-warrant-was-served-at-wrong-address/>; Nahal Amouzadeh, *2 Prince George’s Co. Officers Shot While Executing Warrant*, WTOPNEWS (Sept. 20, 2018, 1:00 AM), <https://wtop.com/prince-georges-county/2018/09/2-prince-georges-co-officers-shot-in-district-heights/>.

⁵⁵ See Cert. Pet. App’x A at 5a.

⁵⁶ *Door-Busting Raids*, *supra* n.27; see also *Lange v. California*, 141 S. Ct. 2011, 2024 (2021) (“On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home.”).

entering a home. Otherwise, homeowners—both those like Ms. Taylor and the woman from Justice Jackson’s hypothetical who exercise their right to self-defense, and those like Bou Bou Phonesavanh and Iyanna Davis who are simply the collateral damage of thoughtless policing—will needlessly be endangered. So will officers sent on unnecessary missions, like Sgt. Mattingly and the two officers shot in the Prince George’s County case.

This Court should grant Ms. Pennington’s petition, reverse the judgment below, and protect human life by upholding the probable-cause requirement for home entries.

Respectfully submitted,

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