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 THE NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[*]

The North Dakota Association of Criminal Defense Lawyers is a chapter of the National Association of Criminal Defense Lawyers and serves as the only statewide organization for criminal defense lawyers in North Dakota. Collectively, its members have represented thousands of defendants accused of crimes.

[*] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, amicus affirms that all parties have consented to the filing of this brief.

Amicus's members understand all too well the situation facing West Virginian criminal-defense lawyers, and of course their clients, as a result of the decision under review. West Virginia's highest state court has adopted a "reason to believe" standard under *Payton v. New York*, 445 U.S. 573 (1980), that requires less than probable cause. Pet.App.18a-19a. Yet, in the West Virginia federal courts, probable cause is required, as it should be. *United States v. Brinkley*, 980 F.3d 377, 392 (4th Cir. 2020). The same situation currently exists in North Dakota. State courts in North Dakota do not require probable cause to believe that the subject of an arrest warrant is in a residence, *State v. Schmidt*, 864 N.W.2d 265, 268-69 (N.D. 2015), while, in federal court in North Dakota, the best reading of Eighth Circuit law is that probable cause is required. *See United States v. Clifford*, 664 F.2d 1090, 1093 (8th Cir. 1981) (stating "*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" (emphasis added)); Pet. 17-18 (summarizing Eighth Circuit law and correctly observing that *Clifford* remains good law).

That situation is intolerable, both in West Virginia and in North Dakota. Criminal defendants in West Virginia and North Dakota (and other states) receive different constitutional protections depending on the courthouse in which they are charged. Worse yet, across the Nation, third parties with relationships to targets of arrest warrants are subjected to intrusions of their most sacrosanct privacy interests—those in their homes—based on constitutionally infirm understandings of *Payton*.

SUMMARY OF ARGUMENT

As the petition for certiorari explains, the decision below continues an acknowledged conflict among the courts

of appeals and state courts of last resort. This conflict is not esoteric; it is implicated every day across the Nation. Whenever police execute an arrest warrant in a residence, the question arises whether the intrusion into a space that is "sacred" in Fourth Amendment jurisprudence was constitutionally permissible. *Segura v. United States*, 468 U.S. 796, 810 (1984). Not only does this legal question arise frequently, but it is important to the fair administration of criminal justice in this country. A common answer should be provided to give clarity to the courts, law enforcement, and the accused.

But the people most affected by this question rarely end up in court. Whenever an arrest warrant for someone else is executed in a residence, all of the other occupants at the time have their lives turned upside down. Review of the decisions that comprise the circuit split reveals that the execution of arrest warrants frequently intrudes on the privacy interests of third-party residents. Anecdotal and objective evidence further shows how intrusive, traumatic, and embarrassing the execution of arrest warrants can be for these third parties.

To be sure, intrusions on the privacy of the home are part of our system of criminal justice, but they must usually be justified by a search warrant for the premises that is supported by probable cause. *See, e.g., Steagald v. United States*, 451 U.S. 204, 212 (1981) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). "A search warrant * * * safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Id.* at 213.

In many cases, however, law enforcement officers execute *arrest* warrants in residences without *search* war-

rants for the premises. In those circumstances, there has not been a determination by a neutral judicial officer that there is "probable cause to believe that the legitimate object of a search is located in a particular place." *Ibid.* The least that can be done to safeguard the privacy interests of third parties in that circumstance is to require law enforcement to have "probable cause to believe that the legitimate object" of the warrant—the subject individual named in the arrest warrant—"is located in" the residence where the arrest warrant was executed. *Ibid.* Otherwise, arrest warrants in some jurisdictions will continue to "embody [a] derivative authority to deprive [an individual] of his interest in the privacy of his home"—an authority this Court has held arrest warrants do not possess. *Id.* at 214 n.7.

ARGUMENT

A. The Decision Below Contributes To A Conflict Among The Courts of Appeals And State Courts Of Last Resort

As the petition for certiorari and the opinions below make clear, the "the quantum of proof necessary to satisfy *Payton* has divided the circuits." Pet.App.32a (Wooton, J., dissenting) (quoting *Brinkley*, 980 F.3d at 385; Pet. 14-25. "Some * * * have read *Payton* to require something less than probable cause." *United States v. Denson*, 775 F.3d 1214, 1216 (10th Cir. 2014) (Gorsuch, J.). Meanwhile, "other circuits have held that *Payton*'s 'reason to believe' standard 'embodies the same standard of reasonableness inherent in probable cause.'" *Id.* at 1217. In short, "[t]he circuits disagree." *Id.* at 1216.

The Third, Fourth, and Ninth Circuits, and the highest state-courts in Alaska, Illinois, Kansas, New Jersey, Oregon, Pennsylvania, and Washington take the position that "reason to believe" requires probable cause. Pet. 14-

15, 20-21; *United States v. Vasquez-Algarin*, 821 F.3d 467, 480 (3d Cir. 2016); *Brinkley*, 980 F.3d at 385; *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002); *Davenport v. State*, 568 P.2d 939, 949 (Alaska 1977); *People v. White*, 512 N.E.2d 677, 682 (Ill. 1987); *State v. Thomas*, 124 P.3d 48, 52 (Kan. 2005); *State v. Jones*, 667 A.2d 1043, 1047 (N.J. 1995); *State v. Davis*, 834 P.2d 1008, 1014 (Or. 1992); *Commonwealth v. Romero*, 183 A.3d 364, 394-95 (Pa. 2018); *State v. Ruem*, 313 P.3d 1156, 1160 (Wash. 2007). The Eighth Circuit's decisions are best read as agreeing that probable cause is required. *See United States v. McIntosh*, 857 F.2d 466, 468-69 (8th Cir. 1988) (holding probable cause required); *Clifford*, 664 F.2d at 1093 (same). *But see United States v. Thabit*, 56 F.4th 1145, 1150 (8th Cir. 2023) (stating the court has not concluded what standard applies). The Sixth and Seventh Circuits have suggested in dicta that they would reach the same conclusion. *United States v. Hardin*, 539 F.3d 404, 416 n.6 (6th Cir. 2008) ("[O]ur statements on this matter are dicta, * * * [but] we believe that probable cause is the correct standard * * * .")[1]; *United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) ("Were we to reach the issue, we might be inclined to adopt the view * * * that 'reasonable belief' is synonymous with probable cause.").

In contrast, other courts require something less than probable cause to satisfy *Payton*'s "reason to believe."

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[1] Two years prior to *Hardin*, the Sixth Circuit held in *United States v. Pruitt*, 458 F.3d 477 (6th Cir. 2006), that *Payton*'s "reasonable belief" standard did not rise to probable cause. *Id.* at 482. To the extent that the Sixth Circuit's seemingly contradictory stances in *Hardin* and *Pruitt* indicate that the Sixth Circuit may not agree with the Third, Fourth, and Ninth Circuits in a subsequent case where the issue is presented, that indeterminacy speaks to the importance of ensuring a uniform, national standard.

This less exacting standard applies in the Second, Tenth, and D.C. Circuits. *See* Pet. 15-16; *United States v. Bohannon*, 824 F.3d 242, 255 (2d Cir. 2016); *Valdez v. McPheters*, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999); *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). It also applies in the highest courts of North Dakota, Colorado, Indiana, Kentucky, Massachusetts, the District of Columbia, and now West Virginia. *See* Pet. 21-22; *Schmidt*, 864 N.W.2d at 268-69; *People v. Aarness*, 150 P.3d 1271, 1276 (Colo. 2006); *Duran v. State*, 930 N.E.2d 10, 16 (Ind. 2010); *Barrett v. Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015); *Commonwealth v. Gentile*, 2 N.E.3d 873, 875 (Mass. 2014); *Brown v. United States*, 932 A.2d 521, 529 (D.C. 2007); Pet.App.18a-19a.

The import of this conflict is significant. The protections afforded by the Fourth Amendment should not vary based on the happenstance of geography and whether the prosecutor brings charges in federal or state court.

B. Resolution Of The Question Presented Is Essential To The Fair Administration Of Justice

It is hard to overstate the significance of the question presented. The issue has arisen in at least the thirty-nine reported decisions comprising the conflict between and within the courts of appeals and state courts of last resort. *See* Pet. 14-25. Indeed, when one includes the courts of appeals that have acknowledged the question without deciding the issue conclusively, *every* federal court of appeals has confronted the issue. *See ibid.*

It is not just federal courts that have addressed the issue; at least seventeen state high courts have weighed in as well. *Ibid.* At least six of those states—Indiana, Kansas, Kentucky, North Dakota, South Carolina, and West Virginia—have adopted standards that conflict with that

of the federal circuit in which they sit. *Compare* Pet.App.18a-19a, *and State v. Asbury*, 493 S.E.2d 349, 350-51 (S.C. 1997), *with Brinkley*, 980 F.3d at 392; *compare Schmidt*, 864 N.W.2d at 268-69, *with Clifford*, 664 F.2d at 1093; *compare Barrett*, 470 S.W.3d at 342, *with Hardin*, 539 F.3d at 416 n.6; *compare Thomas*, 124 P.3d at 52, *with Valdez*, 172 F.3d at 1225; *compare Duran*, 930 N.E.2d at 16, *with Jackson*, 576 F.3d at 469. If Ms. Pennington had been prosecuted in the United States District Court for the Southern District of West Virginia, by all rights her motion to suppress would have been granted under *Brinkley*.

Whether police officers have sufficient "reason to believe" the subject of an arrest warrant is present at a residence under *Payton*, 445 U.S. at 603, is often a subject of litigation. The published appellate decisions discussed above represent only a small fraction of the instances in which courts deal with the issue. A commercial database search revealed dozens more decisions in the last year alone in which the question presented arose. And such a search sets only the floor of the number of times an issue is litigated, as commercial databases do not collect all written decisions and cannot capture oral decisions made from the bench.

Fundamentally, however, caselaw presents just the tip of an iceberg. It will not infrequently occur that law enforcement will lack probable cause for tying the subject to a particular residence, but the execution of the warrant will not result in litigation. Those circumstances could arise because the subject of the warrant is not found in the residence, charges are never brought against the subject

of the warrant, a plea bargain is reached, or no relevant evidence is found at the residence.[2]

The executions of warrants in these instances may occur peacefully and without the kind of violent altercations that all too frequently occur in the execution of warrants. But in all such cases—whether an arrest results or individuals feel sufficiently aggrieved to seek legal redress—the privacy rights of individual citizens with no relationship to criminal wrongdoing have been sacrificed unconstitutionally. The Fourth Amendment "castle" has been breached. *See Payton*, 445 U.S. at 596 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603) ("That the house of every one is to him as his castle and fortress * * *.")).

In all events, the question presented is confronted by law enforcement officers anytime they execute an arrest warrant in someone's residence. Each time, they must ask what support they have for the inference that the subject is at the residence. There can be no doubt that the execution of arrest warrants at a residence is an everyday occurrence, even though locating reliable statistics regarding the frequency with which arrest warrants are executed at residences has proven daunting.[3] And the notion that the answer depends not only on the jurisdiction

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[2] To be sure, there are other instances in which the issue presented will not arise because law enforcement will have ample cause to believe a suspect is at a particular residence. Investigators may have observed the subject entering and exiting the residence on numerous occasions or may have obtained government records indicating the subject's residence.

[3] Even the director of the Federal Bureau of Investigations has in the past described the alarming lack of statistics regarding police interactions with citizens as both "embarrassing" and "ridiculous." Aaron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings "Ridiculous," "Embarrassing"*, Wash. Post (Oct. 7,

in which the question is being asked, but also on the court in which it is asked, is intolerable to the everyday administration of criminal justice.

This discrepancy is especially intolerable when one considers the frequency with which the execution of arrest warrants in residences disrupts the lives of innocent third parties. As one would expect, questions regarding whether law enforcement had sufficient information tying the subject of a warrant to a residence are most likely to arise in situations where the residence is owned by someone else and the subject of the warrant is believed to either be only a temporary guest, or is sharing the residence with others.

This is borne out by study of the cases that have considered the question presented. Out of the thirty-nine cases directly cited in the petition at pages 14-25 to illustrate the split in authority (including the decision under review), only six suggested that the person to be arrested was the only individual living in the residence. *See Thomas*, 429 F.3d at 285 (although others present in the apartment, no indication that they lived there); *United States v. Lauter*, 57 F.3d 212, 213-14 (2d Cir. 1995) (noting that arrestee's girlfriend was in apartment but not specifying whether she lived there); *Denson*, 775 F.3d at 1216; *United States v. Magluta*, 44 F.3d 1530, 1531-33 (11th Cir. 1995); *State v. Smith*, 90 P.3d 221, 222-23 (Ariz. Ct. App. 2004); *Asbury*, 493 S.E.2d at 350-51. In some of the cases,

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2015) (then-FBI Director James Comey further stating, "It is unacceptable that *The Washington Post* and the *Guardian* newspaper from the U.K. are becoming the lead source of information about violent encounters between police and civilians."); *see* Mark Berman, *FBI Director: We Really Have No Idea If There's "an Epidemic of Police Violence Against Black People"*, Wash. Post (Oct. 17, 2016).

it appears that the subject of the warrant lived in the residence with others, most often family members. *See, e.g.*, Pet.App.5a-7a; *United States v. Barrera*, 464 F.3d 496, 497 (5th Cir. 2005); *Barrett*, 470 S.W.3d at 339 & n.1. In others, the subject of the warrant was merely a visitor in someone else's home. *See, e.g.*, *Bohannon*, 824 F.3d at 245; *Gorman*, 314 F.3d at 1107; *White*, 512 N.E.2d at 678-81.

In the overwhelming majority of cases, however, the basis for police's presence in the home was the execution of an arrest warrant. In only two of the thirty-nine cases did law enforcement have a valid search warrant for the residence when they executed the arrest warrant. *Davenport*, 568 P.2d at 941-43; *State v. Krout*, 674 P.2d 1121, 1122 (N.M. 1984).[4] Accordingly, the only basis for intruding on the privacy interests of any affected third parties was the police's inference that the subject of the arrest warrant was at the residence.

For the innocent third parties who experience a forceful intrusion into their home pursuant to an arrest warrant, the execution of the warrant can be a harrowing ordeal. The third party in this case, Tracy Pennington, awoke to the sights and sounds of several police officers, weapons drawn, streaming into her home. Pet. 2. The officers proceeded to rummage through laundry and underwear drawers. *Id.* at 6. The officers were not there for Ms. Pennington but for S.W., her minor daughter. *Ibid.* And S.W. was not wanted in connection with some violent

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[4] In seven cases, police entered the residences without a search warrant but obtained a search warrant after the fact. *See, e.g.*, *Vasquez-Algarin*, 821 F.3d at 470; *Magluta*, 44 F.3d at 1533; *Ruem*, 313 P.3d at 1159; *State v. Hatchie*, 166 P.3d 698, 700-02 (Wa. 2007); *Romero*, 183 A.3d at 372; *Asbury*, 493 S.E.2d at 351; *Witherspoon v. State*, 2022 WL 17729247, at *3 (Md. Ct. Spec. App. Dec. 16, 2022).

crime for which the officers might have good reason to proactively draw their weapons before making an arrest. She had a warrant for skipping school. *Ibid.*

The officers knew for a fact that S.W. had been placed in the temporary custody of her grandparents and no longer legally resided with her parents. *Ibid.* So on what basis did the officers believe S.W. was with her parents that night? An anonymous, unverified, uncorroborated tip that even West Virginia concedes did not give the officers probable cause to believe S.W. was present that night. *Id.* at 5-6, 9.

The fact that the officers did find S.W. at the home—hiding behind a chest of drawers and crying out for her mother—does nothing to absolve the state's intrusion into a private home unsupported by a search warrant, probable cause, or exigent circumstances. *Id.* at 2. The fact that the officers found evidence sufficient to charge Ms. Pennington with a crime that night was not justice but luck, harkening back to the "evils" of general warrants. *See Payton*, 445 U.S. at 583 & n.21 (describing the "indiscriminate searches and seizures conducted under the authority of 'general warrants' [as] the immediate evil[] that motivated the framing and adoption of the Fourth Amendment") (citation omitted); *see also infra* Part C.

An intrusion into an innocent party's home to arrest another can be jarring. It may even be traumatizing. Ms. Pennington's experience is not exceptional. *Gorman* presents a similar scenario. The innocent third party in *Gorman* was asleep and woken up before sunrise by "loud banging" on the door to endure speaking to law enforcement while not fully dressed because officers had come to arrest a guest at her house. 314 F.3d at 1107. Understandably, the innocent third party in the *Gorman* arrest, whose mother and baby shared the home with her, stated

she was "really nervous" throughout the ordeal and "kind of bewildered" by the officers' conduct. *Ibid.*

This case and *Gorman* show how even seemingly routine executions of arrest warrants can be jarring for third parties. But arrest warrants are frequently executed in ways that are far removed from traditional policing. In the nearly forty-five years since this Court decided *Payton*, 445 U.S. 573, and *Steagald*, 451 U.S. 204, the use of paramilitary police units, such as SWAT teams, has risen dramatically. "Since at least the 1990s, * * * the Pentagon has sent extra military equipment to local law enforcement agencies in every state." Timothy Williams, *Some Officers Bristle at Recall of Military Equipment*, N.Y. Times (Jan. 26, 2016). By even the mid-1990s, more than 65% of American towns with populations over 25,000 had a paramilitary police unit.[5]

These units are frequently deployed to execute warrants whenever law enforcement encounters what it considers a high-risk situation. *See, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 96 (2005) (describing use of SWAT team to execute warrant for weapons). In Boston, for example, a SWAT team is used to be used if the suspect has "a recent and/or relevant history of firearms on their record" or a

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[5] *See* Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Soc. Probs. 1, 6 (1997) (reporting that, as of 1995, 89% of cities with populations over 50,000 had their own paramilitary police unit); Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 Just. Q. 607, 611-12 (1997) (same for 65% of cities with populations between 25,000 and 50,000). By 2020, 65% of the 18,000 law enforcement agencies in the country had received military equipment via the federal "1033" program, through which the Department of Defense transfers military equipment to police for free. Rashawn Ray, *How 9/11 Helped to Militarize American Law Enforcement*, Brookings (Sept. 9, 2021).

supervisor "reasonably suspects there could be a threat to the safety of anyone involved in the entry and search of the location." Boston Police Department, *Rules and Procedures*, Rule 334, § 3.1(F) (Nov. 3, 2021), https://tinyurl.com/BPDswatrule. In Los Angeles, the police use high-risk warrant procedures, which include the use of a SWAT team, any time "it is determined that Department personnel involved in the execution of a[n] * * * arrest warrant may face a confrontation with a violent suspect." Los Angeles Police Department, *Department Manual*, Vol. 4, Series 742.05, https://tinyurl.com/LAPDswatrule (last visited on Mar. 9, 2023). And, in Chicago, SWAT teams must be consulted whenever the police are executing an arrest warrant in a situation deemed "high risk" based on an assessment form, or police intend to use a "no knock" warrant. *Chicago Police Department Search Warrants Special Order S04-19-02*, § II(B)(3) (Jan. 31, 2023), https://tinyurl.com/CPDswat. Although the question before this Court is obviously not whether paramilitary policing is deployed too frequently, the effect that a SWAT team's entrance into a residence has on the occupants cannot be doubted.

That effect is particularly concerning given that the likelihood that the execution of an arrest warrant in a residence will touch innocent third parties has recently increased as well. Cohabitation has increased in popularity—more citizens are living in stranger's residences, or allowing strangers to live in theirs. *See* Allie Volpe, *The Strange, Unique Intimacy of the Roommate Relationship*, The Atlantic (Aug. 13, 2018). Certainly, no one in 1980 or 1981, when *Payton* and *Steagald* were decided, would have imagined that investors would value a company at $76 billion that facilitated such rentals. Prosper Junior Bakiny, *Is Airbnb Stock a Buy Now?*, Motley Fool

(Mar. 10, 2023, 6:46 AM), https://tinyurl.com/Bakiny (noting also that Airbnb had annual revenue of $8.4 billion).

The execution of arrest warrants in residences is a traumatic intrusion into the private lives of citizens. Worse yet, the intrusions are becoming more invasive at the same time that it is becoming more likely that the citizens affected bear no relation to the crime being investigated. And for individuals represented by amicus's members, their hopes of vindicating their rights depends principally on whether they are prosecuted in a state or federal court.

C. Probable Cause To Believe A Suspect Is At A Residence Should Be Required Before Entering A Residence With Only An Arrest Warrant

Executions of arrest warrants in residences raise constitutional concerns regardless of the manner in which they are executed. "[T]he home is sacred in Fourth Amendment terms," but "not primarily because of the occupants' possessory interests in the premises." *Segura*, 468 U.S. at 810. Instead, it is sacred because of the occupants' "privacy interests in the activities that take place within." *Ibid.*; *accord Caniglia v. Strom*, 141 S.Ct. 1596, 1599 (2021) ("The Fourth Amendment protects * * * the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (citations omitted)).

Concern over intrusions in the home predates the founding of the country, and was one of the reasons for the American Revolution. The Fourth Amendment and its proscriptions against unreasonable searches and seizures grew, in part, out of the abuses of "general warrants" employed in England and specifically the "writs of assistance" in colonial America. *Steagald*, 451 U.S. at 220. The writ of assistance identified only the object of a search

and left it to the discretion of executing officials which places should be searched. *Ibid.* The searches that were the most "deeply concern[ing]" and "foremost in the minds of the Framers, were those involving invasions of the home." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). These writs, and the searches executed under their authority, so offended the colonists that they contributed to the move for American independence:

> In 1761 the validity of the use of the Writs was contested in the historic proceedings in Boston. James Otis attacked the Writ of Assistance because its use "placed the liberty of every man in the hands of every petty officer." His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that "American Independence was then and there born."

Frank v. Maryland, 359 U.S. 360, 364 (1959) (quoting William Tudor, *Life of James Otis* 61, 66 (1823)).

An arrest warrant used to enter the home of a third party "suffers from the same infirmity" as the writ of assistance, and presents the same risks of abuse. *Steagald*, 451 U.S. at 220. It would allow the police, "[a]rmed solely with an arrest warrant for a single person," to "search all the homes of that individual's friends and acquaintances," precisely the concern underlying the hostility to the writs. *Id.* at 215. This risk is far from illusory. *See ibid.* (citing

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (enjoining police practice in which 300 homes were searched under arrest warrants for two individuals)).[6]

Fundamentally, every arrest of a suspect while the suspect is living with or visiting third parties "involves an incursion on the privacy interests of innocent persons that is justified solely by their relationship with the suspect." Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Cal. L. Rev. 1593, 1638 n.199 (1987). As this Court recognized in *Steagald*, an arrest warrant "cannot embody any derivative authority to deprive [the third party] of his interest in the privacy of his home." *Steagald*, 451 U.S. at 214 n.7. The only justification for that incursion is "an independent showing" tying the subject of the warrant to the residence to be searched. *Ibid.*

In other words, a warrant founded on probable cause. That standard has proven itself to be the appropriate test. It is the "best compromise" for balancing the need to safeguard citizens from unreasonable intrusions of their privacy interests with the need to enforce the law. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). To hold otherwise renders *Steagald* a dead letter, for everyone's home would be "susceptible to search by dint of mere suspicion or uncorroborated information." *Vasquez-Algarin*, 821 F.3d at 480 (explaining that a lesser standard is an "end-run around" *Steagald*).

* * * * *

[6] The use of arrest warrants in such circumstances would also encourage bypassing the probable-cause requirement by entering "a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Ibid.*

The split amongst the lower courts on the question presented has deepened to the point that, in a growing number of states, an individual's Fourth Amendment rights vary significantly courthouse by courthouse. That variance is often outcome determinative, as it was here.

It is not only lawyers and participants in the criminal justice system who should be concerned. To the contrary, the effects of the decision below, and of the other courts that have taken the same lax view of what constitutes sufficient "reason to believe" under *Payton*, 445 U.S. 573, are borne most substantially by parties with no greater connection to the criminal justice system than that one of their friends or family has been accused of a crime. These innocent third parties have both their homes and their Fourth Amendment privacy interests invaded.

The Court should grant review to determine what level of belief police must have before executing such invasions, especially given the entrenched division among the lower courts on the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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