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 IN OPPOSITION

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QUESTIONS PRESENTED

In *Payton* v. *New York*, 445 U.S. 573 (1980), the Court held that officers may enter a suspect's residence to execute an arrest warrant when they have "reason to believe the suspect is within." Here, police had a concededly valid "pickup order"—issued on a judicial finding of probable cause—for a juvenile. Police also had reason to believe that the juvenile was living at her parents' apartment and was inside that apartment when the police arrived there.

The question presented is whether *Payton* implicitly required police to further establish "probable cause" that the juvenile lived in the apartment and was present there before they could enter to execute the pickup order.

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INTRODUCTION

When police execute a valid arrest warrant, they often start their search at the suspect's home. But a suspect on the run isn't likely to open the door, so the police may need to enter on their own. An arrest warrant allows them to do just that. Though "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (cleaned up), an arrest warrant justifies "a limited invasion of [a] person's privacy interest when it is necessary to arrest him in his home," *Steagald* v. *United States*, 451 U.S. 204, 214 n.7 (1980).

The right to enter a warrant target's home has limits—police can use an arrest warrant to enter a home only if they have a "reason to believe" that the suspect both lives there and is inside when the police go in. *Payton*, 445 U.S. at 603. The limits prevent police from misusing the arrest warrant by conducting a pretextual search of the suspect's home when it appears the target isn't there or by raiding purely third-party residences. Thus, this "reason to believe" language balances the public's interest in arresting a suspect under a valid arrest warrant with the Fourth Amendment private homeowners' rights to be secure in their homes.

Courts have consistently applied these *Payton*-based limits. To be sure, courts sometimes approach this "reason to believe" language differently: some read it to mean "probable cause"; others take it to mean something "less than probable cause." But the division between these readings is narrow, and it has rarely led to different outcomes in practice. Both understandings of *Payton* take the same commonsense approach—looking at various factors and all the circumstances—in determining whether police had enough reason to think a suspect is

home. So far from being a hard certainty, the "reason to believe" inquiry is "a fluid concept—turning on the assessment of probabilities in particular factual contexts." *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983). And when courts consider a given case's facts, the results are often the same—no matter which standard the court used. Thus, "[t]he disagreement among the circuits has been more about semantics than substance," and they do not regularly produce different outcomes. *United States* v. *Barrera*, 464 F.3d 496, 501 (5th Cir. 2006), *cert. denied*, 550 U.S. 937 (2007).

Petitioner tries to cleave a wide split from this narrow gap, but the minimal distance among the courts does not warrant this Court's intervention. Because the Petition misunderstands the split, it also misapprehends the import of what a grant here might do. The scant daylight between these standards means that this Court's review will not further protect Fourth Amendment rights. Petitioner and her Amici confirm that no matter the standard used, searches will necessarily continue to intrude on the privacy of the home. They offer no reasons to suggest that migrating to a double-probable-cause standard—probable cause for the arrest and probable cause for the entry—will curb those incidents. No wonder, then, that this Court has repeatedly denied similar petitions for certiorari raising the same issue in recent years. See, *e.g.*, *Ross* v. *United States*, 141 S. Ct. 1394 (2021); *Harper* v. *Leahy*, 139 S. Ct. 795 (2019); *Bohannon* v. *United States*, 137 S. Ct. 628 (2017); *Fialdini* v. *Cote*, 577 U.S. 824 (2015).

In any event, the Supreme Court of Appeals decided this case correctly. *Payton*'s plain language confirms that police don't need probable cause to enter a house with a valid arrest warrant: "[A]n 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." *Payton*, 445 U.S. at 603 (emphasis added). If the Court had intended to impose a probable-cause standard on entry with an arrest warrant, it presumably would have used the words "probable cause"—especially given that it used the words "probable cause" in the first part of the same sentence. But the Court instead used "reason to believe." So any theory that equates "reason to believe" with "probable cause" cannot be squared with *Payton*. All Petitioner's arguments in support of a probable-cause-based approach thus amount to a silent effort to overturn *Payton* itself, all without ever engaging with any of the factors that would need to be met before taking such an aggressive step.

All in all, nothing here justifies Supreme Court intervention. The Court should instead deny the Petition.

STATEMENT

1. Petitioner Tracy Pennington's minor daughter, S.W., wouldn't go to school. She missed so much school that she was adjudicated "as a status offender for truancy" in July 2018. Pet.App.3a. Yet even after that adjudication, nothing changed—she continued to skip class. *Id.* So in November 2018, her parents agreed with the trial court that S.W. should be placed in the temporary custody of her paternal grandparents in the hopes that she would start going to class. Pet.App.3a-4a. But this effort failed, too. Only a month in, S.W. stopped attending school and ran away. Pet.App.4a.

In January 2019, a month after she ran away, the State petitioned the trial court to take S.W. into custody as an "active runaway." Pet.App.4a. The state court granted

the motion, determining that probable cause existed to believe that "S.W.'s health, safety, and welfare demanded that she be taken into custody." *Id.* West Virginia courts have treated this "pick-up" order as the functional equivalent of an arrest warrant. Pet.App.10a-11a. But see, *e.g.*, *Haugen* v. *Fields*, No. CV-05-3109, 2007 WL 1526366, at *4 (E.D. Wash. May 23, 2007) ("The Court acknowledges that a court pickup order, with the corresponding finding of imminent harm by a court, has additional characteristics not found in an arrest warrant."). Petitioner does not challenge the validity of this order.

Local law enforcement and the Department of Health and Human Resources (DHHR) then looked for S.W. Pet.App.5a. They pursued tips that S.W. had been seen at Petitioner's apartment or at her maternal grandmother's house. *Id.* They also spoke with Petitioner by phone and made many trips to her home—but they never made face-to-face contact with Petitioner at the apartment. *Id.*; Resp.Br.3. Despite law enforcement's best efforts, they couldn't find S.W. for several months.

But a break in the case came at 8:30 p.m. on May 16, 2019, when the police received a tip from a woman who saw S.W. at Petitioner's home. Pet.App.5a. Unlike the other tips, the woman had talked to Petitioner, who told her that she intended "to keep [S.W.] hidden until she was 18, so all this juvenile stuff would go away." *Id.* Chief Deputy Sheriff Ross Mellinger called Deputy Ben DeWees and related this tip, saying that it was credible. *Id.*

After reviewing the contents of the pick-up order, Deputy DeWees contacted the Jackson County Prosecuting Attorney to see if he needed a search warrant to enter Petitioner's home. Pet.App.5a. The Prosecuting Attorney told the officer that he did not need to secure a

second warrant. *Id.* DeWees then went to Petitioner's apartment, less than one hour after he received the tip from Chief Deputy Mellinger. Pet.App.6a; Resp. Br. 3-4. Along the way, DeWees contacted two other law-enforcement officers who had been to Petitioner's apartment earlier that evening in an unsuccessful attempt to speak with her on an unrelated criminal matter. Pet.App.5a-6a.

The officers gathered at Petitioner's apartment. There, DeWees knocked on the door. Consistent with the other times police came to the house, no one answered. Pet.App.6a. This time, though, the officers also heard footsteps from inside the apartment. *Id.* So DeWees went to the Petitioner's landlord, who lived next door, and got a key to enter the apartment. *Id.*

Once inside, the officers found Petitioner and G.W. (S.W.'s father) lying in bed. Pet.App.6a. They both denied that S.W. was there. *Id.* The officers then searched the house for S.W. for about ten minutes. The apartment was in an extreme state of disarray, so the officers were forced to look behind furniture, in between mattresses and box springs, and in massive piles of clothes. Pet.App.6a n.2. They finally found S.W.—five months after she went missing—hiding behind a hollowed out chest of drawers. Pet.App.6a. The officers took her into custody in accordance with the pickup order. They also arrested Petitioner and G.W. for "child concealment" in violation of West Virginia Code § 61-2-14(d). Pet.App.6a-7a.

2. A grand jury indicted Petitioner and G.W. on felony charges of child concealment and conspiracy. Pet.App.7a. Arguing that the police's entry and search were unlawful, Petitioner moved to suppress any evidence obtained the night that police found S.W. *Id.* After hearing testimony from Deputy DeWees and a DHHR

case worker, the trial court denied her motion. Pet.App.40a-48a. The court concluded that the officers "had good cause to believe S.W. was inside the Apartment," and the court questioned whether the exclusionary rule could even be applied to "the fruit of the arrest warrant itself" (that is, S.W.'s person). Pet.App.46a-47a; cf. *New York* v. *Harris*, 495 U.S. 14, 18 (1990) ("There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest."). Petitioner later accepted a plea agreement to one count of child concealment, but she retained the right to appeal the suppression ruling. Pet.App.8a.

Petitioner then appealed to the state supreme court, arguing that the officers needed probable cause to search her apartment for S.W. Pet.App.11a-12a. Petitioner observed that courts had taken different approaches to the standard for entering a home with an arrest warrant, and she urged the state court to follow a Fourth Circuit decision adopting a probable-cause standard. Pet. Br. 8-12. Petitioner also argued—and the State conceded at the time—that the facts known to the officers at the time of the search did not establish probable cause. Pet.9.

The Supreme Court of Appeals was unconvinced. In a 4-1 decision, the court held that *Payton*'s "reason to believe" standard for warrantless entry "requires less proof than probable cause." Pet.App.2a-3a. The "plain text of *Payton*," the state supreme court reasoned, showed that this Court "used a phrase other than 'probable cause' because it meant something other than 'probable cause.'" Pet.App.13a (quoting *United States* v. *Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005)). The court also noted that it was "not bound to adopt" the Fourth Circuit's approach. Pet.App.19a n.18.

Looking to the facts here, the court concluded that the officers had a reasonable belief that S.W. resided with Petitioner and was in the home "at the time they entered for purposes of executing the pick-up order." Pet.App.19a. The court cited the tips officers received over the months that placed S.W. at Petitioner's home, as well as S.W. having lived with Petitioner until authorities temporarily placed her with her grandparents. Pet.App.19a-20a. These facts, combined with the most recent tip that placed her at the home and the noise coming from inside once the officers were on scene, were enough to satisfy *Payton*. *Id.*

One justice dissented, arguing that this Court meant to equate "reason to believe" with "probable cause." Pet.App.24a. Applying that standard, the dissenting justice would have held the search improper. Pet.App.35a. He also thought that the State hadn't met its burden under the "reason to believe" standard that the majority preferred. Pet.App.36a.

REASONS FOR DENYING THE PETITION

Many courts have taken *Payton* at its word, finding that a "reason to believe" standard does not require that officers have probable cause to believe a suspect is present in his or her residence before executing an arrest warrant there. Some courts have required probable cause. But Petitioner overstates this divergence. Despite using different words, courts have produced few real-world differences. Under both standards, courts take similar approaches and produce similar outcomes when evaluating the police's decision to enter the suspect's home. So review is unnecessary here given that any decision would have only a negligible effect on the lower courts—especially where the state supreme court has the

better of the argument. And though Petitioner insists otherwise, imposing some higher standard of probable cause—and tacitly overturning *Payton* in the process—would not guard against any of the Fourth Amendment dangers that Petitioner and Amici worry might arise under the existing standard. So, as it has done with many similar petitions, the Court should deny the Petition here.

I. Petitioner Overstates The Differences Among The Courts.

A. Courts have sometimes reached different conclusions on whether *Payton*'s "reason to believe" standard requires probable cause. But although courts are not perfectly in sync when characterizing the rightful test, the disagreement has little practical significance. "[B]oth standards have been applied leniently, and not much difference exists between the two." Kristin S. McKeon, *There's No Place Like Home—Except When You Are Under Arrest*: *The Third Circuit's Analysis of Home Arrests in* United States v. Veal, 52 VILL. L. REV. 1021, 1041 (2007). So even those pressing for a new probable-cause standard are forced to admit that the difference "may produce a different outcome in only a small number of close cases." Michael A. Rabasca, Payton v. New York: *Is "Reason to Believe" Probable Cause or A Lesser Standard?*, 5 SETON HALL CIRCUIT REV. 437, 440 (2009).

Petitioner's own cases observe that these wording differences have little real-world impact. The Ninth Circuit, which equates "reason to believe" with "probable cause," has simultaneously noted the "similarity between probable cause and the 'reason to believe' standard." *United States* v. *Gorman*, 314 F.3d 1105, 1113-14 (9th Cir. 2002). In fact, that court thought that "'reasonable

grounds to believe' … is often synonymous with probable cause." *Id.* Likewise, the Fifth Circuit, which initially rejected probable cause but has more recently applied a probable-cause standard, has labeled the disagreement "more about semantics than substance." *United States* v. *Barrera*, 464 F.3d 496, 501 (5th Cir. 2006), *cert. denied*, 550 U.S. 937 (2007). And the Eleventh Circuit, without picking sides, has said that it is "difficult … to compare the quantum of proof" that *Payton*'s reason to believe standard requires "with the proof that probable cause requires." *United States* v. *Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995). At least one state court has said similar things, too. *State* v. *Smith*, 90 P.3d 221, 225 (Ariz. Ct. App. 2004).

By Petitioner's own account, the question presented was irrelevant in more than a few cases. Pet.28-29. And looking with a wider lens shows just how often courts have expressly remarked that the choice of one standard or another makes no difference in the ultimate result. See, *e.g.*, *United States* v. *Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014) (Gorsuch, J.) (declining to reconsider approach to *Payton* because "nothing turns on" answer); *United States* v. *Pruitt*, 458 F.3d 477, 489-91 (6th Cir. 2006) (Clay, J., concurring), *cert. denied*, 549 U.S. 1283 (2007) (arguing that probable cause should be standard, but agreeing with outcome); *United States* v. *Hardin*, 539 F.3d 404, 416 (6th Cir. 2008) ("[T]his case, too, does not require that we adopt one standard or the other."); *United States* v. *Hill*, 649 F.3d 258, 263 (4th Cir. 2011) (refusing to decide between the standards because it made no difference to the outcome); *United States* v. *Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) ("[W]e need not decide whether 'reasonable belief' requires probable cause or something less than probable cause."); accord *People* v. *Garrett*, No. C080236, 2019 WL 168539, at *3 (Cal. Ct. App. Jan. 11, 2019)

(explaining that the court did not need to decide whether probable cause or a lesser standard applied because it made no difference); *State* v. *Lowery*, 875 N.W.2d 12, 21 (Neb. Ct. App. 2016) (same); *Evans* v. *State*, 454 S.W.2d 744, 751 (Ark. 2015) (Goodson, J., concurring) (same); *State* v. *Davis*, No. A07-1367, 2008 WL 4133376, at *3 (Minn. Ct. App. Sept. 9, 2008) (same).

When one considers the substance of these tests, it's unsurprising that this split in authority yields little practical significance. Both standards are commonsense, nontechnical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Gates*, 462 U.S. at 231 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949)). So the lacuna between the two concepts, while real, is much smaller than Petitioner suggests.

Probable cause requires only a "fair probability," that is, "more than a 'bare suspicion' but less than a preponderance of the evidence at hand. *Denson*, 775 F.3d at 1217. It is "not a high bar." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 586 (2018). So even those who understand *Payton* to require probable cause have suggested the standard could be met, for instance, with little more than an "inference" that a defendant is home (at least without "special knowledge otherwise"). 2 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 3.6(a) (4th ed. Nov. 2022 update); see also, *e.g.*, *Commonwealth* v. *DiBenedetto*, 693 N.E.2d 1007, 1010 (Mass. 1998) (holding that early-morning timing of police's entry to execute arrest warrant, combined with fact that door was ajar, satisfied a probable-cause standard).

Meanwhile, "reasonable belief" or "reason to believe" requires more than a "hunch." As the Second Circuit

explained, "reason to believe is not a particularly high standard, but it does require specific and articulable facts that, taken together with rational inferences drawn therefrom, provide a particularized and objective basis for thinking that the arrest-warrant subject may be present within specific premises." *United States* v. *Bohannon*, 824 F.3d 242, 255 (2d Cir. 2016). This same understanding also prevails in "the majority of state courts." *Cunningham* v. *Balt. Cnty.*, 232 A.3d 278 (Md. Ct. Spec. App. 2020).

So far from being a fixed formula, both standards task courts to consider the totality of the circumstances and inferences rooted in common sense. See *Gates*, 462 U.S. at 232 ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."). And because both standards deal with the "factual and practical considerations of everyday life," *id.* at 231, the variations in the standards often end up being irrelevant to the fact-driven outcomes that flow from the standards' use.

B. Remember, too, that police officers—and the courts reviewing the officers' decisions—use the same kinds of factors in determining whether they have a "reason to believe" that the suspect was inside his residence as they do when assessing probable cause. Important factors include whether the suspect was recently seen by the police or a third party; whether there was noise or light coming from the suspect's residence; whether cars connected with the suspect were seen at the residence; and the time of day viewed alongside information about the suspect's schedule. Matthew A. Edwards, *Posner's Pragmatism and* Payton *Home Arrests*, 77 WASH. L. REV. 299, 342-49 (2002) (explaining how these different factors have been applied). Courts

also consider whether the suspect is aware the police are looking for them. See *Magluta*, 44 F.3d at 1535 ("[O]fficers may take into consideration the possibility that the resident may be aware that police are attempting to ascertain whether or not the resident is at home."). If so, the lack of the above factors allows the police to assume the suspect is in the residence. Thus, if division exists among lower courts, it's chiefly in how courts consider the relevant facts of each case.

A few cases illustrate how the courts' view of the fact-driven factors, not the line between "probable cause" versus "reason to believe," drive decisions like the one here.

Consider the Tenth Circuit's decision in *United States* v. *Denson*, in which the court held that the facts known to the officers in the case were enough to establish probable cause. 775 F.3d at 1217. The court considered a recently opened utility account for a home that the suspect lived in. *Id.* The court also considered that the suspect hadn't reported any recent earnings, which suggested that he was likely "out of work at the time of the search—all the more reason why he might be at home when they visited, around 8:30 a.m. on a weekday." *Id.* And the court noted how the suspect had absconded and gone into hiding from law enforcement—making it "incrementally more likely that he would be holed up at home rather than out and about." *Id.* Finally, the "electric meter was whirring away"—indicating that there was someone in the home. *Id.* at 1217-18. Together, these facts established probable cause.

Similarly, the Second Circuit in *United States* v. *Lauter*, 57 F.3d 212, 215 (2d Cir. 1995), found that officers had probable cause to believe the suspect lived in the residence and was present at the time they executed the

warrant. The Second Circuit relied heavily on a confidential informant, whose father was the landlord at the apartment complex, who said that the suspect moved into the basement apartment during the weekend. *Id.* The court also looked at the time of day when the warrant was executed and that the suspect "was unemployed and typically slept late." *Id.* Though the circuit said that the district court shouldn't have applied a probable-cause standard, the circuit noted that the facts satisfied this higher standard anyway. *Id.*

On the other hand, the Massachusetts high court found that police did *not* have probable cause (though they did have "reason to believe") in *Commonwealth* v. *Silva*, 802 N.E.2d 535, 542 (Mass. 2004). There, a confidential informant told police that men were selling drugs out of an apartment. *Id.* at 538. Police then contacted the apartment building manager, who informed the police that the suspect was the sole lessee of the apartment. *Id.* The police also checked their records, which showed several outstanding arrest warrants tied to that address. *Id.* The police knocked on the door and heard movement inside the apartment; the occupant had also barricaded the door. *Id.* Finally, the police looked inside the apartment and saw a man matching the suspect's general description. *Id.* Despite all these facts, the court summarily said that the police lacked probable cause to believe the suspect was inside the apartment. On these same facts, courts in the Tenth and Seventh Circuit likely would have found probable cause.

Again, these cases show that the way courts weigh the relevant facts drives the outcomes of cases, rather than how they interpret "reason to believe" or "probable cause." Variations result—even when everyone is applying "probable cause," for instance—because

different courts draw different inferences. Yet this Court does not take up cases to decide what "inferences [should be] drawn" from specific facts. *Gen. Talking Pictures Corp.* v. *W. Elec. Co.*, 304 U.S. 175, 178 (1938).

And at least in many courts, even the facts here could have been found to satisfy a probable-cause standard. A tipper had recently identified S.W. at Petitioner's apartment. Petitioner's home was undeniably S.W.'s home before she was removed by the State and became a runaway. Officers heard noise coming from inside the home when they approached it. And the officers came at a time of day when a teenage girl would be expected to be present. So while the State conceded below that the probable-cause standard was not met, the Supreme Court of Appeals might have still found it was on these facts. See *Turner* v. *Holland*, 332 S.E.2d 164, 165 (W. Va. 1985) (noting that the Supreme Court of Appeals is "not required to accept the State's concession").

In short, Petitioner's split is largely one of legal terminology and little more. A negligible difference in wording has no real-world impact justifying this Court's involvement in this rather unusual case, which involves an effort to suppress the fact of a pickup that predictably resulted from a juvenile pickup order.

II. A New, Higher Standard Wouldn't Meaningfully Extend Fourth Amendment Protections.

Switching to a probable cause standard would also yield little additional Fourth Amendment protections for suspects and third parties. The Petition and the briefs from Amici confirm as much.

The Petition emphasizes that Fourth Amendment principles apply with special force to the home. Pet.29-37. Fair enough—though the Fourth Amendment is not an absolute bar against entry even when a home is involved. See *Caniglia* v. *Strom*, 141 S. Ct. 1596, 1599 (2021) ("[T]he Fourth Amendment does not prohibit all unwelcome intrusions on private property—only unreasonable ones." (cleaned up)); see also *Katz* v. *United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."). The Petition then cites cases in which courts have blessed warrantless entries under *Payton* when the facts might have suggested that the suspect was not present in his or her home. Pet.32. The Petition seems to be suggesting with these cases that the Court needs to adopt a new probable-cause standard to keep "bad" outcomes like these from happening.

Petitioner's cited cases hardly demonstrate rampant abuse under the "reason to believe" standard. In one of Petitioner's purportedly illustrative cases, the court found the entry unlawful and suppressed the resulting evidence. See *United States* v. *McIntosh*, 857 F.2d 466, 468-69 (8th Cir. 1988). In another unreported lower-court case that Petitioner cites, the police relied on nearly contemporaneous cell-phone data to place the warrant target directly at a location and then relied on other information marking that location as the warrant-target's place of residence. *City of Akron* v. *Conkle*, No. 28927, 2019 WL 5212581, at *3 (Ohio Ct. App. Oct. 16, 2019). Petitioner also relies on a case in which the defendant forfeited any argument that police did not have reason to believe that the house was the defendant's home *and* any argument about the police's reason to believe the defendant was present. *State* v. *Northover*, 991 P.2d 380, 383-84 (Idaho 1999). A different case that Petitioner cites involved an arrest warrant executed at the suspect's

approximate last-known address, where lights and sounds at a late hour made it obvious the resident was home. *Carpenter* v. *State*, 974 N.E.2d 569, 573 (Ind. Ct. App. 2012). And in yet another case, "reason to believe" was found where (1) officers relied on information that the warrant-target himself provided, (2) the location had been the target's home for two years before, (3) a database that had been accurate in the past showed the address, and (4) several physical indications suggested the target was at home. See *United States* v. *Powell*, 379 F.3d 520, 523-24 (8th Cir. 2004). If these sorts of cases are the best examples of a purported constitutional crisis in the Fourth Amendment realm, then they suggest that the crisis is an imagined one.

Beyond that, one can just as easily find cases applying probable cause that allow thin facts to justify an entry into the home. Take *State* v. *Turley*, a case in which police proceeded to a home that they knew the warrant-target's wife owned. 120 P.3d 1229, 1233 (Or. Ct. App. 2005), abrogated on other grounds by *State* v. *Walker*, 258 P.3d 1228 (Or. 2011). Once there, police saw some footprints in the snow, a few lights, and a heater running. *Id.* The Court of Appeals of Oregon found these minimal facts nevertheless met the probable-cause standard that Petitioner champions here. And *Turley* is not an outlier. See, *e.g.*, *Lowery*, 875 N.W.2d at 21 (finding probable cause sufficient to justify entry based on arrest warrant where target's car was seen outside home and someone was seen peering through the shades); *Fisher* v. *Volz*, 496 F.2d 333, 343 (3d Cir. 1974) (finding same where police saw apartment's phone number written on a note in the suspect's mother's house).

Cases like these confirm that a higher probable-cause standard would not prevent the purported harm on which

the Petition focuses. Prevention lies in applying whatever standard applies in a meaningfully rigorous manner, not in dispensing with the present standard wholesale. In other words, the Petition does not so much challenge the standard itself as it does the lax way in which various courts might *apply* these standards in particular cases.

Elsewhere, the Petition notes that authorities might abuse arrest warrants and wield them as a pretext to enter a home. Pet.36. It crafts a hypothetical in which police wait to execute a warrant for speeding until a person enters his or her home so that the police then have a pretext to enter the home, too; Petitioner imagines that the pretextual entry would not be suppressed. *Id.* Yet in that fictional case, the police would have satisfied even a probable-cause standard, as they would have watched the suspect enter the home. And even that fact aside, police wouldn't be required to show that they could arrest the speeding suspect outside the home before justifying an arrest inside the home—even under a probable-cause standard. So it isn't clear what these examples are supposed to show other than abuses can happen under any standard. And in any event, all these worries forget that other Fourth Amendment limits still apply. If, for instance, police search more broadly than necessary to execute the arrest warrant, then courts can and do still hold them responsible by excluding the evidence or subjecting them to liability. See, *e.g.*, *People* v. *LeBlanc*, 70 Cal. Rptr. 2d 195, 200-01 (Cal. Ct. App. 1997) (determining that police executing arrest warrant at a hotel room violated the Fourth Amendment where, after spotting "cocaine pipes" in plain view, they searched the rest of the room without a warrant); *State* v. *Estep*, 753 N.E.2d 22, 26-28 (Ind. Ct. App. 2001) (holding that, while police properly entered residence under *Payton*, they improperly swept the entire home).

The Petition also insists that changing cultural conditions justify a higher standard, Pet.33-36, but it ignores half the relevant equation. In evaluating Fourth Amendment reasonableness before, the Court has "balanced the intrusion on the individual's Fourth Amendment interests *against its promotion of legitimate governmental interests*." *Buie*, 494 U.S. at 331 (emphasis added). When this "careful balancing … suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court] ha[s] not hesitated to adopt such a standard." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341 (1985). Here, Petitioner entirely overlooks the public interests, focusing solely on the private ones.

For example, while it might be true that many arrest warrants are outstanding, that fact does not mean the Court should throw up more obstacles to their use. After all, when an arrest warrant names someone, a court has determined that probable cause exists to say that the person has committed a crime. *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963). The public interest is therefore better served by empowering police to undertake reasonable measures to bring these many accused persons before courts to answer the charges against them—not by giving them more ways to outrun the law.

Likewise, the Petition emphasizes "Americans' increasingly transient living arrangements." Pet.35. These arrangements afford a good reason to provide police more flexibility, not less. In an increasingly transient world, police will always find themselves one step behind if they are constantly hamstrung by an overly onerous quantum of proof that requires them to gather more and more facts before acting. See, *e.g.*, *United*

States v. *May*, 68 F.3d 515, 516 (D.C. Cir. 1995) (discussing the police's need to act "as quickly as possible" in executing an arrest warrant as to a dangerous suspect). And police would find themselves particularly flat-footed if any new probable-cause standard carries with it an additional new requirement to make a second trip to the magistrate, as Petitioner seems to want. See Pet.11-12, 30-31, 36.

Amici's arguments fare worse. Amici focus on how warrantless entries disrupt the lives of those inside the home and that "intrusion into an innocent party's home to arrest another can be jarring." NDACDL.Am.11; see also NACDL.Am. at 16-19. They stress that modern policing no longer resembles the policing of yore, with SWAT teams that pose potential safety risks both to the people inside and the police. NDACDL.Am.12-14. Yet it isn't clear how these arguments relate to resolving the distinction between a less-than-probable-cause standard and probable cause; SWAT teams could be used whether courts require probable cause or not. Rather than explain why switching standards would better protect Fourth Amendment rights, these arguments just suggest that policing is dangerous. Similarly, another Amicus details the risks of police entering homes. Cato.Am.6-14. They chronicle incidents of officer-involved shootings and describe the dangers that officers, suspects, and third parties sometimes face when home entry is involved. Yet most of the described cases implicated search warrants, which require probable cause. Cato.Am.14. So again, it is unclear why these examples should drive the Court to rewrite *Payton*.

At bottom, the Petition and Amici misapprehend the probable-cause standard under *Payton*. Far from the hard-nosed standard used when a neutral and detached

magistrate decides whether to issue a search warrant, *McDonald* v. *United States*, 335 U.S. 451, 453 (1948), probable cause under *Payton* uses common sense, permitting officers and courts to draw reasonable inferences from the circumstances, *Smith* v. *Tolley*, 960 F. Supp. 977, 986 (E.D. Va. 1997). See also 3 W.R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 6.1(a) (6th ed. 2022). At least one court has suggested that this more relaxed view of probable cause is "in reality, … not one of probable cause at all." *Tolley*, 960 F. Supp. at 987. The rub is that switching from one standard (under which officers and courts consider the totality of facts available and use common sense to decide) to another standard (under which they employ the same considerations) won't further protect Fourth Amendment rights.

III. Any Tension Between State Courts And Their Encompassing Federal Circuits Is Tolerable.

Unable to sell the idea that a probable-cause standard would better protect Fourth Amendment interests, Petitioner tries to argue that the different *Payton* formulations are intolerable because they lead to intra-jurisdictional splits between state courts and their encompassing federal circuit. Pet.23.

But setting aside the fact that the "split" is overstated in practice, see Section I, *supra*, Petitioner's argument betrays a misunderstanding of our unique constitutional scheme. That scheme shows a "willingness to tolerate a fairly wide degree of disuniformity at the lower court level." Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 293 (2022). Obviously, "state courts … possess the authority, absent a provision for exclusive jurisdiction, to render binding judicial decisions

that rest on their own interpretations of federal law." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989). Their choice to do so differently from a geographically proximate federal court is no reason for special concern. So this Court should not worry itself just because, for instance, the Supreme Court of Appeals of West Virginia declined to embrace a divided 2-1 decision from the Fourth Circuit. See *United States* v. *Brinkley*, 980 F.3d 377, 396 (4th Cir. 2020) (Richardson, J., dissenting) (explaining why the "reasonable belief" standard is "a more faithful reading of *Payton*").

Truth is, the unique power-sharing arrangement between state and federal courts often leads to intra-jurisdictional conflict. In the Ninth Circuit, police can perform a protective frisk for weapons in the absence of reasonable suspicion in a consensual encounter. *United States* v. *Orman*, 486 F.3d 1170 (9th Cir. 2007). But the Arizona Supreme Court rejected the Ninth Circuit's position, requiring reasonable suspicion of criminal activity before conducting a protective search in a consensual encounter. *State* v. *Serna*, 331 P.3d 405, 412 (Ariz. 2014); see also *United States* v. *Burton*, 228 F.3d 524, 525 (4th Cir. 2000); *Bailey* v. *State*, 987 A.2d 72, 84-85 (Md. 2010). Similar conflict arises over whether police can pat-down search all companions of arrestees. The Fourth Circuit has blessed this practice, *United States* v. *Poms*, 484 F.2d 919, 921-22 (4th Cir. 1973), while Virginia has rejected it, *El-Amin* v. *Commonwealth*, 607 S.E.2d 115, 118 (Va. 2005). Yet the Sixth Circuit has declined to adopt the rule, *United States* v. *Bell*, 762 F.2d 495, 499 (6th Cir. 1985), whereas Kentucky has adopted the automatic-companion rule, *Owens* v. *Commonwealth*, 291 S.W.3d 704, 705-06 (Ky. 2009).

Intra-jurisdictional splits like these are commonly seen in areas implicating the Fourth, Fifth, and Sixth Amendments. See Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 254-58 (2014) (collecting instances of intra-jurisdictional splits). For example, courts are split over whether handcuffing during the execution of a search warrant qualifies as "custody" sufficient to trigger *Miranda* requirements. The Fourth Circuit has said that the defendant was in custody, *United States* v. *Bullard*, No. 95-5785, 1996 WL 683790, at *6 (4th Cir. Nov. 27, 1996), while Maryland has said the opposite, *Smith* v. *State*, 974 A.2d 991, 1012-13 (Md. Ct. Spec. App. 2009). See also *United States* v. *Cavazos*, 668 F.3d 190, 194 (5th Cir. 2012) (custody); *State* v. *Palmer*, 14 So. 3d 304, 310 (La. 2009) (not in custody). But the Court has never said that disagreement of this sort warrants special attention or concern.

Although uniformity is a worthy goal to have, our system allows for a degree of non-uniformity, which promotes a better deliberative process. And as seen here, the different formulations that courts have adopted are most often driven by the particular facts in the case (and almost as often yield the same results). At most, the Court should only intervene when non-uniformity among federal and state courts in a given circuit regularly yields sufficiently disparate results. That's not the case here.

IV. The Decision Below is Correct.

A. In any event, the state supreme court correctly concluded that *Payton*'s "reason to believe" standard does not require officers to have probable cause to believe a

suspect is present in the dwelling at issue before executing an arrest warrant.

Start with *Payton*'s text: "[F]or Fourth Amendment purposes, 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." *Payton*, 445 U.S. at 603. Having used the term "probable cause" in the first part of the sentence, which ends with the language "reason to believe the suspect is within," it cannot be thought that the Court intended to impose a probable cause standard by using the "reason to believe" language. The Court knew how to use the term "probable cause" and declined to use it. *Tolley*, 960 F. Supp. at 987.

To be sure, this Court has at times likened probable cause with reasonable belief, see *Gerstein* v. *Pugh*, 420 U.S. 103, 114-16 (1975) and *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003), but the Court seldom uses the terms interchangeably. For example, in *Maryland* v. *Buie*, 494 U.S. 325 (1990), this Court stated that the Maryland state supreme court applied "an unnecessarily strict Fourth Amendment standard" when it required a protective sweep to be justified by probable cause. *Id.* at 337. Instead, the Court said that a protective sweep was proper when the "searching officer possesses a reasonable belief based on specific and articulable facts." *Id.* Even before *Payton*, the Court had distinguished "probable cause" from "reason to believe" in *Terry* v. *Ohio*, the seminal case on "reasonable suspicion." 392 U.S. 1, 27 (1968) (explaining that an officer can conduct a weapons search based on "reason to believe" "regardless of whether he has probable cause to arrest the individual for a crime"). And in *Arizona* v. *Gant*, the Court permitted an officer to search a vehicle incident to arrest where "it is reasonable

to believe evidence relevant to the crime of arrest might be found in the vehicle." 556 U.S. 332, 343 (2009) (cleaned up); see also *id.* at 347 (distinguishing that standard from "probable cause to believe a vehicle contains evidence of criminal activity").

Steagald v. *United States* reinforces the distinction between these concepts. 451 U.S. at 216. There, the Court found that probable cause was necessary to allow entry to execute an arrest warrant at the home of a third party rather than the warrant-target's home. *Id.* But if Petitioner were right that "reason to believe" and "probable cause" were the same, then *Payton* and *Steagald* would employ the same standard. They do not. See, *e.g.*, *id.* at 213 (distinguishing the case from one in which "the agents sought to … use the [arrest] warrant to arrest [the warrant target] … in his home"). Indeed, Petitioner pushes for *Steagald* to apply directly to the facts here just because Petitioner also lived in the home where the arrest took place, Pet.30-31, even though no court has taken that approach—not even Petitioner's favored circuits. See, *e.g.*, *United States* v. *Lovelock*, 170 F.3d 339, 345 (2d Cir. 1999) ("[T]he requirement that the person named in an arrest warrant open his doors to the officers of the law does not allow a house-mate to keep those doors shut." (cleaned up)); *United States* v. *Risse*, 83 F.3d 212, 216 & n.3 (8th Cir. 1996) ("[I]f the suspect is a co-resident of the third party, then *Steagald* does not apply."); *United States* v. *Robertson*, 833 F.2d 777, 780 (9th Cir. 1987) ("Johnson was as much a resident as Robertson and so his residence could be entered with a warrant for his arrest.").

In short, these cases show the Court doesn't use the terms interchangeably, "but rather that it considers

reasonable belief to be a less stringent standard than probable cause." *Pruitt*, 458 F.3d at 484.

Twisting "reason to believe" to mean "probable cause" also requires discarding *Payton*'s holding. Rejecting the notion that officers must have "a search warrant based on probable cause," *Payton*, 445 U.S. at 602, the Court explained that "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-603. It doesn't make sense that the Court would require a second probable cause determination anyway. And as a practical matter, the high standard of probable cause that Petitioner pushes would "effectively make *Payton* a dead letter"; "people do not live in individual, separate, hermetically-sealed residences," so "officers could never rely on *Payton*, since they could never be certain that the suspect had not moved out the previous day." *Valdez* v. *McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999).

Nor can Petitioner's heightened probable-cause standard be squared with how lower courts have applied *Payton* from the beginning. Even the courts that have purportedly adopted the probable-cause standard haven't embraced the aggressive form of it that Petitioner advances. Instead, they have adopted a more relaxed approach that turns on reasonableness and common sense. One circuit has remarked that probable cause and reasonable belief embody the "same standards of reasonableness," which "allow[] the officer … to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances." *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977). And again, even those

who support a probable-cause interpretation of *Payton* have noted that the language in *Payton* suggests a softer form of probable cause. LaFave, SEARCH AND SEIZURE, *supra*, § 6.1(a). Thus, the Supreme Court of Appeals of West Virginia rightly declined to embrace the overassertive form of probable cause that Petitioner now urges this Court to adopt.

B. The state supreme court also correctly applied *Payton*'s holding to the facts here. The police satisfy *Payton*'s first prong only if the information known to them at the time provided them with a reason to believe that S.W. lived there. The facts here establish that S.W. had lived with Petitioner up until she was removed from Petitioner's custody, and Petitioner still had parental rights over S.W. despite the temporary placement. It was reasonable for the officers to infer that a teenage girl would move back in with the one family she had known before. S.W. also had been seen at Petitioner's apartment several times during the five months she was missing. Finally, the informant reported seeing S.W. at the home and heard that Petitioner was concealing S.W. in the home.

Turning to the second factor, the court also properly found that there was a reason to believe that S.W. would be present in the home when they entered. S.W. had absconded and the informant stated she was laying low. The officers also arrived at the home sometime after 8:30 p.m., a time of night that a child would ordinarily be at home. *Fialdini* v. *Cote*, 594 Fed. App'x 113, 119 (4th Cir. 2014) (time of day is relevant); *Magluta*, 44 F.3d at 1535 (same). Officers heard footsteps inside the home, indicating that there were people at home. See, *e.g.*, *United States* v. *Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001) (sounds of movement are relevant). Given the totality of

facts, the state supreme court correctly concluded that the officers had a reason to believe that S.W. was inside the home.

In sum, on both the law and the facts, the Supreme Court of Appeals got it right. Although Petitioner thinks the result should have gone another way, "the lower court[] acted responsibly and attempted faithfully to apply the correct legal rule to what is at best a marginal set of facts." *Salazar-Limon* v. *City of Hous.*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari). Nothing is cert-worthy in that.

CONCLUSION

For all these reasons, the Court should deny the Petition.

Respectfully submitted.

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