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

REPLY BRIEF FOR THE PETITIONER

ORIN S. KERR
334 Law Building
Berkeley, CA 94720

JOHN B. KENNEY
PAXTON M. LEWIS
KELSEY J. CURTIS
Wilson Sonsini
Goodrich & Rosati, PC
1700 K Street, NW
Washington, DC 20006

FRED A. ROWLEY, JR.
Counsel of Record
MARK R. YOHALEM
Wilson Sonsini
Goodrich & Rosati, PC
633 W. 5th Street
Los Angeles, CA 90071
(323) 210-2902
fred.rowley@wsgr.com

ROGER L. LAMBERT
PO Box 588
Hurricane, WV 25526

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The entrenched split over *Payton* is real and outcome-determinative. 1

II. This case presents the Court with a unique opportunity to finally clarify *Payton*. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Bohannon v. *United States*,
137 S. Ct. 628 (2017) 12

Commonwealth v. *Silva*,
802 N.E.2d 535 (Mass. 2004)............................. 7

Dunaway v. *New York*,
442 U.S. 200 (1979)... 4

Fialdini v. *Cote*,
577 U.S. 824 (2015)... 12

Fialdini v. *Cote*,
594 F. App'x 113 (4th Cir. 2014) 12

Harper v. *Leahy*,
139 S. Ct. 795 (2019) 12

Lange v. *California*,
141 S. Ct. 2011 (2021) 2, 4

Payton v. *New York*,
445 U.S. 573 (1980).................. 1, 2, 5, 6, 7, 8, 9,
10, 11, 12

Ross v. *United States*,
141 S. Ct. 1394 (2021) 12

Siedentop v. *State*,
337 P.3d 1 (Alaska Ct. App. 2014) 7

State v. *Canfield*,
360 P.3d 490 (Kan. Ct. App. 2015)................... 7

State v. *McKinley*,
764 S.E.2d 303 (W. Va. 2014) 10

State v. *Ruem*,
313 P.3d 1156 (Wash. 2013) (en banc) 7

Steagald v. *United States*,
451 U.S. 204 (1981) 9

United States v. *Barrera*,
464 F.3d 496 (5th Cir. 2006) 5

United States v. *Brinkley*,
980 F.3d 377 (4th Cir. 2020) 3, 6, 10, 11

United States v. *Gorman*,
314 F.3d 1105 (9th Cir. 2002) 7, 8

United States v. *Magluta*,
44 F.3d 1530 (11th Cir. 1995) 5

United States v. *Vasquez-Algarin*,
821 F.3d 467 (3d Cir. 2016) 5, 7

United States v. *Wilhelm*,
80 F.3d 116 (4th Cir. 1996) 11

Va. House of Delegates v. Bethune-Hill,
139 S. Ct. 1945 (2019) 11

CONSTITUTION

U.S. Const. amend. IV 2, 4, 12

RULES

S. Ct. Rule 10 2

OTHER AUTHORITIES

Casebrief, *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 (2007) 4

Oral Argument (Sept. 27, 2022), https://youtu.be/2tzFiUgkrAc?t=3736 .... 3, 10

Ryan C. Williams, *Lower Court Originalism*, 45 Harv. J.L. & Pub. Pol'y 257 (2022) 2

INTRODUCTION

The State does not dispute that this case presents a clean opportunity to resolve a split among numerous federal Circuits and state courts of last resort. Instead, the State argues that the split lacks "real-world" importance because probable cause here would be "[f]ar from the hard-nosed standard used when a neutral and detached magistrate decides whether to issue a search warrant." BIO 14, 19-20. Put otherwise, the State believes the split does not matter because the probable cause requirement does not matter. The Constitution, the Court's precedent, this case itself, and decisions on both sides of the split all say otherwise. Review is warranted.

I. The entrenched split over *Payton* is real and outcome-determinative.

1. The conceded "divergence" (BIO 7) over whether *Payton* requires probable cause is broad and entrenched. The Third, Fourth, and Ninth Circuits have all held that *Payton* requires probable cause, with the Sixth and Seventh Circuits also inclining that way. In contrast, the Second, Tenth, and D.C. Circuits have all rejected probable cause in favor of a lower standard. The Fifth and Eleventh Circuits have attempted to cut a middle, amorphous path, and the Eighth Circuit has flip-flopped on its standard. State high courts are likewise divided, with seven requiring probable cause and seven rejecting it. And, as the State acknowledges, state courts and their coordinate Circuits have created "[i]ntra-jurisdictional splits" over *Payton*'s meaning (BIO 22), rendering the same home entry lawful or unlawful depending whether the resulting prosecution is brought in federal or state court. Pet.23-24; NACDL Amicus Br. 9-12.

This should be the end of the matter. The split over *Payton* involves a foundational Fourth Amendment question—the standard for entering a home—and cuts across both the "United States court[s] of appeals" and "state court[s] of last resort." S. Ct. Rule 10. The State's only response is to quote a law review article's passing suggestion that this Court "tolerate[s] a fairly wide degree of disuniformity at the lower court level." BIO 20 (quoting Ryan C. Williams, *Lower Court Originalism*, 45 Harv. J.L. & Pub. Pol'y 257, 293 (2022)). That argument cannot be reconciled with Rule 10 standard or the importance of a split going to "the [Fourth] Amendment's 'very core,'" *Lange* v. *California*, 141 S. Ct. 2011, 2018 (2021) (citation omitted).

2. The State claims that the conceded split carries "little practical significance" because there is "scant daylight" between probable cause and lower suspicion standards. BIO 8, 2. This is wrong. If the choice between probable cause and a lower standard involved such a "narrow gap" and such "small[]" stakes (BIO 2, 10), the State would not have pressed the court below to adopt the lower standard. It asked the West Virginia Supreme Court to resolve *Payton*'s standard because it was outcome-determinative here and important going forward. It is precisely because this question "regularly produce[s] different outcomes" (cf. BIO 2) that *Payton* has been "frequently debated" in the lower courts (Pet.App.13a (Op.9)) and provoked sharp divisions within appellate panels, including the panel below and the Fourth Circuit panel in *Brinkley*.

a. In the West Virginia Supreme Court, the State treated the choice between probable cause and a lower standard as more than "one of legal terminology." Cf. BIO 14. The State acknowledged "a current split among the federal circuit courts and state courts alike." Resp.Br.6. The State conceded that these were not semantic differences but "conflicting decisions." Resp.Br.13. Indeed, the State contended that the lower standard adopted by some courts was not something akin to probable cause but something identical to the very different "reasonable suspicion" standard. Thus, the State referred to the split as the "probable cause/reasonable suspicion debate" (Resp.Br.15) and urged the West Virginia Supreme Court to join the courts rejecting probable cause and hold "that reasonable suspicion applies here" (Oral Argument at 1:19:29-1:19:45 (Sept. 27, 2022), https://youtu.be/2tzFiUgkrAc). The reason the State urged the adoption of the lower standard was because, "based on the small appendix in this case and the facts contained in that appendix, it does not appear that there is probable cause in this case… . There is, however, reasonable suspicion… ." *Id.* 1:18:18-1:18:42.

In other words, the State said the same thing Petitioner does: there is a split; there is a significant difference between the approaches on the two sides of that split; and the choice of standard was outcome-determinative because the facts do not support probable cause here. The State framed the choice between probable cause and a lower standard as making a real "difference in the ultimate result" and "practical significance," and not merely standards with a "narrow gap" or "scant daylight." Cf. BIO 2, 8-10.

b. This Court's precedents confirm the difference between probable cause and any lower standard. As the Court emphasized in *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979), probable cause "provides the relative simplicity and clarity necessary to the implementation of a workable rule" that is "essential to guide police officers," while reasonableness requires "balancing of the multifarious circumstances presented by different cases" and could allow "the protections intended by the Framers [to] all too easily disappear in the consideration and balancing" of those factors.

The State seeks to minimize the significance of the probable cause requirement by suggesting that even when probable cause is required, courts have "allow[ed] thin facts to justify an entry into the home." BIO 16. But assuming arguendo that "[b]oth standards have been applied leniently," as the State's student-note authority suggests (BIO 8 (quoting Casebrief, *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)), that is a reason to *grant* review here, not deny it. Only a probable cause standard adequately protects "'[f]reedom' in one's own 'dwelling,'" the "archetype of the privacy protection secured by the Fourth Amendment." *Lange*, 141 S. Ct. at 2018. A lower standard (like the reasonable suspicion standard urged by the State) permits officers to enter a home based on "so little evidence that an arrestee resides at a dwelling as to expose all dwellings to an unacceptable risk of police error and warrantless entry." *United States* v. *Vasquez-Algarin*, 821 F.3d 467, 479

(3d Cir. 2016). That some courts already apply probable cause leniently is not a reason to make the standard more lenient still.

3. The State's effort to downplay the split's "real-world impact" in the lower courts (BIO 8-14) is equally baseless.

a. That two Circuits (the Fifth and Eleventh) have sometimes characterized the difference between probable cause and *Payton*'s "reason to believe" formulation as "about semantics" or "difficult … to compare" hardly renders the choice made by other Circuits meaningless. BIO 9 (quoting *United States* v. *Barrera*, 464 F.3d 496, 501 (5th Cir. 2006) and *United States* v. *Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995)).

Two large groups of Circuit and state courts have either required probable cause or rejected it in favor of a lower standard. Neither group treated the choice as "hav[ing] only a negligible effect." Cf. BIO 7. In breaking with Circuits on the less-than-probable-cause side of the split, for example, the Third Circuit criticized their approach for "requir[ing] significantly less evidence to support a belief of residency than the other Courts of Appeals, presumably in part as a result of its choice to depart from the probable cause standard and the protections it affords." *Vasquez-Algarin*, 821 F.3d at 476. Again, the State itself argued below that the courts rejecting probable cause had adopted reasonable suspicion, a difference with indisputable doctrinal significance. And while the Fifth and Eleventh Circuits have adopted more nebulous formations (BIO 9), the existence of a *third* approach

taken by a group of courts highlights the confusion over *Payton* and the need for review.

b. That evidence of residency might be so clear or lacking in some cases to make the standard irrelevant does not change the courts' sharp disagreement when "the choice of one standard or another" *does* "make[] [a] difference." Cf. BIO 9-10. The State emphasizes the decision in *United States* v. *Denson*, where the Tenth Circuit found no "need to pursue the question" because the police had probable cause. 775 F.3d 1214, 1217 (10th Cir. 2014); see BIO 9, 12. But at least six Circuits and 20 state courts *have* had to make "the choice of one standard or another" (BIO 9) in applying *Payton*. Indeed, despite being unnecessary, the Tenth Circuit in *Denson* still "wonder[ed] if reason exists to reconsider *Valdez*," which had adopted a lower standard, and switch to "the familiar probable cause standard." 775 F.3d at 1216-17 (Gorsuch, J).

The contradictory choices made by the Fourth Circuit in *Brinkley* and the West Virginia Supreme Court below illustrate why the probable cause standard matters. In *United States* v. *Brinkley*, the Fourth Circuit required probable cause and held the facts "failed to establish probable cause" even though "the officers developed a well-founded suspicion." 980 F.3d 377, 386-89 (4th Cir. 2020). Here, the State conceded that the probable cause standard could not be met, and the search's evidence escaped suppression only because the State persuaded the court below to apply a lower standard. Pet.App.2a-3a, 19a-20a (Op.i, 15-16).

The disagreement between the West Virginia Supreme Court and the Fourth Circuit about *Payton* is

"more about [substance] than [semantics]." Cf. BIO 9. In *both* cases the choice of standard was dispositive of the search's constitutionality. And this inter-jurisdictional dispute is just one example, for cases on both sides of the split have noted when the facts fail probable cause, even if they would establish reasonable suspicion. See, e.g., *Vasquez-Algarin*, 821 F.3d at 470, 480-82 (informant tips did not establish probable cause); *State* v. *Canfield*, 360 P.3d 490, at *3 (Kan. Ct. App. 2015) ("officers had a hunch but not probable cause to believe that [defendant] was at home" when she resided there but no car was present and nothing suggested she was home); *Siedentop* v. *State*, 337 P.3d 1, 3 (Alaska Ct. App. 2014) (tip from suspect's wife that he was "associating" with a woman at a house did not establish probable cause that he resided and was present there); *State* v. *Ruem*, 313 P.3d 1156, 1161 (Wash. 2013) (en banc) (officers lacked probable cause that defendant resided and was present, despite stale information that he resided there previously); *Commonwealth* v. *Silva*, 802 N.E.2d 535, 541-42 & n.8 (Mass. 2004) (holding that "police did not have probable cause to believe [the suspect] was in the apartment," but "did have a 'reasonable belief,'" and comparing that standard to "reasonable suspicion").

c. The Ninth Circuit's decision in *United States* v. *Gorman*, 314 F.3d 1105 (9th Cir. 2002) refutes, rather than supports, the State's suggestion that the choice between probable cause and a lower standard is meaningless (BIO 8-9). There, the Ninth Circuit grappled with the difference between the two approaches, before concluding that "the 'reason to believe' stand-

ard of *Payton*" refers "to the standard of reasonableness embedded in probable cause, *not reasonable suspicion*." *Gorman*, 314 F.3d at 1113 (emphasis added). Far from minimizing the standard's "real-world impact" (BIO 8), *Gorman* shows both why "the 'reason to believe' standard is far from clear," and why this Court ought to clarify that this standard "entail[s] the same protection and reasonableness inherent in probable cause." 314 F.3d at 1112, 1115. Put otherwise, *Gorman*'s characterization of the choice as being between probable cause and reasonable suspicion—the same characterization the State made below—underscores the split's doctrinal and "real-world" significance.

d. The frequency with which courts "expressly remark[]" on the "choice of one standard or another" (BIO 9) is beside the point. Unlike in the police-stop context—where *every case* presents the question whether the stop's circumstances require the application of probable cause or reasonable suspicion—the choice of standard under *Payton* happens only once per jurisdiction, and then controls thereafter, leaving little room for later "express[] remark[s]." But the "quantum of proof … necessary to satisfy the reason to believe standard" will be dispositive whenever police cannot meet probable cause, even if the standard is not discussed. Pet.App.13a (Op.9). Moreover, what is striking is not that there are some cases where the standard goes unremarked or is not dispositive, but that there is such a wealth of cases in which courts have been forced to pick sides of a clear, entrenched split. That shows the standard *does* matter.

4. While the State waves away the potential for abuse of *Payton* (BIO 16-17), this Court has recognized both the third-party privacy interests at stake when officers enter a home to execute an arrest warrant and the risk that "arrest warrant[s] may serve as the pretext for entering a home" without probable cause. *Steagald* v. *United States*, 451 U.S. 204, 215, 218-23 (1981). These risks are magnified when police can enter a home on less than probable cause (Cato Br. 6-16), *especially* if courts apply the standard in a "lax way" (BIO 17).

II. This case presents the Court with a unique opportunity to finally clarify *Payton*.

This case presents the *Payton* split in a fully preserved, clean, and stark posture. The State conceded it lacked probable cause, and the majority adopted a lower, case-dispositive standard, rejecting the Fourth Circuit's approach.

1. The State acknowledges conceding that "the probable-cause standard was not met," but also claims that "the Supreme Court of Appeals might have still found it was on these facts." BIO 14. This hedge cannot be squared with the law, the record here, or the State's own characterization of that record—*viz.*, that "it does not appear that there is probable cause in this case."

a. The State asked the West Virginia Supreme Court to choose sides in the split over *Payton* and join the courts rejecting probable cause precisely because it could not meet that standard:

> [Court:] If this Court were to adopt the *Brinkley* reasoning and apply a probable cause standard, is it the State's position that probable cause was not met in this case?
>
> [The State:] That is the State's position, your honor, based on the record that we have. Based on the small appendix in this case and the facts contained in that appendix, it does not appear that there is probable cause in this case. So the State would concede that.

Oral Argument at 1:18:18-1:18:42 (Sept. 27, 2022), https://youtu.be/2tzFiUgkrAc?t=3736.

Based on the State's positions, the West Virginia Supreme Court chose sides, rejected the Fourth Circuit's probable cause formulation, and held that "[r]eason to believe requires less proof than probable cause." Pet.App.2a-3a (Op.i). The State recognized that the holding it sought would resolve an issue of first impression in West Virginia, as its Supreme Court "ha[d] not yet defined *Payton*'s 'reason to believe' standard." Resp.Br.6. The court accepted the State's invitation, announcing its new holding in the Syllabus: "Reason to believe requires less proof than probable cause … ." Pet.App.2a-3a (Op.i.); see *State* v. *McKinley*, 764 S.E.2d 303, 313 (W. Va. 2014) ("original syllabus points … announce new points of law").

Having prevailed on its arguments and secured a lower standard of suspicion, the State should be held to its "conce[ssion] below that the probable-cause standard was not met" (BIO 14). E.g., *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952-53 & n.3 (2019).

b. Even if the State could escape from its concession, the fact remains the record in this case does not support probable cause—that is why the State conceded the point below. As the dissent explained, the "various 'tips'" that police received about S.W.'s whereabouts "demonstrated that the juvenile was, at minimum, bouncing around," and the officers had only "a single, anonymous, unsubstantiated tip" to counterbalance this "uncertainty." Pet.App.38a-39a. That is not enough for probable cause. E.g., *United States* v. *Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996) ("information from an unnamed informant" with "no indication of that informant's truthfulness or reliability" insufficient for probable cause). The other facts that the State now raises—such as the "noise coming from inside the home" and that the entry was "at a time of day when a teenage girl would be expected to be present" (BIO 14)—could not establish probable cause because they were "generic indicia of presence" suggesting "only that *someone* [wa]s there—not necessarily the suspect," *Brinkley*, 980 F.3d at 390.

2. The State disputes none of the other circumstances that make this an ideal case for resolving the split over *Payton*. It does not dispute that the question whether *Payton* requires probable cause is fully preserved. It does not dispute that this issue controls not only the trial court's suppression ruling, but also the State's prosecution against Pennington. If this Court reverses the West Virginia Supreme Court and adopts a probable cause standard, the search of Pennington's home necessarily violated the Fourth Amendment, as the State has invoked no independent warrant exception. Pet.27. And if the evidence seized

in the search is excluded, the State's case falls apart. *Ibid.*

The State responds only that "this Court has repeatedly denied similar petitions for certiorari," citing the same four cases addressed in the Petition. BIO 2 (citing *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)). The shortcomings of those petitions underscore why this is a singularly clean opportunity to address the split. *Ross*, *Harper*, and *Bohannon* all presented preservation obstacles and merits complications absent here. Pet.27-28. And in contrast to *Fialdini*, the West Virginia Supreme Court here was asked to, and did, "enter into the midst of this debate [over *Payton*]." Cf. *Fialdini* v. *Cote*, 594 F. App'x 113, 117 (4th Cir. 2014). Moreover, none of those cases created an inter-jurisdictional split between a state supreme court and its coordinate Circuit.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

ORIN S. KERR
334 Law Building
Berkeley, CA 94720

JOHN B. KENNEY
PAXTON M. LEWIS
KELSEY J. CURTIS
Wilson Sonsini
Goodrich & Rosati, PC
1700 K Street, NW
Washington, DC 20006

FRED A. ROWLEY, JR.
Counsel of Record
MARK R. YOHALEM
Wilson Sonsini
Goodrich & Rosati, PC
633 W. 5th Street
Los Angeles, CA 90071
(323) 210-2902
fred.rowley@wsgr.com

ROGER L. LAMBERT
PO Box 588
Hurricane, WV 25526

Counsel for Petitioner

APRIL 2023