No. 24-424

In the Supreme Court of the United States

RAYMOND N. BAILEY, JR.,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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

Clark M. Neily III
Counsel of Record
Laura A. Bondank
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

November 15, 2024

QUESTION PRESENTED

Whether a warrantless search violates the Fourth Amendment where, although a person's residence is subject to warrantless search, the government lacks probable cause to believe that the place to be searched is, in fact, that person's residence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

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

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

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

SUMMARY OF ARGUMENT

When officers entered and searched the Econo-Lodge motel room in North Little Rock, they did so based on Petitioner Raymond Bailey's probationary status. Pursuant to the terms of his probation, Bailey was subject to a search waiver under which he consented to the search of his person, place of residence, or motor vehicle. However, when officers acted upon this waiver and searched the motel room, they lacked probable cause to believe Bailey was actually residing there.

Although the Eighth Circuit has held that officers must have probable cause to believe a dwelling is the residence of a probationer or parolee to rely on a consent waiver for a search, the Arkansas Supreme Court found that reasonable suspicion was sufficient. *See United States v. Thabit*, 56 F.4th 1145 (8th Cir. 2023). In doing so, it increased the likelihood of police searches being conducted at wrong addresses, thus increasing the risk to both citizens and law enforcement.

Bailey's petition is not ultimately about protecting property—it's about protecting people. Fourth Amendment limits on home entries protect human life. Entries based on underdeveloped or stale information needlessly threaten the safety of citizens and law enforcement. In recent years, news reports and social media have featured countless stories of violent encounters between law enforcement and homeowners due to a wrong address. By discarding the probable cause requirement and lowering the evidentiary threshold required to support a warrantless search, the opinion below needlessly endangers ordinary citizens and law enforcement officers.

ARGUMENT

I. PROBABLE CAUSE PROTECTS HUMAN LIFE.

This Court has observed that officers are constitutionally "required" not to enter a residence when they are "put on notice of the risk" that they "might" lack warrant authorization to search it. *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). Accordingly, officers must undertake "a reasonable effort to ascertain and identify the place intended to be searched." *Id.* at 88.

The *Garrison* rule protects human life. The constitutional guarantee of security in one's house was inspired by overbroad "general warrants" issued by British colonial authorities. U.S. CONST. amend. IV.; *Payton v. New York*, 445 U.S. 573, 583 (1980). Nothing is nearer to the Fourth Amendment's essence than preventing "the danger of needless intrusions." *Id.*

Restrictions on residential entries protect several important constitutional values, including privacy.[2]

---

[2] *See Payton*, 445 U.S. at 589 ("In [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."); *Hudson*, 547 U.S. at 594 ("[E]lements of privacy and dignity . . . can be destroyed by a sudden entrance . . . ."); *see also id.* (observing that police officers may encounter people undressed or in bed); *Ker v. California*, 374 U.S. 23, 57 (1963) (Brennan, J., concurring in part and dissenting in part) (noting the "shock, fright or embarrassment attendant upon an unannounced police intrusion"); *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.").

Police officers searching a residence—whether it be a house or a hotel room—may encounter any number of dangerous or embarrassing scenarios. *See Hudson v. Michigan*, 547 U.S. 586, 594 (2006) ("[U]nannounced entry may provoke violence in supposed self-defense by the surprised resident.").

Another important Fourth Amendment value is the protection of property. As early as 1603, the Court of King's Bench worried that the "destruction or breaking of any house" during an arrest could cause "great damage and inconvenience." *Wilson v. Arkansas*, 514 U.S. 927, 935–36 (1995) (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K.B. 1603)); *see also* Mayra Moreno, *Retired Officer, Family Startled by Deputies Serving Arrest Warrant at Wrong Home*, 6 ABC ACTION NEWS (Sept. 10, 2020) ("A retired Texas officer is calling deputies' response unprofessional and intimidating after they broke down his front door to serve a warrant . . . . [T]hey were not at the correct house.").[3]

But the most important right protected by the Fourth Amendment is human life. This Court has repeatedly noted the importance of protecting homeowners' lives and limbs from the perils of home entries. In 1948, this Court considered *McDonald v. United States*, where a police officer jimmied open a woman's bedroom window and crawled inside to investigate an illegal lottery scheme operated from her boarding house. 335 U.S. 451, 452–53 (1948). The officer lacked an arrest or search warrant, and the Court held that the subsequent search was illegal. *Id.* at 452–56. Concurring, Justice Robert Jackson expressed concern for

[3] Available at https://tinyurl.com/96t5dcza.

the woman's safety, predicting "grave troubles" if police continued to carry out entries cavalierly. *Id.* at 459 (Jackson, J., concurring). He considered the lack of injury to anyone a matter of "luck more than [of] foresight." *Id.* at 460. Justice Jackson further noted that many homeowners are armed, and when a woman "sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot." *Id.* at 460–61. For his part, an officer "seeing a gun being drawn on him might shoot first"—but under the circumstances, Justice Jackson wrote that he himself "should not want the task of convincing a jury that it was not murder." *Id.* at 461.

Justice Jackson saw the warrant requirement as a means of preventing "a method of law enforcement" that he characterized as "reckless" and "fraught with danger and discredit." *Id.* But warrants do not increase homeowners' safety if police have near-total discretion to determine whether a given subject lives at a home and is present there before entering. Indeed, this Court has held that the Fourth Amendment does not allow a warrant (akin to a Colonial writ of assistance) that "specifies only the object of a search" and "leaves to the unfettered discretion of the police the decision as to which particular homes should be searched." *Steagald v. United States*, 451 U.S. 204, 220 (1981).

The same concerns motivating Justice Jackson's concurrence in *McDonald* exist in the context of this case as well. Officers did not need a warrant to search Bailey's residence due to his probationary status. But Bailey's waiver does not extinguish the officers' duty to properly ascertain that the residence to be searched belonged to Bailey. Like warrants, probable cause protects officers and individuals from needless danger.

Authorizing entry into a dwelling based on nothing more than reasonable suspicion "is certain to involve the police" and others "in grave troubles if continued." *McDonald*, 335 U.S. at 460 (Jackson, J., concurring).

The standard adopted below is only the very loosest of fetters. Reasonable suspicion is a notably weak evidentiary standard that has been used to justify a plethora of "muscular investigatory practice[s]." Devon W. Carbado, *Stop-and-Strip Violence: The Doctrinal Migrations of Reasonable Suspicion*, 55 HARV. C.R.-C.L. L Rev. 467, 490 (2020); *see also Terry v. Ohio*, 392 U.S. 1 (1968) (stop-and-frisk searches); *Arizona v. Johnson*, 555 U.S. 323 (2009) (frisk of vehicle passengers); *United States v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984) (stop-and-strip searches at the border); *Ibrahim v. Dept' of Homeland Sec.*, 62 F. Supp. 3d 909 (N.D. Cal. 2014) (adding people to the no-fly list).

Entries of dwellings cannot constitutionally be supported by such tenuous grounds for suspicion. As four justices wrote in *Ker v. California*, "practical hazards of law enforcement militate strongly against any relaxation" of requirements for home entries. 374 U.S. 23, 57 (1963) (Brennan, J., concurring in part and dissenting in part). It is always possible that "the police may be misinformed as to the name or address of a suspect, or as to other material information." *Id.*

Before making their warrantless entry in this case, officers witnessed a variety of criminal activity in the motel parking lot. Not only did they lack probable cause to believe Bailey was residing in the particular room they chose to search, they had no knowledge of the potential dangers lurking behind the motel room door. By entering the room without probable cause, the

officers put their lives, and the lives of any people inside, at risk. That manifest risk of danger "necessitates a more rigorous standard than reasonable suspicion." *United States v. Thabit*, 56 F.4th 1145, 1151 (8th Cir. 2023).

II. ENTRIES WITHOUT PROBABLE CAUSE NEEDLESSLY IMPERIL ORDINARY CITIZENS.

Accepting the decision below and dispensing with probable cause would endanger ordinary citizens going about their lives. Tragic deaths have occurred at the hands of police officers who went to the wrong address or relied on stale information. Such cases (whether they involve arrest warrants or not) illustrate the risks posed by letting officers enter a dwelling without probable cause to believe that the probationer is in fact residing there.

Perhaps the most notable recent case is that of Louisville EMT Breonna Taylor. A judge issued a search warrant after police said that they believed a drug dealer—her on-again-off-again former boyfriend who lived nearby—received packages at Ms. Taylor's apartment. Officers arrived there shortly after midnight and knocked loudly, but Ms. Taylor and her boyfriend, Kenneth Walker, did not hear them identify themselves. When officers used a battering ram to gain entry, Mr. Walker believed that Ms. Taylor's former boyfriend was breaking down the door. As Justice Jackson forewarned in *McDonald*, Mr. Walker struck an officer when he fired a pistol in self-defense. Police shot back, killing Ms. Taylor. *See* Richard Oppel Jr. et al., *What to Know about Bronna Taylor's Death*, N.Y. TIMES

(Aug. 23, 2024).[4] Her death triggered intense and prolonged public protest. Later investigations showed that the warrant affidavit was based on false information and that the officers lacked probable cause to conduct the search. *Id.; see also Current and Former Louisville, Kentucky Police Officers Charged with Federal Crimes Related to Death of Breonna Taylor*, DEP'T OF JUSTICE (Aug 4, 2022).[5]

Now consider the facts of Ms. Taylor's case had her ex-boyfriend been on probation. Under the test adopted by the court below, officers may have had reasonable suspicion to believe he lived at her apartment and was there that night. It would not be dispositive that he sometimes lived elsewhere, especially as he still stayed in the neighborhood. The police may have even considered his having moved out as evidence that he was trying to avoid detection. Thus, officers would have been authorized to enter the apartment at a time when one who sometimes lived there would ordinarily be present—say, a little after midnight.

Probable cause requires fresh, detailed observation. "The stringent probable-cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view"—and imperiling residents like Ms. Taylor. *Payton*, 445 U.S. at 617 (White, J., dissenting).

Common law supplied an additional safeguard against residential intrusions: home arrests had to be

---

[4] Available at https://tinyurl.com/4yeha3rm.

[5] Available at https://tinyurl.com/339waect.

done during daytime. *Id.* at 616–17. But now, dangerous nighttime raids like the one at Bronna Taylor's apartment, featuring military-style equipment and armaments, are commonplace. Consider the 2014 raid that nearly killed 19-month-old Bounkham "Bou Bou" Phonesavanh. Police raided the rural Georgia home where he was staying with his parents at around 2:15 a.m. *See* Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017).[6] The officers had a no-knock search warrant based on informants having supposedly bought $50 of methamphetamine in the yard there. *Id.* Ten officers arrived in an armored Humvee with assault rifles, body armor, Kevlar helmets, a door-breaching shotgun, sledgehammers, and a ballistic shield. *Id.* As they splintered the door with a metal battering ram, one officer threw a flashbang grenade through the living room window, which exploded in a playpen where Bou Bou was sleeping. *Id.* His throat and face were badly burned, nearly killing him, and he required more than 15 surgeries to save his life and repair the damage. *Id.*; Tyler Estep, *New $1.6M Settlement for Parents of Georgia Toddler Injured in Raid*, ATL. J.-CONST. (Feb 26, 2016).[7] His family received nearly $4 million in settlements. *Id.*

The target drug dealer turned out to be a relative of the Phonesavanh family who was not present at the home. *Id.* Bou Bou's mother acknowledged that the police didn't mean to harm her son, but said "they could've done a lot more to prevent this." Sack, *supra.* As with Ms. Taylor's case, a sheriff's deputy embellished the search-warrant application. *Id.* But on one

---

[6] Available at https://tinyurl.com/2s5f3bs2.

[7] Available at https://tinyurl.com/bdh8dkcc.

crucial point, the deputy's lack of preparation proved especially dangerous to the residents, including Bou Bou. She didn't surveil the home, instead relying on one informant's denial that there was any evidence of a child living there *Id.*

Now suppose the suspected drug dealer was on probation. It is likely that officers had reasonable suspicion to believe the suspect lived in the home and would be present in the early-morning hours. But if they had undertaken the sort of observations that would have provided probable cause, they would have realized that the home contained children. Young children played in the front yard daily, and the minivan had four child safety seats inside. *See* Jacob Sullum, *How Cops Became Baby Burners,* REASON (June 4, 2014).[8] Having to develop probable cause makes officers slow down, observe carefully, and notice details that can minimize the risk to civilians.

Cases like Ms. Taylor's and Bou Bou Phonesavanh's are tragic and horrific, but not isolated. Warrant execution in drug cases involves danger as a matter of course. Between 2010 and 2014, over 90 percent of Maryland SWAT deployments were to serve search warrants, and two-thirds of them involved forcible entries. *See* Sack, *supra*. "Firearms were discharged in 99 operations, civilians were killed in nine and injured in 95 . . . and animals were killed in 14." *Id.* Between January 2011 and March 2013, the Little Rock, Arkansas SWAT team "broke down doors and detonated flash-bangs in more than 90 percent of 147 narcotics search warrant raids." *Id.* Nationwide, at least "47 civilians and five officers died as a result of

[8] Available at https://tinyurl.com/3ky7kpsu.

the execution of knock-and-announce searches, while 31 civilians and eight officers died in the execution of no-knock warrants." *Id.*

The risk posed to innocent third parties from police searches—including particularly warrantless searches—is all the more reason to require probable cause. In August 2015, police in Worcester, Massachusetts secured a no-knock warrant for a suspected drug dealer's apartment based on one informant's word. They did not surveil the home. Motor vehicle and utility records *that they did review* indicated that the suspect had moved. But the SWAT team swept in, detaining three adults and two children at gunpoint. Eventually, officers realized that the residents didn't know the suspect, who had indeed left three months earlier. *Id.* Would they have had reasonable suspicion to believe he was present? Possibly. Probable cause? Certainly not: their evidence was stale.

More careful observation might also have prevented injury to Iyanna Davis of Hempstead, New York. She was shot by police who had a warrant for the other unit in her two-family residence. That's the sort of mistake that would likely have been caught during the development of probable cause that the suspect lived there and was present. *Id.* Cases abound of risky police entries into wrong homes.[9]

Many of the dangerous cases discussed above involve the execution of search warrants. But at least

---

[9] *See, e.g.*, Joel Brown, *"I Never Got an Apology" Raleigh Mom Still Devastated after RPD Tactical Team Raids Wrong Home*, ABC11 (Feb. 1, 2022), https://tinyurl.com/mrsthwdx (discussing Raleigh school-bus driver Yolanda Irving, held at gunpoint by officers who had a warrant for the house two doors down);

those need to be backed by probable cause. The ruling below requires much less than that—police need only reasonable suspicion to believe a probationer is residing somewhere before entering. It poses even more of a risk to people's lives.

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

Raids do not only imperil civilians. They put officers at risk too, as Justice Jackson observed in *McDonald*. Considering the homeowner in the hypothetical he posed, Justice Jackson expressed concern that she might shoot a policeman crawling through her window and that her subsequent plea of self-defense "might result awkwardly for enforcement officers." *McDonald*, 335 U.S. at 461 (Jackson, J., concurring). He considered entering homes without warrants backed by probable cause "reckless" and "fraught with danger and

---

Minyvonne Burke, *Black Woman Handcuffed Naked in Raid at Wrong Home Set to Get $2.9 Million from Chicago*, NBC NEWS (Dec. 14, 2021), https://tinyurl.com/4m3tuau8 (discussing Chicago social worker Anjanette Young, who secured a nearly-$3 million settlement after being handcuffed naked by officers whose warrant targeted the home across the street); Nick Sibilla, *Cop Who Wrongly Led No-Knock Raid Against 78-Year-Old Grandfather Can't Be Sued, Court Rules*, FORBES (June 9, 2021), https://tinyurl.com/58pktnb2 (discussing Onree Davis, a 78-year-old Georgia man whose home was raided by officers targeting his next-door neighbor, even though a captain "later testified he 'wasn't sure' this second house was actually their target and just assumed his subordinates 'acquired information'" justifying entry); Ashley Fantz, *Fatal Mistake*, SALON (Oct. 19, 2000), https://tinyurl.com/yck3hj65 (discussing the fatal shooting of 64-year-old John Adams of Lebanon, Tennessee by officers who went to the wrong house).

discredit to the law enforcement agencies themselves." *Id.*

His concerns are borne out by reality. "[O]fficers were injured in at least 30" Maryland SWAT raids between 2010 and 2014. Sack, *supra*. A homeowner who does not realize that the people invading his home are police has "a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." *Ker*, 374 U.S. at 58 (quoting *Launock v. Brown*, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (1819)). One of the key reasons for the knock-and-announce rule is "to protect the arresting officers from being shot as trespassers." *Id.* But as Ms. Taylor's case shows, residents do not always hear warnings; besides, no-knock warrants sometimes mean they aren't given.

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

tip, and their chief imposed a moratorium on serving warrants until he was sure each had been properly vetted. *See* Jack Pointer, *2 Prince George's Co. Officers Shot after Warrant Served at Wrong Home: Police Chief*, WTOP NEWS (Sept 20, 2018, 1:00 AM).[10]

CONCLUSION

The Court should grant the petition to better resolve the split between the Eighth Circuit and the Arkansas Supreme Court and clarify that the former better protects police and citizens from the manifest hazards of warrantless searches and thus better accords with the text and history of the Fourth Amendment.

Respectfully submitted,

Clark M. Neily III
Counsel of Record
Laura A. Bondank
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

November 15, 2024

[10] Available at https://tinyurl.com/385emtum.