No. 24-424

IN THE

Supreme Court of the United States

RAYMOND N. BAILEY, JR.,

Petitioner,

v.

ARKANSAS,

Respondent.

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

BRIEF IN OPPOSITION

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street
Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

TIM GRIFFIN
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
DYLAN L. JACOBS
Deputy Solicitor General
ASHER L. STEINBERG
Senior Assistant Solicitor General
CHRISTIAN HARRIS
Senior Assistant Attorney General

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Petitioner, a felon on probation, consented to suspicionless searches of his residence and any other area or property under his control. Police observed him appearing to traffic in drugs out of a motel and searched his motel room, which he was seen entering and exiting, was registered to, and to which he had a key. The question presented is:

Whether police needed probable cause to believe petitioner was residing in or in control of the motel room before searching it.

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STATEMENT

1. In 2018, petitioner Raymond Bailey was sentenced to five years' probation after he pleaded guilty to second-degree domestic battering, a felony. Under Arkansas law, a felon placed on probation must consent, as a condition of being placed on probation, to warrantless and suspicionless searches of his "person, place of residence . . . or other real or personal property . . . under his or her control or possession, at any time, day or night." Ark. Code Ann. 16-93-106(a)(1). And Bailey did so, agreeing to "submit [his] person, place of residence," and "any other area or property under [his] control to search and seizure at any time, day or night, with or without a search warrant." Pet. App. 2a.

Two years later, in June 2020, local police observed multiple people approaching a black sedan in the parking lot of an Econo Lodge motel in North Little Rock and appearing to purchase drugs. Pet. App. 2a, 18a. During their surveillance, Bailey left the sedan with a duffel bag, took it into Room 106 of the motel, and got back into the passenger seat. Pet. App. 2a-3a, 18a. He and the driver then drove off to a nearby McDonald's. Pet. App. 3a, 18a. Bailey went into the McDonald's, Pet. App. 18a, while the driver made another apparent drug sale in the parking lot, Pet. App. 3a. Police arrested the driver and found heroin in the car. *Id.* Bailey, meanwhile, slipped out of the McDonald's and returned to the motel on foot. *Id.*

By the time Bailey returned to the motel, police had learned that his name was on the motel's guest registry. Pet. App. 3a. They had also learned that he was on probation and had executed a search waiver. *Id.* When Bailey returned, police searched him and found a key to Room 106, the room he had come in and out of with

the duffel bag. *Id.* Relying on his search waiver, they used his key to enter his motel room and found heroin and drug paraphernalia. Pet. App. 3a, 18a.

Bailey was charged with possession of heroin and fentanyl with intent to deliver. Pet. App. 17a. Bailey moved to suppress the evidence found in his motel room, claiming that the police needed probable cause to believe the motel room was his residence before they could search it under his search waiver. Pet. App. 3a. Citing an Eighth Circuit case involving the level of cause needed to search "a dwelling of a third party" under a search waiver, the trial court accepted that argument. Pet. App. 20a (citing *United States v. Thabit*, 56 F.4th 1145 (8th Cir. 2023)). The trial court then declared that the probable-cause standard required police to have "proof that a residence was in fact a parolee's 'place of residence'" before searching it under a search waiver. *Id.* It concluded in a single unreasoned sentence that there was "no such proof," *id.*, and granted Bailey's suppression motion, Pet. App. 21a.

The state appealed the grant of suppression and the Arkansas Supreme Court reversed. Pet. App. 8a. First, that court explained that the Eighth Circuit's decision in *Thabit*—on which the circuit court relied to hold probable cause was the applicable standard—was inapposite. *Thabit*, it explained, "involved a waiver search of a private residence known to belong to a third party whose own constitutional rights to be free of unreasonable searches were potentially at issue." Pet. App. 6a. The court "decline[d] to use [its] standard for the waiver search of a probationer's motel room." *Id.*

Instead, applying this Court's decision in *United States v. Knights*, 534 U.S. 112 (2001), the court held that—given the search waivers they execute—a

probationer has a sufficiently diminished "expectation of privacy in his" residence, Pet. App. 7a, that police need only have a reasonable suspicion that a probationer resides in a place to search it under a search waiver, Pet. App. 8a. Applying that standard in the first instance, the court held that the police met that standard because Bailey had a key to Room 106, was on the motel guest registry, and was seen putting bags in the room. *Id.* The court did not opine on whether Bailey's preferred probable-cause standard was met or the circuit court's view that probable cause required the State to prove Bailey resided in the motel room.

Two justices wrote separate opinions. Justice Webb, though concurring in the result, wouldn't have required reasonable suspicion, but rather would have simply held that the search of Bailey's motel room was reasonable under the totality of the circumstances. Pet. App. 10a-11a (Webb, J., concurring in part and dissenting in part). Justice Hudson, joined by Justice Baker, dissented, advocating a probable-cause standard. Pet. App. 15a-16a (Hudson, J., dissenting). Though the dissent acknowledged that the Eighth Circuit's decision in *Thabit* did not involve the parolee's own residence, it asserted that the Ninth Circuit and an Arkansas district court had applied the probable-cause standard to searches of parolees' or probationers' motel rooms, and would have followed those decisions on the view that "federal court decisions" are "highly persuasive." Pet. App. 16a. The dissent explicitly did not opine on whether the trial court correctly applied the probable-cause standard. *Id.*

REASONS FOR DENYING THE PETITION

I. The shallow conflict on the question presented does not merit review.

By Bailey's own account, this petition presents a shallow conflict over a sparsely ventilated question: he claims the decision below conflicts with precedential decisions of just two courts of appeals and one state court. And even that overstates matters. In reality, the decision below conflicts only with a handful of Ninth Circuit opinions, and those opinions are ripe for reexamination because they are at odds with that court's prior precedent. The decision below doesn't conflict with the Eighth Circuit's decision in *Thabit*; as the Arkansas Supreme Court explained, *Thabit* addressed the level of cause needed to search a third-party dwelling, while the decision below only decided the level of cause needed to search an offender's own residence. It doesn't conflict with the Washington Supreme Court's precedent either; that court has only decided whether searches of probationers' residences without probable cause are permissible under the Washington Constitution.

As for the Ninth Circuit, that court's foundational precedents in this area hold that searches of *third-party* residences absent probable cause to believe an offender lives there both violate: 1) the third party's rights, because an offender's search waiver does not eliminate her expectations of privacy; and 2) the offender's rights, because unlike an offender's own residence, search waivers typically do not apply to third-party residences where the offender is only a guest. That court's later extension of those cases to searches of an offender's own residence was unreasoned, at odds with the rationales it originally gave for

adopting the probable-cause standard, and is ripe for reexamination.

A. Bailey claims the decision below conflicts with precedential decisions of two Circuits and one state court. But the weight of his argument for reviewing that shallow split rests on the supposed conflict between the decision below and the Eighth Circuit's decision in *Thabit*, which he claims raises forum-shopping concerns, Pet. 14-16, and "puts Arkansas law enforcement in an impossible position," Pet. 15. The decision below, however, doesn't conflict with *Thabit*. As the Arkansas Supreme Court explained, *Thabit* and this case present two critically different questions: the level of cause needed to search a third party's residence under a search waiver, and the level of cause needed to search a place where no third parties reside.

In *Thabit*, police suspected Thabit of living at someone else's home. Their only basis for thinking so was that a confidential informant had told police Thabit was staying at an unspecified residence with an unidentified woman, and that they later saw Thabit leaving a woman's residence. *Thabit*, 56 F.4th at 1148. On that basis, police searched her home pursuant to Thabit's search waiver of his residence. Principally reasoning that "the potential for violations of the constitutional rights of third parties necessitates a more rigorous standard than reasonable suspicion," *id.* at 1151, the Eighth Circuit "h[e]ld that probable cause is the appropriate standard in a case involving a dwelling of a third party," *id.*

As the Arkansas Supreme Court explained, that is not this case. Here, rather than search "a private residence known to belong to a third party whose own constitutional rights . . . were potentially at issue," Pet.

App. 6a, police searched "a probationer's motel room," *id.* Bailey doesn't actually dispute that distinction; he only argues it fails to distinguish decisions from other jurisdictions. Pet. 10. But at least on the Eighth Circuit's rationale, that distinction matters. Though there are obvious Fourth Amendment standing problems with allowing defendants to invoke "the constitutional rights of third parties," *Thabit*, 56 F.4th at 1151, the Eighth Circuit effectively did that when it held the probable-cause standard applied because of those rights. Were it presented with a case where only an offender's waived rights against a search of his own residence were at stake, that court might well reach a different result.

To be sure, in a footnote the court below criticized how *Thabit* addressed searches of third-party residences, suggesting its rule would anomalously accord offenders greater rights in other people's homes than in their own. Pet. App. 6a n.3. But that footnote was dictum, and even if it suggested there was a conflict between the court below and the Eighth Circuit on searches of third-party residences, this case does not present that issue. And if the court below were presented with it, it might see the matter differently. For the rights of third parties aren't the only reason to require a greater level of cause to search a third party's dwelling. One reason, as members of the Ninth Circuit have explained, is that parolees and probationers arguably haven't consented to searches of third-party residences where police mistakenly believe they reside. *See United States v. Grandberry*, 730 F.3d 968, 985 (9th Cir. 2013) (Berzon, J., concurring) (contending that California parolees waive their rights against searches of their

actual residences, but not against searches of residences in which they're guests).

B. Unlike the Eighth Circuit, several panels of the Ninth Circuit have held that police need probable cause to search an offender's own residence under a search waiver, even when no third party resides there. But that rule isn't nearly as entrenched as Bailey claims. As Bailey describes the Ninth Circuit's cases, that court announced his preferred rule in an en banc decision two decades ago and has followed it ever since. In fact, the en banc decided a very different question, holding that a third party's Fourth Amendment rights are violated if police mistakenly search her residence without probable cause to believe an offender resides there. Later panels, with little reasoning, and over the criticism of multiple judges, eventually extended that rule to hold that an offender's Fourth Amendment rights are violated if police search his residence without probable cause to believe he resides there—even though the basis for the search is a search waiver consenting to suspicionless searches of his residence. In time the Ninth Circuit may well correct that error and reaffirm its en banc court's distinction between searches of an offender's own residence and searches of others'. But even if it doesn't, a conflict between a single state court and a single out-of-state court of appeals is not a sufficient basis for certiorari.

The Ninth Circuit's first major decision on residence searches pursuant to search waivers was its en banc decision in *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005). *Motley* wasn't a criminal case. Rather, a parolee's girlfriend sued under Section 1983 after police searched her apartment on the belief that the parolee was living there when he was actually in

custody. *See id.* at 1075-77. The Ninth Circuit held that the test for whether her Fourth Amendment rights were violated was whether police had probable cause to believe the parolee resided in her apartment. It reasoned that "the parole condition indicates only the parolee's acquiescence to a warrantless search of his own residence," *id.* at 1079; by contrast, "[n]othing in the law justifies the entry into and search of a third person's house to search for the parolee," *id.* Moreover, because the "plaintiff [wa]s not a parolee, she [could] not be subjected to the same burdens upon her privacy, and the departures from the usual . . . probable-cause requirements allowed with respect to parolees [we]re not justified for her." *Id.* (quoting *Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004)). Accordingly, to "protect[] the interests of third parties," *id.* at 1080, the Ninth Circuit held police may not search a third party's residence without probable cause to believe a parolee resided there.

Though *Motley* rested on the premise that third parties have greater Fourth Amendment rights than parolees do, Ninth Circuit panels soon extended *Motley* to hold that its probable-cause standard defined parolees' own Fourth Amendment rights. In *United States v. Howard*, 447 F.3d 1257 (9th Cir. 2006), "engag[ing] in no Fourth Amendment analysis . . . to support the rule [it] adopted," *Grandberry*, 730 F.3d at 984 (Watford, J., concurring), a panel held that a parolee's Fourth Amendment rights are violated if police search a third party's residence in which he is a guest without probable cause to believe he resides there. *Howard*, 447 F.3d at 1262. Judge Noonan, concurring dubitante, argued the majority's holding failed to consider the parolee's "diminished expectation of

privacy" in holding that *his* Fourth Amendment rights were violated. *Id.* at 1269.

In subsequent cases *Howard* continued to draw criticism from Ninth Circuit judges. In 2013, Judge Watford called for its "reexamination," *Grandberry*, 730 F.3d at 983 (Watford, J., concurring), arguing that its rule paradoxically accorded a parolee greater Fourth Amendment rights at others' homes than at his "own home," where under his search waiver he "has no legitimate expectation of privacy," *id.* But his criticisms elicited a belated justification of *Howard*'s rule that confirmed it was limited to third parties' homes. Responding to his critique, Judge Berzon, the author of the majority opinion in *Grandberry*, agreed that normally people have lesser Fourth Amendment rights as guests in others' homes than in their own homes. *Id.* at 985-86 (Berzon, J., concurring). But whereas parole search waivers "allow suspicionless searches" of the parolee's residence, *id.* at 985, they usually don't provide consent to "searches of other people's houses" where a parolee is a guest, *id.* Thus, where police mistakenly search a third-party residence where a parolee is merely a visitor, the parolee's Fourth Amendment rights as a guest can justify suppression where his waived rights in his own home could not.

Though *Howard*'s extension of *Motley* was ultimately justified on the ground that search waivers don't consent to searches of other people's residences, a handful of panels extended *Howard* further to cover the offender's own residence or motel room. None explained how that extension served *Motley*'s third-party rights theory or *Howard* and *Grandberry*'s third-party homes theory. *See United States v. Mayer*, 560 F.3d 948, 957 (9th Cir. 2009) (requiring probable cause

to search a probationer's residence); *United States v. Franklin*, 603 F.3d 652, 656 (9th Cir. 2010) (requiring probable cause to search a probationer's motel room); *United States v. Cervantes*, 859 F.3d 1175, 1183 (9th Cir. 2017) (requiring probable cause to search the motel room of an offender on mandatory supervision). At most they noted that searches of motel rooms may invade the "privacy interests of third parties," *id.*, but didn't explain how offenders have standing to invoke those rights. And in each case, police had probable cause, perhaps explaining the casualness with which those panels extended *Howard* to searches of an offender's own residence. Indeed, two decades after *Motley*, the Ninth Circuit still has never ordered suppression when an offender's own residence or motel room was searched.

In sum, the decision below doesn't conflict with the Ninth Circuit's foundational precedents in this area, which, like the Eighth Circuit's decision in *Thabit*, were limited to third-party residences. To the extent the decision below conflicts with later Ninth Circuit decisions extending that court's probable-cause rule to offenders' own residences, those decisions conflict with the Ninth Circuit's rationales for adopting that rule in the first place, were barely considered, and may well be reexamined, as multiple Ninth Circuit judges have urged. And even if the conflict between the Arkansas Supreme Court and Ninth Circuit were entrenched, that conflict alone would not suffice for review. *See, e.g.*, *Walker v. Arkansas*, 144 S. Ct. 1459 (2024) (No. 23-893) (denying certiorari to review conceded Fourth Amendment split between the Ninth Circuit and Arkansas Court of Appeals).

C. Bailey also claims that three other courts have held police need probable cause to believe the place they search is the offender's residence. Pet. 8-9. But none held the Fourth Amendment requires probable cause. Two of them are non-precedential decisions that merely assumed probable cause is required, and the third only decided a state constitutional claim.

Bailey first claims the Third Circuit held probable cause was required in *United States v. Manuel*. Pet. 8-9. An unpublished decision, *Manuel* didn't hold that. Instead, the panel, finding probable cause satisfied, only agreed with the defendant that some "cases suggest that probable cause is required," 342 F. App'x 844, 848 (3d Cir. 2009), including the Ninth Circuit's decision in *Motley*. Two years later, the Third Circuit expressly declined to "decide whether probable cause is required" because police had probable cause. *United States v. Crutchfield*, 444 F. App'x 526, 528 (3d Cir. 2011). *Manuel* is thus best read to not decide the question either. In any event, its non-precedential status means, and *Crutchfield* confirms, the question remains open in the Third Circuit.

Bailey's reliance on *Brown v. State*, a non-precedential Alaska Court of Appeals case, Pet. 9, is similarly unavailing. In that case, the court simply noted that in *Motley* the Ninth Circuit had required probable cause to search a third-party residence, before holding probable cause was satisfied. No. A-8088, 2006 WL 1119019, at *6 (Alaska Ct. App. Apr. 26, 2006). The court didn't say if it agreed with *Motley* or whether *Motley*'s rule applied to an offender's own motel room. So that opinion is best read to only assume probable cause is the standard. Confirming that, the court wrote in a later opinion that "[n]o Alaska case has decided what

burden the State bears to prove that the location searched was the probationer's residence," and "assume[d] without deciding that probable cause is the applicable standard." *Brown v. State*, No. A-11308, 2015 WL 5000610, at *3 (Alaska Ct. App. Aug. 18, 2015). And its statement about Alaska law wasn't an oversight; both sides cited the earlier *Brown* decision in their briefs. The question presented remains open in Alaska, even at the intermediate level.

Finally, Bailey's reliance on the Washington Supreme Court's decision in *State v. Winterstein* (Pet. 9) is misplaced, as that case only decided a state constitutional claim. There, in a section of its opinion entitled "Search of the Residence under Article I, Section 7" that never cited the Fourth Amendment and began by discussing the warrant requirement of Article I, section 7 of the Washington Constitution, 220 P.3d 1226, 1229 (Wash. 2009) (en banc), the Washington Supreme Court required probable cause to search a probationer's residence, *id.* at 1230. It didn't decide the federal question presented here. And even if it were read to, it relied on *Motley*, as Bailey notes, Pet. 9, extending its reasoning to the inapposite context of motions to suppress evidence found in an offender's own residence. Were the Ninth Circuit to reconsider its own unreasoned precedent extending *Motley* in that fashion, *supra* at 9-10, the Washington Supreme Court might well reconsider *Winterstein*.

II. This case is an exceptionally poor vehicle to decide the question presented.

Bailey claims this case "presents a uniquely ideal vehicle" to decide whether police need probable cause to believe a place is a parolee's or probationer's

residence. Pet. 16. In fact, it's an exceptionally poor one, because the police unquestionably had probable cause to believe Bailey was staying in the motel room they searched. Bailey's only basis for claiming the standard of review is outcome-determinative is that the trial court held police lacked probable cause. But that conclusion was infected by a basic legal error: the trial court equated probable cause to believe Bailey resided in the motel room with proof that he actually did. Under the actual probable-cause standard, the police easily had probable cause, for the same reasons the Arkansas Supreme Court held they had reasonable suspicion. So a decision in Bailey's favor wouldn't affect the outcome in his case. Were this Court to hold the police needed probable cause, the Arkansas Supreme Court would hold on remand that they had it.

Below, after adopting the probable-cause standard, the trial court held the State failed to meet it because it didn't meet its "burden to show that law enforcement had proof" that Room 106 "was in fact [Bailey's] 'place of residence.'" Pet. App. 20a. But that isn't the test for probable cause. Instead, probable cause requires only "a fair probability," *Illinois v. Gates*, 462 U.S. 213, 238 (1983), or a "substantial chance," *id.* at 244 n.13, "not an actual showing," *id.* The Arkansas Supreme Court chose not to address that error, instead deciding that probable cause wasn't the applicable standard in the first place. But nothing in its opinion suggests it agreed with the trial court's misapplication of probable cause.

Under the actual probable-cause standard, the police easily had probable cause to believe Bailey was staying in Room 106. As the Arkansas Supreme Court noted in holding the police had reasonable suspicion, Pet. App. 8a, Bailey was seen entering and exiting the

room with luggage; his name was on the motel guest registry; and he had a working key to the room. The only reasonable conclusion that could be drawn from these facts is that Bailey was staying in Room 106, and courts that have addressed probable cause in these circumstances have held less evidence sufficed for probable cause. *See Franklin*, 603 F.3d at 656 (motel clerk's statement that a parolee was renting a room and parole officer's recognition of voice that answered door "overwhelmingly support[ed]" probable cause to believe parolee resided in the motel room); *United States v. Odom*, No. 22-cr-49, 2024 WL 216784, at *9 (E.D. Ark. Jan. 19, 2024) (probable cause to believe a parolee resided in a motel room when an informant claimed he was staying there, police saw him exiting the room, and police found a motel key card on his person that *didn't* open the room); *United States v. Nichols*, No. 20-cr-102, 2022 WL 17084407, at *1 (E.D. Ark. Nov. 17, 2022) (though deeming reasonable suspicion the correct standard, finding probable cause where a hotel room was occupied under a probationer's name and police saw him leaving the room).

Bailey may counter that the police lacked probable cause to believe he was residing in the motel room, rather than only temporarily staying in it.[1] But under Arkansas law, which controls the interpretation of Bailey's search waiver, a residence, unlike a domicile, needn't be permanent; a person "may have more than

[1] Bailey may also argue that the Arkansas Supreme Court wouldn't apply the probable-cause standard on remand and instead allow the trial court to reinstate its misapplication of the standard. But that would be inconsistent with that court's practice in this case, where it applied its own reasonable-suspicion standard to the facts in the first instance.

one place of residence," and "[n]o particular length of time is necessary to establish" it. *Leathers v. Warmack*, 19 S.W.3d 27, 34 (Ark. 2000). Even a two-night stay in a motel room suffices. *See Odom*, 2024 WL 216784, at *11 (applying Arkansas law); *Nichols*, 2022 WL 17084407, at *1 (finding probable cause to believe a probationer resided at an Arkansas hotel room absent any evidence of his stay's duration). So where police knew with virtual certainty that Bailey was staying in Room 106, there was at least a fair probability that his stay was long enough to count as residence. And even if that were in doubt, the police undebatably had probable cause to believe Room 106 fell under Bailey's further search waiver of "any other area or property under [his] control." Pet. App. 2a. *See Cervantes*, 859 F.3d at 1183 (probable cause to believe a hotel room to which a parolee had a key card was a "premises" under his control).

III. The question presented is not important.

Bailey claims the question presented is of "exceptional legal and practical importance for millions" of parolees and probationers and millions more "innocent third-parties" who might harbor them. Pet. 13, 14. Yet in spite of the millions of offenders subject to search waivers, by Bailey's own account only six state and federal courts—and in reality just three—have decided whether police need probable cause to believe a place falls within those waivers' terms. That's because, as Bailey admits, "standards of review are rarely dispositive." Pet. 16. And that's especially true here, where police usually know or can easily find out where a parolee or probationer resides. So in the real world, the legality of a vanishingly small number of searches will depend on the standard.

A. Bailey paints a picture of a question that controls the rights of millions of parolees and probationers against being searched "in any location that could conceivably be believed to be their residence." Pet. 14. Yet given how many people the question presented could theoretically affect, it's striking how few courts have needed to decide it. By Bailey's own account only six courts, including state courts in just three States, have decided the question, and in reality, the number is only three including one state court. *Supra* at 11-12. Just as many courts have declined to address the question, reasoning that even if probable cause were required, the government had it. *Id.* (Third Circuit and Alaska Court of Appeals); Pet. 12 (noting the Sixth Circuit has repeatedly declined to decide the question).

And even when courts have decided the question, the answer has rarely been dispositive. In the overwhelming majority of the cases that have required probable cause, including apparently every one involving a motel room, probable cause was satisfied, as it was here.[2] In fact, of all the cases Bailey cites requiring probable cause, including 15 from the Ninth Circuit, Pet. 7-8, only four have held police didn't have it. *See*

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[2] *See Cervantes*, 859 F.3d at 1183; *Franklin*, 603 F.3d at 656; *United States v. Verdugo*, 847 F. App'x 461, 462 (9th Cir. 2021); *United States v. Oneal*, 468 F. App'x 729, 730 (9th Cir. 2012); *Odom*, 2024 WL 216784, at *10-11; *United States v. Mattingly*, No. 21-cr-230, 2022 WL 1193279, at *4-5 (D. Nev. Feb. 18, 2022), *adopted*, 2022 WL 1184903 (D. Nev. Apr. 21, 2022); *United States v. Eibeck*, No. 14cr3488, 2015 WL 894655, at *4 (S.D. Cal. Feb. 25, 2015) (all finding probable cause to believe an offender resided in or had control of a motel room). The Alaska Court of Appeals' decision in *Brown*, though only assuming probable cause was required, also held police had probable cause to believe a defendant resided in a motel room. 2006 WL 1119019, at *6.

Thabit, 56 F.4th at 1152; *Grandberry*, 730 F.3d at 980; *Cuevas v. De Roco*, 531 F.3d 726, 734 (9th Cir. 2008); *Howard*, 447 F.3d at 1268. That's a total of four cases ever where the standard has been outcome-determinative. And even that overstates matters, as the government in those cases might well have lost under a reasonable-suspicion standard as well. *See Thabit*, 56 F.4th at 1148 (noting the district court held police lacked reasonable suspicion).

It isn't hard to see why this question so rarely matters: Parolees and probationers are typically required to tell their parole and probation officers where they reside and if they move. *See, e.g.*, *Mayer*, 560 F.3d at 954. So absent a violation of their parole or probation conditions, police will know where they reside. When parolees and probationers do change their residence without giving notice, their residence usually isn't difficult for police to establish, and the kinds of facts that lead police to suspect that they reside at a particular place will usually suffice for probable cause. In the reported motel room cases, for example, police don't just proceed on a hunch that an offender is staying in a particular motel room; a motel clerk says he is, Pet. App. 3a; *Franklin*, 603 F.3d at 656, or the offender admits it when police find him, *Cervantes*, 859 F.3d at 1183. In the cases involving houses or apartments, police are often informed by neighbors, relatives or the offender himself that he resides at the place police search, *see Mayer*, 560 F.3d at 957; *Motley*, 432 F.3d at 1081, or are seen coming and going from the residence, typically with a key, in a manner that strongly suggests residency, *see Howard*, 447 F.3d at 1265-66 (collecting cases). Occasionally, the police's reasons to suspect an offender resides somewhere may

fall into the delta between reasonable suspicion and probable cause. But as the vanishingly small number of cases where courts have found a lack of probable cause shows, those cases will be rare.

B. Bailey's main argument for the question presented's importance is the supposed intrastate split between the Arkansas Supreme Court and the Eighth Circuit. Pet. 14-16. But as the Arkansas Supreme Court explained and as Bailey doesn't really dispute, Pet. 10 (citing Pet. App. 6a), there is no split between those courts. The Eighth Circuit announced a rule for searches of third-party residences; the Arkansas Supreme Court announced a rule for places where third parties aren't known to reside. *Supra* at 5-6. As things stand, then, a police officer in Arkansas needs probable cause to believe a parolee or probationer resides at a third party's residence, but only reasonable suspicion if he suspects a parolee or probationer resides at his own home.

Yet even if there were a split, it wouldn't be especially problematic. Bailey says the supposed split puts Arkansas police in "an impossible position" because they can be held liable in Section 1983 suits for searches that the Arkansas Supreme Court has "authorized." Pet. 15. But nothing in the Arkansas Supreme Court's decision requires police to search on reasonable suspicion; instead, they are free to comply with the Eighth Circuit's more protective rule, as they might well do anyway to avoid close questions of reasonable suspicion. Likewise, Bailey's hypothetical of a class action to enjoin compliance with the Eighth Circuit's rule (Pet. 15 n.4) poses no difficulty for dual

compliance, though such a class action would almost certainly fail for lack of standing.[3]

Finally, the risk that federal offenses would be prosecuted as state offenses to take advantage of the Arkansas Supreme Court's marginally less protective rule, Pet. 16, is more theoretical than real—especially where there is no real conflict. Indeed, this Court recently declined to review a closely related Fourth Amendment question on which there were multiple conceded intrastate splits between state courts and federal courts of appeals, including the state court from which cert was sought. *Pennington v. West Virginia*, 143 S. Ct. 2493 (2023) (No. 22-747) (denying cert on whether police need probable cause to believe the subject of an arrest warrant lives at a home and is present there to enter it).

IV. The decision below correctly declined to require probable cause.

Bailey tellingly offers no argument on the merits that the Fourth Amendment requires probable cause in these circumstances. That is because there is no good argument that it does. Courts have explained why a third party's Fourth Amendment rights may be violated when police search her residence for an offender. And courts have explained why an offender's Fourth Amendment rights may be violated when courts search a third party's residence where he's a

[3] A plaintiff would have to allege an imminent risk that police would search places they believe to be his residence on reasonable suspicion, which would require him to allege, among other things, that police are likely not to know where his residence is, though his parole or probation conditions would require him to report that information.

guest; their search waivers may not apply to those residences. But no convincing explanation has been offered for how it could violate an offender's Fourth Amendment rights to search his own residence where he has consented to warrantless searches of it. The only hint of an explanation is that courts should require probable cause to deter searches that could "unduly imping[e]" on "the privacy interests of third parties." *Cervantes*, 859 F.3d at 1183. That explanation is a non-starter. For "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," *Alderman v. United States*, 394 U.S. 165, 174 (1969), and only "defendants whose [own] Fourth Amendment rights have been violated" can benefit from the exclusionary rule, *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). So the test for whether a kind of search violates defendants' Fourth Amendment rights can't turn on the risk that such searches may violate the rights of others.

But absent that, there is no reason to require probable cause in cases where the residence police search is in fact subject to a search waiver. This Court held in *Samson v. California* that parole search conditions "eliminate a released prisoner's reasonable expectation of privacy [such] that a suspicionless search by a law enforcement officer [does] not offend the Fourth Amendment." 547 U.S. 843, 847 (2006). Courts of appeals have unanimously held, and the question presented assumes, Pet. i (stipulating Bailey's residence was subject to warrantless search), the same is true of probation search conditions. *See United States v. Tessier*, 814 F.3d 432, 433 (6th Cir. 2016); *United States v. King*, 736 F.3d 805, 806 (9th Cir. 2013); *United States*

v. Barnett, 415 F.3d 690, 692-93 (7th Cir. 2005); *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982).[4]

Because parolees and probationers who agree to suspicionless searches of their residences have no reasonable expectation of privacy in them, the Fourth Amendment does not require probable cause to search their residences. It can't be that parolees and probationers have no expectation of privacy in their residences when they comply with their conditions of release and report where they reside, but do have an expectation of privacy in their residence so long as they conceal where their residence is.

Bailey may argue that police at least need probable cause to believe a place *is* an offender's residence. But that's not how Fourth Amendment standing works. For example, "a person present in a stolen automobile at the time of the search may not object to the lawfulness of the search of the automobile," *Byrd v. United States*, 584 U.S. 395, 409 (2018) (alteration omitted) (quoting *Rakas*, 439 U.S. at 141 n.9), because a "car thief [does] not have a reasonable expectation of privacy in a stolen car," *id.* That rule doesn't change if police lack probable cause to believe the car is stolen; indeed, the whole point of the rule is that as to the car thief, police do not need probable cause. If a person lacks a reasonable expectation of privacy in a place, it doesn't violate his rights to search that place, with or without probable cause.

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[4] The Eleventh Circuit has reached the same result after *Samson*. *See United States v. Williams*, 650 F. App'x 977, 980 (11th Cir. 2016).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIM GRIFFIN
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
DYLAN L. JACOBS
Deputy Solicitor General
ASHER L. STEINBERG
Senior Assistant
Solicitor General
CHRISTIAN HARRIS
Senior Assistant
Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street
Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@
arkansasag.gov

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