No. _____

In the Supreme Court of the United States

JUNE HARPER,

Petitioner,

v.

ARTHUR LEAHY, DANIEL KIRK, CHRISTOPHER TEHAN, CHING NIEH, *and* CITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

According to *Payton* v. *New York*, 445 U.S. 573 (1980), "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*." *Id*. at 603 (emphasis added).

The lower courts are intractably divided over the meaning of *Payton*'s "reason to believe" standard. Whereas three circuits and five state high courts have held that the standard requires only "reasonable suspicion" that the suspect is within, two circuits and two state supreme courts have held that it requires "probable cause" to believe that the suspect is within. The difference between the two standards is substantial and often determines the legality of the entry. It therefore often dictates (in criminal proceedings) the admissibility of evidence subsequently found in the home or (in civil proceedings) the plaintiff's entitlement to damages under Section 1983.

The question presented is:

Does the Fourth Amendment require police officers to have probable cause to believe that a suspect is present in a home before forcing entry into that home to execute an arrest warrant for the suspect?

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PETITION FOR A WRIT OF CERTIORARI

June Harper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-5a) and district court's opinion (App., *infra*, 6a-19a) are both unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states in relevant part that "[t]he right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

Under *Payton* v. *New York*, 445 U.S. 573 (1980), "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives" in order to execute the warrant, but only "when there is reason to believe the suspect is within." *Id*. at 603.

The lower courts are deeply divided over the meaning of *Payton*'s "reason to believe" standard. Whereas three circuits and five state high courts have held that the standard requires only "reasonable suspicion" that the suspect is within (akin to the standard applicable under *Terry* v. *Ohio*, 392 U.S. 1 (1968)), the Third and Ninth Circuits and the Supreme Courts of Pennsylvania and Washington have held that it requires "probable cause" to believe that the suspect is within. The difference between the two standards often dictates the legality of the entry.

This is such a case. The officers here had no basis for believing that petitioner's son was at home besides the fact that it was early in the morning and they heard a male voice inside the house. Even accepting that such information is enough under a relaxed "reasonable suspicion" standard, there is no question that it falls distantly short of the specific and corroborated facts necessary to satisfy probable cause.

Not only does the answer to the question presented dictate the outcome in this case, but it is a matter of great practical importance nationwide. For starters, it arises with tremendous frequency in criminal and civil cases every year. Those cases are being resolved in divergent ways as a result of the entrenched conflict among the lower courts. In addition, outstanding

arrest warrants are startlingly common, meaning that the Second Circuit's rule in this case is undermining the Fourth Amendment rights of millions of citizens in their homes. Because it presents a clean opportunity to decide the issue, the petition should be granted.

STATEMENT

A. Factual background

Petitioner June Harper's son, Kedar Harper, was suspected of committing a burglary. App., *infra*, 2a, 7a. Respondent Arthur Leahy, a New York City police detective assigned to investigate the burglary, retrieved the police department's "investigation card" for Kedar. *Ibid*. The card indicated that Kedar resided at 910 Caton Avenue, Apartment 52, in Brooklyn. *Ibid*. Detective Leahy was unable to obtain further information about Kedar's whereabouts from searches of other departmental records. App., *infra*, 7a.

Detective Leahy next searched a database containing information on outstanding arrest warrants. App., *infra*, 8a. The search indicated that there was a six-month-old bench warrant for Kedar's arrest (*ibid*.) issued in connection with Kedar's failure to appear in court for an unrelated, non-criminal citation (CA App. 10). The warrant indicated that Kedar resided at 910 Caton Avenue, without listing an apartment number. App., *infra*, 8a.

Wanting to interrogate Kedar, Detective Leahy determined that he would take Kedar into custody on the unrelated bench warrant. He and the other individual respondents knocked on the door at 910 Caton Avenue, Apartment 52, at around 7:00 a.m. App., *infra*, 2a, 8a. Harper's mother (petitioner here) answered the door. *Ibid*. She "confirmed that [Kedar] was her son and when shown the arrest warrant with his picture on it, she further confirmed that the warrant was for

[Kedar]." App., *infra*, 8a. But she told the detectives that Kedar was "not home." *Ibid*.

Detective Leahy, who testified that he had heard a male voice inside the apartment, informed petitioner that he and the other officers intended to enter the premises to search for Kedar. App., *infra*, 8a. Petitioner "expressed the view that the arrest warrant did not give the police the right to enter the apartment and started to close the door." *Ibid*. Detective Leahy forcibly stopped petitioner from closing the door and pulled her out of the apartment by her arm. *Ibid*. Petitioner attempted to prevent the detectives from handcuffing her, but they subdued her and placed her under arrest. App., *infra*, 8a-9a.

The detectives did not find Kedar in the apartment during their subsequent search.[1]

Following her arrest, petitioner was charged with assault in the second degree, assault in the third degree, obstructing governmental administration in the second degree, and resisting arrest. CA App. 15. The charge for second-degree assault was later dismissed. *Ibid*. Petitioner went to trial on the remaining charges and was acquitted. App., *infra*, 9a.

B. Procedural background

1. Petitioner filed a Section 1983 civil rights complaint against respondents, alleging various violations of her state and federal rights. As relevant to the question presented here, she claimed that the individual respondents violated her Fourth Amendment

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[1] The parties dispute whether Kedar left the apartment the night before or shortly before the detectives entered the apartment. Compare CA App. 289-291, with CA App. 194-195. Nothing in this appeal turns on the resolution of that dispute.

rights by forcibly entering her home and wrongfully arresting and assaulting her. CA App. 20-21.

2. The district court granted summary judgment to respondents. App., *infra*, 6a-19a. The court explained that the outcome of the false arrest claim turned on "[o]ne fundamental legal point" (App., *infra*, 9a): namely, that "if police officers have a reasonable belief that a person subject to an arrest warrant may be in his home, they have the right to enter to see if the suspect is there and attempt to make the arrest." *Ibid.* (citing *Payton*). The court concluded succinctly, "I do not see how any jury could find that the officers in this case lacked a reasonable belief that [(1)] plaintiff lived in the subject premises and [(2)] might be in it" at the time of the officers knocked on petitioner's front door. *Ibid.*[2]

The district court addressed each point in turn. As an initial matter, the court reasoned that Detective Leahy "had plenty of corroborative evidence to form the belief" that the address listed on Kedar's information card was, in fact, his residence. App., *infra*, 12a. On this score, the court made four observations:

> *First*, Det. Leahy had searched multiple databases to find Harper, and the address of the subject premises was the only address that came up. *Second*, [a] court had issued [a] warrant, containing the address of the subject

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[2] The lower courts "have broken the analysis of whether [an] entry [is] lawful [under *Payton*] into two conjunctive parts: (1) whether there is reason to believe that the location is the defendant's residence, and (2) whether or not there was a 'reasonable belief' that he would be home." *United States* v. *Hill*, 649 F.3d 258, 262 (4th Cir. 2011). Accord, *e.g.*, *Commonwealth* v. *Romero*, 183 A.3d 364, 391 (Pa. 2018) (citing *United States* v. *Gay*, 240 F.3d 1222, 1226 (10th Cir. 2001)).

> premises, only six months earlier. *Third*, the woman who answered the door—[petitioner]—identified herself as Harper's mother, as far from a stranger as one could get, and further identified that the warrant was for her son. This was at least circumstantial evidence that the address that was listed in the database for him was correct. *Fourth*, plaintiff specifically stated to the officers that Harper was "not at home," thus confirming that he did in fact live there.

App., *infra*, 12a-13a (emphasis added).

As to the second point—whether the officers had reason to believe that Kedar was actually within the apartment at the time they knocked at the door—the court made three additional observations: *First*, "the officers heard a male voice inside when they knocked on the door, which gave them reason to believe that Harper might be inside." App., *infra*, 13a. *Second*, "when a suspect's mother says that he is 'not at home' at 7 a.m., only the most naïve police officer would accept that statement at face value." *Ibid*. And *third*, "in any event, the Second Circuit has 'rejected the contention that the police must first conduct a thorough investigation to obtain evidence of an arrestee's actual presence before entering his residence.'" *Ibid*. (quoting *United States* v. *Terry*, 702 F.2d 299, 319 (2d Cir. 1983)).

On this basis, the district court concluded that the officers satisfied the *Payton* test, and thus petitioner's Fourth Amendment claim "collapses." App., *infra*, 13a. The court thus entered summary judgment on petition-

er's federal constitutional claims. App., *infra*, 19a.[3]

3. The court of appeals affirmed. App., *infra*, 1a-5a. The court began by reciting the *Payton* test and describing the degree of suspicion necessary to satisfy the test. App., *infra*, 2a-3a. For this point, the court relied principally on its prior decision in *United States* v. *Bohannon*, 824 F.3d 242 (2d Cir. 2016).

In *Bohannon* (App., *infra*, 20a-49a), the lower court "note[d] a circuit split as to the showing necessary to satisfy *Payton*'s 'reason to believe' standard, with some courts equating reason to believe to probable cause and others holding that reason to believe is a lesser standard." App., *infra*, 40a. The court reaffirmed its position that *Payton* "does not demand probable cause." App., *infra*, 41a. Instead likening *Payton*'s reason-to-believe standard to the articulable-suspicion standard under *Terry* v. *Ohio*, 392 U.S. 1 (1968), the court held that entry into a suspect's home to execute an arrest warrant "requires more than a hunch as to presence, but less than a probability." App., *infra*, 43a.

"To satisfy this not particularly high standard," the Second Circuit explained in this case, "the officers need only 'have a basis for a reasonable belief as to the operative facts, not that they acquire all available information or that those facts exist.'" App., *infra*, 3a (quoting *United States* v. *Lovelock*, 170 F.3d 339, 344 (2d Cir. 1999)). In other words, officers need not "first conduct a thorough investigation to obtain evidence of an arrestee's actual presence before entering his residence." *Ibid*. (quoting *United States* v. *Terry*, 702 F.2d 299, 319 (2d Cir. 1983)).

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[3] The court granted judgment on petitioner's state law claims as well. App., *infra*, 18a. Those claims are not implicated here.

Applying that standard here, and emphasizing again that it "is not a particularly high [one]" (App., *infra*, 4a (quoting *Bohannon* (App., *infra*, 43a))), the court of appeals concluded that "the undisputed facts in the record provided the officers with reason to believe that Kedar would be present at the Apartment at the time of the attempted arrest" (App., *infra*, 3a).

REASONS FOR GRANTING THE PETITION

This case squarely presents a frequently recurring question of Fourth Amendment law concerning officers' intrusion into a private residence, a place "entitled to special protection as the center of the private lives of our people." *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006) (quoting *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)). The question is whether the Fourth Amendment requires police officers to have probable cause to believe that a suspect is present in a home before forcing entry into that home to execute a warrant for the suspect's arrest.

Two circuits and two state supreme courts require probable cause to believe the suspect is within. But three other circuits and five other state high courts (including the Second Circuit) have held that officers with an arrest warrant may enter a home based on no more than the suspicion required for a *Terry* stop. That is so, according to these courts, even when the warrant is for mere failure to appear in court to answer a civil citation, as in this case. On that basis alone, the court of appeals affirmed the district court's grant of summary judgment to respondents in this case.

The four-to-eight split among the lower courts is producing conflicting outcomes despite indistinguishable factual circumstances. Today, the answer to the question whether officers must have probable cause to believe the suspect is within before entering a home to

execute an arrest warrant depends on where the entry takes place—in Philadelphia and San Francisco, probable cause is required; in New York City and Washington, D.C., it is not.

This is a matter of enormous practical concern. The issue arises frequently and is often outcome-determinative. In those jurisdictions where courts have rejected the probable cause requirement, moreover, citizens' homes are now subject to unchecked intrusion by the police any time officers believe that a suspect might be at home and the suspect has a bench warrant for an unpaid parking ticket. Because the issue is both important and cleanly presented here, further review is warranted.

A. The lower courts are intractably divided over the question presented

There is an acknowledged "circuit split" over the question presented. App., *infra*, 40a. As the Tenth Circuit recently explained, some courts "have read *Payton* to require something less than probable cause," whereas other courts "have held that *Payton*'s 'reason to believe' standard 'embodies the same standard of reasonableness inherent in probable cause.'" *United States* v. *Denson*, 775 F.3d 1214, 1216-1217 (10th Cir. 2014). According to the Pennsylvania Supreme Court, "[t]his question long has divided the federal courts," and "the United States Supreme Court has not had occasion to revisit this important constitutional issue." *Commonwealth* v. *Romero*, 183 A.3d 364, 371, 392 (Pa. 2018).

Other courts have likewise acknowledged the split. See, *e.g.*, *United States* v. *Exum*, 657 F. App'x 153, 155 (4th Cir. 2016) ("[C]ourts disagree as to whether *Payton*'s 'reason to believe' standard requires a showing of probable cause or something less."); *Barrett* v.

Commonwealth, 470 S.W.3d 337, 341 (Ky. 2015) ("courts are split"); *United States* v. *Hill*, 649 F.3d 258, 262-263 (4th Cir. 2011) ("[C]ircuits have employed a variety of approaches in defining reasonable belief."); *United States* v. *Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) ("circuits disagree").

The reason for the confusion is well understood: "The 'reason to believe' standard was not defined in *Payton*, and since *Payton*, neither the Supreme Court, nor the courts of appeals have provided much illumination." *State* v. *Hatchie*, 166 P.3d 698, 706 (Wash. 2007) (quoting *United States* v. *Magluta*, 44 F.3d 1530, 1534 (11th Cir. 1995)). The Court should resolve the confusion over this important question.

1. Four courts hold that Payton *requires probable cause*

Two federal courts of appeals and two state high courts have held that *Payton*'s "reason to believe" standard is synonymous with probable cause.

According to the **Third Circuit** in *United States* v. *Vasquez-Algarin*, 821 F.3d 467 (3d Cir. 2016), "[t]he vaunted place of the home in our constitutional privacy jurisprudence was central to the Supreme Court's analysis in *Payton*." *Id*. at 479. Given the weighty "constitutional principles at stake," the court concluded, "law enforcement armed with only an arrest warrant may not force entry into a home based on anything less than probable cause to believe an arrestee resides at and is then present within the residence." *Id.* at 480. "A laxer standard" would "render all private homes—the most sacred of Fourth Amendment spaces—susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination." *Ibid.* On that ground, the

Third Circuit reversed the district court's denial of the defendant's motion to suppress. *Id.* at 484.

Before that, the **Ninth Circuit** had adopted the probable cause standard in *United States* v. *Gorman*, 314 F.3d 1105 (9th Cir. 2002): "We * * * hold that the 'reason to believe,' or reasonable belief, standard of *Payton* * * * embodies the same standard of reasonableness inherent in probable cause." *Id.* at 1111. In coming to that conclusion, the Ninth Circuit noted that "the 'reason to believe' standard is far from clear" because this Court "did not define the 'reason to believe' standard in *Payton* [and has not] defined the standard subsequently." *Id.* at 1112. At the same time, according to the Ninth Circuit, "[t]he phrase 'reasonable grounds to believe,'" which had appeared in its earlier decisions interpreting *Payton*, "is often synonymous with probable cause." *Id.* at 1114. The court thus rejected the government's contention that "the 'reason to believe,' or reasonable belief, standard is akin to 'reasonable suspicion'" under the *Terry* framework, concluding instead that the *Payton* standard "should be read to entail the same protection and reasonableness inherent in probable cause." *Id.* at 1111, 1115.

Because the district court in *Gorman* had "equated the 'reason to believe' standard * * * with 'reasonable suspicion' instead of probable cause," the Ninth Circuit reversed the denial of the defendant's motion to suppress. 314 F.3d at 1115-1116.

The **Supreme Court of Washington** likewise has held that, under *Payton*, "'probable cause' is the minimum standard for determining when an officer has reason to believe a place to be entered is the suspect's residence." *Hatchie*, 166 P.3d at 706 (acknowledging the conflict among the federal circuits). Lest there be

any doubt, the court added that "[p]robable cause requires more than [mere] suspicion." *Ibid.*

Most recently, the **Supreme Court of Pennsylvania** "agree[d] with the *Vasquez-Algarin* court's reasoning, and similarly conclude[d] that the authority contemplated by [*Payton*] cannot operate upon anything less than probable cause." *Romero*, 183 A.3d at 394. The outcome in *Romero* turned principally on the first prong of the *Payton* test: "how it is to be determined that the home is that of the intended arrestee." 183 A.3d at 371. The answer mattered in that case because if a suspect is a mere guest in a third party's home, police must have a separate search warrant for the suspect in the residence under *Steagald* v. *United States*, 451 U.S. 204 (1981).

To resolve the apparent tension between *Payton* and *Steagald*, the *Romero* court went a step further than the Third and Ninth Circuits and Washington Supreme Court, holding that "the Fourth Amendment requires that, even when seeking to execute an arrest warrant, a law enforcement entry into a home must be authorized by a warrant reflecting a magisterial determination of probable cause to search that home." 183 A.3d at 405-406.

Against this background, there is no question that if petitioner had brought her Fourth Amendment claim in the Third or Ninth Circuits or in the state courts of Washington or Pennsylvania, the forced entry into her home would have been held unconstitutional.

2. Eight courts hold that **Payton** *requires mere suspicion*

Other courts have sided with the **Second Circuit** and its decision in *Bohannon*.

In *Valdez* v. *McPheters*, 172 F.3d 1220 (10th Cir. 1999), the **Tenth Circuit** criticized the dissenting

judge for applying "a standard much closer to probable cause than reasonable belief," explaining that probable cause "is a higher standard than reasonable belief, which is * * * the appropriate standard" under *Payton*. *Id.* at 1227 n.5 (quotation marks omitted).

Similarly, the **D.C. Circuit** held in *United States* v. *Thomas*, 429 F.3d 282 (D.C. Cir. 2005), that "an officer executing an arrest warrant may enter a dwelling if he has only a 'reasonable belief,' falling short of probable cause to believe, the suspect lives there and is present at the time." *Id.* at 286. The court dismissed the notion that reason to believe equates to probable cause, opining pithily: "We think it more likely * * * that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'" *Ibid.*

The state courts of last resort in **Kentucky, Massachusetts, Indiana, the District of Columbia, and Colorado** have likewise held that *Payton*'s standard demands less than probable cause. See *Barrett* v. *Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015) ("reject[ing] the probable cause standard" under *Payton*); *Commonwealth* v. *Gentile*, 2 N.E.3d 873, 875 (Mass. 2014) ("[T]he 'reasonable belief' standard [under *Payton*] is 'less exacting than probable cause.'"); *Duran* v. *State*, 930 N.E.2d 10, 16 (Ind. 2010) ("*Payton* requires a lower degree of confirmation than probable cause."); *Brown* v. *United States*, 932 A.2d 521, 529 (D.C. 2007) (similar); *People* v. *Aarness*, 150 P.3d 1271, 1276 (Colo. 2006) (similar). Each of these courts would have reached the same conclusion as the Second Circuit in this case.

This is a mature split that has persisted despite open recognition of the disagreement and repeated opportunities for the courts to consider the reasoning

adopted by their peers. Only this Court can resolve the disagreement among the lower courts.

3. Two circuits are internally conflicted on the question presented

Further evidencing the confusion among the lower courts, two circuits are internally conflicted over the meaning of the *Payton* standard.

In *United States* v. *Pruitt*, 458 F.3d 477 (6th Cir. 2006), the **Sixth Circuit** agreed with the parties that "a circuit-split does exist" and—expressly rejecting the Ninth Circuit's decision in *Gorman*—held that "a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant." *Id*. at 482. But two years later, the same court indicated in *United States* v. *Hardin*, 539 F.3d 404 (6th Cir. 2008), that "probable cause is the correct standard" because "'reason to believe' is a functional equivalent of probable cause." *Id*. at 416 n.6. Faced with these conflicting decisions, district courts within the Sixth Circuit have applied *Pruitt* and *Hardin* with differing results.[4]

The same is true in the **Fifth Circuit**, which held in *United States* v. *Route*, 104 F.3d 59 (5th Cir. 1997), that *Payton*'s reason-to-believe standard is "distinct from the 'probable cause' standard" and, in doing so, purported to "adopt * * * the 'reasonable belief' standard of the Second [Circuit]" and other courts. *Id*. at 62. Yet some nine years later (and relying on many of the same cases), the court explained that, although

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[4] Compare, *e.g.*, *United States* v. *Jett*, 2009 WL 4043350, at *4 & n.4 (N.D. Ohio 2009) (citing *Pruitt* and applying "reasonable belief" standard as distinct from the probable cause standard), with, *e.g.*, *United States* v. *Wix*, 2012 WL 2160562, at *6 (W.D. Ky. 2012) (citing *Hardin* and applying probable cause standard).

Payton does not require "an additional trip to the magistrate," "reasonable belief embodies the same standards of reasonableness as probable cause." *United States* v. *Barrera*, 464 F.3d 496, 501 (5th Cir. 2006) (brackets omitted) (quoting *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977)). As in the Sixth Circuit, district courts within the Fifth Circuit have applied the conflicting holdings of *Route* and *Barrera* differently in different cases.[5]

In light of this conflict, criminal defendants whose suppression motions implicate the question presented are receiving divergent results based on the luck or misfortune of geography. Section 1983 plaintiffs (like petitioner here) whose claims turn on the question presented are likewise being granted or denied relief based on the luck of the draw. This is no way to administer the Fourth Amendment.

B. The question presented is important

The question presented reflects deep disagreement concerning a factual scenario that recurs frequently. The conflict is therefore producing substantial disparity in how officers are executing arrest warrants and how the courts are administering the protections of the Fourth Amendment.

1. The question presented arises frequently. No fewer than fourteen federal circuits and state high courts have conclusively ruled on whether *Payton*'s standard requires probable cause or a lesser degree of suspicion (see *supra*, pp. 9-15), and numerous others

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[5] Compare, *e.g.*, *United States* v. *Harris*, 2015 WL 4973585, at *2 (M.D. La. 2015) (citing *Route* and applying a lesser standard "distinct from the probable cause standard"), with, *e.g.*, *United States* v. *Valenzuela*, 716 F. Supp. 2d 494, 501 (S.D. Tex. 2007) (citing *Barrera* and applying "probable cause" standard).

have either confronted the question without deciding it or addressed it in dictum.[6]

And a simple (and likely underinclusive) search of lower federal and state court opinions from 2015 alone indicates that the question presented arises in dozens of trial court cases every year.[7]

2. Not only does the question presented arise in many cases every year, but the common occurrence of outstanding arrest warrants means that it is undermining countless citizens' Fourth Amendment protections in their homes.

A staggering number of Americans have outstanding bench warrants issued for failure to appear in court

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[6] See, *e.g.*, *Evans* v. *State*, 454 S.W.3d 744, 747-748 (Ark. 2015); *State* v. *Schmidt*, 864 N.W.2d 265, 268 (N.D. 2015); *United States* v. *Hill*, 649 F.3d 258, 263 (4th Cir. 2011); *United States* v. *Jackson*, 576 F.3d 465, 469 (7th Cir. 2009); *United States* v. *Weems*, 322 F.3d 18, 22-23 & n.3 (1st Cir. 2003); *United States* v. *Magluta*, 44 F.3d 1530, 1534-1535 (11th Cir. 1995). See also *United States* v. *Clifford*, 664 F.2d 1090, 1093 (8th Cir. 1981) (stating in dictum that "*Payton* authorizes entry on the basis of the existing arrest warrant for the defendant and probable cause to believe that the defendant was within the premises").

[7] See, *e.g.*, *Brand* v. *Casal*, 2015 WL 9304036, at *9 (N.D. Ga. 2015); *Collins* v. *State*, 462 S.W.3d 617, 622 (Tex. App. 2015); *State* v. *Owens*, 2015 WL 7939623, at *3 (Minn. Ct. App. 2015); *United States* v. *Richardson*, 2015 WL 10002169, at *6 (M.D. Fla. 2015); *United States* v. *Washington*, 2015 WL 10490548, at *4 (W.D. La. 2015), adopted by 2016 WL 1071109 (W.D. La. 2016); *United States* v. *Harris*, 2015 WL 4973585, at *4 (M.D. La. 2015); *United States* v. *Scott*, 2015 WL 4478518, at *3 (D. Kan. 2015); *United States* v. *Bowen*, 2015 WL 3460530, at *7 (W.D. Mo. 2015); *United States* v. *Scott*, 2015 WL 2083212, at *3 (D. Conn. 2015); *United States* v. *Stewart*, 102 F. Supp. 3d 392, 398-399 (D.R.I. 2015); *United States* v. *Pitts*, 2015 WL 619611, at *7 (E.D. Pa. 2015); *Verdine* v. *State*, 2015 WL 6121370, at *2-*3 (Tex. App. 2015).

for minor civil citations. In New York City, within the Second Circuit, for example, "nearly one in seven residents," or 1.2 million people in total, "have open arrest warrants." Allegra Kirkland, *How 1.2 million New Yorkers ended up with arrest warrants*, Business Insider (Aug. 4, 2015), perma.cc/C2CN-TPVZ. "Many of them have no idea that these warrants exist, and many of the warrants themselves date back years, even decades," and "[t]he vast majority of warrants occur when people who receive summons for minor violations, such as riding a bike on the sidewalk or drinking a beer in public, fail to appear in court." *Ibid*.

New York is no outlier: "In Cincinnati, * * * the ratio of outstanding warrants to residents is about one-to-three; in Baltimore, it is one-to-twelve. In all of Massachusetts, the ratio is about one-to-eight." Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177, 183 n.29 (2008). As in New York, "[t]he great majority of [these] outstanding warrants are issued for trivial offenses, particularly the failure to appear in traffic court." *Id*. at 181 n.22.

According to the Second Circuit's ruling in this case, police are free to enter these people's homes without probable cause to believe that they are actually at home—all for the purpose of executing an arrest warrant for a minor civil offense that is entirely unrelated to the officers' true investigative goals. As the Third Circuit recognized, that conclusion "render[s] all private homes—the most sacred of Fourth Amendment spaces—susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination." *Vasquez-Algarin*, 821 F.3d at 480. It is imperative that the Court address this "important constitutional issue," which concerns a "principle[] that stand[s] at the very heart of the

Fourth Amendment: the essential protection of the privacy in one's home." *Romero*, 183 A.3d at 371.

C. The selection of a standard under *Payton* is often outcome-determinative, as it was in this case

1. The selection of a standard under *Payton* (reasonable suspicion or probable cause) is very often outcome-determinative.

Courts that apply the reasonable suspicion standard, like the Second Circuit below, often liken it to the "articulable suspicion" standard under *Terry* v. *Ohio*, 392 U.S. 1 (1968)—the standard necessary for making an investigative stop. In *Bohannon*, for example, the Second Circuit explained that "reasonable suspicion" is "a concept generally associated with investigative stops." App., *infra*, 42a. Accord U.S. Br. at 23 n.8, *United States* v. *Bohannon*, CA2 No. 14-4679, 2015 WL 1606889 (Apr. 1, 2015) ("the two standards are synonymous"). Expressly "borrow[ing] from reasonable-suspicion precedent[s]" under *Terry*, the court thus held that *Payton* requires only a "reasonable basis for the police to believe defendant *might* be within." App., *infra*, 43a (quoting *United States* v. *Spencer*, 684 F.2d 220, 223 (2d Cir. 1982)). This standard entails a "lesser showing" and "less justification" than probable cause, which requires that "'the totality of circumstances indicates a '*fair probability* that the thing to be seized will be found in a particular place.'" App., *infra*, 40a, 42a (quoting *Walczyk* v. *Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (brackets omitted)). Accord *Illinois* v. *Gates*, 462 U.S. 213, 235 (1983) ("probability * * * is the standard of probable cause").

As other courts have recognized, "[t]he reasonable belief standard is not very demanding, and certainly less demanding than probable cause." *Gentile*, 2 N.E.3d

at 884. Or, stated inversely, "[p]robable cause requires more than [mere] suspicion." *Hatchie*, 166 P.3d at 706. Accord, *e.g.*, *Barrett*, 470 S.W.3d at 342-343 (finding that *Payton*'s reason-to-believe standard is a "lesser standard" and "less exacting" than probable cause).

There is therefore no denying that the distinction between the two standards—a distinction that is the foundation of the Court's *Terry* jurisprudence—has a real and practical impact on case outcomes:

> Reasonable suspicion is a less demanding standard than probable cause[,] not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. *White*, 496 U.S. 325, 330 (1990).

2. The choice between the two standards made a difference the the outcome in this case. To support its conclusion that the officers had a reasonable suspicion that Kedar was within his residence at the relevant time, the court made just two factual observations: "the officers heard a male voice inside when they knocked on the door," and "when a suspect's mother says that he is 'not at home' at 7 a.m., only the most naïve police officer would accept that statement at face value." App., *infra*, 13a. These facts were sufficient, according to the district court, because under the reasonable suspicion standard, "the Second Circuit has 'rejected the contention that the police must first conduct a thorough investigation to obtain evidence of an arrestee's actual presence before entering his res-

idence.'" *Ibid.* (quoting *United States* v. *Terry*, 702 F.2d 299, 319 (2d Cir. 1983)).

A showing of probable cause—a conclusion that Kedar was *probably*, not just *possibly*, in petitioner's apartment—would have required far more concrete evidence than the facts presented to the officers at the time they knocked on petitioner's door. A reliable tip from a confidential informant confirming that Kedar had entered the apartment the night before, together with surveillance confirming that he had not yet left, would have been adequate. See, *e.g.*, *Jackson*, 576 F.3d at 469 (probable cause satisfied when police received an anonymous tip that the defendant was residing in a third party's apartment, and upon the arrival of police, the defendant's girlfriend confirmed that he was inside). But the belief that the apartment was Kedar's residence, coupled with the mere fact that the officers heard a male voice inside, was manifestly insufficient for probable cause to believe that Kedar was present in the apartment that morning. The district court itself suggested as much, explaining that the facts known to the officers gave them only "reason to believe that [Kedar] *might* be inside" (App., *infra*, 13a (emphasis)), not that he *probably* was.

There is therefore no doubting that if petitioner's claim had arisen in the Third or Ninth Circuits or the state courts of Pennsylvania or Washington, the lower courts would not have upheld the officers' forced entry into petitioner's home.

3. In urging further review here, we are mindful that the Court recently denied certiorari in *Bohannon*. But as the United States explained in its brief in opposition in that case, *Bohannon* was an interlocutory appeal from a denial of a motion to suppress, and this Court disfavors interlocutory review. U.S. BIO 8-9,

Bohannon v. *United States*, No. 16-449 (Dec. 5, 2016). Interlocutory review would have been particularly problematic in *Bohannon* because the defendant there faced criminal charges not affected by the Fourth Amendment question, meaning that the Fourth Amendment issue may not have affected his sentence. *Id.* at 9. Beyond that, the facts supporting the officers' belief that the suspect was within were detailed and concrete, including observations from multi-pronged surveillance and cell tower data. *Id.* at 2-3. The United States thus argued that the facts known to the officers were adequate even under the probable cause standard. *Id.* at 14.

None of those complications is present here. This is an appeal from a final judgment. Petitioner refused consent for the officers to enter her home, and the officers had no other justification for forcing entry. Nor is there any conceivable basis for holding that respondents had probable cause to believe Kedar was within the apartment that morning; the facts here are as thin as they come. That is why the Second Circuit felt compelled to emphasize twice (App., *infra*, 3a, 4a) that its precedents do not establish a "particularly high standard" of suspicion under *Payton*.

This case thus cleanly presents the *Payton* issue. As the district court put it, the case turns on this "[o]ne fundamental legal point." App., *infra*, 9a. The *Payton* issue drove the district court's and the court of appeals' analysis, furnishing the sole basis for granting judgment to respondents on petitioner's federal constitutional claims. Petitioner would have obtained a different result in the Third or Ninth Circuits or the state courts of Pennsylvania or Washington.

D. Police must have probable cause before entering a third party's home to execute an arrest warrant

The clean presentation of an important question of Fourth Amendment law over which the lower courts are deeply and openly divided is reason enough to grant the petition. Review is all the more warranted because the Second Circuit's position is wrong.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). It has been so "since the origins of the Republic." *Payton*, 445 U.S. at 601. Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id*. at 585-586 (quoting *United States* v. *United States Dist. Court*, 407 U.S. 297, 313 (1972)). It is therefore the most basic and fundamental principle of Fourth Amendment law "that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (quoting *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004)).

To be sure, after *Payton*, "police can enter a dwelling for the purpose of executing an arrest warrant." *Gorman*, 314 F.3d at 1111. But that "does not mean that officers armed with a warrant can enter a private home at any time or for any reason." *Ibid*. "Quite the contrary," officers must have "*reason to believe* the suspect is within." *Ibid*. (emphasis added).

The Court's selection of words—*reason to believe*—is meaningful. At the time that *Payton* was decided, courts had routinely "come to equate the reasonableness inherent in 'reason to believe' with the reasonableness inherent in probable cause." *Gorman*, 314 F.3d at 1114. Accord *United States* v. *Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) ("[T]he Supreme Court

tends to use phrases like 'reasonable grounds for belief' as 'grammatical analogue[s]' for probable cause.") (quoting *Pruitt*, 458 F.3d at 490 (Clay, J., concurring)). As this Court stated in *Maryland* v. *Pringle*, 540 U.S. 366 (2003), for example, "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Id*. at 371 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949)).

Thus, in *Maryland* v. *Buie*, 494 U.S. 325 (1990), this Court—when considering whether officers executing a home arrest pursuant to *Payton* could also perform a protective sweep of the residence—explained that "[p]ossessing an arrest warrant *and probable cause to believe Buie was in his home* * * * entitled [the officers] to enter and to search anywhere in the house in which Buie might be found." *Id*. at 332-333 (emphasis added). If the Court had "intended the 'reason to believe' language in *Payton* to set forth a new, lesser standard, surely [it] would have explained that the officers were entitled to be inside Buie's residence on the basis of an arrest warrant and a 'reasonable belief' as to Buie's presence," rather than "probable cause." *Vasquez-Algarin*, 821 F.3d at 475.

The D.C. Circuit ignored all of that when it hastily surmised that "*Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'" *Thomas*, 429 F.3d at 286.

"A contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching [a] home * * * for the subject of an arrest warrant" and also for plain-view evidence to support a case against the suspect—"would create a significant potential for abuse." *Steagald*, 451 U.S. at 215. "Armed solely with an arrest warrant," officers "could search

all the homes of that individual's friends and acquaintances" looking for evidence to support their case. *Ibid.* Such an approach would convert arrest warrants into writs of assistance—one of the prime evils against which the Fourth Amendment was directed. See *ibid.* That is an especially troubling prospect in modern society, where outstanding arrest warrants are surprisingly common.

There is, at bottom, no justification for allowing entry into a home based on the mere *chance* that the subject of an arrest warrant is within. The probable-cause standard—which has as long and distinguished a pedigree as the Fourth Amendment itself—better protects the public in their homes, which lie at the "[Fourth] Amendment's 'very core.'" *Jardines*, 569 U.S. at 6. Those courts that have departed from the probable cause standard in this context have done so without satisfactory explanation, based on a misreading of *Payton*. This Court should correct those courts and, in doing so, establish uniformity on this important question of constitutional law.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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