No. 18-339

In the Supreme Court of the United States

JUNE HARPER, PETITIONER

v.

ARTHUR LEAHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK, CONNECTICUT, DISTRICT OF COLUMBIA, AND OKLAHOMA ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The New York State Association of Criminal Defense Lawyers, Connecticut Criminal Defense Lawyers Association, District of Columbia Association of Criminal Defense Lawyers, and Oklahoma Criminal Defense Lawyers Association[*] are chapters of the National Association of

[*] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to 37.2, counsel of record for all parties received notice of amici's intent to file this brief at least ten days before the due date. The parties have consented to the filing of this brief.

Criminal Defense Lawyers. Each is composed of several hundred members and serves as the only statewide (or districtwide) organizations for criminal defense lawyers in their respective jurisdictions. Collectively, amici's members have represented thousands of defendants accused of crimes.

Amici have an interest in ensuring that arrest warrants are executed in a manner consistent with the rights granted by the Fourth Amendment and applied to the states through the Fourteenth Amendment. New York, Connecticut, the District of Columbia,[1] and Oklahoma are within federal circuits that have not adopted probable cause as the standard for "reason to believe" under *Payton* v. *New York*, 445 U.S. 573 (1980). See *United States* v. *Bohannon*, 824 F.3d 242 (2d Cir. 2016); *United States* v. *Thomas*, 429 F.3d 282 (D.C. Cir. 2005); *Valdez* v. *McPheters*, 172 F.3d 1220 (10th Cir. 1999). The individuals represented by amici accordingly are subjected to a lower standard of Fourth Amendment protection than individuals in other states. And, as a result, innocent third parties with relationships with those individuals are subjected to greater intrusions on the privacy interests they hold in their homes.

[1] The District of Columbia Court of Appeals also applies the same standard as the D.C. Circuit. See *Brown* v. *United States*, 932 A.2d 521, 529 (D.C. 2007).

SUMMARY OF ARGUMENT

As the petition for certiorari explains, the decision below continues an express conflict among the courts of appeals and state courts of last resort. The courts are divided about an issue that is implicated every time police seek to execute an arrest warrant in a residence: namely, how strong must the evidence be tying the subject of the arrest warrant to the residence in order to justify executing the warrant at a residence, a space that is "sacred" in Fourth Amendment jurisprudence? *Segura* v. *United States*, 468 U.S. 796, 810 (1984). Not only does this legal question arise frequently, but it is important to the everyday administration of criminal justice in this country. A common answer should be provided to give clarity to the courts, law enforcement, and the accused.

The people most affected by this question, however, are the innocent third parties whose privacy interests are invaded whenever an arrest warrant for someone else is executed in their homes, either because law enforcement suspects the subject of an arrest warrant lives there or may only be temporarily at the residence. Review of the decisions that comprise the split in authority on this issue reveals that the execution of arrest warrants frequently intrudes on the privacy interests of third party residents. And both anecdotal and objective evidence shows how intrusive, traumatic, and embarrassing the execution of arrest warrants can be for these third parties.

To be sure, intrusions on the privacy of the home are part of our system of criminal justice, and they are usually justified because law enforcement has procured a search warrant for the premises that is supported by probable cause. See, *e.g.*, *Steagald* v. *United States*, 451 U.S. 204, 212 (1981) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed

without a warrant."). "A search warrant * * * safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Id.* at 213.

In many cases, however, law enforcement officers execute arrest warrants in residences without search warrants for the premises. In those circumstances, there has not been a determination by a neutral judicial officer that there has been "a showing of probable cause to believe that the legitimate object of a search is located in a particular place." *Ibid.* The least that can be done to safeguard the privacy interests of third parties in that circumstance is to require law enforcement to have "probable cause to believe that the legitimate object" of the warrant — the subject individual named in the arrest warrant — "is located in" the residence where the arrest warrant was executed. *Ibid.* Otherwise, arrest warrants in some jurisdictions will continue to "embody [a] derivative authority to deprive [the third party] of his interest in the privacy of his home" — an authority this Court has held arrest warrants do not possess. *Id.* at 214 n.7.

ARGUMENT

A. The Decision Below Contributes To A Conflict Among The Courts of Appeals And State Courts Of Last Resort

As the petition for certiorari makes clear, the lower courts are divided on the question presented. "Some * * * have read *Payton* to require something less than probable cause." *United States v. Denson*, 775 F.3d 1214, 1216-1217 (10th Cir. 2014). Meanwhile, "other circuits have held that *Payton*'s 'reason to believe' standard 'embodies the same standard of reasonableness inherent in probable cause.'" *Ibid.* In short, "[t]he circuits disagree." *Ibid.*

The Third Circuit, Ninth Circuit, and the highest courts of the state of Pennsylvania and Washington take the position that "reason to believe" requires at a minimum probable cause. Pet. at 10-12; *United States* v. *Vasquez-Algarin*, 821 F.3d 467, 480 (3d Cir. 2016); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002); *Commonwealth* v. *Romero*, 183 A.3d 364, 394-395 (Pa. 2018); *State* v. *Hatchie*, 166 P.3d 698, 706 (Wash. 2007).

In contrast, other courts require something less than probable cause to satisfy *Payton*'s "reason to believe." This less exacting standard applies in the Second Circuit, Tenth Circuit, D.C. Circuit, Pet. at 12-13; *Bohannon*, 824 F.3d at 255; *Valdez*, 172 F.3d at 1227 n.5; *Thomas*, 429 F.3d at 286, as well as the highest courts of the states of Kentucky, Massachusetts, Indiana, and the District of Columbia, Pet. at 13; *Barrett* v. *Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015); *Commonwealth* v. *Gentile*, 2 N.E.3d 873, 875 (Mass. 2014); *Duran* v. *State*, 930 N.E.2d 10, 16 (Ind. 2010); *Brown*, 932 A.2d at 529.

Meanwhile, the Sixth Circuit and Fifth Circuit appear internally conflicted on what is required to satisfy *Payton*'s "reason to believe standard." Pet. at 14-15; compare *United States* v. *Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006), with *United States* v. *Hardin*, 539 F.3d 404, 416 n.6 (6th Cir. 2008); compare *United States* v. *Route*, 104 F.3d 59, 62 (5th Cir. 1997), with *United States* v. *Barrera*, 464 F.3d 496, 501 (5th Cir. 2006).

The import of this conflict is significant. The protections afforded by the Fourth Amendment should not vary based on the happenstance of geography.

B. Resolution Of The Question Presented Is Essential To The Fair Administration Of Justice

1. It is hard to overstate the significance of the question presented. Whether police officers have sufficient

"reason to believe" the subject of an arrest warrant is present at a residence under *Payton*, 445 U.S. at 603, is often a subject of litigation. The issue has arisen in at least the fourteen reported decisions comprising the conflict between and within the courts of appeals and state courts of last resort. See Pet. 9-15. Indeed, when one includes the courts of appeals that have acknowledged the question without deciding the issue conclusively, *every* federal court of appeals has confronted the issue. See Pet. 16 n.6.

Published appellate decisions, of course, represent only a small fraction of the instances in which the matter arises in litigation. A commercial database search revealed twelve decisions in 2015 in which the question presented arose. Pet. at 16 n.7. And such a search sets only the floor of the number of times an issue is litigated, as commercial databases do not collect all written decisions and cannot capture oral decisions made from the bench.

Fundamentally, however, caselaw presents just the tip of an iceberg. It will not infrequently occur that law enforcement will lack probable cause for tying the subject to a particular residence, but the execution of the warrant will not result in litigation. Those circumstances could arise because the subject of the warrant is not found in the residence, charges are never brought against the subject of the warrant, a plea bargain is reached, or no relevant evidence is found at the residence.[2]

The executions of warrants in these instances can occur peacefully and without the kind of violent altercation that happened in the execution of the arrest warrant in

[2] To be sure, there are other instances in which the issue presented will not arise in the execution of an arrest warrant at a residence because law enforcement will have ample cause to believe a suspect is at a particular residence. Investigators may have observed the subject entering and exiting the residence on numerous occasions or may have obtained government records indicating the subject's residence.

this case. But in all such cases — whether an arrest results or innocent individuals feel sufficiently aggrieved to seek legal redress — the privacy rights of individual citizens with no relationship to criminal wrongdoing have been sacrificed unnecessarily.

In all events, the question presented is confronted by law enforcement officers anytime they execute an arrest warrant in someone's residence. Each time, they must ask what support they have for the inference that the subject is at the residence. There can be no doubt that the execution of arrest warrants at a residence is an everyday occurrence, even though locating reliable statistics regarding the frequency with which arrest warrants are executed at residences has proven daunting.[3] And the notion that the answer depends on the jurisdiction in which the question is being asked is intolerable to the everyday administration of criminal justice.

2. This discrepancy is especially intolerable when one considers the frequency with which the execution of arrest warrants in residences disrupts the lives of innocent third parties. As one would expect, questions regarding whether law enforcement had sufficient information tying the subject of a warrant to a residence are most likely to

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[3] The alarming lack of statistics kept regarding police interactions with citizens has been described as both "embarrassing and ridiculous." Aaron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings "Ridiculous," "Embarrassing"*, Wash. Post (Oct. 7, 2015) (then-FBI Director James Comey further stating "It is unacceptable that *The Washington Post* and the *Guardian* newspaper from the U.K. are becoming the lead source of information about violent encounters between police and civilians."); see Mark Berman, *FBI Director: We Really Have No Idea If There's "an Epidemic of Police Violence Against Black People"*, Wash. Post (Oct. 17, 2016).

arise in situations where the residence is owned by someone else and the subject of the warrant is believed to either be only a temporary guest, or is sharing the residence with others.

This is borne out by study of the cases that have considered the question presented. Out of the fourteen cases identified as forming the split in authority in the petition at pages 9-15 (including the decision under review), only one of the opinions suggested that the person to be arrested was the only individual living in the residence. See *Thomas*, 429 F.3d at 285 (although others present in the apartment, no indication that they lived there). In some of the cases, it appears that the subject of the warrant did live in the residence with others, most often family members. See Pet. App. 8a; *Barrera*, 464 F.3d at 497; *Barrett*, 470 S.W.3d at 339 & n.1. In others, the subject of the warrant was merely a visitor in someone else's home, as in *Bohannon*, the decision relied upon by the court below. See 824 F.3d at 245; *Gorman*, 314 F.3d at 1107. Finally, in none of the fourteen cases did law enforcement have a valid search warrant for the residence where they executed the arrest warrant.[4] Accordingly, the only basis for intruding on the privacy interests of any affected third parties was the police's inference that the subject of the arrest warrant was at the residence.

For the innocent third parties who experience a forceful intrusion into their home pursuant to an arrest warrant, the execution of the warrant can be a harrowing ordeal. The third party in this case, June Harper, answered the door of her home at 7 a.m. to police detective Arthur

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[4] Indeed, in only one of the cases was there even mention of law enforcement seeking a search warrant. *Pruitt*, 458 F.3d at 481-482 (noting invalid warrant obtained because not supported by adequate affidavit).

Leahy. Pet. App. 8a. Along with three other detectives, Det. Leahy arrived at Ms. Harper's home to arrest her son, Kedar Harper, on suspicion of having committed a burglary. *Id.* at 7a-8a. Ms. Harper confirmed to Det. Leahy that Kedar was her son and when shown an arrest warrant with his picture on it, she confirmed that the warrant was for her son. *Id.* at 8a. But Ms. Harper told Detective Leahy that her son was not home. Because Det. Leahy heard a male voice inside the home, he informed Ms. Harper that he would enter her home to look for her son. Ms. Harper expressed the view that the arrest warrant did not give the detectives the right to enter her home, and she started to close the door. Det. Leahy stopped her from closing the door and pulled her by the arm. Ms. Harper attempted to prevent detectives from handcuffing her, but she was subdued and placed under arrest. *Ibid.*

Ms. Harper's experience is not exceptional. An intrusion into an innocent party's home to arrest another can be jarring. It may even be traumatizing. A third party may be asleep and woken up before sunrise by "loud banging" on the door to endure speaking to law enforcement while not fully dressed because officers had come to arrest a guest at the house. See *Gorman*, 314 F.3d at 1107. Understandably, the innocent third party in the *Gorman* arrest, whose mother and baby shared the home with her, stated she was "really nervous" throughout the ordeal and "kind of bewildered" by the officers' conduct. *Ibid.*

Although the circumstances in this case and *Gorman* show how even seemingly routine executions of arrest warrants can be jarring or even traumatizing for third parties, warrants are frequently executed in ways that are far removed from traditional policing. In the thirty-five years since this Court decided *Payton*, 445 U.S. 573, and *Steagald*, 451 U.S. 204, the use of paramilitary police

units, such as SWAT teams, has risen dramatically. "Since at least the 1990s, * * * the Pentagon has sent extra military equipment to local law enforcement agencies in every state." Timothy Williams, *Some Officers Bristle at Recall of Military Equipment*, N.Y. Times (Jan. 26, 2016). By even the mid-1990s, more than 65% of American towns with populations over 25,000 had a paramilitary police unit.[5]

These units are frequently deployed to execute warrants in what law enforcement consider high-risk situations. See, *e.g.*, *Muehler* v. *Mena*, 544 U.S. 93, 96 (2005) (describing use of SWAT team to execute warrant for weapons). Their view of what constitutes a high-risk arrest, however, can result in the use of paramilitary policing across a wide array of circumstances. In Boston, for example, all that is required for a SWAT team to be used is that the suspect has "a prior history of violations involving the use of firearms." Boston Police Department, *Rules and Procedures*, Rule 334, § 3 (June 14, 2006) <tinyurl.com/bostonswatrule>. In Los Angeles, the police use high-risk warrant procedures, which include the use of a SWAT team, any time the suspect "has a documented violent history." Los Angeles Police Department, *Department Manual* Vol. 4, Series 742.20 (last visited on Oct. 11, 2018) <tinyurl.com/LAPDSWAT>. And, in Chicago, SWAT teams must be consulted whenever the police are executing an arrest warrant against someone with a

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[5] See Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Soc. Probs. 1, 6 (1997) (reporting that, as of 1995, 89% of cities with populations over 50,000 had their own paramilitary police unit); Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 Just. Q. 607, 611-612 (1997) (same for 65% of cities with populations between 25,000 and 50,000).

violent criminal history, or a "large number" of suspects will be present, or police intend to use a "no knock" warrant. *Chicago Police Department Search Warrants Special Order S04-19*, (Sept. 3, 2015).

The trend towards paramilitary policing is particularly concerning given that, during the same period, the likelihood that the execution of an arrest warrant in a residence will touch innocent third parties has as well. Cohabitation has increased in popularity. See Allie Volpe, *The Strange, Unique Intimacy of the Roommate Relationship*, The Atlantic (Aug. 13, 2018). And more citizens are living in stranger's residences, or allowing strangers to live in theirs. Certainly, no one in 1980 or 1981, when *Payton* and *Steagald* were decided, would have imagined that investors would value a company at $31 billion that facilitated such rentals. See Greg Bensinger, *Airbnb Wants You to Do More Than Just Book a Home*, Wall St. J. (Feb. 21, 2018) (noting $31 billion valuation of Airbnb).

In short, the execution of arrest warrants in residences is a traumatic intrusion into the private lives of citizens. Worse yet, the intrusions are becoming more invasive at the same time that it is becoming more likely that the citizens affected bear no relation to the crime being investigated.

C. Probable Cause To Believe A Suspect Is At A Residence Should Be Required Before Entering A Residence With Only An Arrest Warrant

Executions of arrest warrants in residences raise constitutional concerns regardless of the manner in which they are executed. "[T]he home is sacred in Fourth Amendment terms," but "not primarily because of the occupants' possessory interests in the premises." *Segura*,

468 U.S. at 810. Instead, it is sacred because of the occupants' "privacy interests in the activities that take place within." *Ibid.*

Concern over intrusions in the home predates the founding of the country, and was one of the reasons for the American Revolution. The Fourth Amendment and its proscriptions against unreasonable searches and seizures grew, in part, out of the abuses of "general warrants" employed in England and specifically the "writs of assistance" in colonial America. See *Steagald*, 451 U.S. at 220. The writ of assistance identified only the object of a search and left it to the discretion of executing officials which places should be searched. *Ibid.* The searches that were the most "deeply concern[ing]" and "foremost in the minds of the Framers, were those involving invasions of the home." *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977). These writs, and the searches executed under their authority, so offended the colonists that they contributed to the move for American independence:

> In 1761 the validity of the use of the Writs was contested in the historic proceedings in Boston. James Otis attacked the Writ of Assistance because its use "placed the liberty of every man in the hands of every petty officer." His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that "American Independence was then and there born."

Frank v. Maryland, 359 U.S. 360, 364 (1959) (quoting William Tudor, *Life of James Otis* 61, 66 (1823)).

An arrest warrant used to enter the home of a third party "suffers from the same infirmity" as the writ of assistance, and presents the same risks of abuse. *Steagald*, 451 U.S. at 220. It would allow the police, "[a]rmed solely with an arrest warrant for a single person," to "search all

the homes of that individual's friends and acquaintances," precisely the concern underlying the hostility to the writs. *Id.* at 215. This risk is far from illusory. See *ibid.* (citing *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966) (enjoining police practice in which 300 homes were searched under arrest warrants for two individuals)).[6]

Fundamentally, every arrest of a suspect while the suspect is living with or visiting third parties "involves an incursion on the privacy interests of innocent persons that is justified solely by their relationship with the suspect." Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Cal. L. Rev. 1593, 1638 n.199 (1987). As this Court recognized in *Steagald*, an arrest warrant "cannot embody any derivative authority to deprive [the third party] of his interest in the privacy of his home." *Steagald*, 451 U.S. at 214 n.7. The only justification for that incursion is "an independent showing" tying the subject of the warrant to the residence to be searched. *Ibid.*

The question presented by the petition, and that has divided the lower courts, is what should be the strength of that showing. Probable cause, the same standard that underlies the execution of search warrants that deprive individuals of the privacy in their home, has proven itself to be the appropriate test. It is the "best compromise" for balancing the need to safeguard citizens from unreasonable intrusions of their privacy interests with the need to enforce the law. *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

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[6] The use of arrest warrants in such circumstances would also encourage bypassing the probable-cause requirement by entering "a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Ibid.*

* * * * *

The split amongst the lower courts on the question presented is not only a matter of concern for lawyers and participants in the criminal justice system. To the contrary, the effects of the decision below, and of the other courts that have taken the same lax view of what constitutes sufficient "reason to believe" under *Payton*, 445 U.S. 573, are borne most substantially by parties with no greater connection to the criminal justice system than that one of their friends or family has been accused of a crime. These innocent third parties bear both the invasion of their Fourth Amendment privacy interests and the intrusion and embarrassment that accompanies the police entering their home without permission. To protect those interests, and consistent with *Steagald*, 451 U.S. 204, the Court should require that police have probable cause to believe the subject of an arrest warrant is present in the residence before executing an arrest warrant there.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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