No. 24-424

IN THE
Supreme Court of the United States

RAYMOND N. BAILEY, JR.,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia and founded in 1982 by its President, John W. Whitehead. The Institute provides free legal assistance to individuals whose constitutional rights have been threatened or violated. And the Institute educates the public about constitutional and human rights issues affecting their freedoms.

SUMMARY OF ARGUMENT

The Fourth Amendment generally prevents police from searching residences without a warrant or probable cause. But parolees and probationers often must, as a condition of their parole or probation, agree to warrantless and suspicionless searches. Here, for example, Arkansas required petitioner Raymond Bailey to agree to searches of his "person, place of residence, or motor vehicle at any time, day or night, whenever requested" by an officer. Pet. App. 5a.

This case asks whether, under a search waiver like Mr. Bailey's, police can search a dwelling that they do not know, or even have probable cause to believe, is his residence. The Arkansas Supreme Court answered yes. It upheld a search based only on officers' suspicion that Mr. Bailey resided where they were searching, splitting from federal courts that have required the greater showing of probable cause.

The practical effects of that decision are as troubling as they are vast. Millions of Americans have executed

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intention to file this brief.

search waivers as a condition of their parole or probation. So millions more Americans who are friends, family members, or acquaintances of those parolees and probationers may now find their homes subject to government invasion as police conduct unchecked searches.

That result cannot be squared with this Court's Fourth Amendment precedents. Those precedents protect the sanctity of the home by requiring law enforcement to take care before intruding. Police therefore must get a warrant before arresting a suspect at home. And they must take additional steps when a suspect is at someone else's home: Before searching, police must demonstrate to a neutral magistrate that there is probable cause to believe the suspect is there. That probable-cause requirement protects innocent homeowners from reckless searches.

The Arkansas Supreme Court's rule undermines that Fourth Amendment right to security. When police search a home, they invade the homeowner's privacy, sometimes damage the homeowner's property, and too often leave the homeowner injured or traumatized. To be sure, sometimes those searches are justified. But under the rule below, home searches will become not just more common, but also more dangerous. The chances that a third party will come to harm rise as the burdens on police to justify their home searches fall.

That state of affairs is intolerable. And only this Court's review can rectify it. The Court should grant certiorari.

ARGUMENT

I. The Decision Below Erodes Fourth Amendment Protections In The Home

The Rutherford Institute agrees with Mr. Bailey that the decision below creates a square conflict among appellate courts on an important Fourth Amendment issue, warranting this Court's review. *See* Pet. 5-9. The people's right to be "secure in their . . . houses," U.S. Const. amend. IV, should not depend on which prosecuting authority develops a case or in which courthouse the case is heard. But unless this Court intervenes, "the application of the Fourth Amendment in Arkansas" will "differ[] between the state and federal courts in that state." Pet. 5.

The Rutherford Institute writes separately to highlight the practical effects of the Arkansas Supreme Court's erroneous decision, which breaks from this Court's Fourth Amendment precedent and exposes innocent third parties to invasive searches. These considerations heighten the need for certiorari.

A. The Fourth Amendment Protects The Right To Be Secure In One's Home

1. "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The Constitution thus draws "a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590 (1980).

The "immediate evils" motivating the Fourth Amendment's framing and enactment were "indiscriminate searches and seizures conducted under the authority of 'general warrants'" during British rule. *Id.* at 583.

General warrants permitted officers to root around colonial homes for evidence of wrongdoing. The warrants "specified only an offense . . . and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched." *Steagald v. United States*, 451 U.S. 204, 220 (1981). General warrants thus "provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home." *Id.* Instead, they "placed the liberty of every man in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886) (cleaned up).

The Fourth Amendment aimed to prevent such abuses. "By limiting the authorization to search to the specific areas and things for which there is probable cause to search," the Amendment "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

2. The Fourth Amendment thus provides added protection for homeowners. When a suspect is at home, the home's "threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590.

And when a suspect is at a third party's home, the Fourth Amendment protects the third party too. For example, in *Steagald*, this Court held that an officer generally needs a search warrant, not just an arrest warrant, to arrest a suspect in a third party's home. 451 U.S. at 213. An arrest warrant protects the suspect from unreasonable seizure; "[a] search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards

an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Id.*

Steagald derived its rule from "the history of the Fourth Amendment." *Id.* at 220. The warrant at issue there, like a colonial writ of assistance (a type of general warrant), "specifie[d] only the object of a search" and "le[ft] to the unfettered discretion of the police the decision as to which particular homes should be searched." *Id.* The Court was thus concerned about the "significant potential for abuse." *Id.* at 215. For example, "[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances" or use an arrest warrant as "pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Id.* Based on those practical concerns, *Steagald* concluded that the Fourth Amendment's "Framers would not have sanctioned the instant search." *Id.* at 220.

B. Third Parties Suffer When Police Search Their Homes Without Probable Cause

1. The concerns that drove *Steagald* are not hypothetical. Blunderbuss home searches for the subjects of arrest warrants unfortunately persist.

Consider Dottie and Ralph New. Sheriffs broke down their door, forced Dottie out of bed in her nightgown, found Ralph on the toilet, held them both at gunpoint, and then left their house in shambles. *See New v. Faris*, 2024 WL 4200749, at *1, *5-6 (S.D. W. Va. Sept. 16, 2024) (declining to grant qualified immunity). All that to search for the News' son, for whom the sheriffs had an arrest warrant but not

probable cause to believe he lived there. *See id.* at *5. The son was not at the home.[2]

2. The decision below makes such reckless searches more likely. It holds that police can "execute a warrantless search" in a dwelling based "only" on "a reasonable suspicion" that a parolee or probationer resides there. Pet. App. 8a. That holding is not just wrong, but dangerous. Families and friends are too often victimized when officers search their homes based on nothing more than a hunch that a probationer or parolee is inside.

For example, Dena Perez was away from her home when police came looking for her boyfriend, who had signed a search waiver per the terms of his parole. *See Perez v. City of Placerville*, 2009 WL 256506, at *1-2 (E.D. Cal. Feb. 3, 2009). Before the officers even entered the house, they shot and killed Perez's dog. *See id.* at *2; *id.* at *3-4 (denying qualified immunity because officers failed to establish probable cause to believe parolee lived at Perez's residence). Perez's boyfriend was in jail during the search, which officers would have known had they cared to check.

In another case, officers invaded the home of Eddie and Connie Carter looking for their parolee son without probable cause to believe that he lived with his

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[2] *See also*, *e.g.*, *Barnette v. City of Phenix City*, 2007 WL 3307213, at *14 (M.D. Ala. Nov. 6, 2007) (denying qualified immunity for a SWAT team that executed a no-knock search and caused significant property damage without probable cause to believe that target of an arrest warrant was within the home), *aff'd*, 280 F. App'x 935 (11th Cir. 2008) (per curiam); *Bakri v. City of Daytona Beach*, 716 F. Supp. 2d 1165, 1174-75 (M.D. Fla. 2010) (denying qualified immunity to officers who invaded the private portion of a gas station to execute an arrest warrant for the owner's son, who was not present, and arrested the owner who protested the warrantless search).

parents. The officers did not announce themselves. Instead, dressed in dark clothing, they advanced on the house with guns drawn. The officers then searched the house and surrounding property, leaving only when the Carters "mentioned that one of their sons is a lawyer." *Carter v. St. John Baptist Par. Sheriff's Off.*, 2012 WL 1752682, at *2 (E.D. La. May 16, 2012); *see id.* at *6 (denying qualified immunity). Traumatized, the Carters went to the hospital; it took Mrs. Carter several days to recover. *See id.* at *2.

And in yet another case, Donald Hoskin was pushed to the ground, given *Miranda* warnings, and placed in a squad car while the police searched his Washington home for his son—even though the officers did not know whether the son lived with the Hoskins, next door, or even in the State. *See Hoskin v. Larsen*, 2007 WL 3228408, at *10 (W.D. Wash. Oct. 31, 2007) (denying qualified immunity).

These cases are not unique.[3] Instead, they are the foreseeable consequence of searches conducted only under the suspicion that the parolee will be in the home. And they vividly illustrate the consequences of making "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." *United States v. Vasquez-Algarin*, 821 F.3d 467, 480 (3d Cir. 2016).

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[3] *See also*, *e.g.*, *Portnoy v. City of Davis*, 663 F. Supp. 2d 949, 958-59 (E.D. Cal. 2009) (denying qualified immunity to officers who went to the wrong house to search for probationer, handcuffed and dragged plaintiff-homeowner, and drew guns in the presence of her children); *Marion v. Maricopa Cnty. Adult Prob. Dep't*, 2011 WL 251448, at *4 (D. Ariz. Jan. 26, 2011) (denying qualified immunity to officers who searched parolee's elderly parents' home without probable cause to believe he lived there).

C. The Decision Below Erroneously Exposes Homeowners To Invasive Searches

Such tenuous determinations cannot constitutionally support home entries. As four Justices wrote in *Ker v. California*, 374 U.S. 23 (1963), "practical hazards of law enforcement militate strongly against any relaxation" of requirements for home entries. *Id.* at 57 (Brennan, J., concurring in part and dissenting in part). The Arkansas Supreme Court was wrong to relax those requirements.

1. Millions of parolees and probationers have executed search waivers—documents that allow searches of their person, residence, or property without a warrant. *See infra* pp. 10-11. Like the warrant in *Steagald*, search waivers "specif[y] only the object of a search." 451 U.S. at 220. They say what or who officers may search, not the specific locations. And so, like the warrant in *Steagald*, search waivers create a "significant potential for abuse." *Id.* at 215.

"Nothing in the law justifies the entry into and search of a third person's house to search for [a] parolee" or probationer under a search waiver. *Motley v. Parks*, 432 F.3d 1072, 1079 (9th Cir. 2005) (en banc). So the question is how to guarantee that officers are "reasonably sure that they are at the *right* house" when conducting an otherwise valid waiver search. *Id.* *Steagald* offers an answer: "a showing of probable cause to believe that the legitimate object of a search is located in a particular place." 451 U.S. at 213.

2. That was the rule before the decision below. *See* Pet. 5-9. For example, in *Motley*, the Ninth Circuit held that, to "protect[] the interest of third parties," officers must "have probable cause to believe that a parolee resides at a particular address prior to conducting a parole search." 432 F.3d at 1080. The court observed that the "'rule of probable cause is a

practical, nontechnical conception affording the best compromise that has been found for accommodating the[] often opposing interests'" of "'safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime'" and "'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). The Third Circuit adopted a similar rule four years later. *See United States v. Manuel*, 342 F. App'x 844, 848 (3d Cir. 2009). And the Eighth Circuit did the same last year. *See United States v. Thabit*, 56 F.4th 1145, 1151 (8th Cir. 2023).

3. The decision below departs from those cases by holding that police can "execute a warrantless search" in a dwelling based "only" on "a reasonable suspicion" that a probationer resides there. Pet. App. 8a. To reach that result, the Arkansas Supreme Court balanced the intrusion on Mr. Bailey's privacy against "'the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 7a (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2001)). And the court concluded that the balance favored the State: Mr. Bailey had "less expectation of privacy in his motel room," while the government had a legitimate "interest in the search waiver." *Id.*

The court erred in assigning third parties no weight in this balance. The court mentioned third parties only in a footnote. *See id.* at 6a n.3. There, the court concluded that adopting the majority rule would give "a probationer or parolee . . . a greater expectation of privacy and greater Fourth Amendment protections when in a third-party's residence than in his or her own residence." *Id.* That mistakes the purpose of the probable-cause requirement articulated in cases like *Steagald*—to protect innocent third parties who happen to be near the parolee. *See supra* pp. 4-5.

As this Court explained, "[t]he additional burden imposed on the police" by requiring them to demonstrate probable cause "is minimal. In contrast, the right protected—that of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the Government—is weighty." *Steagald*, 451 U.S. at 222.

II. The Question Presented Is Exceptionally Important To The Families And Communities Of Millions Of Probationers And Parolees

Across the country, nearly four million individuals are subject to community supervision; the population of probationers and parolees far exceeds the number of individuals in jail or prison.[4] Most of those individuals have had to execute search waivers: In a nationwide survey of probation and parole programs, about 65% of jurisdictions reported requiring such waivers as a condition of court supervision.[5] And in many of the remaining jurisdictions, such waivers are unnecessary because the State imposes "a special condition of supervised release that allows for searches without individualized suspicion." *United States v. Oliveras*, 96 F.4th 298, 311-12 (2d Cir. 2024); *see also United States v. Sharp*, 40 F.4th 749, 752-53 (6th Cir. 2022).

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[4] *Compare* Danielle Kaeble, Bureau of Justice Statistics, U.S. Dep't of Justice, "Probation and Parole in the United States, 2022," at 1 (rev. Aug. 22, 2024) ("BJS Report"), https://bjs.ojp.gov/document/ppus22.pdf, *with* E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, "Prisoners in 2022 – Statistical Tables," at 1 (rev. Oct. 15, 2024), https://bjs.ojp.gov/document/p22st.pdf, *and* Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, "Jail Inmates in 2022 – Statistical Tables," at 1 (Dec. 2023), https://bjs.ojp.gov/document/ji22st.pdf.

[5] *See* Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 Harv. C.R.-C.L. L. Rev. 1, 44-46 (App. C.8) (2023) (identifying jurisdictions).

So as Mr. Bailey has explained, "[t]he sheer number of people affected confirms" that the Question Presented is exceptionally important. Pet. 13.

Two other practical realities make this case an important one warranting this Court's review. *First*, the decision below exposes third-party homeowners not just to searches, but to waiver-based searches, which are uniquely intrusive. This Court has held that parolees and probationers who have executed search waivers have a "significantly diminished . . . reasonable expectation of privacy." *Samson v. California*, 547 U.S. 843, 852 (2006). And thus, for example, California permits searches of parolees in all but the "decidedly narrow" circumstances where the search "'is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose.'" *United States v. Estrella*, 69 F.4th 958, 972 (9th Cir. 2023) (quoting *People v. Cervantes*, 127 Cal. Rptr. 2d 468, 471 (Cal. Ct. App. 2002)), *cert. denied*, 144 S. Ct. 1049 (2024).

Consider three recent cases from across the country. In one, the court upheld the search of the "photos, videos, and maps" on a parolee's cell phone. *United States v. Payne*, 99 F.4th 495, 507 (9th Cir. 2024), *pet. for cert. pending*, No. 24-5871 (U.S.). In another, the court upheld the search of a parolee's luggage. *See United States v. Lowe*, 117 F.4th 1253, 1269 (10th Cir. 2024). And in the third, the court upheld a search where the officer sniffed for marijuana throughout a probationer's shared home. *See United States v. Harden*, 104 F.4th 830, 837-38 (11th Cir. 2024). Of course, those searches may have been justified. As this Court has explained, the State's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a

way that it does not on the ordinary citizen." *Knights*, 534 U.S. at 121.

But the decision below opens up the homes of "ordinary citizens" to similarly invasive searches. Parents of probationers or parolees have not waived their Fourth Amendment rights. Nor have their brothers and sisters. Nor have their friends. But police will often, if not always, have reason to suspect that a probationer or parolee is residing with a parent, sibling, or friend. So under the Arkansas Supreme Court's reasoning, all of those relatives and friends lose the right to security in their homes just because the police think that a parolee or probationer might be staying with them.

Second, the decision below exacerbates an already-rampant overpolicing problem, particularly in minority communities. At last count, black Americans represented 31% of all probationers but less than 14% of the overall population.[6] The racial disparity in search waivers is even more stark. For example, in Virginia where The Rutherford Institute is based, Fourth Amendment waivers are disproportionately imposed on Black and Hispanic individuals: "In the capital city of Richmond, 96 percent of people who agreed to waive their Fourth Amendment rights in 2020 were people of color . . . . The city's population was 45 percent Black and eight percent Hispanic. That same year in Lynchburg, Virginia, . . . Black people accounted for 78 percent of all [search] waivers signed, while they only made up 28 percent of the population."[7]

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[6] *See* BJS Report, *supra* note 4, at 7 tbl. 7; Census Bureau, QuickFacts, https://www.census.gov/quickfacts/fact/table/US/RHI22523 (last accessed Nov. 13, 2024).

[7] Lauren Gill, "'An Impossible Choice': Virginians Asked to Waive Constitutional Rights to Get a Plea Deal," BOLTS (May 9,

Fourth Amendment waivers already give police deep access to the homes of minority individuals.[8] The Arkansas Supreme Court's erroneous decision, if left unreviewed, would only make that problem worse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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2024), https://boltsmag.org/fourth-amendment-waiver-virginia-police-traffic-stops/.

[8] *See* David J. Harding et al., *Home Is Hard to Find: Neighborhoods, Institutions, and the Residential Trajectories of Returning Prisoners*, 647 Annals Am. Acad. Pol. & Soc. Sci. 214, 216-17, 222 (May 2013) (finding that 66% of African Americans who lived in high-poverty areas prior to prison moved back to high-poverty areas after prison, and "[p]oor urban communities bear a disproportionate share of the burden" of reintegrating former prisoners).