No. 22-7629

IN THE

Supreme Court of the United States

JOSE LUIS NUNEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CONSTITUTION

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes.

NACDL was founded in 1958. It has a nationwide membership of thousands of members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. Each year, NACDL files amicus briefs in this Court and others in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL has a fundamental interest in the equitable administration of the criminal justice system through clear laws that are properly applied in accordance with the Constitution, the will of Congress, and the decisions of this Court.

NACDL has a particular interest in this case because the Ninth Circuit's expansive interpretations of the "protective sweep" exception to the warrant requirement and the inevitable discovery exception to

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[1] No party has authored this brief in whole or in part, and no one other than Amici, their members, and their counsel have paid for the preparation or submission of this brief.

the exclusionary rule undermine fundamental protections afforded to the accused by the Fourth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment prohibits "unreasonable searches and seizures" and requires that any warrant be issued "upon probable cause … and particularly describing the place to be searched." U.S. Const. amend. IV. The Amendment "was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself." *Riley* v. *California*, 573 U.S. 373, 403 (2014). At base, the Fourth Amendment's purpose "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018) (citing *Camara* v. *Mun. Court of City and Cty. of S.F.*, 387 U.S. 523, 528 (1967)).

Nowhere are these safeguards more hallowed than in one's home. Indeed, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (internal quotations omitted). "[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." *Id.* at 590. The Court has repeatedly and recently rejected attempts to erode the

sacred protections of the home. See *Caniglia* v. *Strom*, 141 S.Ct. 1596, 1600 (2021) ("[T]his Court has repeatedly declined to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home.") (internal quotations and citations omitted).

Evidence found during an illegal search must be excluded in proceedings against the criminal defendant. See *Herring* v. *United States*, 555 U.S. 135, 139 (2009) (citing *Weeks* v. *United States*, 232 U.S. 383, 398 (1914)). This century-old exclusionary rule gives teeth to Fourth Amendment's protections.

While recognizing the importance of the Fourth Amendment's protections, this Court has permitted "a few specifically established and well-delineated exceptions" to the warrant requirement. *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009). At issue here are one exception to the Warrant Clause—the protective sweep doctrine, see *Maryland* v. *Buie*, 494 U.S. 325 (1990)—and one exception to the exclusionary rule—the inevitable discovery doctrine, see *Nix* v. *Williams*, 467 U.S. 431 (1984). The Ninth Circuit's ruling below deepens well-defined conflicts of authority as to the scope of protective sweeps and inevitable discovery and creates a new split on protective sweeps.

This case presents a sound vehicle to resolve all of those divisions of authority because the Court would have to reach each issue in order to decide this case. As indicated by the volume of decisions underlying the conflicts identified in the petition, the questions presented are of recurring importance and have significant practical consequences for law enforcement and those subjected to it. And the

decision below is wrong, at the extreme end of the conflicts among federal and state appellate courts. The decision widens exceptions that threaten the rules themselves and jeopardizes individuals' Fourth Amendment rights by conveying significantly more leeway to police than the Constitution permits. The Court's review is necessary to resolve these multiple conflicts of authority and reaffirm the protections afforded by the Bill of Rights.

ARGUMENT

I.
REVIEW IS NECESSARY TO RESOLVE CONFLICTING APPLICATIONS OF THE FOURTH AMENDMENT THAT REFLECT UNWARRANTED EXPANSION OF EXCEPTIONS TO FOURTH AMENDMENT RIGHTS.

The Court should grant certiorari to restore uniformity as to fundamental Fourth Amendment protections and to reaffirm the protections themselves. The decision below, and decisions that accord with it, reflect the expansion of originally narrow exceptions in *Buie* and *Nix*, and as such, represent an erosion of the public's right to be free from unreasonable searches.

As NACDL's members are well aware, the volume of appellate decisions addressing the questions presented by the petition are barely the tip of the iceberg. State and federal trial courts are applying the protective sweep and inevitable discovery doctrines cases hundreds, if not thousands, of times each year.

Yet this Court has not addressed in any substantive fashion the protective sweep exception or the inevitable discovery doctrine for decades. Since its

1990 decision in *Buie*, the Court has only cited the case in passing on a handful of opinions. It has not grappled with any subsequent applications of its holding. And the Court's last decision to engage in any meaningful analysis and application of *Nix* was *Murray* v. *United States*¸ 487 U.S. 533 (1988), issued more than 35 years ago—only four years after *Nix* itself. Since that time, many decisions of the courts of appeals and the States have expanded the decidedly narrow exceptions the Court created in *Buie* and *Nix*.

A. The Court Should Resolve the Conflict of Authority on the Protective Sweep Exception to the Warrant Requirement to Forestall Further Erosion of the Fourth Amendment's Protections.

In *Buie*, the Court recognized a "protective sweep" exception to the warrant requirement. Relying on the same principles as undergirded *Terry* v. *Ohio*¸ the Court held that arresting officers lawfully present in a home under an arrest warrant could perform a limited protective sweep to ensure no other individuals were present in the home who could threaten the officers' safety. *Buie*, 494 U.S. at 337.

In announcing the exception, the Court went to great lengths to underscore its limited application. First, the Court defined a protective sweep as "a *quick* and *limited* search of the premises, *incident to an arrest* and conducted *to protect the safety of police officers or others*." *Id.* at 327 (emphasis added). Second, these warrantless searches must be "*narrowly confined* to a cursory visual inspection of those places in which a person might be hiding." *Ibid.* (emphasis added). Third, the officers conducting the

sweep must "possess[] a reasonable belief based on *specific and articulable facts* which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept *harbored an individual* posing a danger to the officers or others." *Ibid.* (emphasis added) (internal quotations and citations omitted).

In the decades since *Buie*¸ lower federal and state courts have diverged as to the scope of these elements. Some courts, including the court below, have widened the exception well beyond its original doctrinal mooring. In doing so, these decisions threaten core protections of the Fourth Amendment.

As the petition points out, two circuits and two States apply the protective sweep doctrine only in conjunction with an arrest. Pet. 10. The Ninth Circuit and many other courts have authorized protective sweeps where no arrest occurs at all, see Pet. 11-12, despite *Buie*'s holding that protective sweeps are permitted "in conjunction with an in-home arrest." *Buie*, 494 U.S. at 337. Some of these cases are reasonable extensions rooted in the same logic as *Buie* itself—where officers are already lawfully present in a home. See, *e.g., United States* v. *Miller*, 430 F.3d 93, 94-95 (2d Cir. 2005) (officers lawfully present in a home permitted to conduct a protective sweep so long as *Buie*'s other elements are satisfied); *Drohan* v. *Vaughn*, 176 F.3d 17, 22 (1st Cir. 1999) (same).

The decision below, however, expands this split one step further by allowing officers to *enter* a home without a warrant to conduct a protective sweep in connection with an arrest many blocks away. That is, the protective sweep exception provides the

justification for both the *warrantless entry* into the home *and* the *warrantless search* of the home, even when the dangerous suspect was apprehended far away from the searched premises. In so doing, the decision below drastically enlarges the space that officers can search by asserting that they were reasonably concerned for their safety while conducting an arrest or while otherwise lawfully present in a given location.

The Ninth Circuit further breaks new ground in allowing a protective sweep to occur in the *absence* of specific and articulable facts. Pet. App. 3a. That holding strikes at the core of *Buie*—that any warrantless search be supported by actual facts leading a reasonable officer to believe the area of the arrest "harbors an individual posing a danger to those on the arrest scene." *Buie*, 494 U.S. at 334. In allowing the *absence* of any facts to support a protective sweep, the Ninth Circuit suggests that *any* post-hoc justification for a warrantless entry is sufficient. After all, a diligent officer is unlikely ever to believe with reasonable certainty that an unsearched remote location is assuredly safe. It is no surprise that most other courts have rejected such a dramatic expansion of *Buie*. See, *e.g., United States* v. *Gandia*, 424 F.3d 255, 264 (2d Cir. 2005) ("Lack of information cannot provide an articulable basis upon which to justify a protective sweep.") (quoting *United States* v. *Colbert*, 76 F.3d 773, 778 (6th Cir. 1996)); see also *United States* v. *Chaves*, 169 F.3d 687, 692 (11th Cir. 1999) ("However, in the absence of specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the

warehouse, the officers' lack of information cannot justify the warrantless sweep in this case.").

Yet, if left undisturbed, the decision below invites other circuits—and the many States that have not squarely addressed the issue—to adopt a similar rule. Prompt review by this Court is warranted to avoid that possibility. As the Court recently noted, "Freedom in one's own dwelling is the archetype of the privacy protection secured by the Fourth Amendment[.] . . . So we are not eager—more the reverse—to print a new permission slip for entering the home without a warrant." *Lange* v. *California*, 141 S. Ct. 2011, 2018-19 (2021) (internal quotations and citations omitted).

Granting certiorari would provide the Court the opportunity to reaffirm fundamental protections afforded by the Bill of Rights. By reversing the decision below and rejecting similar decisions, the Court could confirm that, as in *Buie*, "[a] 'protective sweep' is a *quick* and *limited* search of premises" for potential dangers "to those on the arrest scene", *Buie*, 494 U.S. at 327, 335, not an unfettered warrantless search of a third party's private property many blocks away from the arrest site. Moreover, the Court could clarify that the protective sweep exception does not independently justify both warrantless entry into and warrantless search of a home. It would also affirm that, again as in *Buie*, any protective sweep by police officers must be based on "specific and articulable facts", *id.* at 337, not on the absence thereof.

B. The Court Should Resolve the Conflict in Inevitable Discovery Authority to Ensure That the Exception Is Sufficiently Narrow to Meaningfully Deter Unlawful Police Activity.

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim[,]" but instead is meant "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures[.]" See *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). As such, exceptions to the exclusionary rule require "weighing the costs and benefits" of allowing improperly obtained evidence to be used. *United States* v. *Leon*, 468 U.S. 897, 906-07 (1984). In *Nix*, the Court adopted the inevitable discovery exception to the exclusionary rule where "the evidence in question would inevitably have been discovered *without reference to the police error or misconduct*." *Nix*, 467 U.S. at 448 (emphasis added). In that case, a young child went missing. Officers wrongfully interrogated the defendant, during which time he identified the location of his victim's body. *Id.* at 436. Police then used the information to find the body. *Ibid.* But the police had already organized a search involving more than 200 volunteers, covering swaths of territory that included where the body was eventually found. *Id.* at 435-36.

At trial, the defendant sought to suppress evidence of the body as fruit of the poisonous tree. *Id.* at 436-37. The Court ultimately held that while the confession was unlawful, the evidence of the body was admissible against the defendant because the evidence "would have been discovered by lawful

means—[specifically] the volunteers' search." *Id.* at 444. As the Court explained, to exclude the evidence based on the wrongful interrogation despite the massive search efforts would not afford rational deterrence to improper police conduct. *Ibid.*

Numerous circuits have properly interpreted the "lawful means" requirement to mean that, as in *Nix*, a separate legal investigation would uncover the same evidence as discovered during the wrongful search. See Pet. 20. As the Eighth Circuit explained, for example, "it is important to focus not on what the officers actually did after unlawfully recovering evidence, but on what the officers were reasonably likely to have done had the unlawful recovery not occurred," meaning what would have occurred independently in the already existing active, lawful investigation. See *United States* v. *Villalba-Alvarado*, 345 F.3d 1007, 1020 (8th Cir. 2003). There must be both (1) "an ongoing line of investigation that is distinct from the impermissible or unlawful technique" and (2) "a showing of a reasonable probability that the permissible line of investigation would have led to the independent discovery of the evidence." *Ibid.* This requirement of an active and independent, lawful investigation properly places the burden on the police to demonstrate that they would have eventually discovered the tainted evidence through legal means apart from all wrongful conduct. It also forestalls exceptions to the warrant requirement based on the compounded speculation that an investigation would (or could) have been undertaken and that the tainted evidence would have been found. See Pet. 20 (collecting other cases).

In the decision below, however, the Ninth Circuit creates an exception that swallows much of the exclusionary rule by allowing police to operate with significantly more leeway than envisioned by the Fourth Amendment by sanctioning near limitless post-hoc rationales of wrongful conduct that cannot be divorced from the wrongful conduct itself.

Unlike in *Nix*, the exclusion of the tainted evidence in the present case *would* serve a deterrent purpose. Specifically, it would discourage officers from entering homes distant from any threats posed by the arrest scene. It would also reinforce the dictates of Fourth Amendment jurisprudence that, absent some other exception, police must obtain a warrant before entering and searching the home. Cf. *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970) (holding that all evidence seized in the warrantless search of a home was to be suppressed even though police had an arrest warrant for the defendant and it was "not impracticable for them to obtain a search warrant as well"). Finally, reversing the decision below would deter officers from undertaking unconstitutional searches by affirming that the inevitable discovery exception requires an ongoing lawful investigation, not a post-hoc rationalization of what *might* have occurred as a result of the initially unlawful search. See *Terry* v. *Ohio*¸ 392 U.S. 1, 12 ("Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as the principal mode of discouraging lawless police conduct.").

II.
THE COURT'S INTERVENTION IS NECESSARY TO PROVIDE CLEAR AND UNIFORM GUIDANCE TO STATE COURTS.

Of course, the vast majority of criminal prosecutions occur in state courts. Yet state courts have scant guidance on parameters for protective sweeps and have been forced to choose between multiple differing approaches among the federal courts of appeals. This deepens existing confusion and exacerbates the irregular application of the law.

In *State* v. *McCall*, for example, the Nevada Supreme Court struggled with the circuit split in determining whether articulable facts must be present before conducting a protective sweep. The Court noted that five circuits (First, Second, Fifth, Sixth, and D.C.) hold "that police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry." *State* v. *McCall*, 517 P.3d 230, 234 (Nev. 2022). The Court noted that the Ninth and Tenth Circuits, however, "veered slightly off the path trod by the other circuits" and that "[t]he Ninth Circuit's caselaw is inconsistent on this issue." *Id.* at 235.[2]

The Nevada court ultimately held that, "before conducting a protective sweep, an officer needs

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[2] The New Jersey Supreme Court came to a similar conclusion in *State* v. *Davila* but noted that several "circuit courts extend the [protective sweeps] exception to varying degrees," and one circuit has even "declined to extend *Buie* into the non-arrest context." 999 A.2d 1116, 1128 (N.J. 2010).

articulable facts that would warrant a reasonably prudent officer to believe that the area to be swept harbors an individual who poses a danger to those at the scene." *Ibid*. It warned that protective sweeps based on mere possibilities of danger would lead to "post-hoc rationalizations" and would allow police officers to "justify virtually any sweep search." *Ibid*.

The Arizona Supreme Court grappled with this same issue in *State* v. *Fisher*. In analyzing whether police officers lawfully conducted a protective sweep of a suspect's apartment when the suspect was detained outside, the Court noted that the federal circuits have decided this issue differently. *State* v. *Fisher*, 250 P.3d 1192, 1196 (Ariz. 2011). The Court ultimately sided with the Second Circuit, holding that "lack of information cannot provide an articulable basis upon which to justify a protective sweep" and that the protective sweep at issue was invalid since the officers "did not articulate specific facts to establish a reasonable belief that someone might be in the apartment." *Ibid*.

The Connecticut Supreme Court similarly assessed the circuit split in *State* v. *Spencer* but found the Sixth Circuit's analysis more compelling. 848 A.2d 1183, 1186 (Conn. 2004). The Court held that a "lack of information 'cannot be an articulable basis for a sweep that requires information to justify it in the first place.'" *Ibid*. (quoting *United States* v. *Colbert*, 76 F.3d 773, 778 (6th Cir. 1996)).

Other state courts have struggled with the circuit split on whether protective sweeps are permissible only incident to an arrest. In *State* v. *Revenaugh*, for example, the Idaho Supreme Court analyzed the

circuit split on whether protective sweeps are authorized only in connection with an arrest. 992 P.2d 769, 772 (Idaho 1999). Noting that the circuits are divided, the Idaho court agreed with the Ninth Circuit that an arrest was not required to justify a protective sweep. *Ibid.*

State courts, and particularly state trial courts, are the front lines of United States criminal justice, handling the overwhelming majority of criminal cases. As illustrated above, the breadth and depth of conflicting authority leaves each state appellate court to fend for itself. The state trial courts are all the more at sea, especially in the many states without published precedent addressing the questions presented in the petition.

By not only deepening but widening the conflict of authority, the decision below gives oxygen to a fire. This case presents the Court with a sound vehicle to resolve multiple conflicts on issues that state trial courts must address without adequate guidance—issues that produce divergent results depending on the circuit or state where a defendant is tried. For this reason as well, this Court's review is warranted.

III.
LEFT UNDISTURBED, THE OPINION BELOW WILL HAVE TANGIBLE NEGATIVE CONSEQUENCES IN INTERACTIONS BETWEEN THE POLICE AND THE PUBLIC.

The concern that expanding exceptions will swallow the warrant requirement and the exclusionary rule are not simply matters of academic debate. The decision below and similar decisions in other courts of appeals affect everyday police

operations by granting officers significantly greater latitude to invade individuals' private space, especially the home, than intended by the Fourth Amendment. Those decisions practically invite officers to justify their unlawful actions after the fact.

If the circuit split is allowed to continue, police in many States will be able to conduct protective sweeps in homes and businesses unassociated with an arrest, the site of an arrest, or any dangers stemming therefrom. Police will have unfettered access to any premise that a suspect entered based on little more than the fact that the suspect was present at some point. Police could point to an entire city block, or many blocks—a territory much vaster than contemplated in *Buie*—to argue that an alleged safety risk justified warrantless entry and search. Indeed, the arrest in this case occurred several blocks from the premises subjected to a supposed protective sweep.

If this Court leaves the well-developed circuit split in place, and the decision below remains the law of the Ninth Circuit, the ramifications for individuals living in high crime areas are readily apparent. By no choice of their own, these individuals will be afforded lesser Fourth Amendment protections than those in safer areas. In such areas the existence of a crime itself—disassociated with the individual or her home—would provide compelling justification for officers to undertake warrantless searches or residences. These individuals could be twice a victim: once of intrusion by a criminal and again by warrantless intrusion by police justified only by what dangers "could" lie inside.

Permitting protective sweeps in the *absence* of any specific and articulable facts that the safety of officers or others may be jeopardized would also provide *carte blanche* for officers to enter *any* premise *whenever* they desired. Such unchecked, expansive power flies in the face of the undisputed purpose, history and text of the Fourth Amendment, and transforms a common sense, limited exception into a virtually unassailable, ever-present, *post hoc* justification for warrantless invasions of individuals' homes.

Allowing the inevitable discovery exception to apply in the absence of an active and independent investigation similarly permits police to reverse-engineer an exception to the warrant requirement by engaging in nothing more than an after-the-fact argument that a warrant *could* have been obtained. As Justice Jackson cautioned in *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave people's homes secure only in the discretion of police officers[.]" So too here. Allowing the decision below to stand will create a standard that undercuts the purpose of the warrant requirement and flips the role of the judiciary from what the Fourth Amendment envisions. Rather than a neutral magistrate sanctioning an invasion of privacy based on probable cause and with particularity as to what is to be searched or seized, instead a post-hoc fact finder—necessarily tainted by the improperly seized evidence—would adjudicate the reasonableness of

officers' actions. Instead of deterring officers from conducting warrantless searches, the decision below encourages officers to avoid the rigors of obtaining a warrant and instead conduct unlawful searches based on the assurance that any evidence found can be justified after the fact.

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The petition for a writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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