No. 19-494

IN THE

Supreme Court of the United States

DAVID ZACHERY MORGAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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

BRIEF OF PROFESSORS BROOKS HOLLAND AND BENJAMIN LEVIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LEONID GRINBERG
MOLOLAMKEN LLP
430 Park Avenue
New York, New York 10022
(212) 607-8160

ROBERT K. KRY
Counsel of Record
CALEB HAYES-DEATS
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
rkry@mololamken.com

Counsel for Amici Curiae

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who have a vital interest in the sound development of Fourth Amendment law, including the plain-view exception. Each teaches and resides in a state that has adopted the expansive interpretation of the plain-view doctrine that the petition challenges.

Brooks Holland is a Professor of Law and J. Donald and Va Lena Scarpelli Curran Faculty Chair in Legal Ethics and Professionalism at Gonzaga University School of Law. He also represented indigent criminal defendants in New York City for eleven years, first with the Legal Aid Society's Criminal Defense Division, and then with the New York County Defenders. Even after joining the academy, he has continued to represent indigent criminal defendants in the United States Court of Appeals for the Ninth Circuit as a member of the Criminal Justice Act Panel. In Professor Holland's experience, the plain-view doctrine has proven central to the outcome of a significant percentage of the search and seizure issues he has litigated in both trial and appellate courts.

Benjamin Levin is an Associate Professor of Law at University of Colorado Law School. Before entering the academy, he represented plaintiffs in civil rights suits arising from police misconduct and wrongful convictions. His scholarship focuses on how laws and institutions shape the power wielded by both police officers and prosecutors, and the potential for abuse of that power.

---

[1] No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than *amici curiae* or their counsel made such a monetary contribution. All counsel of record received timely notice of *amici curiae*'s intent to file this brief, and all parties have consented to the filing.

Professors Holland and Levin regularly teach courses related to criminal law and procedure. They share an interest in preserving the protections afforded by the Fourth Amendment. They regard the Supreme Court of Washington's decision—and the expansive interpretation of the plain-view exception it adopted—as a significant erosion of those protections. They thus urge this Court to grant the petition and restore the full scope of Fourth Amendment protections in Washington, Colorado, and any other State that may adopt the same, erroneous rule.

REASONS FOR GRANTING THE PETITION

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." That constitutional requirement ensures that the "deliberate, impartial judgment of a judicial officer" will "be interposed between the citizen and the police." *Katz* v. *United States*, 389 U.S. 347, 357 (1967) (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 481-482 (1963)). It has frequently led this Court to invalidate warrantless searches and seizures "notwithstanding facts unquestionably showing probable cause." *Ibid.* (quoting *Agnello* v. *United States*, 269 U.S. 20, 33 (1925)).

In this case, however, the Supreme Court of Washington upheld a warrantless search based only upon a showing of probable cause. It ruled that police officers can seize evidence under the plain-view exception when they "'reasonably conclude' that the subject evidence is associated with a crime." *State* v. *Morgan*, 440 P.3d 136, 139 (Wash. 2019) (quoting *State* v. *Hudson*, 874 P.2d 160, 166 (Wash. 1994)). That approach effectively reduces the plain-view exception to a finding of probable cause, as the

dissent recognized. *Id.* at 141 (Madsen, J., dissenting); see also *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt." (quoting *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979))). The implications are enormous, eroding both the Fourth Amendment's warrant requirement and the protections afforded by any warrant officers do obtain. If the plain-view exception requires only a showing of probable cause, officers will bear the same burden of proof regardless of whether they proceed before a magistrate judge in advance of any seizure, or instead await a subsequent suppression hearing over the applicability of the plain-view exception. Even where officers do obtain a warrant, the Supreme Court of Washington's interpretation of the plain-view exception effectively transforms that warrant into the type of general warrant the Framers abhorred, undermining the Fourth Amendment's requirement that the "things to be seized" be described with particularity. U.S. Const. amend. IV.

The correct interpretation of the plain-view exception is an issue of critical importance. Where state courts have previously unmoored an exception to the warrant requirement from its constitutional foundations, this Court has intervened, describing the exceptions as "jealously and carefully drawn." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971). The decision below threatens to erode the Fourth Amendment's protections for a significant part of the country. *Amici*, two professors who research and teach criminal procedure in the affected States, urge the Court to review the Supreme Court of Washington's decision.

I. THE SUPREME COURT OF WASHINGTON'S DECISION EXPANDS THE PLAIN-VIEW EXCEPTION BEYOND ITS TRADITIONAL BOUNDS

This Court has "repeatedly emphasized" that "the most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *United States* v. *Edwards*, 415 U.S. 800, 809 (1974) (quoting *Coolidge*, 403 U.S. at 454-455). The plain-view exception to that basic constitutional rule is a narrow exception that permits seizure only where (1) an officer is "lawfully located in a place from which the object can be plainly seen," (2) the officer has "a lawful right of access to the object," and (3) the object's "incriminating character" is "immediately apparent." *Horton* v. *California*, 496 U.S. 128, 136-137 (1990). The Court has grounded the plain-view exception in a recognition that, where "contraband" is plainly visible, "resort to a neutral magistrate * * * would often be impracticable and would do little to promote the objectives of the Fourth Amendment." *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993); see also *Arizona* v. *Hicks*, 480 U.S. 321, 326-327 (1987) (justifying the exception based on "the inconvenience and the risk—to [officers] or to preservation of evidence—of going to obtain a warrant").

The facts of this case do not implicate the principles underlying the plain-view exception. The seized evidence was not "contraband," but clothing. *Dickerson*, 508 U.S. at 375. That clothing was not even visible, much less plainly so: The officer "could not examine the clothing without removing it from * * * plastic hospital bags." *Morgan*, 440 P.3d at 138; see also *ibid.* ("Officer Breault

did not smell gasoline or see blood through the plastic hospital bags."). And far from finding himself in a situation where obtaining a warrant would be "impracticable," *Dickerson*, 508 U.S. at 375, the seizing officer travelled to the clothing, with a "crime scene technician," for the specific purpose of collecting it, *Morgan*, 440 P.3d at 138. For all of these reasons, both the trial court and the Washington Court of Appeals rejected the State's invocation of the plain-view exception. Pet. App. 44a-45a, 58a.

The Supreme Court of Washington reversed those decisions only by fundamentally altering the exception. It articulated a test for the plain-view exception that focused on whether, "considering the surrounding circumstances, the police can reasonably conclude that the subject evidence is associated with a crime." *Morgan*, 440 P.3d at 139. The court's application of that test rendered what was in "plain view" irrelevant, permitting it to conclude that the officer could "reasonably" seize the clothing "[w]ithout examining" it and without "having to *see* blood or *smell* gasoline." *Id.* at 140 & n.6. The dissent rightly recognized that such an approach "divorces the observations of the seizing officer from the seizure." *Id.* at 140 (Madsen, J., dissenting). If the plain-view exception does not depend on the observations, or even perceptions, of the seizing officer, the standard for seizing evidence under that exception becomes identical to the standard for obtaining a warrant. *Id.* at 139-140 (majority opinion). In either circumstance, officers need only show probable cause based on the evidence they have collectively gathered. *Ibid.*

The Supreme Court of Colorado has adopted a similar—and similarly expansive—view of the plain-view exception. *People* v. *Swietlicki*, 361 P.3d 411, 415-416 (Colo.

2015). It held that the "immediately apparent requirement of the plain-view exception means nothing more than the police must possess probable cause without conducting a further search." *Ibid.* And like the Supreme Court of Washington, the Supreme Court of Colorado considers the evidence available to *all* officers, not just the officer who seizes the object in plain view. *Id.* at 416-417. As the petition explains, such an interpretation of the plain-view exception departs markedly from the one adopted by numerous other state and federal courts. Pet. 15-20.

The interpretation accepted below cannot be reconciled with this Court's precedents. This Court's prior decisions emphasize that a finding of probable cause, standing alone, does not justify a warrantless search, because the process for obtaining a warrant independently affords valuable protections. See *Katz*, 389 U.S. at 357 ("Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police." (citations omitted)); see also *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996) (noting the Fourth Amendment's "strong preference for searches conducted pursuant to a warrant" (quoting *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983))). The Supreme Court of Washington articulated no reason for departing from that bedrock principle in plain-view cases generally. And it did not do so in the specific circumstances here, which raise no concern that obtaining a warrant would be "impracticable," *Dickerson*, 508 U.S. at 375, or pose any "inconvenience" or "risk," *Hicks*, 480 U.S. at 327. This Court should intervene to prevent the

plain-view exception from eroding the Fourth Amendment protections afforded by a neutral magistrate judge.

II. The Supreme Court Of Washington's Interpretation Of The Plain-View Exception Undermines The Constitution's Requirement That A Warrant "Particularly" Describe The "Things To Be Seized"

The decision below has profound implications for seizures both with and without a warrant. Where officers obtain a warrant, the Supreme Court of Washington's decision undermines a significant limitation on the scope of that warrant. The Fourth Amendment requires warrants to "particularly describ[e]" the "things to be seized." U.S. Const. amend. IV. "The Founding generation crafted the Fourth Amendment as a 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." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Riley* v. *California*, 573 U.S. 373, 403 (2014)). But "the purpose of the particularity requirement is not limited to the prevention of general searches." *Groh* v. *Ramirez*, 540 U.S. 551, 561 (2004). "A particular warrant also 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Ibid.* (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)).

This Court has previously interpreted the plain-view exception to apply only where (1) an officer is "lawfully located in a place from which an object can be plainly seen," (2) the officer has "a lawful right of access to the object," and (3) the object's "incriminating character" is

"immediately apparent." *Horton*, 496 U.S. at 136-137. As described above, the Supreme Courts of Washington and Colorado have expanded the plain-view exception by equating the "immediately apparent" prong with a finding of probable cause. See pp. 5-6, *supra*; *Morgan*, 440 P.3d at 139; *Swietlicki*, 361 P.3d at 415-416 ("'Immediately Apparent' Means Probable Cause").

That interpretation expands the scope of any warrant by lowering the standard officers must meet to seize property the warrant does not describe. The Court's decision in *Horton* clarified that officers need not show "inadverten[ce]" to justify plain-view seizures. 496 U.S. at 138. An officer executing a warrant can seize additional property under the plain-view exception even though she "fully expects to find it in the course of a search." *Ibid.* If an officer need only show probable cause to justify plain-view seizure, then a warrant to seize *something* acts as a warrant to seize *anything* in the same location, as long as police can ultimately portray what they seize as suspicious.

A simple example illustrates the point. If police officers executing a warrant expect to have probable cause to seize ten items, they can do so regardless of whether the warrant "particularly describ[es]" all ten items, five, or only one. U.S. Const. amend. IV. That approach disregards the Fourth Amendment's text. It undermines the requirement that a warrant particularly describe the "things to be seized." *Ibid.* And authorizing officers to seize any suspicious object—regardless of whether the seizing officer herself comprehends *why* it is suspicious—resurrects the "general warrant" that the Framers "reviled," permitting "officers to rummage through" any place described in a warrant "in an unrestrained search

for evidence of criminal activity." *Carpenter*, 138 S. Ct. at 2213.

Undermining the requirement that a warrant "particularly describ[e]" the "things to be seized" offends the property rights that underpin the Fourth Amendment's protections. The Fourth Amendment protects not only privacy, but also people's right "to be secure in their * * * effects." U.S. Const. amend. IV. Seizures, by definition, cause "meaningful interference with an individual's possessory interests in th[e] property" seized. *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

This Court's recent decisions emphasize the Fourth Amendment's "close connection to property." *United States* v. *Jones*, 565 U.S. 400, 405 (2012). In *Jones*, this Court held that affixing a GPS tracking device to an individual's property offended the Fourth Amendment because it amounted to a "classic trespassory search." *Id.* at 412. Similarly, in *Florida* v. *Jardines*, 569 U.S. 1 (2013), the Court held that the Fourth Amendment prohibited officers from gathering evidence by "physically intruding on * * * property." *Id.* at 11. It reached that conclusion even though "background social norms [typically] invite a visitor to the front door," the location at issue. *Id.* at 9. And the Court's concern for property rights caused it to invalidate a search that, in other contexts, had been held not to violate a "reasonable expectation of privacy." *Id.* at 10. An interpretation of the plain-view exception that permits warrantless seizures of property simply because the property could have been described in a warrant is inconsistent with the Fourth Amendment's solicitude for property interests.

The Fourth Amendment's particularity requirement protects property rights by guaranteeing that citizens

receive the "deliberate, impartial judgment of a judicial officer" for *each* item of property police officers seize. *Katz*, 389 U.S. at 357. It "prevents the seizure of one thing under a warrant describing another," and ensures that "nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 192, 196 (1927); cf. *Coolidge*, 403 U.S. at 471 (plurality opinion) ("If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants * * * particularly describing * * * (the) things to be seized.'"). The requirement has its roots in founding-era concerns about the protection of personal property and common-law actions for conversion and trespass to chattels. See Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment*, 125 Yale L.J. 946, 987-994 (2016). These principles foreclose any broad grant of authority to seize property that, although not described in the warrant, is seen by officers and regarded as suspicious. But that is precisely what the Supreme Court of Washington interpreted the plain-view exception to provide when it equated the "immediately apparent" prong with a finding of probable cause.

The Fourth Amendment's text—and this Court's interpretation of it—forbids the approach adopted by the Supreme Court of Washington. It requires the "deliberate, impartial judgment of a judicial officer" for each item to be seized, and it invalidates warrantless seizures notwithstanding officers' subsequent ability to adduce "facts unquestionably showing probable cause." *Katz*, 389 U.S. at 357. The Court should grant the petition and reaffirm those longstanding principles.

III. The Interpretation Of The Plain-View Exception Below Incentivizes Warrantless Seizures By Subjecting Them To The Same Standard Officers Would Need To Satisfy To Obtain A Warrant

The decision below threatens to sharply increase the number of warrantless seizures under the plain-view exception. It gives officers a choice: prove probable cause to a magistrate judge before seizure, as the Constitution requires, or prove it during a subsequent suppression hearing. Under the decision below, officers will almost always elect a suppression hearing. They have strong incentives to avoid the delay and formality of obtaining a warrant, to advance their investigation, and to defer a demonstration of probable cause until after they have gathered additional evidence. The countervailing factors on which courts rely to deter unjustified searches, in contrast, will have little effect.

This Court has warned that applying the same standard to searches with and without a warrant will undermine officers' incentives to seek a warrant. In *Ornelas* v. *United States*, 517 U.S. 690 (1996), the Court rejected a Seventh Circuit rule that gave the same deference to "warrantless searches" as to a magistrate judge's "decision to issue a warrant." *Id.* at 698. Police officers, the Court explained, "are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches." *Id.* at 699. The Seventh Circuit's rule "would eliminate the incentive," and thus disserve the Fourth Amendment's "strong preference for searches conducted pursuant to a warrant." *Ibid.* The same is true here.

A. Officers Have Strong Incentives To Postpone Proof of Probable Cause Until a Suppression Hearing

Officers have strong incentives to undertake warrantless searches. The decision below multiplies their opportunities to do so. Whenever officers believe that they can attain a lawful right of access to potential evidence, the decision below permits them to decide whether to attempt to prove probable cause to a magistrate judge before seizure, or instead at a suppression hearing.

Faced with that choice, officers have powerful incentives to seize first and justify later. Officers want to advance their investigation, preserve potential evidence, and disrupt what they suspect is illegal activity. Obtaining a warrant delays that process. "Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review." *Missouri* v. *McNeely*, 569 U.S. 141, 155 (2013); see also *Mitchell* v. *Wisconsin*, 139 S. Ct. 2525, 2539 (2019).

Officers may also enjoy structural advantages at a suppression hearing, leading them to conclude that they have a better chance of establishing probable cause if they seize under the plain-view exception before proving probable cause. The Court's Fourth Amendment jurisprudence judges the reasonableness of a search or seizure from the perspective of an "*innocent* person." *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991); see also *Mich. Dep't of State Police* v. *Sitz*, 496 U.S. 444, 452 (1990) (considering "fear and surprise engendered in law-abiding motorists"). By the time of a suppression hearing, the defendant may seem anything but innocent. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth*

Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L.J. 727, 771 (1993) ("The typical Fourth Amendment case involves a clearly guilty person, often charged with a serious crime, whose only argument at a pretrial suppression hearing or on appeal is that the evidence against him was illegally seized."). A judge evaluating probable cause thus balances abstract privacy and property interests against the palpable cost of freeing an incriminated defendant. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. L. Rev. 1609, 1623 (2012) ("[T]he exclusionary rule rubs our faces in the costs of the Fourth Amendment.").

This Court has contrasted "the safeguards provided by an objective predetermination of probable cause" with the "far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964); see also William J. Stuntz, *Warrants & Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 915 (1991) ("Warrants attack distortions that come with the suppression hearing by changing the timing of the relevant decision. A magistrate grants or denies a warrant application before he knows whether the police will find the evidence, or whether the suspect is a criminal."). Social science confirms the importance of that contrast. By the time of a suppression hearing, the outcome of any seizure under the plain-view exception will be known. That knowledge threatens to trigger two types of psychological bias, both of which increase the likelihood of a finding of probable cause.

First, hindsight bias may lead an adjudicator to exaggerate the *ex ante* probability that the "subject evidence [wa]s associated with a crime." *Morgan*, 440 P.3d at 139; see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 577-581 (1998). Most, but not all, studies of judicial behavior have found that judges exhibit hindsight bias. See Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 Wm. & Mary L. Rev. 2017, 2071 (2017) ("[S]tudies have documented that judges respond more favorably to litigants they like or with whom they sympathize * * * and fall prey to hindsight bias when assessing probable cause."); Bernard Chao et al., *Why Courts Fail To Protect Privacy: Race, Age, Bias, and Technology*, 106 Cal. L. Rev. 263, 283-285 (2018) (collecting studies).[2]

Second, and relatedly, knowledge of the outcome affects the assessment of not only the decision to seize, but also the decision-maker. Where an officer has in fact seized incriminating evidence, outcome bias may enhance an adjudicator's estimation of that officer's decision-making. See Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. Personality & Soc. Psychol. 569, 571-574 (1988). Thus, a finding of incriminating evidence likely renders judges more inclined to conclude that officers acted appropriately and accommodated reasonable expectations of privacy.

Officers do not need to study social science to appreciate the fundamental point. Demonstrating probable

---

[2] But cf. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Penn. L. Rev. 1251, 1316 (2005) (observing a slight, but statistically insignificant, increase in findings of probable cause based on hindsight).

cause is easier after an investigation is complete, officers have found evidence of crime, and the costs of protecting Fourth Amendment rights are magnified. By applying the same standard to requests for a warrant and to warrantless seizures under the plain-view exception, the decision below undermines officers' incentives to obtain a warrant. Any officer who expects to have lawful access to potential evidence can seize first under the plain-view exception and defer proof of probable cause until later. That approach is inconsistent with the Fourth Amendment's emphatic preference for the "objective predetermination of probable cause," *Beck*, 379 U.S. at 96, that occurs when the "deliberate, impartial judgment of a judicial officer" is "interposed between the citizen and the police," *Katz*, 389 U.S. at 357.

B. Offsetting Consequences Will Not Adequately Deter Police Officers from Deferring Proof of Probable Cause Until a Suppression Hearing

The tools on which courts typically rely to deter unjustified searches—the exclusionary rule and private suits—will not offset the impact of the decision below. Officers seizing under the expansive interpretation of the plain-view exception adopted below will rarely fear the exclusion of evidence. If they fail to demonstrate probable cause at a suppression hearing, despite having the benefit of additional time and information, they almost certainly could not have obtained a warrant in the first place. And officers will confront the exclusionary rule in only a small percentage of cases. See Bar-Gill & Friedman, *supra*, at 1622-1626 ("[F]or the most part courts only consider police conduct in cases in which that conduct paid off."). If evidence seized under the plain-view exception does not ultimately advance the case, officers can ignore it. Indeed, that appears to have occurred in

petitioner's case: Officers seized petitioner's cell phone, but never sought to admit it, thereby mooting any application of the exclusionary rule. Pet. 7 n.2.

Neither will the threat of private liability meaningfully offset the incentive the decision below creates to undertake warrantless seizures under the plain-view exception. Individuals whose property is seized generally cannot bring a private suit to enforce their Fourth Amendment rights for some time. Absent exceptional circumstances, federal courts abstain from hearing private suits that challenge the constitutionality of pending state criminal proceedings. See *Sprint Commc'ns* v. *Jacobs*, 571 U.S. 69, 73 (2013); *Younger* v. *Harris*, 401 U.S. 37 (1971). And a criminal proceeding that results in a conviction bars any private suit to enforce Fourth Amendment rights that would have the effect of challenging that conviction. See *Heck* v. *Humphrey*, 512 U.S. 477, 485-487 (1994); *Szajer* v. *City of Los Angeles*, 632 F.3d 607, 611-612 (9th Cir. 2011).

Even if a defendant prevails in a criminal proceeding, officers are unlikely to fear liability in all but the most egregious instances. Qualified immunity erects a high barrier to private suits, protecting "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011); see also *Pearson* v. *Callahan*, 555 U.S. 223, 243-244 (2009); Bar-Gill & Friedman, *supra*, at 1629-1630; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1814-1820 (2018). And if plaintiffs overcome that defense, they still must prove damages attributable to a temporary seizure, which "may be difficult to quantify in financial terms." Nancy Leong, *Making Rights*, 92

B.U. L. Rev. 405, 430-432 (2012); see also Bar-Gill & Friedman, *supra*, at 1628-1629.

As a result of these barriers and others, 71% of published federal appellate decisions concerning the Fourth Amendment arise in criminal rather than civil cases. Leong, *supra*, at 423. When excessive force claims are excluded, that figure rises to 85%. *Id.* at 424.

IV. The Supreme Court Of Washington's Interpretation Of The Plain-View Exception Untethers It From Its Constitutional Foundation

The Supreme Court of Washington's interpretation of the plain-view exception disregards the principles that justify that exception. "The warrantless seizure of contraband that presents itself in [plain view] is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment." *Dickerson*, 508 U.S. at 375; see also *Hicks*, 480 U.S. at 326-327 (justifying the exception based on "the inconvenience and the risk—to [officers] and to preservation of evidence—of going to obtain a warrant"). The Supreme Court of Washington's decision sweeps far more broadly, extending the exception to situations where resort to a neutral magistrate would hardly be "impracticable." Such extension undermines the protections of the Fourth Amendment, transforming "what was meant to be an exception into a tool with far broader application." *Collins* v. *Virginia*, 138 S. Ct. 1663, 1672-1673 (2018).

This Court has intervened in other cases to restrain expansive interpretations of exceptions to the warrant

requirement that disconnect the exceptions from their original purposes.

In *Collins* v. *Virginia*, 138 S. Ct. 1663 (2018), for example, the Court considered the application of the automobile exception to the search of a vehicle parked in front of a home. *Id.* at 1673. The Court had previously explained that the automobile exception is justified by the "inherent mobility" of vehicles and the "pervasive" regulations that govern them. *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Lower courts, however, applied the automobile exception to a vehicle parked on private, residential property. *Collins*, 138 S. Ct. at 1669. That application threatened the "separate and substantial Fourth Amendment interest in * * * home and curtilage." *Id.* at 1672. The Court thus intervened to clarify that the automobile exception does not "afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage." *Ibid.* A contrary approach, the Court explained, would transform "what was meant to be an exception into a tool with far broader application." *Id.* at 1672-1673.

In *Arizona* v. *Gant*, 556 U.S. 332 (2009), the Court considered whether the search-incident-to-arrest exception authorized the search of a vehicle an arrestee had recently occupied. *Id.* at 335. Prior decisions justified the exception based on two considerations: (1) "the need to disarm the suspect in order to take him into custody"; and (2) "the need to preserve evidence on his person for later use." *United States* v. *Robinson*, 414 U.S. 218, 234 (1973). Lower courts, however, routinely applied the exception to vehicle searches that occurred after a driver was arrested, causing one judge to lament that they had "abandoned * * * constitutional moorings and floated to a

place where the law approves of purely exploratory searches." *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in judgment) (quoting *United States* v. *McLaughlin*, 170 F.3d 889, 890 (9th Cir. 1999) (Trott, J., concurring)). In *Gant*, this Court intervened to reinstate the exception's constitutional moorings, holding that officers can "search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556 U.S. at 351.

In *Riley* v. *California*, 573 U.S. 373 (2014), the Court considered the application of the search-incident-to-arrest exception to an arrestee's cell phone. *Id.* at 386-388. Lower courts had permitted the "warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person." *Id.* at 380. But such searches unearthed "a digital record of nearly every aspect of [arrestees'] lives—from the mundane to the intimate." *Id.* at 395. This Court found that such a broad expansion of the search-incident-to-arrest exception would "untether the rule from the justifications underlying it." *Id.* at 386. It thus held that the exception did not justify cell phone searches. *Ibid.*

In each of these cases, the Court prevented the warrant requirement's "jealously and carefully drawn" exceptions, *Coolidge*, 403 U.S. at 455, from expanding to swallow the rule. This case presents a similar threat. The Supreme Court of Washington's holding permits warrantless seizure of any visible property to which an officer has lawful access, so long as any information

available to police creates probable cause. That rule creates too broad an exception to the requirement of a neutral magistrate, weakening the Fourth Amendment's protections for seizures both with and without a warrant. And it does so for reasons completely divorced from concerns about impracticability, inconvenience, or risk.

This Court has repeatedly recognized that the same legal standards should not apply to warrant applications and warrantless seizures. It has warned that any such equivalence would eliminate important incentives to obtain a warrant. *Ornelas*, 517 U.S. at 699. And it has emphasized that even facts "unquestionably showing probable cause" do not automatically justify a warrantless seizure. *Katz*, 389 U.S. at 357. The decision below ignores these principles. It creates strong incentives to undertake warrantless seizures under the plain-view exception, distorting the balance struck by prior Fourth Amendment precedent. This Court should grant the petition and restore that balance.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

LEONID GRINBERG
MOLOLAMKEN LLP
430 Park Avenue
New York, New York 10022
(212) 607-8160

ROBERT K. KRY
Counsel of Record
CALEB HAYES-DEATS
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
rkry@mololamken.com

Counsel for Amici Curiae

NOVEMBER 2019