No. 20-157

In the Supreme Court of the United States

EDWARD A. CANIGLIA, *Petitioner*

v.

ROBERT F. STROM, *ET AL.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY AND RESTORE THE FOURTH, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

At common law, one of the "special protections" afforded to the home was that, absent the homeowner's consent, the government was required to obtain a warrant before entering in all but the most extreme circumstances. Indeed, some early commentators disputed whether even a warrant was sufficient for entering a home. More "lenient" commentators made allowances for pursuing felons, while others concluded that a warrant was still required. But unless someone was threatened with harm, Founding-era authorities did not allow warrantless entry of the home for what is now called a community-caretaking function.

To the contrary, community caretaking—duties beyond law enforcement or keeping the peace—would have been nonsensical to the Framers. And permitting entry into the home for such functions would have been even more outlandish. Hence, when this Court first recognized the community-caretaking exception, it rested the exception on the "constitutional difference between houses and cars." *Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973) (quoting *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970)). This Court should continue adhering to that limitation and reject the First Circuit's boundless vision of the exception.

This is especially important because many of the most intimate details of a person's life historically

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[1] All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to fund its preparation or submission.

found in the home are today more accessible through phones and other electronic devices.

While the Fourth Amendment protects electronic devices and communications, this protection cannot be said to exceed protection of the home itself—the "first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). It logically follows that, if the government may enter the home without a warrant in a community-caretaking capacity, the government may treat electronic sources of information the same way, posing an even greater threat to privacy and the ultimate integrity of the Fourth Amendment. Were that to happen, the most sensitive aspects of a person's life would be routinely accessible to the government whenever it seeks to perform a community-caretaking function. The branding almost writes itself: "Big Brother" may be "watching you," but it's for your own good![2]

Proper resolution of this question is of paramount importance to *Amici*. *Amicus* Project for Privacy & Surveillance Accountability (PPSA) is a nonprofit, nonpartisan organization concerned about a range of privacy and surveillance issues—from the surveillance of American citizens under the guise of foreign-intelligence gathering, to the monitoring of domestic activities under the guise of law enforcement.

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment. Restore the Fourth believes everyone is

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[2] George Orwell, *1984* (1949).

entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right. Restore the Fourth oversees a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political respect for the Fourth Amendment. Restore the Fourth also files amicus briefs in significant Fourth Amendment cases.

Amici believe that, if the Court extended the community-caretaking exception to the home, that extension would pose a tremendous risk of abuse in other similarly sensitive areas like electronic devices. To prevent such abuse, the Court should look to the common law for guidance and, in so doing, reject the First Circuit's determination that the community-caretaking exception reaches the home.

STATEMENT

Petitioner Edward Caniglia had no criminal record or history of violence—only a disagreement with his wife. D. Ct. Dkt. 44, ¶1; Pet.53a. When it escalated, he took an unloaded gun, placed it on the table, and asked his wife to take him "out of his misery." Pet.53a. He then left his home after his wife threatened to call the police. Pet.53-54a. He eventually returned, and the argument continued. Pet.54a. This time, Mrs. Caniglia left the house and spent the night in a hotel. *Ibid.* The following day, she could not reach Edward. *Ibid.* Worried, she called the police and asked them to check on him. *Ibid.*

The police called Edward and helped his wife return home. Pet.55a. At the house, the police spoke with Edward on the back deck, but he seemed fine and expressly disavowed any intent to commit suicide. *Ibid.* Yet the police did not believe him and summoned a rescue lieutenant from the local Fire Department to take him to the hospital. Pet.55a-56a. While Edward was there—and unable to harm himself—the police falsely told his wife that Edward had consented to removal of his guns. Ms. Caniglia led the police to the guns, which they seized. Pet.6a, 10a-11a, 56a-57a; J.A.56-57. Several days later, the Caniglias made unsuccessful attempts to get the guns back. Pet.57a.

Edward sued, arguing, among other things, that the police's entry into his home without a warrant violated the Fourth Amendment. Pet.53a. In response, the police asserted the community-caretaking exception. Pet.59a. The district court agreed, reasoning that "community caretaking" could be "required not only in vehicles, but also in homes." Pet.60a n.3. The First Circuit affirmed, despite acknowledging that this Court has never extended the community-caretaking exception outside the motor-vehicle context. Pet.12a-14a. It also noted the Court's emphasis on the constitutional difference between searches of the home and searches of automobiles. Pet.13a. But the panel found the "special role" that "police officers play in our society" and the need for police "elbow room" justified extending the community-caretaking exception to the home. Pet.16a.

SUMMARY OF ARGUMENT

I. The Court has long looked to common-law sources to determine the reasonableness of a search or a seizure. See *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214 (2018). No Founding Era or common-law authority of which *Amici* are aware would have allowed the police to enter a person's home without a warrant in a community-caretaking capacity. To the contrary, the home was considered so sacred that, absent a warrant or consent, the government could enter it only in the most extreme circumstances.

The Court's longstanding practice of looking to the common law for guidance on the original public meaning of the Fourth Amendment thus counsels rejection of the First Circuit's view that the community-caretaking exception reaches the home. Indeed, this case is a far cry from *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), which applied the exception to automobiles. There, the Court upheld the post-accident search of a car trunk that was "neither in the custody nor on the premises" of the car's owner. *Id.* at 447-448. A search of a car trunk in such circumstances is a far smaller invasion of privacy than searching a person's home.

II. Another powerful reason not to extend the community-caretaking exception to the home is the other contexts to which such an extension would also logically apply—especially electronic devices. Such devices hold vast amounts of personal information that, historically, would only have been found in the home. Extending the community-caretaking exception to the place the Constitution protects most robustly would logically allow courts to extend the exception to

other, less safeguarded areas, such as electronic devices. But that would be devastating to the privacy of all Americans.

ARGUMENT

I. Because Warrantless Home Entry Was Permitted At The Founding Only When Pursuing A Felon Or Responding To A Risk Of Imminent Harm, The Community-Caretaking Exception Should Not Be Extended To Homes.

The common law did not recognize a community-caretaking exception to the warrant requirement. Instead, a warrant was required to enter a person's home in all but the most extreme circumstances. Because the common law has long guided this Court's understanding of the Fourth Amendment, the Court should reject the extension of the community-caretaking exception adopted below.

A. Founding-era common law sets the standards for resolving modern Fourth Amendment questions.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures." U.S. Const. amend. IV (emphasis added). Recognizing the Amendment to be an "affirmance" of the common law on this point,[3] the Court respects "historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth

[3] Joseph Story, 3 *Commentaries on the Constitution of the United States* 748 (1833).

Amendment] was adopted.'" *Carpenter*, 138 S. Ct. at 2214 (quoting *Carroll* v. *United States*, 267 U.S. 132, 149 (1925)).

In this regard, the common law furnishes two "basic guideposts": (1) the Fourth Amendment protects the "privacies of life" from "arbitrary power,"138 S. Ct. at 2214 (quoting *Boyd* v. *United States,* 116 U.S. 616, 630 (1886)); and (2) the "central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance,'" *ibid.* (quoting *United States* v. *Di Re*, 332 U.S. 581, 595 (1948)). This case implicates both guideposts. As explained in Section II.A., at common law the "privacies of life" were nowhere more present than in the home. If the community-caretaking exception then allows the police to enter the home without a warrant, consent, or even the existence of probable cause, one meaningful obstacle to government overreach is forever lost.

Fortunately, as shown in Section I.B., there was at common law no community-caretaking exception to the warrant requirement, and warrantless entry into the home was acceptable only in the most extreme circumstances. The Court should therefore decline to extend the community-caretaking exception to the home.

B. At common law, officers could enter a home for non-investigative purposes only to apprehend a fleeing felon or if they witnessed an affray and could prevent imminent harm.

At common law, officers had a duty "to keep the peace."[4] In performing this duty, however, the police still had to get a warrant to enter a person's home in all but the most extreme cases. The need to perform a community-caretaking function, as it is understood today, would *not* have been such an extreme case. This is apparent in both legal commentary and case law during and after the Founding period.

1. English courts considered a man's house his "castle and fortress." *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604). As William Pitt famously put it: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."[5]

Because of this, at common law, outside of certain rare "circumstances," "the Crown could not intrude on the sanctity of the home without a warrant."[6] The home was not to be "violated" unless "absolute

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[4] Matthew Hale, 2 *Historia Placitorum Coronae* 95 (1800).

[5] Nelson Lasson, *The History & Development of the Fourth Amendment* 49-50 (1937).

[6] Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1195-1196 (2016).

necessity" compelled this to "secure public benefit."[7] Otherwise, in "all cases where the law" was "silent" and "express principles d[id] not apply," the "extreme violence" of entering a home without permission was forbidden.[8] The Fourth Amendment, "little more than the affirmance" of the common law,[9] was meant by the Framers to continue this tradition and prevent the "evil" of warrantless "physical entry of the home." *Welsh* v. *Wisconsin*, 466 U.S. 740, 748 (1984) (citations omitted).

Aside from pursuing a felon or raising a hue and cry,[10] there was at common law only one other scenario that potentially allowed warrantless home entry: interrupting an "affray" to prevent imminent harm.[11]

The first American edition of Giles Jacobs' law dictionary describes an affray as "a skirmish or fighting between two or more" in which there is "a stroke given, or offered, or a weapon drawn."[12] If a

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[7] Joseph Chitty, 1 *A Practical Treatise on the Criminal Law* 52 (1816).

[8] *Ibid.*

[9] Joseph Story, 3 *Commentaries on the Constitution of the United States* 748 (1833).

[10] The "hue and cry" exception was available only in a narrow class of cases where the victim of a serious offense sought the assistance from the Crown in apprehending a felon who had fled. See PPSA and Restore the Fourth Br. 9-15, *Lange* v. *California* (No. 20-18) (2020) (exploring the common-law exigent-circumstances exception and the hue and cry).

[11] *Id.* at 13 n.27, 14 n.30.

[12] Giles Jacobs, 1 *The Law-Dictionary: Explaining the Rise, Progress, and Present State of the English Law* 65 (1811).

peace officer witnessed an affray, there was "no doubt" that he could "do all such things" to end the disturbance.[13] Contemporary common-law commentators like Joseph Shaw noted that, "[w]hen an affray is in a House, the Constable, on his being refused Entrance, may break it open to keep the Peace."[14]

The authority of the government to enter a house without a warrant, however, was limited to cases in which the officer actually heard or observed the affray—requiring an immediate response to prevent harm. As noted by Joseph Chitty, an officer could "break open the doors" in order to "*suppress* the tumult" if the affray is "within view or hearing of the constable" or a "violent cry of murder" was heard within a house.[15]

Two respected common-law commentators, William Hawkins and Matthew Hale, both wrote that a warrant was required before entering a home if an officer did not personally observe or hear the affray. Hawkins explained that "a Constable hath no power to arrest a Man for an Affray done out of his own View" without a warrant, for "it is the proper business of a Constable to preserve the Peace, not punish the Breach of it."[16] Hale agreed: If the affray was past,

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[13] *Ibid.*

[14] Joseph Shaw, 1 *The Practical Justice of the Peace* 569 (4th ed. 1744).

[15] Joseph Chitty, 1 *A Practical Treatise on the Criminal Law* 56 (1836) (emphasis added).

[16] William Hawkins, 1 *A Treatise of the Pleas of the Crown* 137 (1716).

"and no danger of death" remained, a constable had to obtain a warrant before entering the home.[17]

These sources confirm that the government was permitted to intrude on the home only in a narrow set of extreme circumstances, such as if an officer witnessed or heard an ongoing affray or was otherwise trying to prevent imminent harm. Outside such time-sensitive cases, however, a warrant was required.

2. "The command of the Fourth Amendment" embodies fundamental "lessons" about the "violent, obnoxious and dangerous" character of "breaking an outer door." *Ker* v. *California*, 374 U.S. 23, 54 (1963) (plurality opinion) (citing Richard Burn, 1 *The Justice of the Peace, and Parish Officer* 275-276 (28th ed. 1837)). Carrying these lessons forward, early American cases allowed warrantless entry into the home *only* in the most urgent circumstances.

For example, in *McLennon* v. *Richardson* the Massachusetts Supreme Judicial Court held that the "authority of a constable to break open doors and arrest without a warrant" was "confined to cases where treason or felony has been committed, or there is an affray or a breach of the peace in his presence." 81 Mass. 74, 77 (1860). Breaches-of-the-peace at common law generally entailed violent crimes that involved "assaulting, striking, or fighting."[18]

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[17] Matthew Hale, 2 *The History of the Pleas of the Crown* 89 (1847).

[18] *Donohue*, The Original Fourth Amendment, *supra* n.6 at 1226 (quoting Saunders Welch, *Observations on the Office of Constable* 6 (printed for A. Millar 1754)); see also *id.* at 1226 n. 262 (quoting William Sheppard, *The Offices and Duties of*

This common-law rule did not change as the country became more established. For example, the New Jersey Court of Errors and Appeals allowed an officer to enter a home without a warrant to stop an affray short of a felony only if the affray was committed in the officer's presence: "[i]f the affray be in a house, the constable may break open the doors to preserve the peace; and if the affrayers fly to the house, and he freshly follow, he may break open the doors to take them without warrant. But he cannot, without a warrant, arrest a man for an affray or breach of the peace out of his view, unless it embrace a felony." *Delafoile* v. *State*, 24 A. 557, 558 (N.J. Ct. Err. & App. 1892) (citations omitted).

3. No common-law authority of which *Amici* are aware would have allowed government officers to enter a person's home for community caretaking as that term is used today. Instead, to the extent the exception has any history, it seems to extend no further back than 1973. See *Cady* v. *Dombrowski*, 413 U.S. 433, 453 (1973) (Brennan, J., dissenting) (arguing that the community-caretaking exception "finds no support in any of the established [Fourth Amendment] exceptions" and that the police should have obtained a warrant because they knew "what they were looking for and had ample opportunity to obtain" one).

Constables 34 (Hodgkinsonne 1641)) ("[A] breach of the peace was understood as 'not onely that fighting, which wee commonly call the Breach of the Peace, but also that every Murder, Rape, Manslaughter, and felonie whatsoever, and every Affraying, or putting in feare of the Kings people.'") (spelling in original).

But even the community-caretaking doctrine that originated in *Cady* bears little resemblance to the exception that the First Circuit applied here. *Cady* itself recognized the profound "constitutional difference between houses and cars," and thus limited the exception to a very narrow set of vehicle searches. 413 U.S. at 439, 446-448. And in *Cady*, the car at issue was "neither in the custody nor on the premises" of the owner when it was searched. *Id.* at 447-448. Here, by contrast, Ms. Caniglia was present when the police entered her home, and the police falsely told her that her husband had consented to having his guns seized, causing her to lead the officers directly to them. Pet.6a, 10a-11a, 56a-57a; J.A.56-57. The First Circuit's decision to apply the community-caretaking exception to the home in these circumstances thus produces a doctrine far removed even from *Cady*.

Therefore, because extending the exception to the home would depart from common-law principles and from this Court's own practice of limiting the exception to vehicles, the Court should decline to extend the exception further.

II. If The Community-Caretaking Exception Extended To Homes, It Could Easily Be Used To Justify Extensive Warrantless Electronic Surveillance.

While the common law's lack of any community-caretaking exception is sufficient reason to reverse here, it is not the only reason. Because jurists applying this case in the future are unlikely to afford electronic devices *greater* protection than the home, the courts will likely and logically extend the community-caretaking exception to searches of cell phones and

other electronic devices if it is extended to the home here. The need to protect Americans' privacy from unlimited electronic surveillance is another powerful reason to reject the rule applied below.

A. Electronic surveillance involves private, personal information implicating the same Fourth Amendment concerns as home entry.

Electronic devices today hold many of the "privacies of life" that were once found only in the home. *Riley* v. *California*, 573 U.S. 373, 403 (2014). "[B]ecause of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests." *Id.* at 408 (Alito, J., concurring in part and in the judgment). Indeed, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393 (majority opinion). And they certainly implicate privacy concerns beyond those implicated by a search of a car.

The Court has thus correctly emphasized that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[.]" *Id.* at 396 (emphasis in original). Indeed, "[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *Ibid.*

Beyond records and information, even the choice of applications that a person installs on her phone can reveal significant private details. There are "apps for

alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for improving your romantic life." *Ibid.* And many Americans use their electronic devices for even the most sensitive of activities, such as mental-health counseling,[19] or sending sexually explicit images of themselves.[20] Cell phones also track their owner's location,[21] and location data can indicate where a person worships, where she banks, where she studies, or where she spends her free time.

The all-encompassing information stored on phones and other devices contain "several interrelated consequences for privacy." *Riley*, 573 U.S. at 394. Foremost among them is the likelihood that "distinct types of information" on phones could "reveal much more in combination than any isolated record" and could "date back to the purchase of the phone." *Ibid.* Also, there is a "pervasiveness" that "characterizes cell

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[19] Amy Novotney, *A growing wave of online therapy*, Monitor on Psychology, Feb. 2017, at 48, https://www.apa.org/monitor/2017/02/online-therapy.

[20] Elizabeth Kinsey Hawley, *Sexting Felonies: A Major Problem for Minors*, Communicating Psychological Science, https://www.communicatingpsychologicalscience.com/blog/sexting-felonies-a-major-problem-for-minors; Sasha Harris-Lovett, *In survey, 88% of U.S. adults said they had sexted and 96% of them endorsed it*, L.A. Times (Aug. 8, 2015), https://www.latimes.com/science/sciencenow/la-sci-sn-sexting-sexual-satisfaction-20150807-story.html.

[21] Novotney, *supra* n.19 ("[S]ome [counseling] apps do report that they use a member's IP address to determine their exact location and send police if a therapist is concerned about a member's safety[.]").

phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day." *Id*. at 395.

Indeed, today electronic devices—with all of their sensitive information—are everywhere. As of 2019, "[t]he vast majority of Americans—96%—now own a cellphone of some kind," with 81% of Americans owning a smartphone.[22] Americans also "own a range of other information devices": Nearly 75% of U.S. adults now own desktop or laptop computers and 50% own tablet computers and/or e-reader devices.[23] And Americans are increasingly online, with 90% of Americans using the internet, likely with some regularity.[24] With the overwhelming majority of Americans connected to an electronic device today, and the vast majority of those electronic devices being connected to the internet, the risk of out-of-control government surveillance is ever-present.

Because of the ubiquity of electronic devices and the incredible amount of private, personal information they contain, searches of a person's personal electronic devices implicate many of the same privacy concerns as searches of a home. Simply put, searching a person's

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[22] Pew Rsch. Ctr., *Mobile Fact Sheet* (June 19, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/.

[23] *Ibid*.

[24] Pew Rsch. Ctr., *Internet/Broadband Fact Sheet* (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

electronics today is even more intrusive than searching her home.

B. A community-caretaking exception that applies to the home would quickly encompass warrantless electronic surveillance, seriously compromising Americans' privacy.

If the Court extended the community-caretaking exception to the home, the same logic allowing that extension would likewise allow law enforcement to search electronic devices. Such an extension would allow warrantless surveillance even if "there is no claim of criminal liability" and the search is "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. But this would end any theoretical limit on the government's authority to surveil these devices at will. After all, electronic devices can reveal a host of caretaking-relevant information about a person's mental, emotional, and physical well-being. Officers would thus be free to argue that the Fourth Amendment excuses mass surveillance to identify and assist all those in need of caretaking. This could spell the end of privacy for most Americans.

1. Unlike home searches, the government can perform electronic searches remotely. See Fed. R. Crim. P. 41(b)(6) (allowing judges to "issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information."). Advances in technology increase the potential for government abuse. A "government agent in Virginia" may "hack into a website located on a

server in Kansas, or even Russia."[25] That same agent could also remotely "verify that the same computer that had been connected at [one] IP address was now connected at" another. *United States* v. *Heckenkamp*, 482 F.3d 1142, 1148 (9th Cir. 2007). And once the government has access to a device, it may access everything stored on it.

Worse still, the government can acquire such access through garden-variety, remote hacking, which "has the potential to be far more intrusive than any other surveillance technique."[26] Through hacking, the government can "conduct novel forms of real-time surveillance, by covertly turning on a device's microphone, camera, or GPS-based locator technology, or by capturing continuous screenshots or seeing anything input into and output from the device."[27]

And if the government can hack a device for one purpose, then it has the wherewithal to hack it for any other, and the potential for such surveillance even without an emergency is limitless. Whether to learn the "suspect's identity," to "obtain a suspect's [past] communications," or to "intercept future conversations," "[a]s security and privacy technology

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[25] Jeremy A. Moseley, *The Fourth Amendment and Remote Searches: Balancing the Protection of "The People" with the Remote Investigation of Internet Crimes*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 355, 356 (2005).

[26] Privacy International, *Government Hacking*, https://www.privacyinternational.org/learn/government-hacking.

[27] *Ibid*.

becomes more prevalent, law enforcement hacking will only become more commonplace."[28]

Imagine, for example, that the police believed a person posed a risk to himself or others. Under a broadened view of the community-caretaking exception, the police would be free to conduct a warrantless search of the person's smartphone to evaluate the risk. The police would then be free to browse through the person's search history, text messages, call logs, and photos—all in the name of caretaking. And during that search, the police might just also stumble across evidence of unrelated illegal activity.

That evidence could then be freely seized and used against the person. After all, another "exception to the warrant requirement is the seizure of evidence in 'plain view.'" *Cady*, 413 U.S. at 452 (Brennan, J., dissenting). This doctrine applies when an officer with "prior justification for an intrusion"—e.g., to perform a community-caretaking function—"inadvertently [comes] across a piece of evidence incriminating" a person. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971). If the police do not violate the Fourth Amendment when they search a home or a phone while acting as community caretakers, then anything illegal they see in that capacity may be used against a person in a criminal prosecution. See, *e.g.*, *United States* v. *Johnson*, 410 F.3d 137, 146 (4th Cir. 2005) (officer's "role changed from community caretaker to

[28] Jonathan Mayer, *Government Hacking*, 127 Yale L.J. 570, 577-578 (2017).

investigator of illegal activity" when he discovered a gun during a caretaker search).

Seemingly benevolent searches would then become an engine for criminal prosecutions even though no warrant was ever obtained, and no probable cause ever existed. The community-caretaking exception would thus become a license for the government to discover criminal activity that—in all other circumstances—would only have been discoverable through a warrant supported by probable cause.

2. Of course, if encryption backdoors were only exploited in searches backed by a warrant, that would limit the government's intrusion into the privacy protected by the Fourth Amendment. But the government is not likely to voluntarily limit itself to those circumstances. To the contrary, as Justice Jackson famously put it, the government will likely "push to the limit" "any privilege of search and seizure without warrant which [the Court] sustain[s]." *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). [29]

Expanding any exception to the warrant requirement, then, poses a risk of further government abuses. Accordingly, the Court should reject any invitation to weaken the Fourth Amendment's protections by further expanding the community-caretaking exception. The Court should reverse the First Circuit's contrary holding.

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[29] Because Justice Jackson had served as Solicitor General prior to writing his *Brinegar* dissent, one wonders if he was speaking from personal experience.

CONCLUSION

The common law did not recognize a community-caretaking exception that would have allowed the police to enter a person's home without a warrant. Accordingly, the Court should reject any invitation to extend the doctrine to the home. Instead, the Court should continue to ensure that the "privacies of life" that define every person's home—and their electronic devices—are fully protected by the Fourth Amendment.

Respectfully submitted.

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