No. 20-18

In The Supreme Court of the United States

ARTHUR GREGORY LANGE, *Petitioner*

v.

CALIFORNIA

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate Division

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

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QUESTION PRESENTED

Absent "consent" or "exigent circumstances," a police officer's "entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald* v. *United States*, 451 U.S. 204, 211 (1981). The question presented is:

> Does pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualify as an exigent circumstance sufficient to allow the officer to enter a home without a warrant?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

The "special protection" given to privacy in the home, *Welsh* v. *Wisconsin*, 466 U.S. 740, 754 (1984), is predicated on the notion that "*all* details" of the home, from the pictures on the wall to the food in the cupboards or the "nonintimate rug on the vestibule floor," "are intimate details." *Kyllo* v. *United States*, 533 U.S. 27, 37 (2001). Today, information on those same "intimate details," and many more, are as likely to be stored on electronic devices as they are to be kept in physical form. If home is where the heart is, many today keep an electronic "home" as well as a physical one. Such modern developments are an important consideration when recognizing limits on government invasions of privacy in the physical as well as the virtual world.

Since before the Founding, one of the "special protections" afforded to the home was the requirement that—in all but the most extreme circumstances—the government obtain a warrant before entering it without consent. Some early commentators disputed whether even a warrant was sufficient for entering a home. More "lenient" commentators made allowances for pursuing felons; some still insisted on warrants; and others made an exception to the requirement. But unless someone was threatened with harm, no Founding-era authorities of which *Amici* are aware would have allowed warrantless entry into the home

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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.

for a mere misdemeanor. That broadly accepted historical limitation on warrantless home entry should guide this Court to reject the categorical exigency rule applied below.

Such a rejection is especially important given that many of the most intimate details of a person's life that could be revealed by searching a person's home are also equally accessible through that person's phones and other electronic devices: Nearly everyone carries with him or her a "cache of sensitive personal information"; "it is the person who is *not* carrying a cell phone, with all that it contains, who is the exception." *Riley* v. *California*, 573 U.S. 373, 395 (2014) (emphasis added).

While the protections for electronic devices and communications remain under development, it is unlikely that courts would give such information sources *more* protection than the home. Accordingly, if the Court were to create a categorical misdemeanor exigency rule applicable to home entry, that rule would inexorably be extended to warrantless entry into electronic sources of information, posing an even more pernicious and extensive threat to privacy and its Fourth Amendment protections.

For example, today's smartphones and other devices contain information detailing every aspect of a person's life—messages to family, identifying documents, intimate pictures, personal journals, health information, financial data, and more are likely to be found on a device that the government has the technical ability to search remotely. If the pursuit of a misdemeanant allows such remote searches, the most sensitive aspects of a person's life will be routinely

accessible to the government merely to help them apprehend people for only minor crimes.

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. *Amicus* Restore the Fourth, Inc. is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment. Restore the Fourth believes that everyone is 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. Besides filing amicus briefs in cases such as this, Restore the Fourth advances these principles by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens.

Amici believe a categorical exception allowing warrantless entry into a person's home poses a tremendous danger of abuse in other similarly sensitive, but as yet less-protected, areas. To avoid such abuse, this Court should look to the common law for guidance and, in so doing, reject the categorical rule applied below.

STATEMENT

Having followed Petitioner's vehicle to inquire why he was playing loud music and occasionally tooting his horn, a California police officer eventually forced his way into Petitioner's garage with the supposed intent to conduct a traffic stop for alleged misdemeanor violations of the California Vehicle Code. Pet. 4-5. Following that warrantless entry and further questioning, the officer ordered Petitioner out of the garage to conduct a DUI investigation, and ultimately charged him with driving under the influence. Pet. Br. 4. Petitioner's suppression motion was rejected in both the trial and appellate courts on the theory that probable cause to believe someone has committed a jailable misdemeanor categorically authorizes an officer to enter that person's home. Pet.3a-4a; 21a, 26-27a.

SUMMARY OF ARGUMENT

The California Court of Appeal found that if a police officer is in hot pursuit of a suspect he has probable cause to believe has committed a jailable misdemeanor, the officer may enter that person's home without a warrant under any circumstance—no matter how minor the misdemeanor or the risk of harm. This categorical rule violates the Fourth Amendment, as even California now admits.

I. The Court has long looked to Founding Era sources to determine the reasonableness of a search or a seizure. See *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214 (2018). It should do the same here and reject the categorical rule applied below because the Founders did not *categorically* allow police officers to

enter the homes of an arguably fleeing misdemeanant. Because the lower court's categorical rule is inconsistent both with the common law and the original public meaning of the Fourth Amendment, this Court should reverse the holding below.

II. The Court should also reject the lower court's categorical rule because it would open the door to warrantless searches in other contexts, like searches of electronic devices. Such devices contain vast amounts of personal information that, historically, would only have been found in the home. Creating a categorical exception to the warrant requirement for the most sacrosanct place would allow courts to logically extend the exception to less safeguarded areas. This is not hypothetical. This Court has already recognized that the need "to pursue a fleeing suspect" "may *** justify [the] warrantless search" of an electronic device. *Riley*, 573 U.S. at 402. The government could readily rely on such language in a future case to justify extensive warrantless searches, remotely or otherwise, of electronic devices, if a categorical misdemeanor rule is adopted here.

But that would be devastating to the privacy rights of all Americans. The Court should therefore decline to adopt such a rule. As Justice Jackson observed more than 70 years ago, law-enforcement officers will interpret, apply, and "push to the limit" "any privilege of search and seizure without warrant" that the Court sustains. *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). This Court can prevent the government from pushing a categorical exception to the limit by rejecting that rule—categorically.

ARGUMENT

I. Because The Exigent-Circumstances Exception At The Founding Did Not Categorically Allow Police To Enter A Home Based On A Jailable Misdemeanor, There Should Be No Such Categorical Exception Today.

The Court has previously held that the "hot pursuit" of a person who has committed a crime "*may*," depending on the facts, "give rise to an exigency," thereby justifying a warrantless search. See *Missouri* v. *McNeely*, 569 U.S. 141, 149 (2013). But the theoretical possibility that pursuing a misdemeanant might create an exigency sufficient to circumvent the warrant requirement does not mean that such exigence always arises, or even that it often will. There was no such categorical rule either at common law or at the time of the Founding. As it has in the past, evidence from common law and the Founding should guide the Court's understanding of the Fourth Amendment's requirements. And with that guidance, the Court should reject the categorical rule 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). And in light of the word "unreasonable," Justice Story described the terms of the Fourth Amendment as

"little more than the affirmance" of the common law."[2] Consistent with Justice Story's commentary, this Court's precedent has long been "informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" *Carpenter*, 138 S. Ct. at 2214 (quoting *Carroll* v. *United States*, 267 U.S. 132, 149 (1925)).

The end result is "basic guideposts": (1) the Fourth Amendment protects "the privacies of life" from "arbitrary power," *ibid.* (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 shown below in Section II.A., at common law the "privacies of life" were nowhere more present than in the home. And if the police may categorically enter a home without a warrant whenever they are in pursuit of a person they have probable cause to believe committed a jailable misdemeanor, then one meaningful obstacle to government overreach will be forever removed.

Thankfully, as shown below in Section I.B., a history-driven understanding of the warrant requirement makes it unnecessary even to rely on these guideposts. At common law, the law-enforcement practice the California court found categorically acceptable was uniformly *forbidden*. Accordingly, consistent with this Court's longstanding

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[2] 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833).

practice of relying upon the common law when interpreting the Fourth Amendment, the Court should reject the California court's categorical rule.

B. The common-law exigent-circumstances exception applied to the hot pursuit of someone suspected of committing only felonies or other violent crimes.

At common law, government officers were required to obtain warrants to enter a person's home in all but the most extreme cases.

1. English courts considered a man's house his "castle and fortress." *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604). "[T]he Crown", therefore, "could not intrude on the sanctity of the home without a warrant" "outside of certain circumstances."[3] The Fourth Amendment, being "little more than the affirmance" of the common law,[4] continued this tradition to prevent the "evil" of "physical entry of the home." *Welsh*, 466 U.S. at 748 (citation omitted).

The government thus was not allowed to enter a home unless an "immediate arrest" was necessary.[5] And immediate arrest was necessary only to apprehend a person "for felony, or suspicion of felony." *Burdett* v. *Abbot*, 104 Eng. Rep. 501, 560 (K.B. 1811). Thus, only in cases involving a suspected felony could

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

[4] 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833).

[5] 1 Joseph Chitty & Richard Peters, Jr., *Practical Treatise on the Criminal Law* 36 (1819).

the police "break open the house to take the felon." *Ibid.*

2. But that approach was far from universal. "[C]ommon-law commentators disagreed sharply" on whether warrantless entries into the home were allowed at all. *Payton* v. *New York*, 445 U.S. 573, 593 (1980). Many, including Lord Coke, "viewed a warrantless entry for the purpose of arrest to be illegal" in almost all cases. *Id.* at 594. In Coke's view, only an indictment, not even a suspicion-based warrant, could "justify breaking down doors."[6] Otherwise, "neither the Constable, nor any other" could "break open any house for the apprehension of the party suspected or charged with [a] felony."[7]

A more common and accepted approach under the common law allowed home entry without a warrant only in circumstances then described as a "hue and cry."[8] The common-law hue and cry exception was available only for a narrow class of serious offenses, namely, "when any felony is committed, or any person

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[6] Donohue, *The Original Fourth Amendment*, *supra* n.3 at 1228 n. 283 (citing Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 177 (Flesher 1644)); see also *Payton*, 445 U.S. at 594 n.37 ("Coke also was of the opinion that only a King's indictment could justify the breaking of doors to effect an arrest[.] *** [N]ot even a warrant issued by a justice of the peace was sufficient authority.").

[7] Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 177 (Flesher 1644).

[8] Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminall Causes* 116-118 (Flesher 1644).

grievously and dangerously wounded, or any person assaulted and offered to be robbed either in the day or night."[9] In these cases, "the party grieved" could approach the Constable, "acquaint him with the causes, describing the party, and telling which way the offender is gone, and require him to raise Hue and Cry."[10] Once Hue and Cry was raised, everyone in the town was required to take chase after the felon,[11] and Crown agents could enter a home without a warrant to arrest the person against whom Hue and Cry was raised.[12]

Apart from the Hue and Cry exception, less restrictive commentators than Coke would have allowed home entry *with* a warrant, but even then only in the case of felonies. Joseph Shaw, for example, argued that even a warrant from a Justice of the Peace would not "justify" a constable "in breaking into a House to apprehend any Person for a less Crime than Felony or Misprision of Felony."[13] And the first American edition of Gile Jacobs' law dictionary wrote that, even with a warrant, the "Doors of a *house* may

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[9] *Id.* at 116

[10] *Ibid.*

[11] See, *e.g.*, *State* v. *J.H.*, 1 Tyl. 444, 446 (Vt. 1802) ("The crime may be of such magnitude, that a faithful and prudent magistrate, to prevent escape, may order the immediate apprehension of the offender without warrant, and promulgate a hue and cry.").

[12] *Semayne's Case*, 77 Eng. Rep. at 196.

[13] 1 Joseph Shaw, *The Practical Justice of the Peace* 85 (6th ed. 1756).

not be broken open on arrests, unless it be for treason or felony."[14]

Still more lenient commentators, such as William Hawkins and Richard Burn, considered *warrantless* home entry appropriate in felony cases when someone "*known* to have committed a treason or felony" was "pursued."[15] By contrast, if there was "probable suspicion only" (not knowledge) and the person was "not indicted," Hawkins considered the "better opinion" to be that "no one can justify the breaking open doors."[16] Burn, citing Hawkins, agreed.[17] To him, "the breaking an outer door [was], in general, so violent, obnoxious and dangerous a proceeding that it should be adopted only in extreme cases where an immediate arrest is requisite."[18] That high standard was not met by any form of probable suspicion—even of a felony.

Edward Hyde East likewise maintained that a "bare suspicion of guilt against [a] party" would not justify breaking open the home, "unless the officer be armed with a magistrate's warrant grounded on such

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[14] 3 Giles Jacobs, *The Law-Dictionary: Explaining the Rise, Progress, and Present State of the English Law* 348-349 (1811).

[15] 2 William Hawkins, *A Treatise on the Pleas of the Crown* 139 (6th ed. 1787) (emphasis added).

[16] *Ibid.*

[17] 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 99 (Strahan 12th ed 1772).

[18] 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 275-276 (28th ed. 1837).

suspicion."[19] East accepted that officers in "fresh pursuit" of a person that had escaped a legal arrest could enter the home if that person "take[s] shelter *** in his own house."[20] But even then, the officer had to demand and be refused admission before he could "break open the door in order to retake him."[21] The timing here was critical: "If it be not *** upon fresh pursuit, *** the officer should have a warrant from a magistrate."[22]

Blackstone and Hale were more permissive still. Blackstone explained that "in the case of *felony actually committed*, or a dangerous wounding *whereby felony is like to ensue*," officers could "upon probable suspicion" both "break open doors" and even "kill the felon if he cannot otherwise be taken."[23] Sir Matthew Hale, who wrote extensively on when warrantless entry into the home was appropriate, had a similar rule: an officer could "break open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable."[24] Hale continued that such home entry was not only permissible, "but by law injoind": "if [the constable]

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[19] 1 Edward Hyde East, 1 *A Treatise of the Pleas of the Crown* 322 (Strahan 1803).

[20] *Id.* at 324.

[21] *Ibid.*

[22] *Ibid.*

[23] 4 Blackstone Commentaries 289 (1769) (emphasis added).

[24] 2 Matthew Hale, *The History of the Pleas of the Crown* 90 (1847).

omits his duty herein, he is indictable and subject to a fine and imprisonment."[25]

Hale's rule extended to fleeing felons as well. "[I]f there be a felony done, (suppose a robbery upon A)" and the "supposed offender" were to "fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant."[26] Were this not allowed, he reasoned, "many felons would escape."[27]

These sources reveal that, although there was "disagreement among seventeenth- and eighteenth-century legal scholars" about when the government could enter a house to apprehend *felons*, none of these commentators thought warrantless home searches for non-violent misdemeanants was permissible.[28] Even those commentators with the most permissive understanding of when warrantless home entry was appropriate, like Blackstone and Hale, spoke only about felonies. To them, the "norm *** was clear: in order to enter into a home, the constable was required

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[25] *Ibid.* (spelling in original).

[26] *Id.* at 92.

[27] *Id.* at 91. Hale's understanding extended not only to felonies, but also to cases involving possible loss of life or limb. In such cases, it was appropriate for the constable to "break open the doors to keep the peace and prevent the danger" upon hearing "an affray in the house" "whereby there is likely to be manslaughter or bloodshed committed." *Id.* at 95.

[28] *Donohue*, The Original Fourth Amendment, *supra* note 3 at 1228 n.283 (collecting sources).

to first have a warrant--unless he was in pursuit of a felon."[29]

3. Early American cases confirm this understanding of the need for a warrant for all but the most severe crimes.

Indeed, early cases in the United States fully recognized the common law's distaste for dispensing with the warrant requirement, even in cases not involving home-entry. In *Commonwealth* v. *Carry,* for example, the Massachusetts Supreme Judicial Court held, based on the "old established rule of the common law," that a "constable or other peace-officer could not arrest one without a warrant, for a crime proved or suspected, if such crime were not an offence amounting in law to felony." 66 Mass. 246, 252 (1853). This was so because "anciently there was a broad and marked distinction between felony and misdemeanor." *Ibid.* On this basis, the court later held that the "authority of a constable to break open doors and arrest without a warrant is confined to cases where treason or felony has been committed, or there is an affray or a breach of the peace in his presence."[30] *McLennon* v. *Richardson*, 81 Mass. 74, 77 (1860).

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[29] *Id.* at 1228-1229.

[30] Donahue explains that Breaches of the Peace at common law were generally violent crimes involving "assaulting, striking, or fighting." *Donohue*, The Original Fourth Amendment, *supra* n.3 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 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,

Other cases not directly involving government invasion of the home also recognized the need for a warrant in cases falling short of a felony. In *Wakely* v. *Hart*, the Pennsylvania Supreme Court held that persons "known to have committed a *felony*" may be "pursued with or without warrant" and arrested. 6 Binn 316, 319 (Pa. 1814) (emphasis added). The court drew this conclusion from the common law—a set of principles "not intended to be altered or impaired by the [C]onstitution." *Ibid.*

Like the common-law commentators before them, these early American cases show that felonies and the pursuit of felons were treated differently at common law than misdemeanors.

Manslaughter, and felonie whatsoever, and every Affraying, or putting in feare of the Kings people.").

II. A Categorical Exception For Misdemeanors Could Easily Be Used To Justify Extensive Warrantless Electronic Surveillance.

Beyond the preceding historical analysis, there are other powerful reasons to reject the categorical rule applied below. One of these is the importance of preventing the logical extension of the rule to other areas lacking the special protections this Court has historically afforded the home. Cell phones and other electronic devices, for example, contain many of the same "privacies of life" that at one point were found exclusively in a person's home. Because the "exigent circumstances exception" allows warrantless searches of electronic devices no less than homes, *Riley*, 573 U.S. at 402, any expansion of that exception in the home context is likely to affect electronic-device searches too. The need to protect Americans' privacy from unlimited electronic surveillance thus provides another powerful reason—beyond the common-law history addressed in Section I.B—to reject the categorical rule applied by the court below.

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

Electronic devices, including phones, computers, tablets, and other appliances, contain vast amounts of personal information that, in earlier times, would only have been found in the home. Some of these devices fit in our pockets and are carried with us at all times. Others are larger, but nearly as ever-present.

As a result, no less than the home, such devices hold "the privacies of life." *Riley*, 573 U.S. at 403. "[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).

These electronic devices—and all of the sensitive information they contain—are ubiquitous. As of 2019, "[t]he vast majority of Americans—96%—now own a cellphone of some kind," with 81% of Americans owning a smartphone.[31] Americans also "own a range of other information devices. Nearly three-quarters of U.S. adults now own desktop or laptop computers, while roughly half now own tablet computers and roughly half own e-reader devices."[32] These devices are nearly all online—"nine-in-ten American adults use the internet."[33] 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.

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

[32] *Ibid.*

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

The Court has thus recognized that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[.]" *Riley*, 573 U.S. at 396. 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—unless the phone is." *Ibid.*

Beyond records and information, even the choice of applications that a person installs on her phone can reveal significant private information. 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 every conceivable hobby or pastime; [and] apps for improving your romantic life." *Id.* at 396. And Americans use their electronic devices for even the most intimate of activities, with 20% of teens[34] and nearly 88% of adults[35] having sent sexually explicit images of themselves using their phones. Cell phones also track their owner's location, and location data can indicate where a person worships, where she banks, where she studies, or where she spends her free time.

The information stored on phones and other devices has "several interrelated consequences for

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[34] 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.

[35] 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.

privacy." *Riley*, 573 U.S. at 394. These include 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 a "pervasiveness *** characterizes cell 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.

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 did during the Founding era. If anything, searching a person's electronics is even *more* intrusive than searching a home.

B. A categorical exigency exception for home entry for ongoing misdemeanors would quickly extend to warrantless electronic surveillance, seriously compromising Americans' privacy.

This Court, moreover, has already indicated that the exigent-circumstances doctrine applies to searches of these ubiquitous electronic devices no less than it does to the home. *Riley*, 573 U.S. at 402. If ongoing misdemeanors categorically constitute exigent circumstances sufficient to justify warrantless home searches, this categorical rule would logically extend to warrantless searches of electronic devices. This would seriously threaten Americans' privacy.

1. Unlike home searches, technology allows the government to perform electronic searches remotely.

The ability to perform a remote search, until recently, would have been impossible. Now, the technology is so widespread that it is even influencing how warrants are issued. Recent amendments to Rule 41(b) of the Federal Rules of Criminal Procedure reflect this reality: Rule 41(b)(6) now allows judges to "issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information."

The ability to conduct remote electronic searches remotely makes the risk of government abuse even greater. A "government agent in Virginia" may "hack into a website located on a server in Kansas, or even Russia."[36] 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 potentially access everything stored on it.

The government can achieve such access through garden-variety hacking, which "has the potential to be far more intrusive than any other surveillance technique."[37] Through hacking, the government can "conduct novel forms of real-time surveillance, by covertly turning on a device's microphone, camera, or

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[36] 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).

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

GPS-based locator technology, or by capturing continuous screenshots or seeing anything input into and output from the device."[38]

The government sees that potential too. When Apple declined to comply with a warrant instructing it to introduce a backdoor into its iOS software, the FBI paid "professional hackers" to discover a "previously unknown software flaw" in the iOS operating system in the wake of the San Bernardino shooting.[39] Once such hackers discover software vulnerabilities, they "do not disclose the flaws to the companies responsible for the software, as the exploit's value depends on the software remaining vulnerable."[40] And although the government has a "strong bias" in favor of disclosing such vulnerabilities once they are discovered, disclosure isn't required.[41] In the San Bernardino case, for example, the hacker "that helped the FBI unlock a San Bernardino shooter's iPhone to get data has sole legal ownership of the method, making it

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[38] *Ibid.*

[39] Ellen Nakashima, *FBI paid professional hackers one-time fee to crack San Bernardino iPhone*, The Washington Post (Apr. 12, 2016), https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5_story.html.

[40] *Ibid.*

[41] Andrew Crocker, *FAQ: Apple, the FBI, and Zero Days*, Electronic Frontier Foundation (Apr. 14, 2016), https://www.eff.org/deeplinks/2016/04/will-apple-ever-find-out-how-fbi-hacked-phone-faq.

highly unlikely the technique will be disclosed by the government to Apple or any other entity."[42]

2. Certain members of Congress also see the potential benefits to law enforcement that ever-present electronics provide. Earlier this year, for example, several members of the Senate Judiciary Committee introduced S. 4051, the Lawful Access to Encrypted Data Act. It would provide financial incentives for companies to introduce an encryption backdoor in their software for law-enforcement purposes in the form of a "prize competition."[43] Other bills, such as the Earn It Act, have also sought to introduce an encryption backdoor for law-enforcement purposes.[44]

Of course, *if* the government limited its use of such backdoors to searches backed by a warrant, that would pose little risk to the privacy protected by the Fourth Amendment. But the government is not likely to limit

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[42] Joseph Menn & Mark Hosenball, *Apple iPhone unlocking maneuver likely to remain secret*, Reuters (Apr. 13, 2016), https://www.reuters.com/article/us-apple-encryption-whitehouse-idUSKCN0XB05D.

[43] Senate Judiciary Committee, *Graham, Cotton, Blackburn Introduce Balanced Solution to Bolster National Security, End Use of Warrant-Proof Encryption that Shields Criminal Activity* (June 23, 2020), https://www.judiciary.senate.gov/press/rep/releases/graham-cotton-blackburn-introduce-balanced-solution-to-bolster-national-security-end-use-of-warrant-proof-encryption-that-shields-criminal-activity.

[44] Jonathon Hauenschild, *The EARN IT Act threatens encryption and national security*, The Hill (June 27, 2020), https://thehill.com/opinion/cybersecurity/504852-the-earn-it-act-threatens-encryption-and-national-security.

its use of the backdoor to that situation. 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). Accordingly, "[i]f U.S. providers are forced by law to backdoor their encryption," it will likely put "an end to Americans' electronic privacy and security."[45]

3. Regardless whether software vulnerabilities are accidental or government-mandated, their existence alone poses a significant risk of abuse. Although "a warrant is generally required" to exploit those vulnerabilities, the pursuit of a fleeing suspect could justify the warrantless search of a cell phone. *Riley*, 573 U.S. at 402.

The incredible amounts of data that personal electronics contain, coupled with the government's ability to hack these devices and obtain *all* their data weighs strongly in favor of keeping the exigent circumstance's exception case-specific. While there may be circumstances when a phone or other electronic device contains information that must be obtained immediately, these extreme cases should remain the exception to the rule.

Allowing the hot pursuit of a misdemeanant to categorically justify a *warrantless* search would gut

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[45] Riana Pfefferkorn, *There's now an even worse anti-encryption bill than Earn It. That doesn't make the Earn It bill ok.*, The Center for Internet and Society (June 24, 2020), http://cyberlaw.stanford.edu/blog/2020/06/there's-now-even-worse-anti-encryption-bill-earn-it-doesn't-make-earn-it-bill-ok.

this principle. Rarely if ever will minor offenses justify warrantless searches. *Welsh*, 466 U.S. at 742, 753. The Court should therefore reject the lower court's categorical rule to avoid the enormous invasion of privacy that such a rule entails, be it of the home or of electronic devices.

CONCLUSION

Common-law history and the Court's subsequent Fourth Amendment jurisprudence contradict the lower court's categorical allowance of warrantless exigent searches of homes for those suspected of having committed jailable misdemeanors. Exigency must be decided on a case-by-case basis. The Court should reject the lower court's categorical rule to ensure protection of the "privacies of life" that define every person's home and electronic devices.

Respectfully submitted.

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December 11, 2020