No. 24-624

IN THE

Supreme Court of the United States

WILLIAM TREVOR CASE,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ of Certiorari to the Montana Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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3 William Blackstone, *Commentaries on the Laws of England* (1766) 7

4 William Blackstone, *Commentaries on the Laws of England* (1791) 2, 7-9, 11, 12, 24

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Joseph Chitty, *Practical Treatise on the Criminal Law* (Edward Earle ed., 1819)..... 8, 10, 12, 24

2 Edward Coke, *Institutes of the Laws of England* (1681) 9

4 Edward Coke, *Institutes of the Laws of England* (1797) 11, 12

A Columbian Patriot, *Observations on the New Constitution, and on the Federal and State Conventions*, reprinted in *Pamphlets on the Constitution of the United States* (Paul Leicester Ford ed., 1888). 19

William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (2009) 5, 18, 19-21, 23-26

Michael Dalton, *The Country Justice* (1690) 9, 22

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) 7, 15, 16, 18

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The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 1836) 18

Laura K. Donahue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181 (2016) 17

Edward Hyde East, *Treatise of the Pleas of the Crown* (1803). 12, 13

Essay by a Farmer and Planter, Md. Journal, Mar. 27, 1788, *in* 5 *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981).... 19

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1 William Hawkins, *A Treatise of the Pleas of the Crown* (1777) 2, 11

2 William Hawkins, *A Treatise of the Pleas of the Crown* (1787) 5, 8, 10-14, 23

Giles Jacob, *A New Law Dictionary* (1739)... 13, 14

Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925 (1997) 20, 25

TABLE OF AUTHORITIES – cont'd

Page(s)

Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905 (2010) 16, 17

James Parker, *The Conductor Generalis* (Pa. 1792)..... 9

Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2d ed. 1898) 21

Barbara J. Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (1991)..... 5, 22, 24

William Sheppard, *An Epitome of All the Common and Statute Laws of the Nation* (1656) 5, 23

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James Fitzjames Stephen, *History of the Criminal Law of England* (1883)..... 8, 10

Joseph Story, *Commentaries on the Constitution of the United States* (1833)..... 16

TABLE OF AUTHORITIES – cont'd

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Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868* (2006) 20-22, 24, 25

George Webb, *The Office and Authority of a Justice of Peace* (Va. 1736) 10, 11, 14

Jack K. Weber, *The Birth of Probable Cause*, 11 Anglo-Am. L. Rev. 155 (1982) 21

Saunders Welch, *Essay on the Office of Constable*, *reprinted in* James Parker, *Conductor Generalis* (N.J. 1764)..... 9, 12, 14

Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924)..... 9

Works of John Adams (Charles Francis Adams ed., 1850) 17, 25

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Police officers must sometimes consider whether to enter a home without permission based on reports that someone inside may need emergency aid. But police officers are not like neighbors offering assistance: they carry deadly weapons, are charged with acting upon potential lawbreaking they observe, and may use lethal force when they perceive threats to their safety during split-second encounters. Forcibly entering homes when there is no emergency can thus put lives in jeopardy. And if mere suspicion that someone might be in danger were enough to allow warrantless police entries, the sanctity of the home would be placed at risk of groundless and even pretextual government intrusions. This Court's precedents therefore require that such entries be supported by probable cause. The Fourth Amendment's text and history compel the same result.

1. Under Founding-era common law, which provides a baseline for reasonableness under the Fourth

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Amendment, much *more* than probable cause was needed for officers to forcibly enter homes, for any purpose.

The common law did not allow law enforcement officers to break into homes to provide emergency aid. The only similar power officers wielded was to enter homes without warrants to stop violent "affrays." But such entry required more than probable cause, not less. Indeed, it required certainty. Officers could not respond to an affray, even in public, without personally observing it with their own senses. If an affray occurred out of an officer's view, he had no power to intervene or arrest the participants. It was well known, therefore, that officers had to personally witness an affray before they could take the extreme measure of forcibly entering a home to stop the affray or apprehend the offenders.

Indeed, many authorities limited the very definition of an affray to *publicly visible* disturbances. An affray was typically understood as "the fighting of two or more persons in some public place, to the terror of his majesty's subjects," and so "if the fighting be in private, it is no affray." 4 William Blackstone, *Commentaries on the Laws of England* 145 (1791). Unless observers could perceive the tumult inside a home, "it cannot be said to be to the terror of the people." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 265 (1777). And without that, law enforcement officers had no right to intervene, much less force their way into homes to do so.

The common law was just as strict about the other conditions that allowed warrantless home entries—there, too, more than probable cause was required. One set of rules governed arrests for felonies, a category limited to a small handful of the most serious crimes. Officers could forcibly enter a home in pursuit

of a fleeing felon, or a perpetrator whose violence had put someone at risk of dying (an event that would make the perpetrator a felon). Likewise, officers could break into homes to arrest such offenders when taking part in the "hue and cry," the age-old method of gathering townspeople to capture felons. But warrantless entry for felony arrests required significantly more than probable cause. This extreme measure was available only if it was *certain* that a felony or a dangerous wounding had actually occurred, and only if the officer had probable cause to believe that the suspect was the culprit. Moreover, if an officer turned out to be wrong that a house contained the suspect in question, the officer was liable for trespass. In short, certainty was required about the existence of a crime and the location of the suspect, along with probable cause of the suspect's guilt.

Officers also could forcibly enter homes to recapture arrestees who had escaped, an offense that itself was originally a felony. But probable cause alone did not suffice here either. Certainty was required, because nothing shielded officers from liability if they were wrong that a home harbored an escapee.

All told, the common law never allowed law enforcement officers who lacked a warrant to enter homes with anything less than probable cause. On the contrary, the common law demanded much more.

2. The Constitution's Framers were no less concerned about defending the sanctity of the home. The Fourth Amendment was meant to preserve common law protections against unbridled search and seizure, inspired by the colonists' experience with general warrants that lacked individualized suspicion backed by credible evidence. As early as the 1600s, the use of such warrants came under attack in England. They were decried as instruments of arbitrary power, and

popular opposition to them quickly solidified as they were used to ransack the homes of vocal critics of the government. During the 1700s, colonists also began to speak out against general warrants, and their use was one of the chief grievances that inspired the movement for independence from British rule.

Fears of home intrusion under general warrants continued in the post-colonial period, as state leaders called for the nation's federal charter to include an explicit protection against such arbitrary power. The Fourth Amendment's text reflects the Framers' staunch opposition to the use of general warrants to invade the home, expressly shielding "houses" from unreasonable searches and requiring all warrants to be predicated on "probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. This text reflects the Framers' core concern with preventing government searches in the absence of some adequate reason to believe the search is necessary. Fundamentally, the Framers wrote the Fourth Amendment to strip law enforcement officers of the power to intrude upon a person's most private spaces without a strong basis for doing so.

3. While the Fourth Amendment mentions probable cause only in its Warrant Clause, the Framers understood that standard to be a more general safeguard against unreasonable searches and seizures.

The concept of probable cause developed independently from the use of warrants. In medieval times, English common law courts were already evaluating whether warrantless arrests were supported by adequate cause. This was deemed essential because "uproar and public outcry are at times made of many things which in truth have no foundation." 2 *Bracton on the Laws and Customs of England* 404 (George Woodbine ed., 1968).

By the fifteenth century, it was clear that "good evidence" was required to arrest suspected criminals without warrants. Barbara J. Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* 129 (1991). Probable cause came into even sharper focus with the proliferation of justice-of-the-peace manuals in the sixteenth century. These manuals described various acceptable causes of suspicion for arrest, while warning that "whether the cause of suspicion be good" could be tested in a false imprisonment action. William Sheppard, *An Epitome of All the Common and Statute Laws of the Nation* 650 (1656).

At the Founding, probable cause had become even more clearly identified as an evidentiary threshold distinct from mere suspicion. Someone making a warrantless arrest would have to show the "cause which induced him to have such a suspicion," which must "appear to the court to have been a sufficient ground." 2 Hawkins, *A Treatise of the Pleas of the Crown* 121 (1787). Warrants could not be granted "without such a probable cause, as might induce a candid and impartial man to suspect the party to be guilty." *Id.* at 136. And the leading precedent on probable cause, which held an officer liable for a fruitless search, explained that "the suspicion must be very well founded to justify entering a house without the owner's consent." *Bostock v Saunders*, 96 Eng. Rep. 539, 540 (K.B. 1773) (de Grey).

Conflict between Britain and the colonies helped further enhance the focus on probable cause. Apart from the general-warrant controversies discussed above, the warrantless seizure of American ships for alleged customs violations incited widespread protests condemning the lack of "any probable cause of seizure that we know of." William J. Cuddihy, *The Fourth*

Amendment: Origins and Original Meaning 589 (2009) (quoting comments of Boston town meeting). After Independence, states enacted protections against searches and seizures unsupported by adequate cause, which were later echoed in the Fourth Amendment. And as that Amendment was being drafted, the First Congress passed measures reflecting the view that probable cause was an important constraint on searches and seizures, including in situations where no warrant was required.

Thus, from the Middle Ages to the Fourth Amendment's adoption, the requirement of probable cause served as a valuable safeguard against unfounded searches and seizures. It remains so today, even when the professed reason for which police officers break into homes is to provide emergency aid.

ARGUMENT

I. Founding-Era Common Law Required *More* Than Probable Cause, Not Less, for Warrantless Home Entries.

"The common law in place at the Constitution's founding" provides "a baseline" for reasonableness under the Fourth Amendment. *Lange v. California*, 594 U.S. 295, 309 (2021). The Amendment "was meant to preserve" certain common law "norms," *Virginia v. Moore*, 553 U.S. 164, 168 (2008), and it "must provide *at a minimum* the degree of protection it afforded when it was adopted," *Lange*, 594 U.S. at 309 (quoting *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis in original)).

On the question presented in this case, the inquiry into common law norms yields a clear answer. *See Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). Law enforcement officers may not enter a home with less than probable cause to believe that an exigency exists.

Professional police officers were "unknown to the common law." *State v. Freeman*, 86 N.C. 683, 684 (1882). "There were no police in the modern sense" during the Founding era, and "justice was a business of amateurs." Lawrence M. Friedman, *Crime and Punishment in American History* 27-28 (1993). "Public order was maintained by a loose system of sheriffs, constables, and night watchmen," with the constable carrying "the main burden of law enforcement." Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 830 (1994). Constables were usually low-status individuals "pressed into a tour of duty for a year." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 620 (1999).

The common law did not allow law enforcement officers to forcibly enter homes—referred to as "breaking doors"—to render emergency aid.[2] Indeed, with only limited exceptions, public officers and private individuals alike were forbidden from entering homes for any purpose without a warrant, "[f]or every man's house [was] looked upon by the law to be his castle of defense and asylum," and "not so much as a common citation or summons . . . [could] be executed upon a man within his own walls." 3 William Blackstone, *Commentaries on the Laws of England* 288 (1766). As a general rule, therefore, warrants were essential "before a government official could enter a house." *Lange*, 594 U.S. at 310. And while that rule had narrow exceptions, "in all cases where the law [was] silent, and express

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[2] The term "breaking doors" meant removing any barrier to entry, such as "lifting up the latch of a door, or unloosing any other fastening which the owner has provided." 4 Blackstone, *supra*, at 226; *see* 1 Matthew Hale, *History of the Pleas of the Crown* 551-52 (1736) ("every one, that enters into another's house against his will . . . doth in law break the house").

principles [did] not apply, this extreme violence [was] illegal." 1 Joseph Chitty, *Practical Treatise on the Criminal Law* 35 (Edward Earle ed., 1819).[3]

Rendering aid was not among the exceptions to the warrant requirement. Instead, officers could forcibly enter homes for only three reasons: to stop an affray (or arrest the offender), to make a felony arrest, and to recapture an escaped arrestee. All three scenarios required much *more* than probable cause.

Most relevant here, officers could forcibly enter homes to stop violent "affrays" and "breaches of the peace," or to arrest the participants. "[A] typical example was 'the fighting of two or more persons' to 'the terror of his majesty's subjects.'" *Lange*, 594 U.S. at 312 (quoting 4 Blackstone, *supra*, at 145). This authority was the only power sanctioned by common law that resembled this Court's emergency-aid doctrine. If there were "likely to be manslaughter or bloodshed committed" during "an affray in a house, where the doors are shut," the constable could "break open the doors to keep the peace and prevent the danger." 2 Matthew Hale, *History of the Pleas of the Crown* 95 (1736); *accord* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 139 (1787); *see* 4 Blackstone, *supra*, at 145 (permitting breaking doors "to suppress an affray, or apprehend the affrayers").[4]

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[3] Spelling and capitalization from historical sources have been changed to modern usage throughout this brief.

[4] The term "breach of the peace" generally signified "an element of violence" when used "in reference to common-law arrest power." *Atwater v. Lago Vista*, 532 U.S. 318, 327-28 n.2 (2001); *accord* 1 James Fitzjames Stephen, *History of the Criminal Law of England* 193 (1883).

The standard required for these entries was *higher* than probable cause—it was certainty, confirmed by an officer's own senses. Officers had to personally witness an affray before they could intervene, even in public. "The constable . . . [could] without warrant, arrest any one for a breach of the peace *committed in his view*," 4 Blackstone, *supra*, at 292 (emphasis added), but he had "no power to arrest a man for an affray done out of his own view, without a warrant," Richard Burn, *The Justice of the Peace, and Parish Officer* 9 (1758); 2 Edward Coke, *Institutes of the Laws of England* 52 (1681) ("after the affray [is] ended, they cannot be arrested without an express Warrant"); James Parker, *The Conductor Generalis* 12 (Pa. 1792) ("a constable is . . . empowered . . . to part an affray *which happens in his presence*" and to arrest participants "*if a constable see persons . . . actually engaged* in an affray" (emphasis added)).

Even in public, therefore, officers could arrest only when an affray was "committed in [their] presence and followed by immediate and continuous pursuit." Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 701 (1924); *see Regina v. Tooley*, 92 Eng. Rep. 349, 352 (Q.B. 1710) ("a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest"); Michael Dalton, *The Country Justice* 36 (1690) ("After the affray . . . the constable, without a warrant, cannot arrest the affrayors."); Saunders Welch, *Essay on the Office of Constable*, *reprinted in* James Parker, *Conductor Generalis* 111, 115 (N.J. 1764) ("after the affray or assault is over . . . the injured person ought to apply to a magistrate for his warrant"). Simply put, the power to respond to an affray or breach of the peace was "limited to cases in which the person to be arrested was taken

in the fact or immediately after its commission." 1 Stephen, *supra*, at 193.[5]

Given these strict limits on interfering with affrays even in public, warrantless home entry for that purpose likewise demanded that officers rely only on their own direct knowledge of the affray. Officers could not forcibly enter based on probable cause or the reports of others. Entry was permitted only when an "affray is made in a house *in the view or hearing of a constable*; or where those who have made an affray *in his presence* fly to a house, and are *immediately* pursued by him." 2 Hawkins, *supra*, at 139 (emphasis added); *accord* 1 Chitty, *supra*, at 35 ("when an affray is made in a house, *in the view or hearing of a constable*, he may break open the outer door in order to suppress it" (emphasis added)); Burn, *supra*, at 9 ("if an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow *with fresh [pur]suit*, he may break open the doors to take them" (emphasis added)); George Webb, *The Office and Authority of a Justice of Peace* 6 (Va. 1736) ("if the affray be in his view," a constable "may break open an house to take the offenders"); William Sheppard, *The Offices of Constables* 8-9 (1657) ("If he that doth make the affray, when he doth see the officer coming to arrest him, shall fly into a house, the officer may *in the fresh pursuit of him*, break open the doors upon him to take him." (emphasis added)).

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[5] Only Matthew Hale seems to have suggested that officers could arrest for affrays committed outside their view. *See* 2 Hale, *supra*, at 90; *but see* 1 *id.* at 587 (acknowledging that the contrary "hath been held"). And Hale did not clearly indicate whether he endorsed *forcible entry* to respond to an affray without an officer's personal observation of it. *See* 2 *id.* at 95; *cf. Lange*, 594 U.S. at 312 (describing another issue on which Hale was an outlier).

Indeed, many commentators limited the very definition of an affray to *publicly visible* disturbances, consistent with the rule that officers must personally witness an affray before intervening. *Cf. Lange*, 594 U.S. at 335 (Roberts, J., concurring in the judgment) (defining "affray" as "public fighting"). Blackstone, for instance, defined affray as "the fighting of two or more persons *in some public place*, to the terror of his majesty's subjects; *for, if the fighting be in private, it is no affray but an assault*." 4 Blackstone, *supra*, at 145 (emphasis added); *see id.* (noting the word's etymological roots in "*affraier*, to terrify"); *accord* 1 Hawkins, *supra*, at 265 (defining "affray" as "a public offense, to the terror of the people," while excluding an assault that "happens in a private place . . . in which case it cannot be said to be to the terror of the people").

In short, breaking doors to respond to affrays—the only common law authority resembling emergency aid—required personal knowledge of the exigency, not merely probable cause, and certainly not anything less.

The two other reasons for which officers could make warrantless home entries were similarly restricted—each required more than probable cause. One set of rules governed felony arrests. If a fleeing felon took refuge in a home, officers could "break open doors to take the felon." 2 Hale, *supra*, at 90; *accord* 4 Edward Coke, *Institutes of the Laws of England* 176-77 (1797); 2 Hawkins, *supra*, at 139; 4 Blackstone, *supra*, at 293; Sheppard, *Offices*, *supra*, at 15; Webb, *supra*, at 145. This rule "extended to crimes that would become felonies if the victims died," *Lange*, 594 U.S. at 312, *i.e.*, to "a dangerous wounding," 4 Blackstone, *supra*, at 292; *accord* 4 Coke, *supra*, at 177; 2 Hale, *supra*, at 94; 2 Hawkins, *supra*, at 139; Burn, *supra*, at 46. In addition, "[m]ost of the common-law authorities

approved warrantless home entries upon a hue and cry," *Lange*, 594 U.S. at 312 n.6, which was "the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another," 4 Blackstone, *supra*, at 293; *accord* 4 Coke, *supra*, at 177; 2 Hale, *supra*, at 94; Burn, *supra*, at 392.

Warrantless entry for a felony arrest required significantly more than probable cause: entry was permitted only if a felony or dangerous wounding had *actually* occurred, and only if there were probable cause to believe the suspect was the culprit. *See* 4 Blackstone, *supra*, at 292 (for a "felony *actually* committed," officers could forcibly enter to arrest those suspected with "probable suspicion" (emphasis in original)); 2 Hale, *supra*, at 92 ("there must be a felony in fact done," and "just grounds of suspicion" that the arrestee committed it); 1 Hale, *supra*, at 588 ("probable cause of suspicion"); Parker, *supra*, at 117 (requiring "first, that a felony has been really committed; and, secondly, that the person you arrest is properly suspected"). In short, warrantless entry was allowed when it was *"certain* that a . . . felony [had] been committed, or a dangerous wound given," 1 Chitty, *supra*, at 35, and even then, when a felony was "actually committed," a "bare suspicion of guilt against the party [would] not warrant a proceeding to this extremity," 1 Edward Hyde East, *Treatise of the Pleas of the Crown* 322 (1803).

Some authorities were even stricter, disallowing forcible entry for felony arrests *with* a warrant, and instead demanding an indictment. "[W]here one lies under a probable suspicion only, and is not indicted," William Hawkins wrote, "it seems the better opinion at this day, [t]hat no one can justify the breaking open doors in order to apprehend him." 2 Hawkins, *supra*, at 139 (footnote omitted); *accord* Burn, *supra*, at 46;

4 Coke, *supra*, at 177 ("for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons . . . is against Magna Carta").

Additionally, officers were subject to liability if they forcibly entered a home to arrest a suspect who was not there. *See* 1 East, *supra*, at 324 ("where the doors . . . are broken open upon supposition of the person sought being there, it must be at the peril of finding him there: unless as it seems where the parties act under a magistrate's warrant"). Probable cause shielded only mistaken beliefs about a suspect's guilt, not about his location. *See, e.g.*, 1 Hale, *supra*, at 588-89. So if a suspect turned out to be absent from a home the officer entered without a warrant, that officer would be liable for trespass.

Significantly, too, "[t]he felony category then was a good deal narrower than now," *Lange*, 594 U.S. at 311, encompassing only a small handful of the most serious crimes, *see* "Felony," Giles Jacob, *A New Law Dictionary* (1739). Indeed, "virtually all felonies were punishable by death." *Tennessee v. Garner*, 471 U.S. 1, 13 (1985).

In sum, the felony-arrest exception allowed warrantless entry for only the gravest of crimes. It required *certainty* that a qualifying crime was committed. It required *certainty* that the person being sought was in the house. And even then, it required *at least* probable cause that the suspect was guilty.

Finally, officers could forcibly enter homes to recapture escaped arrestees. *See* 2 Hawkins, *supra*, at 139 (allowing entry "[w]herever a person is lawfully arrested for any cause and afterward escapes, and shelters him in a house" (footnote omitted)); *Lange*, 594 U.S. at 311 n.5. This rule also arose from the need

to arrest felons: escaping from an arrest, often called "prison breaking," was originally a felony under common law, even when the underlying crime was only a misdemeanor. *See* 2 Hawkins, *supra*, at 190, 194-95; Burn, *supra*, at 609-10. A statute modified that rule, *see id.*, but some authorities in the eighteenth century still maintained "[t]hat such an escape amounts to felony," 2 Hawkins, *supra*, at 189; *see, e.g.*, Jacob, *A New Law Dictionary*, *supra* (defining "felony" as including breach of prison); Webb, *supra*, at 145 (categorizing escape as a felony).

Regardless, the standards governing warrantless entry to recapture an arrestee were just as strict as those governing an initial arrest: probable cause alone did not suffice. No special rule shielded officers who turned out to be wrong that a home harbored an escapee. *See, e.g.*, 2 Hawkins, *supra*, at 138-39. Instead, officers who made that mistake were liable for trespass, despite having reasonably believed an escapee was present, because their intrusion did not fall within any of the recognized justifications for warrantless entry. *See id.*; *cf.* Parker, *supra*, at 117 (explaining that an error about whether an arrestee was "properly suspected" of felony was "excusable in the law").

To sum up, the only common law authority resembling the emergency-aid doctrine required personal knowledge of an exigency, directly confirmed by an officer's own senses. That rule was in harmony with the common law's militant protection of the home from unnecessary intrusion, which consistently required more than probable cause, not less. On the question presented in this case, the common law spoke with "unanimity." *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 (2001). Officers could not forcibly enter homes based on probable cause that an exigency *might* exist, let alone based on some lesser degree of suspicion.

II. The Fourth Amendment's Chief Aim Was to Restrain Discretionary Searches of the Home.

The Constitution's Framers were just as concerned as the English common law with preserving the sanctity of the home. As text and history confirm, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972). Thus, "when it comes to the Fourth Amendment, the home is first among equals," *Florida v. Jardines*, 569 U.S. 1, 6 (2013), and it is the place where privacy interests are "most heightened," *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

As described above, the concept of the home as a place of enhanced personal security was a pervasive theme in English common law, a sentiment reflected in the oft-cited statement that "the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose." *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604) (footnote omitted). Outside of a few narrow and well-defined exigent circumstances, forcibly entering a home was "regarded as an unlawful search or seizure." *Houghton*, 526 U.S. at 299. The common law afforded no authority at all for warrantless entry merely to *search* a home. And even search warrants were available only to recover stolen goods. *See* Davies, *supra*, at 645-46.

"The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home." *Wilson v. Layne*, 526 U.S. 603, 610 (1999). Its text explicitly links "houses" with "the right of the people to be secure." U.S. Const. amend. IV. And its broad protections for personal security were largely a response to abusive home searches the Founding generation

suffered under British rule—namely, searches conducted under "general warrants" and "writs of assistance" that were not based on sworn evidence or individualized suspicion. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* 748, § 1895 (1833) (attributing the Fourth Amendment to "the strong sensibility excited, both in England and America, upon the subject of general warrants").

"Opposition to such searches was in fact one of the driving forces behind the Revolution itself." *Riley v. California*, 573 U.S. 373, 403 (2014). In the mid-1700s, general warrants were used in both England and America to conduct unrestrained searches of homes. Because of the common law's strong protections for the home, the British government was forced to enact statutes abrogating those safeguards. *See* Davies, *supra*, at 646. For example, Parliament enacted the "Act of Frauds" in 1662, which empowered officials to "enter, and go into any house, shop, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other package, there to seize, and from thence to bring, any kind of goods or merchandize whatsoever, prohibited and uncustomed." Act of Frauds of 1662, 12 Car. 2, cl. 11, § V(2), *reprinted in* 8 *The Statutes at Large of England and Great-Britain* 78, 81 (1763). The Act also authorized the use of writs of assistance, which permitted officers to "commandeer anyone—constables and ordinary citizens alike—to help in executing searches and seizures." Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 907 (2010).

Colonial opposition to general warrants and writs of assistance was galvanized by events on both sides of the Atlantic in the years before the American Revolution. After King George II died in 1760, colonial

customs officers had to reapply for writs of assistance to be issued in the name of the new king. *Id.* at 908. In Boston, where the economy depended in part on trade in smuggled goods, a group of merchants objected to the new king's writs in *Paxton's Case*. *See id.* Their attorney, James Otis, delivered a "declamation against general warrants" widely considered "one of the most celebrated orations in U.S. history." Laura K. Donahue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1249 (2016). Otis called the writ of assistance "the worst instrument of arbitrary power," placing "the liberty of every man in the hands of every petty officer," for it permitted officers to invade private homes "when they please[, and] we are commanded to permit their entry." 2 *Works of John Adams*, app. A at 523-24 (Charles Francis Adams ed., 1850). Otis thus advanced the bedrock principle "that a person's home is especially private and must be protected from arbitrary government intrusion." Michael, *supra*, at 908-09. And his challenge to writs of assistance "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

Although Otis failed to prevent the issuance of the writs he fought in Boston, English courts promptly vindicated his arguments in a series of cases arising out of the Crown's use of general warrants to silence John Wilkes and other political enemies of King George III. As one landmark decision put it, such "discretionary power . . . to search wherever [the officers'] suspicions may chance to fall" would "affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1167 (C.P. 1763). "[L]egal criticism of the general warrant was especially strong

when the security of a house was at issue." Davies, *supra*, at 603. One decision noted that if the government's promiscuous warrants were permitted, every Englishman could find that "[h]is house is rifled" and "his most valuable secrets are taken out of his possession." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1064 (C.P. 1765).

These cases were widely covered in American newspapers, and "the reaction of the colonial press to that controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes." Cuddihy, *supra*, at 538. "[A]ccounts of the trials exclaimed the importance of the issue for English liberty and the sanctity of the house while condemning general warrants as 'illegal,' 'unconstitutional,' 'void,' 'oppressive,' and 'unwarrantable.'" Davies, *supra*, at 563 & n.22 (collecting sources).

After Independence, the fight to preserve the home's security continued. While general warrants initially remained common, the "specific warrant ultimately won out." Cuddihy, *supra*, at 602. By 1784, eight states had "formulated constitutions with restrictions on search and seizure." *Id.* at 603. When the Constitutional Convention unveiled its proposed new federal charter, critics expressed fears about the use of general warrants to ransack homes. Patrick Henry raised the specter of federal officers "who may search, at any time, your houses, and most secret recesses." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 58 (Jonathan Elliot ed., 1836). Another Anti-Federalist protested that officers would have "power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretense of searching for excisable goods, . . . break open your doors, chests, trunks, desks, and boxes, and rummage your houses

from bottom to top." *Essay by a Farmer and Planter*, Md. Journal, Mar. 27, 1788, *in* 5 *The Complete Anti-Federalist* 74-75 (Herbert J. Storing ed., 1981). The sister of James Otis, Mercy Otis Warren, argued for a constitutional guarantee to prevent "any petty revenue officer" from "enter[ing] our houses, search[ing], insult[ing], and seiz[ing] at pleasure." A Columbian Patriot, *Observations on the New Constitution, and on the Federal and State Conventions*, reprinted in *Pamphlets on the Constitution of the United States* 13 (Paul Leicester Ford ed., 1888).

To assuage these fears, state ratifying conventions demanded more explicit protection from unbridled search and seizure. For example, Virginia's proposed federal bill of rights provided that "all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted." Cuddihy, *supra*, at 684. Other states mimicked this language. *Id.* at 685. Arguments about the dangers of general warrants received extensive press coverage, illustrating "a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

Two key themes emerged from these debates: the idea that the right of personal security is at its peak within the four walls of the home, and the strongly felt need for a limiting principle to regulate the discretion of officers engaged in searches that encroach on that security. These ideas found expression in James Madison's draft of the Fourth Amendment, which made clear the importance of credible evidence and individualized suspicion as predicates for home searches: "The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not

be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789) (Joseph Gales ed., 1834). As the Amendment's language took final form, its explicit recognition of the home's sanctity and its requirement of specific warrants remained materially the same. Cuddihy, *supra*, at 695-97.

The Fourth Amendment thus enshrines in our national charter the Framers' opposition to searches and seizures, especially within the home, conducted without particularized suspicion backed by reliable evidence. A key feature of the Framers' response, as discussed next, was the requirement of probable cause.

III. The Framers Viewed Probable Cause as a Vital Safeguard Against Unfounded Searches and Seizures.

While the Fourth Amendment mentions probable cause only in its Warrant Clause, the Framers understood that standard to be a more general safeguard against unreasonable searches and seizures, whether or not conducted with a warrant. Given the home's special status under common law and in the Fourth Amendment's history, the Framers would not have sanctioned home entry with anything less than probable cause.

The concept of probable cause developed "long before the creation of either general or specific warrants." Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 961 (1997). Sometimes referred to as "just" or "good" cause for "belief" or "suspicion," probable cause arose to regulate arrests "in a warrantless world." Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A*

History of Search and Seizure, 1789–1868, at 46 (2006). The concept has always centered around "individualized suspicion supported by quality evidence." *Id.*

As early as 1244, a bare accusation of murder was ruled inadequate—to have given "no cause"—for an arrest under English common law. Jack K. Weber, *The Birth of Probable Cause*, 11 Anglo-Am. L. Rev. 155, 156 (1982). In 1326, the King's Bench similarly ruled that the cause for which a person was arrested "seems . . . insufficient." *R. v. de Wellingborough* (K.B. 1326), *in* 4 *Select Cases in the Court of King's Bench Under Edward II*, at 164-65 (G.O. Sayles ed., 1957). Forty years later, an arrest of suspected robbers was held unjustified because it was based only on "common cry and scandal." *Ughtred v. Musgrave* (King's Council, 1366), *in Select Cases Before the King's Council, 1243–1482*, at 60 (I.S. Leadam ed., 1918); *see* Cuddihy, *supra*, at 423. As these cases illustrate, anyone who arrested a supposed felon without a warrant (as both private citizens and public officers could do) acted "at his peril," and if sued would have to justify the cause for the arrest. 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 582-83 (2d ed. 1898). Although "virtual certainty" was not required, at least "a moderate degree of suspicion" was necessary. Weber, *supra*, at 159.

Describing probable cause, Henry de Bracton's treatise discussed the reliability of the informer, the value of the evidence, and the extent of any corroboration, such as "a precedent act" by the suspect. *See* 2 *Bracton on the Laws and Customs of England*, *supra*, at 403-04. Sensible inferences could be drawn, "as where one is taken over the body of the dead man with his knife dripping blood," but rumor alone could not

create a presumption of suspicion unless it came from "worthy and responsible men, . . . and it must be not once but repeatedly that complaint arises." *Id.* at 404. "For," the treatise cautioned, "uproar and public outcry are at times made of many things which in truth have no foundation." *Id.*

By the late fifteenth century, anyone who personally knew of a felony could arrest the suspected culprit, but "[s]uch suspicions required good evidence." Shapiro, *supra*, at 129. This restriction applied to law enforcement officers, although their "grounds of suspicion might be less certain than those of the private citizen." *Id.*

Probable cause came into sharper focus with the proliferation of justice-of-the-peace manuals in the sixteenth century. *Id.* "These handbooks, from their inception, included a list of the 'causes of suspicion,'" including a suspect's "ability to commit the crime, his whereabouts at the time of the crime, the presence of witnesses and/or signs (for example, blood) that engender suspicion." *Id.* Some of these criteria, such as a suspect's reputation and parentage, reflected a close-knit, class-stratified society, and plainly have not stood the test of time. But what endured was the basic idea of standards to "insure accusations had some rational basis," without requiring accusers "to fully prove their suspicions." *Id.* at 130. These standards regulated warrantless intrusions as well as the issuance of warrants.

For instance, Michael Dalton's *Country Justice*, "[t]he most influential seventeenth-century handbook in both England and America," Taslitz, *supra*, at 47, instructed that warrantless arrests required "some just cause, or some lawful and just suspicion at the least," Dalton, *supra*, at 447. The accuser making the arrest needed a basis for his belief, *id.* at 447-49,

though again, some of the accepted bases like "the common voice and fame" would not persist. William Sheppard similarly endorsed warrantless arrests if a person had "some cause and reason to suspect th[e] party that he doth arrest," while warning that "whether the cause of suspicion be good, shall be tried by the judges in [an] action of false imprisonment." Sheppard, *Epitome*, *supra*, at 650. And indeed, court decisions fleshed out criteria that qualified as "good causes of suspicion." *Sir Anthony Ashley's Case*, 77 Eng. Rep. 1366, 1368 (St. Ch. 1611) (listing examples, including "if murder be committed, and one is seen near the place"). These criteria largely centered around "behavior reasonably suggesting guilt." Cuddihy, *supra*, at 423.

By the time of the great common law treatises known to the American Founders, probable cause was more clearly identified as an evidentiary threshold distinct from the concept of suspicion. Matthew Hale wrote that accusers could make warrantless arrests without fear of liability if they had "probable cause of suspicion." 1 Hale, *supra*, at 588. And if an accuser sought a warrant, the justice of the peace was "a competent judge of the probabilities offered to him of such suspicion." 2 *id.* at 110. William Hawkins similarly cautioned that someone making an arrest would have to show the "cause which induced him to have such a suspicion," which must "appear to the court to have been a sufficient ground for his proceeding." 2 Hawkins, *supra*, at 121. The "common fame of the country," for instance, was inadequate unless it were shown, "upon evidence," that "such fame had some probable ground." *Id.* at 119 (footnote omitted). Warrants could not be granted "without such a probable cause, as might induce a candid and impartial man to suspect the party to be guilty." *Id.* at 136.

The treatises thus presented probable cause as "credible evidence of facts giving rise to suspicion." Taslitz, *supra*, at 48. Hawkins's treatment in particular "became a standard part of the arrest canon of the English and the American handbook tradition." Shapiro, *supra*, at 138; *see, e.g.*, Burn, *supra*, at 747 (parroting Hawkins's "candid and impartial man" formulation of the probable cause standard). William Blackstone confirmed that warrantless felony arrests could be made "upon probable suspicion," and that a justice of the peace could issue arrest warrants based on the reports of others, "because he is a competent judge of the probability offered to him of such suspicion." 4 Blackstone, *supra*, at 292, 290; *see also* 1 Chitty, *supra*, at 23 (stating that warrants required "such a probable cause as might induce a discreet and impartial man to suspect the party to be guilty").

In "the controlling British precedent on probable cause" at the Founding, Cuddihy, *supra*, at 583, the King's Bench held an excise officer liable in trespass for initiating a fruitless home search for stolen goods, because "no evidence was given at the trial of any probable cause or ground of suspicion," *Bostock v Saunders*, 95 Eng. Rep. 1141, 1145 (K.B. 1773) (de Grey); *see id.*, 96 Eng. Rep. 539, 540 (K.B. 1773) (de Grey) ("[T]he suspicion must be very well founded to justify entering a house without the owner's consent. Every man's house is his castle."). And in *Leach v. Money*, one of the seminal general-warrant cases, the plaintiff argued that the arresting officer had "no probable cause, nor any reason for justifying the officer under a probable cause." 19 How. St. Tr. 1001, 1022 (K.B. 1765). "Whether there was a probable cause or ground of suspicion was a matter for the jury," the court held, but the warrant at issue was invalid because "the receiving or judging of the information [was] left to the

discretion of the officer." *Id.* at 1026-27 (quotation marks omitted); *accord Entick*, 95 Eng. Rep. at 818 ("there must be an oath that the party has had his goods stolen, *and his strong reason to believe they are concealed in such a place*" (emphasis added)).

"American trends concerning probable cause were discernable by the 1760s," at which point the colonists understood probable cause "to include important guarantees of a sufficiently trustworthy evidentiary basis." Taslitz, *supra*, at 48-49. Probable cause was salient whether or not a warrant was employed.

Americans condemned general warrants because they facilitated searches that lacked probable cause and rested only on "[b]are suspicion without oath." 2 *Works of John Adams*, *supra*, at 524 (James Otis's speech); *see supra* Part II. At the same time, "warrantless seizures of ships stimulated the belief that seizures as well as searches were unreasonable without adequate cause." Cuddihy, *supra*, at 586. Under color of statutory authority to seize ships based on probable cause, the British captured American ships for alleged customs violations, including John Hancock's vessel, the *Liberty*. A Boston town meeting denounced the lack of "any probable cause of seizure that we know of." *Id.* at 589. A prominent Charleston shipowner likewise protested that there was "no shadow of pretense" of any cause for seizing his ship. *Id.* at 587. "The statements on probable cause [in these two cases] saturated newspapers from Rhode Island to South Carolina." *Id.* at 590; *see* Thomas Barrow, *Trade and Empire: The British Customs Service in Colonial America, 1660–1775*, at 234 (1967) ("Hancock and his ship, the *Liberty*, had commenced a series of events leading to open revolution."). This controversy "helped to focus colonial thinking on the principle of probable cause," Maclin, *supra*, at 962, and "inserted 'probable cause' of

seizure into the American legal vocabulary" as a rule demanding a "substantial reason" for such actions, Cuddihy, *supra*, at 591.

It was only natural, therefore, that after Independence many states enacted protections against searches and seizures unsupported by adequate cause. *E.g.*, Mass. Const. art. XIV (1780) (safeguarding the "right to be secure from all unreasonable searches and seizures . . . if the cause or foundation of them be not previously supported by oath or affirmation"). These provisions used a variety of formulations: some proscribed seizures of persons "whose offense is not . . . supported by evidence," Va. Decl. of Rights § 10 (1776), while others prohibited warrants that lacked "a sufficient foundation for them," Pa. Const. of 1776, Decl. of Rights, art. X. Like the Fourth Amendment, however, they all reflected the basic idea that reasonable searches and seizures must be based on good cause.

After ratification, the First Congress confirmed the prevailing view that probable cause was an important safeguard for searches and seizures, regardless of whether a warrant was involved. Less than two months before sending the Fourth Amendment to the states for approval, Congress enacted a customs statute that relied on probable cause for searches conducted both with and without warrants. The statute permitted customs officials to search ships without a warrant if they had "reason to suspect" that dutiable goods were concealed inside. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43. Likewise, customs officials could search dwellings and other buildings on land—with a warrant—if they had "cause to suspect" the concealment of dutiable goods. *Id.* There is no indication that these two formulations ("reason to suspect" and "cause to suspect") were originally understood as different standards; instead, the distinction was whether

or not a warrant was required. Indeed, the statute immunized customs officials from liability for seizures in both contexts if a judge found there was "a reasonable cause of seizure." *Id.* § 36, 1 Stat. at 47. These three formulations all meant the same thing—and as evident in the provision authorizing search warrants, they were understood as equivalent to the "probable cause" that was soon to be inscribed in the Fourth Amendment.

Similarly, the First Congress later authorized internal revenue inspectors to obtain search warrants "upon reasonable cause of suspicion" that taxable spirits were fraudulently concealed in a building—yet another formulation expressing the same concept of adequate cause. Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207. Like customs officials, revenue inspectors were immune for their seizures if "there was probable cause for making the said seizure." *Id.* § 38, 1 Stat. at 208.[6]

In sum, from the era of Magna Carta in England to the First Congress in America, the requirement of probable cause (or "just" cause, or "reasonable" cause) was seen as a valuable safeguard against unfounded searches and seizures, even in contexts in which warrants were not needed. Of course, it is precisely in those contexts—where officers act on their own initiative, without prior judicial approval—that this safeguard may be *most* valuable.

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[6] Separately, this statute allowed entry into distilleries for the limited purpose of cataloguing the liquor stored there, but only after an owner registered the premises with the government as a distillery. *See id.* §§ 25-26, 29, 1 Stat. at 205-06.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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