No. 24-624

In the Supreme Court of the United States

WILLIAM TREVOR CASE, *Petitioner,*

v.

MONTANA

On Writ of Certiorari to the
Supreme Court of Montana

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

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QUESTION PRESENTED

Whether law enforcement may enter a home without a search warrant based on less than probable cause that an emergency is occurring, or whether the emergency-aid exception requires probable cause.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

In *Caniglia* v. *Strom*, 593 U.S. 194, 199 (2021), and *Lange* v. *California*, 594 U.S. 295, 303 (2021), this Court rejected Fourth Amendment analyses that allowed the police to enter a person's home without a warrant absent a true exigency. In each case, the lower court approved a non-exigent home entry by ignoring founding-era, common-law home protections and expanding a previously narrow exception to the Fourth Amendment's warrant requirement. The Montana Supreme Court repeated those mistakes here, approving police entry of a home to render emergency aid even though there was no probable cause that an emergency existed. On this view, police may enter a home without a warrant even when a judge would have to *deny* a warrant due to lack of probable cause on the same grounds. See U.S. Const. amend. IV. The decision below, no less than the lower court decisions rejected in *Caniglia* and *Lange*, cannot be squared with the Fourth Amendment and should be reversed.

Proper resolution of the question presented is of paramount importance to *Amici* Project for Privacy & Surveillance Accountability, Inc. and Restore the Fourth, Inc. Both *Amici* are national, non-partisan civil liberties organizations dedicated to robust enforcement of the Fourth Amendment. *Amici* are dedicated to preserving the Founders' vision for

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the brief's preparation or submission.

Americans' privacy in the modern age, and the decision below reflects a drastic departure from founding-era understandings.

At common law, for example, absent the homeowner's consent, the government needed to obtain a warrant before entering a person's home in all but the most extreme circumstances. Early common law authorities set the constitutional floor for the Fourth Amendment's protection of the home from warrantless searches.

Consistent with common-law history, this Court requires "warrant exception[s] permitting home entry [to be] jealously and carefully drawn" and regularly "decline[s] to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home." *Lange*, 594 U.S. at 303 (cleaned up). Yet the Supreme Court of Montana condoned a warrantless home entry here under its expansive version of the very "community caretaker" exception this Court rejected in *Caniglia*—just under a different name. Under Montana's exception, no warrant is needed to enter a home if there are merely "articulable facts"—falling well-short of probable cause—that an emergency is ongoing. See *Montana* v. *Lovegren*, 51 P.3d 471, 475-476 (Mont. 2002). That standard should be rejected because it fails to clear the minimum founding-era privacy bar and threatens to dilute Fourth Amendment protections in other areas—such as searches of personal electronics.

STATEMENT

Police officers went to William Case's home after obtaining information suggesting that Case threatened suicide. Looking through a window, the police saw not Case, but an empty gun holster and a notepad. App.4a. They thus decided not to enter, believing that Case "was likely lying in wait * * * to commit suicide by cop." App.5a, 29a. The police waited around forty minutes before entering Case's home. App.5a. When they finally entered, they did so without a warrant: They felt unrestrained by the Fourth Amendment because they believed they were there to help Case. App.4a. While sweeping the house, one officer saw a "dark object" "near Case's waist," believed it was a gun, and shot Case, who fell. App.6a. Police retrieved a gun from a nearby laundry hamper. *Ibid.*

Case was charged with felony assault on a peace officer. Before trial, he moved unsuccessfully to suppress the evidence obtained during the warrantless search of his home. App.6a-7a, 43a. The Montana Supreme Court affirmed, holding that Montana's "community caretaker" exception justified the warrantless entry notwithstanding *Caniglia*. App.18a-20a. The court did little to address Case's showing that there was no exigency since police entered Case's home knowing that he was likely trying to commit "suicide by cop." In dissent, Justice McKinnon noted that—by condoning the search here despite the lack of probable cause—the majority had extended Montana's exception to circumstances this Court expressly rejected in *Caniglia*. App.27a-28a (McKinnon, J., dissenting).

SUMMARY

The Supreme Court of Montana maintains that police need not obtain a warrant to enter a home when "an experienced officer would suspect that a citizen is in need of help" considering "specific" and "articulable" facts. App.16a (quoting *Montana* v. *Lovegren*, 51 P.3d 471, 475-476 (Mont. 2002)). Articulable suspicion of an emergency, however, is not the same as probable cause to believe an emergency exists—a more exacting rule. The decision below thus explodes a narrow Fourth Amendment exception allowing warrantless home entry in cases of true emergency. Because this holding defies common-law privacy expectations and this Court's precedent, it should be reversed.

I. When considering claimed exceptions to the Fourth Amendment, this Court looks to founding-era, common-law expectations of privacy and the original public meaning of the Fourth Amendment. *Carpenter* v. *United States*, 585 U.S. 296, 304-305 (2018); *Lange,* 594 U.S. at 309; *cf. N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 22-24 (2022). No founding-era or common-law authority of which *Amici* are aware would have allowed the police to enter a person's home for community-caretaking or emergency-aid purposes based on only the permissive standard of "articulable suspicion." To the contrary, the home was so sacred at common law that, absent a warrant or consent, the government could enter it only in the most extreme circumstances. Such historical unwillingness to allow warrantless searches, even when in furtherance of some suspected public benefit, supports requiring probable cause to believe that an emergency exists before the police may undertake a warrantless entry.

The Court should reject the lower court's expansive understanding of the emergency-aid requirement for this reason.

II. Lowering the bar for emergency-aid searches also risks the loss of Fourth Amendment protections in other sensitive contexts—especially the digital arena. Electronic devices and accounts hold vast amounts of personal information that historically would have been found only in the home. By the same token, these sources—no less than the home itself—may harbor suspected emergencies (however improbable). That poses a problem. If the Court were to lower the burden of proof to justify warrantless searches of the home, it would, in turn, open the door to warrantless searches of less historically protected areas like electronic devices and accounts, producing a devastating loss of privacy for all Americans. The Court should reject the lower court's understanding of the Fourth Amendment for this reason too.

ARGUMENT

Amici agree with Petitioner (at 19-28) that the decision below conflicts with this Court's Fourth Amendment precedent. Articulable suspicion of an emergency cannot suffice to enter a home without a warrant—a reality that founding-era law governing warrantless entry of homes makes clear. Also, if the standard adopted below were applied to electronic devices or accounts, digital privacy would all but disappear. To prevent these harms, the Court should reverse. Homes—and, by logical extension, electronic devices and accounts carrying all the information of a home—merit the constitutional protection of probable

cause when confronted with warrantless searches executed by the police in the name of emergency aid.

I. Founding-era Expectations of Privacy Required at Least Probable Cause of Exigent or Emergency Circumstances for Warrantless Home Entry, Even in Emergencies.

Common-law expectations of privacy have long guided this Court's understanding of the Fourth Amendment. At common law, officers had to obtain a warrant to enter a person's home in all but the most extreme circumstances. And in those rare cases that the common law excused officers who entered homes without a warrant, it was because of imminent threats, meaning readily observable proof of danger. The Court should thus spell out for the lower courts that, to the extent the Fourth Amendment permits an emergency-aid exception to the warrant requirement for home entry at all, this exception does not apply absent probable cause to believe an emergency exists at the time of entry. In the process, the Court should clarify that the exception does not apply unless the entry is reasonably expected to alleviate, rather than worsen, the relevant emergency. *Cf. Reed* v. *Town of Gilbert*, 576 U.S. 155, 171 (2015) (government burdens on speech must "further[] a compelling interest").

A. Founding-era common law sets the expectations and 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). The Fourth Amendment's default rule for a reasonable search is that the search be pursuant to a "Warrant[]" based "upon probable cause[.]" *Ibid.* Recognizing the Amendment to be an "affirmance" of the common law on these points,[2] the Court respects "historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" *Carpenter* v. *United States*, 585 U.S. 296, 305 (2018) (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," *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 explained in Section II.A, at common law, the "privacies of life" found their apex in the home. Allowing the police to enter the home without a warrant, consent, or even the existence of probable cause that an emergency exists would remove a meaningful historical obstacle to government overreach.

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

B. At common law, officers could enter a home without a warrant only to arrest a fleeing felon, if they witnessed an affray, or upon observable proof they could prevent imminent harm.

At common law, non-consensual warrantless entry into the home was allowed only in the most extreme circumstances, and never supported by less than "probable suspicion." While common-law officers, for example, had a duty "to keep the peace,"[3] they still had to get a warrant to enter a person's home in all but the rarest, most extreme cases. The mere possibility of a threat to an individual based only on a third-party report, with countervailing independent knowledge that the threat is unlikely to materialize without interference, would *not* have been such an extreme case because it lacked sufficient proof of imminent harm. Legal commentary and case law during and after the founding period reflect this understanding.

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."[4]

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[3] 2 Matthew Hale, *Historia Placitorum Coronae* (*The History of the Pleas of the Crown*) 95 (Little Britain, E. Rider 1800).

[4] Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 49-50 (1937).

Outside certain rare "circumstances," "the Crown could not intrude on the sanctity of the home without a warrant."[5] The home was not to be "violated" unless "absolute necessity" compelled such a violation to "secure [a] public benefit."[6] Otherwise, in "all cases where the law" was "silent" and "express principles d[id] not apply," the "extreme violence" of warrantless home entry was forbidden.[7] And even then, some commentators maintained that it was *never* permissible to so enter a home—even with a warrant. *Payton* v. *New York*, 445 U.S. 573, 593-597 (1980). In Lord Coke's view, for instance, only an *indictment* could "justify breaking down doors" to apprehend a felon.[8]

The Fourth Amendment, which Justice Story recognized as "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) (citation omitted).

Putting aside the stricter commentators and taking the generally accepted founding-era approach, the common law recognized only one scenario that

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

[6] 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 52 (London, A.J. Valpy 1816).

[7] *Ibid.*

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

[9] Story, *supra* note 2, at 748.

allowed warrantless home entry besides pursuit of a felon or the raising of a hue-and-cry[10]: an effort to stop an "affray" to prevent imminent harm, and even then, only upon strong evidence of such necessity.[11]

The first American edition of Giles Jacobs' law dictionary describes an affray as "a skirmish or fighting between two or more" in which "a stroke [is] given, or offered, or a weapon drawn."[12] If a peace officer personally witnessed an affray, there was "no doubt" that he could "do all such things" to end the disturbance.[13] Consistent with this view, common-law scholar 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]

Government authority to enter a house without a warrant, however, was limited to cases in which the

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[10] The "hue and cry" exception was available only in a narrow class of cases where the victim of a serious offense, often involving "grievous[] and dangerous[] wound[s]," sought the assistance from the Crown in apprehending a felon who had fled. See Br. of Project for Privacy & Surveillance Accountability and Restore the Fourth, Inc. as *Amici Curiae* Supporting Petitioner at 9-15, *Lange* v. *California*, 594 U.S. 295 (2021) (No. 20-18) (exploring the common-law exigent-circumstances exception and the hue and cry), https://tinyurl.com/2wbuj9sk.

[11] *Id.* at 13 n.27 (citing 2 Matthew Hale, *Historia Placitorum Coronae* (*The History of the Pleas of the Crown*) 95 (Phila., Robert H. Small 1847)); 14 n.30 (citing Donohue, *supra* note 5, at 1226).

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

[13] *Ibid.*

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

officer heard or observed the affray and needed to enter to prevent harm. As scholar Joseph Chitty explained, an officer could "break open the doors" to "*suppress* the tumult" if the affray is "within the view or hearing of a constable" or upon hearing a "violent cry of murder" within a house.[15]

If an officer did not personally observe or hear an affray in a home, entry required a warrant. William Hawkins noted 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 to punish the Breach of it."[16] Matthew Hale agreed: If an affray was past, "and no danger of death" remained, a constable "could not arrest the parties without a warrant from the justice of the peace[,]" much less enter a person's home.[17] Arrests for an affray based "on the information and complaint from another" without the constable's presence were impermissible because, as Hale concluded, "[i]t is difficult to find any instance where a constable hath any greater power than a private person over a breach of the peace out of his view."[18]

Caution is required, however, when analogizing home entry to quell affrays at common law to modern emergencies. As Justice Thomas rightly recognizes,

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

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

[17] Hale (1847), *supra* note 11, at 89.

[18] *Id.* at 89-90 n.6.

"[a]ffrays were defined by their public nature and effect." *United States* v. *Rahimi,* 602 U.S. 680, 769 (2024) (Thomas, J., dissenting) (citing 4 William Blackstone, Commentaries on the Laws of England 145 (1769)); *accord Bruen*, 597 U.S. at 120 (Breyer, J., dissenting) (quoting 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135 (London, Eliz. Nutt 1716)). In other words, the common law justified warrantless home entry to end an affray to protect residents and restore public peace—interests that by their nature presented an unusually strong need for police intervention.

And even in the case of a "felony actually committed, or a dangerous wounding whereby felony is likely to ensue," Blackstone still determined that any warrantless entry of a home required "*probable*," not merely *reasonable* "suspicion."[19]

2. Following the careful path laid by common-law scholars, this Court too has recognized "[t]he command of the Fourth Amendment" to advance fundamental "lesson[s]" about the "violent, obnoxious and dangerous" character of "breaking an outer door." *Ker* v. *California*, 374 U.S. 23, 54 (1963) (plurality opinion) (citing 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 275-276 (28th ed. 1837)). Carrying these lessons forward, early American cases allowed warrantless police entry into the home *only* in the most urgent circumstances—and, even then, *only* upon a showing of evidence equal to at least probable cause.

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[19] 4 William Blackstone, Commentaries on the Laws of England 289 (1769) (emphasis added).

For example, in 1860, Massachusetts' high court explained that, at common law, 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*." *McLennon* v. *Richardson*, 81 Mass. 74, 77 (1860) (emphasis added) (citations omitted). Peace breaches at common law generally entailed violent crimes that involved "assaulting, striking, or * * * fighting."[20] Cases like *McLennon* thus made clear that the only emergency sufficient to justify warrantless home entry was a violent event personally witnessed by the constable—a standard even more demanding than probable cause.

This common-law rule did not change with time. For example, in 1892, 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[21]—but

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[20] Donohue, *supra* note 5, at 1226 (quoting Saunders Welch, *Observations on the Office of Constable* 6 (London, printed for A. Millar 1754)); see also *id.* at 1226 n.262 (quoting William Sheppard, *The Offices and Duties of Constables* 34 (London, Richard 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)).

[21] "Felony," as used at common law and in the treatises cited by later American cases, was more than just a statutory distinction: the term meant the most serious of crimes, making apprehension for misdemeanors and prevention of affrays a better analogy for emergency-aid searches. See, *e.g.*, *Gardner* v. *New Jersey*, 26 A. 30, 32 (N.J. Sup. Ct. 1892) ("In the classification of criminal offenses at common law, felony was a nomen generalis, which comprised all offenses which occasioned a forfeiture of either lands or goods or both, to which capital or other punishment was

only if the affray was committed in the officer's presence. The Court explained that, "[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. *New Jersey*, 24 A. 557, 558 (N.J. 1892) (citations omitted). In this manner, American courts reaffirmed that they would not permit warrantless home entries absent an officer's personal, direct observation of an affray—closely analogous to a requirement of probable cause.

3. In short, no common-law authority of which *Amici* are aware approved the idea that emergencies generally allow the police to enter a home without a warrant—much less without probable cause—except as necessary to apprehend a fleeing criminal or to prevent an affray. By contrast, the emergency-aid exception is a modern invention. And here, the Supreme Court of Montana has extended this invention to its logical limit, holding that the exception allows warrantless entry even when a court would probably not have issued a warrant had the police sought one.

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super-added, according to the degree of guilt." (citations omitted)), *aff'd*, 30 A. 429 (N.J. 1893) (per curiam); *Felony,* Black's Law Dictionary 483 (1st ed. 1891) ("In American Law. The Term has no very definite or precise meaning * * * The statutes or codes of several of the states define felony as any public offense on conviction of which the offender is liable to be sentenced to death or to imprisonment in a penitentiary or state prison.").

Illustrating the newness of this entire doctrine, this Court first articulated the emergency-aid exception in 1978,[22] and state court cases do not seem to date back much further.[23] Careful examination of the Court's seminal cases articulating the exception, moreover, shows just how narrow this Court considered the exception, which each reflecting circumstances like the "affray" of English common law.

In *Michigan* v. *Fisher*, for example, the police entered a home because they "could see violent behavior inside." 558 U.S. 45, 48 (2009). Later, in *Brigham City* v. *Stuart,* police officers watched as a young man broke free and struck an officer. 547 U.S. 398, 406 (2006). Like founding-era cases that justified warrantless entry following an affray, the Court's emergency-aid cases involved the police personally observing violent behavior.

Most relevant here, at the very least, this exception requires an "objectively reasonable basis to believe that there is a *current, ongoing crisis* for which it is reasonable to act now." *Caniglia* v. *Strom*, 593 U.S. 194, 206 (2021) (Kavanaugh, J., concurring) (emphasis added).[24] Here, by contrast, Case never

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[22] *Mincey* v. *Arizona*, 437 U.S. 385, 392 n.6 (1978) (citing Melinda Roberts, Note, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 Ford. L. Rev. 571, 584 n.102 (1975)).

[23] See Roberts, *supra* note 22, at 585 n.106 (collecting cases).

[24] The "objectively reasonable basis" is not a level of suspicion. Rather, it is language from *Brigham City,* where this Court rejected the argument that the emergency-aid exception requires analysis of the subjective motive of officers. *Brigham City* v. *Stuart,* 547 U.S. 398, 404 (2006).

requested police aid; the officers responded to a report from Case's ex-girlfriend. App.3a. Besides an empty holster and a notepad, the officers lacked any evidence of a potential emergency when they arrived at the home. App.4a. Any emergency was also so attenuated that the police saw fit to wait at least forty minutes before entering, belying the argument that there was an imminent threat to Case's life. App.5a. Worse, police entered even though they believed that Case was likely waiting for them and would not harm himself if they stayed outside. App.29a. Rather than resolving the threat, then, the police *contributed* to it. Applying the emergency-aid exception here would thus dishonor the founding era's protection of the home—given that the basis for the search falls far short of the absolute floor the Fourth Amendment sets.

This is no surprise either: The decision below *explicitly* models itself on Fourth Amendment rules for searches of vehicles and public places—not homes. Montana "first recognized the doctrine" applied below in *Montana* v. *Lovegren*, 51 P.3d 471, 475 (Mont. 2002). *Est. of Frazier* v. *Miller*, 484 P.3d 912, 918 (Mont. 2021). *Lovegren* devoted multiple pages to explaining that the low bar for justifying police stops applied even to home entries if there were some colorable suggestion that an emergency was ongoing. 51 P.3d at 473-476 (citing, *inter alia*, *Terry* v. *Ohio*, 392 U.S. 1 (1968)).

The decision below thus affirms the warrantless police entry of Case's home through language that is nearly identical to the Fourth Amendment standard for safety frisks and traffic stops. Compare App.12a-15a (requiring "objective, specific and articulable facts

from which an experienced officer would suspect that a citizen is in need of help or is in peril" (citation omitted)), with *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) (requiring only "specific and articulable facts" to search an automobile trunk for weapons (citation omitted)); and *Terry*, 392 U.S. at 7, 21 (requiring "specific and articulable facts" for a weapons frisk).

This is a problem. By modeling its emergency-aid exception on the *Terry* standard and adopting the same language that this Court has used when discussing the standard applied to searches of areas *less* protected than the home, the decision below ignored what this Court has called the "unmistakable distinction between vehicles and homes." *Caniglia*, 593 U.S. at 199. Such a dangerous flouting of this Court's precedent should be rejected. It turns the Fourth Amendment's warrant *requirement* into a warrant *suggestion* and allows police to enter a person's home in circumstances when no warrant would issue. For this reason, this Court should put a definitive end to the misguided view that emergencies allow the police to treat homes as something other than homes by holding that any emergency-aid exception requires probable cause of an ongoing emergency.

II. If the Evidentiary Threshold for the Emergency-Aid Exception Were Lowered, It Could Easily Be Used to Justify Extensive Warrantless Electronic Surveillance.

While the common law's limited application of, and higher evidentiary burden for, an emergency-aid exception is sufficient reason to reverse here, it is not the only reason. When it comes to the Fourth Amendment—which also protects electronic devices, accounts, and communications—the home is the "first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). Thus, if the government may enter a home without a warrant based on articulable suspicion of an emergency—a standard far short of probable cause—digital information will be next. The insidious branding writes itself: "Big Brother" may be "watching," but it's for your own good![25] Guarding against such surveillance is another powerful reason for the Court to reverse the decision below.

A. Electronic surveillance raises the same Fourth Amendment concerns as warrantless 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) (citation omitted). Indeed, as Justice Alito has explained, "because 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 * * *

[25] George Orwell, *1984*, at 26 (1949).

implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id*. at 393 (majority opinion).

The Court has thus correctly emphasized that "a cell phone search [today] would typically expose to the government far *more* [personal information] 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[.]" *Id*. at 396-397. Even the choice of applications on a 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; * * * [and] apps for improving your romantic life." *Id.* at 396. And many Americans use their phones for even the most sensitive of activities imaginable: mental-health counseling[26] or sexually explicit communications with their intimate partners.[27] Phones also track their owner's location, creating data that shows not only where a person

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[26] Amy Novotney, *A growing wave of online therapy*, 48 Monitor on Psych. 48 (Feb. 2017), https://tinyurl.com/mrpmu68j.

[27] Elizabeth Kinsey Hawley, *Sexting Felonies: A Major Problem for Minors*, Communicating Psych. Sci. (Aug. 2020), https://tinyurl.com/4aszmauh; 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://tinyurl.com/3cm945sk.

worships, banks, and studies, but also where and with whom a person spends her free time.[28]

Several "interrelated consequences for privacy" follow from the ubiquity of electronic devices. *Riley*, 573 U.S. at 394. Most important, the many "distinct types of information" on phones may "reveal much more in combination than any isolated record" and may "date back to the purchase of the phone[.]" *Ibid.* There is also a "pervasiveness" that "characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a [vast] cache of sensitive personal information with them as they went about their day." *Id.* at 395.

But today, phones and similar devices—with all their sensitive information—are everywhere. As of mid-2024, "[t]he vast majority of Americans—98%—now own a cellphone of some kind," with 91% of Americans owning a smartphone.[29] Americans also own a range of other information devices. Nearly 81% of U.S. adults now own desktop or laptop computers and 64% own tablet computers.[30] And Americans are increasingly online, with 96% of Americans using the

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[28] Novotney, *supra* note 26 ("[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[.]").

[29] *Mobile Fact Sheet*, Pew Rsch. Ctr. (Nov. 13, 2024), https://tinyurl.com/3fw242ry.

[30] Press Release, U.S. Census Bureau, No. CB24-TPS.61, Computer and Internet Use in the United States: 2021 (June 18, 2024), https://tinyurl.com/bdfkskay.

internet, likely with some regularity[31]—a point that this Court appreciated in considering ongoing changes in technology last term. See, *e.g.*, *Free Speech Coal., Inc.* v. *Paxton*, 145 S. Ct. 2291, 2314 (2025) (noting "in 2024, 95 percent of American teens had access to a smartphone, allowing many to access the internet at almost any time and place."). Since most Americans are connected to an electronic device connected to the internet, unlimited police surveillance of electronic devices poses an existential risk to the very idea of privacy.

Nor is the information obtainable on a device limited to the device itself given the rise of remote data collection and cloud storage. See *Riley*, 573 U.S. at 397. Cloud-based storage—including those found in remote hard drives, social-media accounts, and email—all contain as much or even more private information as any given device, making this storage frequent targets of government surveillance. See, *e.g.*, *Heidi Grp., Inc.* v. *Texas Health & Hum. Servs. Comm'n*, 138 F.4th 920, 935 (5th Cir. 2025) (remote storage service Dropbox); *United States* v. *Zelaya-Veliz*, 94 F.4th 321, 333-334 (4th Cir. 2024) (private social media), *cert. denied mem.*, 145 S. Ct. 571 (2024); *United States* v. *Warshak*, 631 F.3d 266, 287-288 (6th Cir. 2010) (private email account).

Because of the ubiquity of electronic devices and the vast amount of private, personal information they contain, searching a person's electronics or accounts today is just as intrusive (if not more so) than

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[31] *Internet, Broadband Fact Sheet*, Pew Rsch. Ctr. (Nov. 13, 2024), https://tinyurl.com/7zcautch.

searching the same person's home. And it raises the same privacy concerns. Vitiating the Fourth Amendment's protections against warrantless entry of homes thus virtually guarantees a downstream dilution of Fourth Amendment protections against warrantless searches of electronic devices and accounts.

B. Absent a fixed rule of probable cause, warrantless electronic surveillance could become routine and severely compromise Americans' privacy.

Given the historic sanctity and privacy of homes, any lowering of the government's burden when it comes to home entry risks the same for every other repository of private information. It would take little effort for the government to use (or abuse) purported concern for a person's safety to justify tracking the person's online activity, reading the person's emails, and searching the person's electronic devices.

1. For example, lowering the bar for warrantless emergency-aid searches 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* v. *Dombrowski*, 413 U.S. 433, 441 (1973). Indeed, this Court has suggested that the related exigent-circumstances doctrine applies to electronic devices. See *Riley*, 573 U.S. at 402. But if the exigent-circumstances doctrine were coupled with Montana's low bar for suspecting an emergency, digital privacy would all but vanish. After all, electronic devices stand to reveal a host of caretaking- or emergency-relevant

information about a person's mental, emotional, and physical well-being. Warrantless surveillance of these devices then becomes simply a matter of articulable suspicion of an "emergency," which the government may easily manifest. And with that, nothing remains of privacy for many or even most Americans.

And, while the physical dimensions of home searches carry practical limits to a search's scope, the government can perform electronic searches remotely and in gross. See Fed. R. Crim. P. 41(b)(6) (judges may "issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information"). Sophisticated automated techniques and algorithms (including artificial intelligence), in turn, allow the government to scan massive databases for targets with the click of a button that would have taken countless hours in years past. *E.g.*, *United States* v. *Smith*, 110 F.4th 817, 837-838 (5th Cir. 2024) (discussing Google's scan of over half-a-billion accounts to find matches for a geofence warrant), *petition for cert. docketed,* No. 24-7237 (U.S. May 19, 2025).

In practice, that means that a "government agent in Virginia" may "hack into a website located on a server in Kansas, or even Russia."[32] The same agent may also remotely "verify that the same computer that had been connected at [one] IP address" is now connected at another. *United States* v. *Heckenkamp*,

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[32] 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).

482 F.3d 1142, 1148 (9th Cir. 2007). And once the government has access, it may easily access everything stored on a given device.

2. 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[.]"[33] Through hacking, the government can "conduct novel forms of real-time surveillance, by covertly turning on a [target] device's microphone, camera, or GPS-based locator technology, or by capturing continuous screenshots or seeing anything input into and output from the device."[34]

The government is fully aware of that potential and has acted on it. Following the San Bernardino shooting, when Apple declined to obey a warrant requiring it to introduce a backdoor into its iOS software, the FBI paid "professional hackers" to discover a "previously unknown software flaw."[35] And once hackers discover software vulnerabilities, they "do not disclose the flaws to the companies * * * as the exploit's value depends on the software remaining vulnerable."[36] While the government has a "strong bias" in favor of disclosing such vulnerabilities once it

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[33] *Government Hacking*, Privacy Int'l, https://tinyurl.com/mr2xnyb4 (last visited Aug. 1, 2025).

[34] *Ibid.*

[35] Ellen Nakashima, *FBI paid professional hackers one-time fee to crack San Bernardino iPhone*, Wash. Post (Apr. 12, 2016), https://tinyurl.com/3zrzew6u.

[36] *Ibid.*

learns of them, disclosure isn't required.[37] The hacker that helped the FBI in the San Bernardino case, for example, had sole legal ownership of the method that he used, making it unlikely that the government will disclose the technique to Apple.

3. And—if the government can so hack devices—articulable suspicion of an emergency presents limitless opportunities for warrantless electronic surveillance. Whether to learn a "suspect's identity," to "obtain a suspect's [past] communications," or to "intercept future conversations," government hacking "will only become more commonplace."[38]

Imagine, for example, that the police suspected that a person posed a risk to himself or others. Under the emergency-aid exception recognized below—an exception lacking any required showing of probable cause—the police may conduct a warrantless search of the person's phone for purposes of risk assessment. The police may then browse the person's search history, text messages, call logs, and photos—all in the name of preventing an emergency. During that search, the police will almost certainly encounter deeply personal private information. They might also stumble across evidence of unrelated, non-exigent illegal activity.

The police will then likely seize and use that evidence against the person. After all, another "exception to the warrant requirement is the seizure of

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[37] Andrew Crocker, *FAQ: Apple, the FBI, and Zero Days,* Elec. Frontier Found. (Apr. 14, 2016), https://tinyurl.com/2uj2waum.

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

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 respond to an emergency—"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 under a valid warrant exception, then anything incriminating they see in that capacity may be used against a person in a criminal prosecution. See, *e.g.*, *Kentucky* v. *King*, 563 U.S. 452, 462-463 (2011) ("law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the [seized] evidence is made").

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 emergency-aid exception would thus reduce to 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. As Justice Robert Jackson famously put it, the government is bound to "push to the limit" any "privilege of search and seizure without warrant" that the Court "sustain[s]." *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).[39] Preservation of the Fourth Amendment then depends on this Court's reaffirming standards

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

like probable cause that the Framers recognized protect the privacies of life against government abuse.

CONCLUSION

The common law of the founding era recognized that circumstances allowing the police to enter a home without a warrant should be very few and even farther between. Failing to recognize this, the court below turned a narrow Fourth Amendment exception for emergencies into a rule that risks swallowing the Fourth Amendment whole. Rejection of this approach will ensure that the "privacies of life" embodied by every person's home—and by their electronic devices too—remain protected by the Fourth Amendment.

Respectfully submitted,

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