No. 24-624

IN THE
Supreme Court of the United States

WILLIAM TREVOR CASE, *Petitioner*,

v.

MONTANA, *Respondent*.

On Writ of Certiorari to the
Supreme Court of Montana

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Downsize DC Foundation, DownsizeDC.org, Inc., U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Downsized DC Foundation, DownsizeDC.org, Inc., U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus curiae* briefs in other cases involving exceptions to the Fourth Amendment's warrant requirement, including in this Court's consideration of *Caniglia v. Strom*. *See* Brief *Amicus Curiae* of Gun Owners of America, *et al.* (Jan. 15, 2021).

STATEMENT OF THE CASE

On September 27, 2021, police in Anaconda, Montana received a call from the former girlfriend of Petitioner William Case, identified as J.H. The caller stated that Case, a man with a history of mental

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

illness, had made threats by telephone to commit suicide, and stated that if she called the police, he would harm the police. Petitioner's Brief ("Pet. Br.") at 4, 6.

Four officers who were familiar with his mental health history were dispatched to Case's residence. *Id.* The officers were aware that Case had attempted "suicide by cop" in interactions with police in the past. They assessed that he would not injure himself unless officers forced their way into his home, but he might shoot at police if they did. *Id.* at 7-9. The officers discussed their options for about 40 minutes after arriving and considered calling Case's father and former wife to try to gain permission for entry, but in the end decided not to do so. *Id.* at 10.

After 40 minutes, and for no apparent reason, the officers changed their minds and forced their way into his home. During a search, Case, who was hiding in a closet, pulled back a closet curtain, and police saw Case's face and a "black object." One officer shot Case in the arm and abdomen, and another retrieved a handgun from a laundry basket near Case. *Id.* The prosecutor charged Case with assault on a police officer. *Id.* The trial court denied Case's motion to suppress evidence obtained from the entry, and Case was ultimately convicted. *Id.* at 11.

The Montana Supreme Court narrowly upheld Case's conviction in a 4-3 decision. *State v. Case*, 2024 MT 165, 553 P.3d 985 (Mont. 2024) ("*Case*"). The Montana court held that the "community caretaker" exception to the warrant requirement would "apply

when an officer's warrantless entry is 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.* at P31. The court further ruled that searches are reasonable without probable cause where "there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril." *Id.* at P32.

Justice McKinnon dissented, believing that probable cause was required whether or not the forced entry related to a criminal matter. "For a warrantless search to be reasonable, probable cause must remain a necessary component in the analysis." *Id.* at P56 (McKinnon, J., dissenting) (emphasis added).

Justice McKinnon concluded:

> The Court incorrectly extends the community caretaker doctrine, which derives from law enforcement's interactions with pedestrians and vehicles, to the warrantless entry of a home.... [T]he community caretaker doctrine [i]s not a standalone exception to the warrant requirement and d[oes] not permit warrantless entries into personal residences. [*Case* at P56.]

SUMMARY OF ARGUMENT

The Montana Supreme Court erred in attempting to craft a path around this Court's unanimous decision in *Caniglia v. Strom*, issued just four short years ago. At that time, this Court refused to expand the

"community caretaking" exception for impounded vehicles in *Cady v. Dombrowksi* to authorize warrantless, forcible police intrusions into homes. This Court's refusal to expand that exception was the correct decision in *Caniglia* and remains the correct decision now. A bare majority of the Montana court tried mightily to distinguish *Caniglia*, not only to allow warrantless intrusions of homes by police, but also to allow such intrusions without probable cause. This decision was a policy preference masquerading as a constitutional decision.

The Montana Supreme Court appears to have been led off-course by its effort to enforce one provision of the Montana Constitution protecting privacy, which, unlike the Fourth Amendment, can be overridden by a "compelling state interest." The Montana court failed to address the substance of the Fourth Amendment, and thus failed to understand that the primary emphasis of the Fourth Amendment is to protect property rights, as established in *United States v. Jones* and *Florida v. Jardines*. Even *Cady* was decided based on Fourth Amendment property principles even though it was decided well before *Jones* and *Jardines*. The Framers wanted the home to have the highest protection, but that protection has been weakened by the Montana court.

This Court understood for many decades that the Fourth Amendment's text banning on "unreasonable searches and seizures" employed a term of art, applying to allow only searches and seizures where the government had a superior property interest in the items searched or seized, either with or without

warrants. This was the foundational principle of Fourth Amendment law known as the "mere evidence rule," erroneously cast aside by this Court, causing Fourth Amendment rights of Americans to have eroded ever since — at least until *Jones* and *Jardines*. The Montana court misunderstands the original public meaning of the Fourth Amendment, which the decision under review undermines.

ARGUMENT

I. THE MONTANA SUPREME COURT DECISION VIOLATES THIS COURT'S HOLDING IN *CANIGLIA V. STROM*.

This Court's decision in *Caniglia v. Strom*, 593 U.S. 194 (2021), makes clear that the "community caretaker" doctrine does not create a standalone exception to the requirement that a warrant must be obtained before the government can enter a citizen's home. *Caniglia* is directly controlling here.

In *Caniglia*, in an argument with his wife, Caniglia "retrieved a handgun from the bedroom, put it on the dining room table, and asked his wife to 'shoot [him] now and get it over with.'" *Caniglia* at 196. Her response was to spend the night at a hotel. Unable to reach Caniglia by phone in the morning, she called police and requested a welfare check. *Id.* Police accompanied Caniglia's wife to the residence, where they found him on the porch. *Id.* He denied that he was suicidal, but agreed to go to a hospital for a psychiatric evaluation, with the promise of the police that they would not seize his firearms if he went. *Id.*

at 196-97. After Caniglia left to go to the hospital, the police lied to his wife that he had given them permission to seize the firearms. *Id.* at 197. She believed the lie, and showed the police where his two firearms were kept, which the police seized without a warrant. *Id.* Caniglia alleged unlawful search and seizure in violation of the Fourth Amendment.

The facts here are similar. Here, Petitioner Case's ex-girlfriend, J.H., called police to say Case had threatened suicide in an earlier call with her. *Case* at P3. She stated that Case said:

> "he was going to get a note or something like that" and planned to commit suicide. After attempting and failing to deescalate the conversation, J.H. claimed to have heard a "clicking" that she thought sounded like a cocking pistol. When J.H. told Case she was going to call the police, Case threatened harm to any officers that came to his home if she did. [*Id.* at P4.]

J.H. drove to Case's residence and met four officers who had already arrived there. For about 40 minutes, they discussed Case's history that they thought were attempts at "suicide by cop." Sergeant Richard Pasha noted that "'he's tried this suicide by cop [routine] before....'" Pet. Br. at 9. "The officers perceived Case's behavior as an attempt to elicit a defensive response, *i.e.*, a 'suicide-by-cop.'" *Case* at P8. *See also id.* at P62 (McKinnon, J., dissenting).

As with *Caniglia*, there was no suggestion that Case was a threat to anyone, including the officers, unless they forced entry into his home. In both situations, there was no reason the officers could not have delayed entry until they obtained a warrant from an independent magistrate, a neutral third party who might have had a less emotional and more seasoned perspective on the situation.

The Montana Supreme Court sought to distinguish *Case* from *Caniglia* by incorrectly asserting that *Case* involved exigent circumstances, while *Caniglia* did not. The Montana court stated: "[u]nlike the situation here, there was no exigency in *Caniglia* to justify the officer's entry.... Caniglia had voluntarily left his home for a psychiatric evaluation by the time officers entered his home and seized his weapons." *Case* at P30. The court below made a passing reference to the possibility that Case was attempting "suicide by cop," but attributed little significance to that claim. By contrast, the defense explained that "the officers arrived at a vacant and silent residence with no signs of an active emergency in progress." *Id.* at P62 (McKinnon, J., dissenting). Case took no offensive action until the officers forced entry, and as with *Caniglia*, the officers subjectively believed he would not do so.

In truth, neither *Caniglia* nor *Case* involved a true exigency. The Montana Supreme Court did not base its decision on a true exigency, but by an erroneous reading of *Caniglia* which had rejected the "community caretaker" doctrine as a freestanding exception to the warrant requirement for a home. The court below

erred by applying that doctrine to a home, finding an emergency where there was none and lowering the standard for police certainty from "probable cause" to, essentially, "reasonable suspicion," as discussed in Section II, *infra.*

II. THE MONTANA SUPREME COURT'S FOURTH AMENDMENT ANALYSIS WAS MISDIRECTED BY ITS FOCUS ON PRIVACY AND REASONABLENESS.

A. The Montana Court's Fourth Amendment Analysis Was Marred by the Montana Constitution's Limited Protection of Privacy Rights.

The challenge before this Court by Petitioner Case is quite obviously brought only under the Fourth Amendment, and not under the Montana State Constitution. However, the fact that the Montana Supreme Court analyzed the issue under both constitutions may have led it into error. For example, the Montana Supreme Court begins: "a peace officer's **warrantless entry into an individual's home is per se unreasonable** because citizens are afforded an expectation of **privacy** and protection from unlawful searches and seizures in their homes." *Case* at P24 (emphasis added). For this proposition the court first cites the Fourth Amendment, and then Article II, §§ 10-11 of the Montana Constitution. Section 10 is quite unlike the Fourth Amendment, as it provides:

> The right of individual **privacy** is essential to the well-being of a free society and shall not be

> infringed without the showing of a **compelling state interest**. [Mont. Const. § 10 (emphasis added).]

The Montana court repeatedly describes this Section 10 as providing "heightened privacy protection[]"[2] — presumably meaning more protection than the Fourth Amendment — in the context of the community caretaker doctrine. It does not, for at least two reasons. First, unlike the Fourth Amendment, Section 10 can be overridden whenever judges employ "interest balancing" and identify a "compelling state interest." *Id*. at P31. Second, Section 10 protects only "privacy" rights and makes no references to the "property" rights which are at the core of the Fourth Amendment. *See United States v. Jones*, 565 U.S. 400, 405 (2012) ("The text of the Fourth Amendment reflects its close connection to property.... Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century....")[3]; *Florida v. Jardines*, 569 U.S. 1, 11 (2013) ("The *Katz* reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains

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[2] Elsewhere, the Montana court also describes the Montana Constitution as providing "greater guarantees" than the Fourth Amendment (*id*. at P32) and yet again as providing a "heightened right to privacy" (*id.* at P34).

[3] Some of these *amici* urged this Court to return to the property baseline of the Fourth Amendment in *Jones*. *See* Brief *Amicus Curiae* of Gun Owners of America, *et al.* (Oct. 3, 2011).

evidence by physically intruding on constitutionally protected areas. ").

On the other hand, Section 11 of the Montana Constitution more closely parallels the Fourth Amendment, although it does not track it:

> The people shall be secure in their persons, papers, electronic data and communications, **homes**, and effects from **unreasonable** searches and seizures. **No warrant to search any place**, to seize any person or thing, or to access electronic data or communications shall issue without describing the place to be searched or the person or thing to be seized, or without **probable cause**, supported by oath or affirmation reduced to writing. [Mont. Const. § 11 (emphasis added).]

Based on some amalgam of the Fourth Amendment and these two provisions of the state Constitution, the Montana court concluded: "a peace officer's **warrantless entry into an individual's home is per se unreasonable** because citizens are afforded an expectation of **privacy** and protection from unlawful searches and seizures in their homes." *Case* at P24 (emphasis added). This statement contains truth and error.

First, the protection of privacy afforded by Section 10 may cause a warrantless home invasion to be deemed "*per se* unreasonable," but the Montana court believes it can be overridden by a modern judge based on how he feels about the reasonableness of the

circumstances surrounding the forced home invasion and whether there was a "compelling state interest."

Second, even if the protection of "places" in Section 11 against unreasonable searches and seizures is deemed a *per se* rule, the Montana court believed it too could be breached by the court's expansion of the "community caretaker" exception.

Third, since the Montana court provided no meaningful analysis of the Fourth Amendment, it did not believe that the Federal Constitution provides any more protection against forced home invasions than its state constitution.

B. The Montana Court Erroneously Found That *Caniglia* Permitted "Reasonable Exigency" Forcible Home Invasions.

The Montana court's analysis continued by identifying several Montana cases, and as several also dealt with the Montana Constitution, they too were not helpful in understanding the Fourth Amendment's protections. When the court's attention finally turned to the Fourth Amendment, it did little more than assert its disagreement with Petitioner Case's interpretation of the Amendment's scope:

> [Petitioner] Case argues that *Caniglia* forbids our application of the community caretaker doctrine in a citizen's home, averring that the only circumstance where a peace officer may enter a home without a warrant or consent is when there are **both [i] exigent**

> **circumstances and [ii] probable cause** for the violation of a criminal statute. [*Case* at P28 (emphasis added).]

The Montana court refused to adopt the view that police would need "probable cause" to conduct a forcible home invasion. The Montana court flatly rejected the holding in *Caniglia* that the "community caretaking" exception did not apply to homes. Additionally, it allowed a forced invasion based only on "reasonable suspicion" — not probable cause. The Montana court believed that the only time probable cause would be needed for a forcible police home invasion would be in a criminal context, or to exercise a seizure subsequent to the forcible home invasion.

> *Caniglia* established that the Fourth Amendment requires [i] **reasonable exigency to enter** a home, and [ii] **probable cause for any seizure** after that point. Unlike the situation here, there was **no exigency in *Caniglia*** to justify the officer's entry, given Caniglia had voluntarily left his home for a psychiatric evaluation by the time officers entered his home and seized his weapons. [*Id*. at P30 (emphasis added).]

In rejecting a "probable cause requirement" for the home invasion, one would have anticipated that the court would have clearly identified some lesser standard, such as "**reasonable suspicion**." However, those words do not appear in the court's opinion. The Montana court's described what is required to justify a forcible home invasion as — "**reasonable exigency**"

— a curious term nowhere found in Justice Scalia's opinion for the unanimous Court in *Caniglia*. Nor is that term found in either of the two concurring opinions. Chief Justice Roberts and Justice Breyer stated: "the Court's exigency precedents, as I read them, permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now." *Caniglia* at 207 (Roberts, C.J., concurring). Justice Kavanaugh's concurrence explained that such a circumstance could be present when police "are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury." *Caniglia* at 611-12 (Kavanaugh, J., dissenting). Neither of these circumstances were present here, but four Justices of the Montana court apparently found authority for a home invasion upon the police finding of a "**reasonable exigency**."

The court identified a three-part test, only the first part of which addresses what is required to conduct a forcible home entry. This term **"reasonable exigency**" is nothing more than "**reasonable suspicion**" all dressed up for court, defined as: "objective, specific and articulable facts from which an experienced officer would **suspect** that a citizen is in need of help or is in peril." *Case* at P32 (quoting *State v. Lovegren*, 2002 MT 153, 51 P.3d 471). Probable cause would be required in the case of a possible criminal offense, but not a situation such as Case. *Case* at P33. The dissenting three judges disagreed, believing that probable cause is required in both criminal and civil contexts, and that neither probable

cause nor exigent circumstances were present here. *Case* at P63-64.

The Montana court refused to accept the limitation set out in *Caniglia* — allowing the search of an impounded vehicle where the "community caretaker" exception under *Cady v. Dombrowski*, 413 U.S. 433 (1973), would apply, and barring a forcible home invasion where, under *Caniglia*, it would not.

The *Caniglia* Court criticized the First Circuit for extrapolating "a freestanding community-caretaking exception that applies to both cars and homes [because] '[t]hreats to individual and community safety are not confined to the highways.'" *Caniglia* at 196. Here, this is exactly what the Montana court did. The Montana court believes that *Caniglia* is in no way inconsistent with applying the *Cady* "community caretaker doctrine" to sanction a home invasion, and such an invasion is lawful when "a peace officer acts on a **duty** to promptly investigate situations 'in which **a citizen may be in peril or need some type of assistance** from an officer.'" *Id.* at P25 (emphasis added). This is a truly loose standard.

First, it posits that the officer has a "duty" to act overriding the Fourth Amendment's protection of the home. Second, it allows a forcible entry into a home whenever "a citizen may be in peril," which requires little or nothing more than a possibility, allowing it to be met without much difficulty. And third, it allows forcible entry into a home whenever a citizen "may ... need some type of assistance from an officer." Again, this requires little or nothing more than a possibility

of needing "some type of assistance." Remember, in neither of these situations has the citizen sought help, for that almost certainly would constitute consent. In both of these situations, the entry is against the will of the homeowner, causing risk to both the homeowner and the police. In truth, these are no standards at all to apply to a forcible entry. In every situation, the actions of the police are justified, and the rights of the citizen are compromised.

The only check on the authority of the police to conduct a forcible home entry is if the police are responding "to criminal activity alone," where they must have probable cause. Then, both "exigent circumstances and probable cause together" are required to "justify a warrantless entry." *Id*. at P33. What makes this special Montana rule so curious is that it actually gives criminals greater rights than law-abiding persons to the integrity of their homes.

Applying the rule established by the Montana court to Petitioner Case, the court found that there were "objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help." *Id.* at P38. The court found "the actions the officers took were appropriate for mitigating peril" (*id.* at P39) even though those same actions led to Case being shot after a forcible entry into his home. Breaking into his home must not have seemed appropriate to Petitioner Case. The court admits that the actions of Mr. Case could never meet a probable cause standard, since:

> [P]robable cause is established if the facts and circumstances within an officer's personal knowledge, or related to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that another person **is committing or has committed an offense**. [*Id*. at P40 (emphasis added).]

There was not the slightest indication that Mr. Case was "committing" or had "committed an offense." Thus, the absence of probable cause led to Mr. Case being shot in a forcible entry. It was only by the Grace of God that the police who forcibly entered his home to assist him did not kill Mr. Case.

In dissent, Justice McKinnon, joined by two other Justices, exposed the post-hoc rationalization used by the Courts to justify the officer's entry and shooting of Mr. Case. Unlike the court opinion which never mentioned the origins of the community caretaker exception or *Caniglia* as having rejected a standalone exception to the warrant requirement (except briefly describing the dissent at *id*. at P31, n.3), Justice McKinnon explained the doctrine "derives from law enforcement's interactions with pedestrians and vehicles" which are readily distinguished from warantless entry of a home. *Id*. at P56 (McKinnon, J., dissenting). The Court's opinion never even mentioned this Court's recently having given primacy to the Fourth Amendment's protection of property interests, while Justice McKinnon discussed *Florida v. Jardines*. *Id*. at P57. The dissent correctly states that "[t]he Court gives no effect to *Caniglia*, which grants greater Fourth Amendment protections than the Court's

decision today." *Id.* at P59. Justice McKinnon believed that both probable cause and exigency would be required to avoid the warrant requirement, but here there was neither. *Id*. at P35.

III. THE MONTANA SUPREME COURT DECISION UNDERMINES FOURTH AMENDMENT PROTECTIONS FOR THE HOME.

A. This Court's Decision in *Cady* Relied on Fourth Amendment Property Principles that Were Wholly Ignored by the Court Below.

The Montana Supreme Court's decision constitutes not just an expansion of this Court's "community caretaking" holding in *Cady v. Dombrowski*, but rather a repudiation of the property principles articulated there. The Montana court extended the "community caretaking exception" from disabled vehicles over which the police exercised custody and control to occupied homes over which the police exercised neither, based on what they perceived to be the policy underlying the *Cady* decision. And it did so with a spurious effort to distinguish *Caniglia.*

The technique utilized by the Montana court to expand the *Cady* holding is not unique, but it avoids reaching a decision based on the Constitution's "text, history, and tradition." *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (2011) (Kavanaugh, J., dissenting). The technique is to assign a new and elastic name to a holding ("community caretaking"),

treating it as a doctrine, and then empowering modern judges to explore the parameters of that new doctrine. Since the doctrine has no independent historical basis, it has no objective meaning. Therefore, a search for its meaning results in completely arbitrary decisions — allowing the lower courts to give it whatever meaning each individual judge chooses — sometimes based on nothing more than a desire to reach his or her desired decision.[4]

The Montana court simply rejects Petitioner Case's assertion that *Caniglia* "forbids [the] application of the community caretaker doctrine in a citizen's home." *Case* at P28. Rather than seeking out the original public meaning of the Fourth Amendment, the Court simply announces, "[w]e are not persuaded by Case's narrow view of peace officers' caretaker obligations." *Id.* From there, its decision primarily addressed case law, putting aside any effort to apply the Fourth

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[4] Another application of this principle, in the area of the First Amendment, is the trend to ignore the separate, well-established historical, common law meaning of "the Freedom of Speech" and "[the Freedom] of the Press" — each separately identified in the First Amendment — amalgamize the two freedoms, and call it the Doctrine of Freedom of Expression. Since the phrase "Freedom of Expression" has neither historical basis nor independent meaning, it provides a judge seeking out its parameters with latitude to ignore the fact that neither the Freedom of Speech nor the Freedom of the Press ever protected obscenity, and then find that the Doctrine of Freedom of Expression robustly protects nude dancing. *See California v. LaRue*, 409 U.S. 109, 113 (1972) ("The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution.").

Amendment. Thus, without meaningful analysis of the Fourth Amendment, the Montana court could defend its expansion of *Cady* by merely asserting it was "not persuaded" by the notion that it should be limited.

B. The *Frazier* Case.

The Montana Supreme Court reflected on the one earlier occasion in which it applied the caretaker doctrine to the warrantless entry of a home — *Estate of Frazier v. Miller*, 2021 MT 85, 484 P.3d 912. The court below described this case as involving a welfare check on Frazier, a suicidal person, at his home. Briefly summarized, the facts were as follows. The officer knocked on the door, getting no response. The officer turned the doorknob and opened the front door. Frazier yelled that the officer did not have the right to be there, and told him to get out. One officer pushed the front door fully open. Frazier begged the officers to shoot him; Frazier moved the gun barrel away from his head and toward the officer, stating "suicide by cop," causing an officer to fire three rounds, all striking Frazier and killing him. *Case* at P41. The court does not state the obvious, that such suicide by cop requires an officer forcibly entering the home without permission and firing, which is what happened here.

With Mr. Frazier and Mr. Case, the Montana Supreme Court now has two real-world illustrations of how well its expanded "community caretaker" warrantless forcible entry doctrine is working. At this point, it seems appropriate to pose the question often asked by television's Dr. Phil:

> Question: "How's that working for you?"
> Answer: Two cases; two casualties;
> one dead; one wounded.
> Mr. Frazier is dead.
> Mr. Case was shot, in his abdomen and arm,
> but survived. (*See Case* at P12; Pet. Br. at 10.)

Despite these illustrations of police carnage visited on Montanans resulting from the Montana court's policy, the Montana court asserted that "the actions the officers took were appropriate for mitigating peril." *Case* at P39. Perhaps such decisions to break into a home would be less frequent if they required a warrant. Perhaps it is time to consider whether the judgment of seasoned police officers — without requiring that judgment to at least meet the standard of probable cause — and therefore only based on "reasonable suspicion" — should not be allowed to override the Fourth Amendment's protection of the home. Perhaps Mr. Frazier was exactly right when he shouted at the police that they did not have the right to be there, and then told them to get out. Would that they had. Sometimes bad things happen, but a constitutional republic requires that if they are going to happen, they should happen when the Constitution is being followed, not when it is being violated.

C. *United States v. Jones* and *Florida v. Jardines.*

The Fourth Amendment protects the home, based on property principles that cannot be waived based on how judges think police should be able to act, based on what they suspect. While it is true that for a half

century, the Fourth Amendment was largely understood only as a protection of privacy, that changed fundamentally with *United States v. Jones* and *Florida v. Jardines*, where this Court re-established the original basis of the Fourth Amendment as the protection of property.[5] As Justice Scalia explained:

> The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. [*Jones* at 405.]

Although *Cady* was decided four decades before *Jones*, even the *Cady* Court also focused on property principles. The *Cady* Court justified the warrantless search of a vehicle in large part because the police had exercised a significant degree of custody and control over Cady's automobile before it was searched. In evaluating the search of the car, the Court identified "two factual considerations [that] deserve emphasis," the first of which was:

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[5] In *Jones*, this Court relegated to second place the Fourth Amendment's protection of "privacy" memorialized in *Katz v. United States*, 389 U.S. 347 (1967). *See Jones* at 409 ("But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."). *See also* H. Titus & W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

> the police had exercised a form of **custody or control** over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent, being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. **At the direction of the police**, and for elemental reasons of safety, the automobile was towed to a private garage.... [*Cady* at 442-43 (emphasis added).]

The *Cady* Court went on to explain that while "[t]he police did not have actual physical custody of the vehicle [as in two earlier cases] the vehicle had been towed there at the officers' directions.... Rather, like an obviously **abandoned** vehicle, it represented a nuisance...." *Id*. at 446-47 (emphasis added). Had the court below evaluated the forcible entry into the home based on property principles, it would have found the police had no custody or control over the home as was present with respect to the vehicle in *Cady*.

The *Cady* Court asserted the distinction which the court below crushed. "'[F]or the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.'" *Cady* at 439 (citations omitted). And the *Cady* Court relied on that distinction:

> The Court's previous recognition of the **distinction** between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of

> a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. [*Cady* at 447-48 (emphasis added).]

The Montana court erred when it failed to appreciate the property principles undergirding the Fourth Amendment and to follow the distinction repeatedly stressed in both *Cady* and *Caniglia* between vehicles and homes.

D. If "Reasonableness" Is the Standard by which the Fourth Amendment Is to Be Interpreted, that Amendment Ceases to Have Any Objective Meaning.

The Montana court refused to require "probable cause" to authorize forcible home invasion by the police, preferring to review that action by what are no better than vague standards of reasonableness.

To be sure, the Fourth Amendment contains the word "unreasonable," but that does not mean that its entire meaning can be reduced down to a simple test as to whether a warrantless search is deemed "reasonable" by a modern judge:

> The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Fourth Amendment (emphasis added).]

However, for most of the existence of the nation, an "unreasonable search and seizure" was decided according to the principles articulated in *Boyd v. United States*, 116 U.S. 616 (1886), *Weeks v. United States*, 232 U.S. 383 (1914), and *Gouled v. United States*, 255 U.S. 298 (1921), known as the "mere evidence rule." This rule was unwisely cast aside.

Under *Boyd* and cases that followed, an "unreasonable" search and seizure was a search for an item where the government did not have a superior property interest. One commentator described the only items which could be searched for and seized as: "(1) fruits of the crime, (2) instrumentalities of the crime, (3) contraband, and (4) weapons or any other means of escape." "Mere Evidence" Rule Discarded and Held Inapplicable to Exclude Evidence Lawfully Seized, ST. JOHN'S LAW REVIEW, vol. 42, no. 3, 425, 426 (Jan. 1968). All other searches, such as searches for mere evidence, were *per se* unreasonable, even if conducted with a warrant. This understanding of the Fourth Amendment, based on common law and property principles, was generally observed until *Warden v. Hayden*, 387 U.S. 294 (1967).

Once the notion of some searches being inherently unreasonable regardless of whether the police had a warrant, courts increasingly came to believe that if warrants were obtained upon probable cause, anything

could be seized, and even if warrants were not obtained, anything falling within judge-crafted "exceptions" to the Fourth Amendment could be seized anyway. The community caretaking doctrine is perhaps the most troubling of those exceptions, as it could cover a wide variety of pretextual searches. If it is now allowed to expand to include warrantless forcible home invasions as the court below decided, it seriously undermines the protections the Framers thought they had provided through the Fourth Amendment.

E. Interest Balancing Lawlessly Elevates the Personal Opinions of Modern Judges over the Text Crafted by the Framers, which Was Consented to by the People.

The Montana court believed that there was no fixed Fourth Amendment rule protecting homes from warrantless searches due to Montana's broadening of the community caretaker exception. Rather, it believed that every fact situation was different, requiring judges to balance the interests of the people versus the interests of the government. The touchstone was the amorphous standard of "reasonableness." Not surprisingly, the court below took the side of the government over the people.

In using interest balancing, the court granted to itself the right to override the constitutional text, cloaking that usurpation in the garb of legalese. While interest balancing has a long pedigree in First Amendment jurisprudence, truly no constitutional rights should be measured based on a balancing of

interests. The most thoughtful and complete rejection of interest balancing in recent years was performed in *District of Columbia v. Heller*, 554 U.S. 570 (2008), there with respect to the Second Amendment. The way that this Court rejected interest balancing in *Heller* should be instructive here.

When *Heller* was argued to the Supreme Court, the Solicitor General — contending for the United States as *amicus curiae* — urged the Court to employ a type of interest balancing (specifically, "intermediate scrutiny") in reviewing the D.C. ban on handguns, believing that if that standard were employed correctly, the statute would be upheld. *See District of Columbia v. Heller,* Docket No. 07-290, Oral Argument Transcript, pp. 44-45. During oral argument, Chief Justice Roberts expressed his doubts of the utility of this approach:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how ... this restriction and the scope of this right looks in relation to those? I'm not sure why we have to articulate some very intricate standard. I mean, **these**

> **standards** that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case? [*Heller* Oral Argument Transcript, p. 44 (emphasis added).]

Indeed, when *Heller* was decided, the approach telegraphed by Chief Justice Roberts during oral argument was exactly the approach taken by the majority.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "**interest-balancing**" approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. **A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all**. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) **even future judges** think that scope too broad.... The Second Amendment ... is the very *product* of an **interest balancing by the people**.... [*Heller* at 634-35 (bold added).]

Indeed, Justice Scalia correctly described interest balancing as a "judge-empowering [test]." *Heller* at 634. That is exactly why judges like, and even love, interest balancing. By it, they grant to themselves raw power to do what they believe should be done, unconstrained by the constraints imposed by the Constitution's written text.

The same rejection of balancing tests that was applied to the Second Amendment should apply to the Fourth Amendment. At no point did the court below analyze the Fourth Amendment. It made no search for its original public meaning. It simply took the *Cady* case and viewed the doctrine as undergoing evolution and a necessary gradual expansion based on what could be termed a policy preference. That policy elevated the powers of the police above the Constitution's protection of the people.

In *Cady,* the Supreme Court described the role police play as "community caretakers." This was expanded upon by the court below. But even if the police are to be considered "guardians of the galaxy," they are still constrained by the U.S. Constitution. The Constitution remains the law which governs the government.

The police may have a "measure of discretion," but that discretion does not authorize them to act in a manner which violates the text, context, history, tradition, and original public meaning of the Fourth Amendment. The decision of the court below granted discretion to police to expand the powers of police and diminish the protection of the People under the Fourth

Amendment. Even though its preference of government power was based on a policy it preferred, that policy was precluded when the Bill of Rights was crafted by the Framers and ratified by the People. The court may have rationalized its decision as being done in the best interests of the community, but its decision was *ultra vires*, as neither that court nor this one has authority to diminish the People's protections set out in the Fourth Amendment.

F. Reasonableness Is a Tort Concept Incorrectly Incorporated into Constitutional Law.

In 1947, Judge Learned Hand of the Second Circuit Court of Appeals enunciated the famous "Hand formula" for determining what conduct is "reasonable" in assigning liability in negligence cases. Judge Hand stated his sensible formula as an algebraic equation:

> if the probability [that an event will occur] be called P; the injury [resulting from the event], L; and the burden [on the defendant to avoid the probability], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL. [*United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2nd Cir. 1947).]

If B is less than PL, then, the emblematic "reasonable person" must assume the burden to eliminate the probability of the injury. Failure to do so is "unreasonable." The Hand formula is a forthright balancing test, which makes eminent sense in

determining when the negligent conduct of one citizen makes him liable to another in a civil case. It allows judges in an infinite number of fact-specific cases to determine which citizen owes how much to another citizen for causing injury. But the Hand formula is utterly worthless in determining constitutional rights. As this Court reminded Americans, enumerated constitutional rights are "the very *product* of an interest balancing by the people," already conducted at the Framing and approved by the people at ratification. *Heller* at 635. There is no need for each case to trigger a new reassessment of whether a constitutional provision is worth enforcing:

> The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. [*Id.* at 634.]

But the Montana court, like so many others, perhaps confused by the Fourth Amendment's use of the phrase "unreasonable search and seizure," has improperly imported the "reasonable person" tort standard into Fourth Amendment law. Again and again throughout its opinion, the Montana court makes clear that it is intentionally applying a fact-specific, *ad hoc* balancing test to every warrantless search.

The Montana court declares as its rule of law that "a **warrantless entry is permissible** if it is **reasonable** given the **facts and circumstances**." *Case* at P31 (emphasis added). In determining whether a search or seizure in a home is "reasonable," the Montana court reasons circularly. "[A]s long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate." *Id.* at P32 (quoting *Lovegren*). In other words, a search is reasonable as long as it's reasonable. Then, "once ... the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating ... the protections provided by the Fourth Amendment." *Id.* (quoting *Lovegren*).

The Montana court simply lays the Hand formula template atop the Fourth Amendment and cuts it to fit. If the risk is too high (in this case, a possible suicide attempt), and the probability that it may occur is high enough (a call from an ex-girlfriend advising of a suicide threat), the officer may infringe on the Fourth Amendment right to the extent necessary to mitigate the risk.

Again and again, the court makes its balancing test clear. "When a warrantless entry is **wholly divorced from a criminal investigation** [ergo, the burden is reduced] and is otherwise reasonable, like here, the probable cause element is 'superfluous'" — *i.e.,* the Fourth Amendment provides no protection. *Id.*

at P33. Tilting the judicial scale away from the Fourth Amendment, the court stated that adding a probable cause requirement to exigent circumstances "is unwieldy and risks grave consequences for individuals in need of care." *Id*. at P34.

The court continued, stating that home searches are permissible under the "community caretaker" exception in "non-criminal situations where a warrantless entry is essential to ensure the wellbeing of a citizen," even if they "would **otherwise be forbidden for lack of criminal activity** and probable cause." *Id*. at P36 (emphasis added). "When acting in a caretaker's capacity, an officer's reasons for a warrantless entry" need only be "**reasonable** and 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id*. (emphasis added). Reasonableness permeates the Montana court decision but reasonableness is not the test.

CONCLUSION

The decision of the Montana Supreme Court should be reversed.

Respectfully submitted,

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