No. 16-1027

In The
Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

[1] This *amicus curiae* brief is filed with the written consent of all parties in this case. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Hernandez v. Mesa*, No. 15-118 (U.S. filed Dec. 9, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. filed May 7, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganias, *United States v. Ganias*, No. 12-240-cr (2d Cir. filed July 29, 2015) (en banc).

SUMMARY OF THE ARGUMENT

The Court granted review in this case to decide if "the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house." Cert. Pet. i. Unfortunately, this case has nothing to do with the automobile exception. The automobile exception legitimizes the "warrantless search *of an automobile*"—it establishes that after stopping a car, the police may with probable cause (but without a warrant) tear up the upholstery, for example, or open up a suitcase that is stored in the trunk. *California v. Acevedo*, 500 U.S. 565, 579 (1991) (emphasis added); *see also Carroll v. United States*, 267 U.S. 132, 153 (1925).

What happened in this case, however, was a warrantless search *for an automobile*. In particular, the police decided to search for a stolen motorcycle under a tarp within the curtilage of a home even though the police did not have a search warrant for the home or for the tarp. To bless this search under the Fourth Amendment, the Court would have to create a new exception to the Fourth Amendment: the garage exception. This new exception would establish that the police may conduct warrantless searches for a stolen or contraband vehicle anywhere the police have probable cause to believe the vehicle is located or garaged.

The Court should refuse to create a garage exception to the Fourth Amendment. As this case shows, a garage exception would abrogate the time-honored

common law protection of homes against warrantless searches—a protection that applies with full force even when police officers otherwise have probable cause to search a home. A garage exception would also abrogate the reasonable expectation of privacy that homeowners maintain in regard to containers on their property. A garage exception would thus "reduce[] the Fourth Amendment to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

ARGUMENT

I. This case is not about the "automobile exception" to the Fourth Amendment.

Officer David Rhodes wanted to find a stolen orange-and-black Suzuki motorcycle that had been used to elude the police in two traffic incidents. *See Collins v. Commonwealth*, 790 S.E.2d 611, 612–14 (Va. 2016). Officer Rhodes' investigation led him to the home of Ryan Austin Collins (Petitioner), where Rhodes could see from the street "what appeared to be a motorcycle covered with a white tarp" parked in Collins' driveway. *Id.* Officer Rhodes then "walked onto the property" without first obtaining a warrant and "[w]hile standing on the driveway . . . uncovered the motorcycle." *Id.* Officer Rhodes concluded that the motorcycle "appeared to be the same orange and black Suzuki" that he was looking for. *Id.*

A. The automobile exception legitimizes warrantless searches *of vehicles*—not warrantless searches *for vehicles* that are stolen property or contraband.

Based on the above facts, the Virginia Supreme Court concluded that what occurred in this case was, in essence, a search of a vehicle for a vehicle. *See id.* at 617 ("[W]e hold that Officer Rhodes' warrantless search of the motorcycle was justified . . . ."). If this analysis is correct, then the Fourth Amendment's automobile exception would come into play. Under this exception, the police may conduct a warrantless search of a vehicle so long as the search is supported by facts that otherwise establish probable cause for the search. *See California v. Acevedo*, 500 U.S. 565 (1991).

To explain the automobile exception, however, is to lay bare the problem with applying it in this case: one cannot search a motorcycle to find a motorcycle. This is "reasoning in a circle"—one has already found what one is looking for. *Fairchild v. St. Paul*, 49 N.W. 325, 326 (Minn. 1891). The dissent below recognized this: "Officer Rhodes did not search an automobile, he searched a tarp." *Collins*, 790 S.E.2d at 621 (Mims, J., dissenting). Or, to be more precise, Officer Rhodes searched a tarp located within the curtilage[3] of Collins' home in

[3] "Curtilage" describes the area "immediately surrounding and associated with the home," making it "part of the home itself for Fourth Amendment purposes." *Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (2013) (quotation marks omitted). The Virginia Supreme Court did not express any doubt that Collins' driveway was part of the "curtilage" of his home. Rightly so. "Because the driveway is frequently (if not always) used for domestic purposes and

order to find a stolen motorcycle. *See id.* at 614 (majority op.).

That removes this case from the realm of the automobile exception. In *Carroll v. United States*, 267 U.S. 132, 147–53 (1925), the Court announced this exception. The Court explained that there was "a necessary difference" under the Fourth Amendment between "a search of a store, dwelling house or other structure" and "a search of a ship, motor boat, wagon or automobile, for contraband goods." *Id.* at 153. Because a "vehicle can be quickly moved out of the locality," the Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant." *Id.*

On every major occasion the Court has spoken about the automobile exception since *Carroll*, the Court has stuck to the above view of the exception. The Court has defined the exception's scope in terms of a warrantless search *of a vehicle*—i.e., a search for something, usually contraband, located inside a vehicle.[4] In

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commonly functions as an access route to the home, a per se rule acknowledging it as part of the home's protected curtilage is entirely appropriate." Vanessa Rownaghi, *Driving Into Unreasonableness: The Driveway, the Curtilage, & Reasonable Expectations of Privacy*, 11 AM. U. J. GENDER, SOCIAL POLICY & LAW 1165, 1192 (2003).

[4] In *Cardwell v. Lewis*, the Court upheld the "warrantless examination of the exterior of a car"—namely, "examination of [a] tire on [a] wheel and the taking of paint scrapings from the exterior of [a] vehicle left in [a] public parking lot." 417 U.S. 583, 591–92 (1974). The Court based this conclusion primarily on the fact that a car "travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* at 590. The Court thus implicitly

this regard, the Court has determined that the exception covers the interior of a vehicle, enclosed or obscured parts of a vehicle (e.g., trunks and glove compartments), and containers stored in a vehicle. *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (bags in a car trunk); *Pennsylvania v. Labron*, 518 U.S. 938, 939–40 (1996) (car trunk and truck floor); *Acevedo*, 500 U.S. at 567, 580–81 (bags in a car trunk); *New York v. Class*, 475 U.S. 106, 112–14 (1986) (obscured dashboard vehicle identification number); *California v. Carney*, 471 U.S. 386, 388, 394 (1985) (interior of a mobile home); *United States v. Ross*, 456 U.S. 798, 801, 825 (1982) (bags in a car trunk); *Arkansas v. Sanders*, 442 U.S. 753, 755, 766 (1979) (suitcase in a car trunk).

The present case, by contrast, concerns a police search *for*—not *of*—a vehicle in a home driveway.[5] And that distinction is of vital importance because in "determining whether a search or seizure is unreasonable,

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acknowledged that the automobile exception—as opposed to the plain-view exception—is focused on searches of "the interior of [a] car." *Id.* at 591.

[5] After uncovering the motorcycle parked on Collins' driveway, Officer Rhodes did perform a search of the vehicle to the extent that he looked for the motorcycle's vehicle identification number. *See Collins*, 790 S.E.2d at 614. But that VIN search cannot be conflated with Officer Rhodes' initial entry onto the curtilage or uncovering of the motorcycle. *Cf. Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (officer's movement of a record player was a search apart from the officer's initial entry into an apartment). It is those earlier searches that are at issue here in terms of whether they also fit under the automobile exception.

we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 169 (2008). This approach ensures that the Fourth Amendment continues to "afford[] the protection that the common law [of the founding era] afforded." *Acevedo*, 500 U.S. at 583–84 (Scalia, J., concurring). "[T]hat includes the requirement of a warrant, where the common law would have required a warrant." *Id.*

B. The common law of the founding era required warrants for police searches aimed at uncovering contraband or stolen property in private places.

The history and common law of the founding era reveal that a special warrant was required to authorize searches for contraband or stolen property in private places. This is best seen in James Otis's argument on behalf of a group of colonial merchants against Crown officers seeking to broaden their customs inspection power in America. *See People v. Case*, 190 N.W. 289, 300–01 (Mich. 1922) (Wiest, J., dissenting) (detailing Otis's speech). Otis explained in his argument that "[i]t had been a common practice, till of late years, for the [Crown] officers of the customs, with no authority but that derived from their commissions, to enter warehouses, and even dwelling-houses, and search them for contraband goods." *Id.*

Otis continued: "The people being naturally indignant, that the sanctity of their homes should be violated, and for such a purpose . . . the custom was gradually limited, till only special warrants were issued for searching particular places, in which there was reason to believe that smuggled goods were concealed . . . ." *Id.* But the "revenue officers were not satisfied with the[se] limited powers"—they wanted general authority to "break open and ransack any houses that [they] saw fit." *Id.* And once this general authority was given to them, they quickly became "inquisitor-general[s] for the whole province, opening the dwelling-place and exposing the property of every inhabitant to [their] perquisition." *Id.*

Otis's argument changed the nation. John Adams remarked that "American Independence was then and there born." *Id.* The same may be said of the Fourth Amendment, which bars "unreasonable searches" by requiring search warrants to be issued based "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Amendment thus codifies the "special warrants" that Otis described as the product of founding era outrage against warrantless searches of private places like homes for contraband. The Framers recognized that without the limits set by the Fourth Amendment on police searches, "the liberty of every man" would rest "in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

The same history attends government searches for stolen property. It was "not at common law legal" during the founding era for government officers to be able "to search all suspected places for stolen goods . . . because it would be extremely dangerous to leave it to the discretion of a common officer to . . . search what houses he thinks fit." 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 66 (1841). Officers instead needed a particularized warrant and state courts were vigilant in enforcing this rule. In *Grumon v. Raymond*, for example, Connecticut's high court condemned a warrant that authorized the police to "[s]earch every house, store or barn within the town of Wilton that is suspected of having certain bags concealed in it, said to be stolen." 1 Conn. 40, 43 (1814). The court observed that "this warrant was such as no justice ought to have issued." *Id.*

In light of this history, the common law of the founding era would have required a warrant for the searches at issue in this case. *Cf. Acevedo*, 500 U.S. at 583 (Scalia, J., concurring). Officer Rhodes sought without a warrant to uncover "contraband" or "stolen property" in a private place—i.e., under a tarp within the curtilage of a home. *Collins*, 790 S.E.2d at 617. This is precisely the kind of police conduct that Americans of the founding era most feared. Is it then "conceivable that the [American] people . . . after so strenuously fighting" warrantless searches of this kind "left a loophole" in the Fourth Amendment allowing them? *Case*, 190 N.W. at 301 (Wiest, J., dissenting).

The question answers itself. "[W]e know the Fourth Amendment is no less protective of persons and property against governmental invasions than the common law was at the time of the founding." *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.). Hence, given that the common law of the founding era would have required a warrant in this case and Officer Rhodes did not have one, the Fourth Amendment invalidates Officer Rhodes' conduct unless: (1) the record reveals some other common law basis for excusing the warrant requirement; or (2) the Court is prepared to recognize a brand new exception to the Fourth Amendment.[6]

The first circumstance does not apply here. The decision below advances two main rationales for upholding Officer Rhodes' warrantless conduct: probable cause and the need to secure a vehicle (i.e., readily movable property). *See Collins*, 790 S.E.2d at 617–18. But neither of these rationales would have served during the founding era to excuse the common-law warrant requirement for a contraband or stolen-property search of a private place, especially a home.

Writing for the Court in *Johnson v. United States*, Justice Jackson makes it clear why the probable-cause rationale is unavailing: "Any assumption that

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[6] While other established Fourth Amendment exceptions (e.g., exigency) might in theory apply to Officer Rhodes' conduct, no basis exists for the Court to consider these exceptions because either they were not raised or they were not decided below. *Cf. CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1654 (2016) ("[T]his is a court of final review and not first view.").

evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." 333 U.S. 10, 14 (1948).

This leaves the vehicle-movability rationale, which does not vitiate the common-law warrant requirement for two reasons. First, this rationale "makes the thing sought for seizure the controlling idea"—i.e., the vehicle—when the common law of the founding era protected private places like homes against warrantless searches *regardless* of the thing sought for seizure, including contraband and stolen property. *Case*, 190 N.W. at 296 (Wiest, J., dissenting). Second, there is nothing to indicate that the common law of the founding era would have allowed warrantless searches of private homes or barns for stolen horses—a conveyance that raises the exact same kind of vehicle-movability concerns that automobiles and motorcycles do today.[7]

In fact, the common law of the founding era and later generations contemplated the opposite: that searches for stolen horses in private places required a warrant. As one legal treatise of the era explained, in

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[7] This analogy is especially apt given that motorcycles are often described in the vernacular as "iron horses." *See, e.g.*, *Kelly v. Hochberg*, 217 P.3d 699, 700 (Or. Ct. App. 2009) ("Plaintiff participated in an annual gathering of motorcycle riders from the west coast, known as the Iron Horse Rodeo.").

the case of a person who suspected "his horse [to be] concealed in the stable of another person," a search warrant was properly issuable based on the person's ability to "conscientiously swear [that] he suspects [the horse] to have been stolen." 5 RICHARD BURN & JOSEPH CHITTY, THE JUSTICE OF THE PEACE & PARISH OFFICER 355 (1831); *see also*, *e.g.*, *Byrnside v. Burdett*, 15 W. Va. 702, 715–16 (1879) (holding that a search warrant for a stable and stolen horse was void for lack of a proper oath); *Ashley v. Peterson*, 25 Wis. 621, 624, 1870 Wisc. LEXIS 96, at *1–2, 4–5 (1870) (holding that a search warrant for two stolen horses was void insofar as the warrant effectively authorized the sheriff to "search the premises of anybody in the town of Baraboo").

II. The Court should not recognize a "garage exception" to the Fourth Amendment.

Since the common law of the founding era offers no support for a warrantless police search of a home (including its curtilage) for a stolen conveyance, the only other way that Officer Rhodes' conduct may be upheld in this case is if the Court recognizes a new exception to the Fourth Amendment: the garage exception. This exception would establish that because of the inherent mobility of vehicles, the police may conduct warrantless searches for a stolen or contraband vehicle anywhere the police have probable cause to believe the vehicle is located or garaged. This exception would be

a bright-line rule, requiring no exigency and respecting no distinction between public and private places.[8]

The Court should not go down this path. The "basic rule of Fourth Amendment jurisprudence" is that "searches conducted outside the judicial process . . . are *per se* unreasonable." *Ross*, 456 U.S. at 825. The Court has recognized "a few specifically established and well-delineated exceptions" to this rule—but only a few. *Id.* It does not behoove the Court to grow this list, especially when a purported exception has no basis in the common law of the founding era. As shown above, recognizing a "garage exception" to the Fourth Amendment would be at direct odds with the founding era's commitment to limiting warrantless searches of private places. But that is not the worst of it.

A. A "garage exception" to the Fourth Amendment would abrogate the time-honored common law protection of the home against warrantless searches.

Time and again, this Court has emphasized the special status of the home under Fourth Amendment. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental

[8] All of this is visible in the decision below, which tracks all the elements of the "garage exception" in affirming Officer Rhodes' conduct. *See Collins*, 790 S.E.2d at 617–20.

intrusion." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quotation marks omitted). The Fourth Amendment accordingly draws "a firm line at the entrance to the house"—including its curtilage—and this Court has staked out a proactive role in ensuring that this line is not crossed. *Payton v. New York*, 445 U.S. 573, 590 (1980); *see Kyllo v. United States*, 533 U.S. 27, 35–36 (2001) (refusing to "leave the homeowner at the mercy of advancing technology" that stood to diminish the Fourth Amendment's protection of the home).

The special place that the home occupies under the Fourth Amendment is no accident. It traces back to the frequent warrantless invasions of the home by Crown agents during the founding era. These invasions were so disturbing that one British jurist was compelled to declare that "to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition." *State v. Ochoa*, 792 N.W.2d 260, 270 (Iowa 2010) (quoting Chief Judge Pratt). Based on this history, this Court has recognized that the "Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

A person's home, in turn, consists of "not only the main house, but all of the cluster of buildings convenient for the occupants of the premises." *Temperani v. United States*, 299 F. 365, 366–67 (9th Cir. 1924). "Within this definition the garage comes clearly within the protection of the Constitution." *Id.* at 367. In *Temperani v. United States*, the Ninth Circuit enforced this

protection, rebuking police officers who "entered the garage" of a suspect without a warrant "to make a search of the premises." *Id.* The court explained that "the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If present laws are deficient in not permitting [a] search in a constitutional way . . . the remedy is with Congress, not in subterfuge or evasion." *Id.*; *see Agnello v. United States*, 269 U.S. 20, 33 (1925) (endorsing *Temperani*).

The constitutional protection of a garage as part of the home is relevant here because of the tarp that Officer Rhodes had to remove to uncover the stolen motorcycle that he was looking for. *See Collins*, 790 S.E.2d at 614. The tarp may be readily analogized to a garage for the motorcycle, covering and storing the vehicle in the same way that a full-fledged home garage would. And once the tarp is viewed in this light, it becomes apparent that affirming Officer Rhodes' warrantless conduct here "would unleash a principle of constitutional law that would have no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016).

This is because there is no material difference between the warrantless removal of a tarp on a home driveway to pursue a probable-cause search for a stolen vehicle and any of the following acts:

- Warrantless opening of a shed to search for a stolen vehicle that can be seen from a distance through a gap in the shed doors;

- Warrantless lifting of closed garage door to search for a stolen vehicle that is visible from the street through a garage window;
- Warrantless entry into a house to search for a stolen vehicle that a porch window reveals to be parked in the living room.[9]

A popular film affords a vivid way to appreciate this point. In *Ferris Bueller's Day Off*, protagonists Ferris Bueller and Cameron Frye decide to go for a joyride in a 1961 Ferrari 250 GT California owned by Frye's father.[10] The Ferrari is parked in the Fryes' home garage: a spacious room surrounded by large glass windows overlooking a ravine.[11] Bueller and Frye succeed in taking the Ferrari, but in the course of returning it, Frye accidentally causes the car to crash through one of the garage's glass windows and fall into the ravine below. Assuming a movie in which this accident had never happened—and one in which the police were engaged in an active investigation of a stolen Ferrari—would the police have been free to enter the Fryes' glass garage without a warrant so long as they had

[9] The idea of a vehicle being parked in someone's living room is not as far-fetched as it might sound. *See, e.g.*, *Florida Man Parks BMW Vehicle in His Living Room to Protect It from Hurricane*, FOX 5 NEWS-D.C., Oct. 10, 2016, http://bit.ly/2AJDXoW; Alex Harris, *Full Garage? No Problem! Couple Stores Car Inside the House During Hurricane Matthew*, MIAMI HERALD, Oct. 7, 2016, http://hrld.us/2dSKjLO.

[10] FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986).

[11] *See* Dennis Rodkin, *Here's Why That* Ferris Bueller *House Is So Hard to Sell*, CHICAGO MAG., Aug. 7, 2013, https://goo.gl/cpNxiW ("The 1974 pavilion . . . . has a kitchen and a bedroom, but it's mostly a four-car show garage.").

probable cause to believe the Ferrari was located there?

Color photograph of the glass garage and Ferrari depicted in *Ferris Bueller's Day Off*.[12]

If the Court recognizes a "garage exception" to the Fourth Amendment, the answer must be 'yes': the police may conduct a warrantless search of any place they have probable cause to believe a stolen vehicle is located. This would then legitimize Officer Rhodes' warrantless search of the tarp in this case. It would also open the home of every American to warrantless police searches on a scale not countenanced since the founding era. The vast majority of Americans own at

[12] *See* AJ LaTrace, *The Famous Ferrari House from 'Ferris Bueller' Has Finally Sold*, CURBED CHICAGO, May 30, 2014, http://bit.ly/2zWKBLm (photo by Coldwell Banker Residential).

least one car[13] and "on average, cars are parked 95% of the time."[14] If the mere presence of a vehicle on a home driveway—or in a home garage—coupled with probable cause is all the police need to enter a home and its curtilage, then the Fourth Amendment is "reduce[d] . . . to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *cf. Riley v. California*, 134 S. Ct. 2473, 2484, 2494–95 (2014) (recognizing the danger of warrantless cellphone searches given the modern ubiquity of cellphones).

The fact that Officer Rhodes' conduct in this case was directed at a tarp rather than a full-fledged garage makes no difference. The Fourth Amendment stands for the proposition that the "poorest man may, in his cottage, bid defiance to all the forces of the Crown." *Miller v. United States*, 357 U.S. 301, 307 (1958). This means the police cannot get a free pass for a tarp, which may be the only kind of garage that the poorest man can afford. *See Boyd*, 116 U.S. at 616 ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."); *Georgia v. Brailsford*, 3 U.S. 1, 4–5 (1794) (Jay, C.J.) ("Justice is indiscriminately due to all, without regard to numbers, wealth, or rank.").

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[13] *See* Matt Schmitz, *How Many Cars Does the Average American Own*, CARS.COM, Mar. 15, 2017, http://bit.ly/2ms7ZVE.

[14] David Z. Morris, *Today's Cars Are Parked 95% of the Time*, FORTUNE, Mar. 13, 2016, http://for.tn/1ppncsK.

B. A "garage exception" to the Fourth Amendment would abrogate the reasonable expectation of privacy that homeowners maintain in regard to containers on their property.

One way to look at a tarp covering a vehicle parked on a home driveway is as a makeshift garage. Another way is as a container. The latter perspective matters because "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *Ross*, 456 U.S. at 822–23. This protection then provides independent confirmation that: (1) upholding Officer Rhodes' warrantless tarp search here would require the Court to recognize a new "garage exception" to the Fourth Amendment; and (2) recognizing a "garage exception" would undermine the Fourth Amendment's protection of the home and its containers on an equal basis.

All of this stems from how the Fourth Amendment limits container searches. Fourth Amendment protection of any given container "varies in different settings." *Ross*, 456 U.S. at 823. For example, bags "carried by a traveler entering the country may be searched at random by a customs officer." *Id.* The same bags may not be searched during a traffic stop, however, absent probable cause. *See Acevedo*, 500 U.S. at 580 ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

Containers thus absorb the Fourth Amendment status of their surroundings. When a container is located in a place where Fourth Amendment protection is at its lowest, like at the border, the container takes on this quality and may be searched without cause. And when a container is located in a place that is already subject to search under the Fourth Amendment, the container may be treated as an extension of the place. For example, if "there is probable cause to search . . . a car," then the police may also search containers in the car without needing to show "individualized probable cause for each one." *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999).

What about a container located in a home—a place where Fourth Amendment protection is at its peak? The same principle applies. The container may be searched only on terms equal to those of the place where the container is located. For the home, those terms are as follows: "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 33 (1925); *see id.* at 32 ("[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.").

No search of a container located in a home (or within its curtilage) may therefore rest on probable

cause alone—a warrant for the home or the container is required. *Cf. Ross*, 456 U.S. at 821 ("[A] warrant that authorizes an officer to search a home . . . also provides authority to open closets, chests, drawers, and containers in which the [object sought] might be found."). Officer Rhodes' warrantless tarp search must then fail under the Fourth Amendment.[15] *Cf. Camara v. Mun. Court*, 387 U.S. 523, 528–29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.").

The only way for the Court to reach the opposite conclusion is by recognizing a new exception to the Fourth Amendment that fits the contours of Officer Rhodes' conduct—i.e., the "garage exception." This would then result in a house divided under the Fourth Amendment, with the containers of a home receiving less constitutional protection than the home itself. That is reason enough for the Court to reject the "garage exception." There is "no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor." *Kyllo*, 533 U.S. at 37. There is also no exception to the warrant requirement for the officer

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[15] This Court's precedents dispose of any suggestion that the menial or inexpensive nature of a tarp weighs against affording this container the same Fourth Amendment protection as other containers that may be found within the home or its curtilage. *See Ross*, 456 U.S. at 822 (highlighting the Court's "virtually unanimous agreement" that "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper").

who removes a tarp that contains a vehicle parked within the curtilage of a home.

CONCLUSION

The Fourth Amendment establishes that a person's home is their "castle" and it is "not to be invaded by any general authority to search." *Weeks v. United States*, 232 U.S. 383, 390 (1914). That principle was violated here when Officer Rhodes conducted a warrantless search of a tarp within the curtilage of Petitioner's home. That Rhodes was searching for a stolen vehicle does not excuse the violation. The "ready mobility" of a stolen vehicle may, of course, "create[] a risk" that the vehicle "will be permanently lost while a warrant is obtained." *Houghton*, 526 U.S. at 304. But that risk cannot justify putting a hole in the Fourth Amendment big enough to drive a Ferrari through—or, for that matter, a stolen orange-and-black Suzuki motorcycle.

Respectfully submitted,

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