No. 20-157

IN THE

Supreme Court of the United States

EDWARD A. CANIGLIA,
Petitioner,

v.

ROBERT F. STROM, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
BRIAN R. FRAZELLE
MIRIAM BECKER-COHEN
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

"At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). Thus, with only "jealously and carefully drawn" exceptions, the Fourth Amendment prohibits a police officer's warrantless entry into a home as "unreasonable *per se*." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (internal quotation marks omitted). Yet the court below declared that a police officer may enter a person's home to search and seize without a warrant—indeed, without so much as *any suspicion* that a crime has been committed—so long as the officer is engaged in a "community caretaking" function. That decision,

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[1] The parties have consented to the filing of this brief, and both of their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

untethered from the text and history of the Fourth Amendment, grants police unbridled discretion to invade the sanctity of the home, and it should be reversed.

The sanctity of the home embodied in the Fourth Amendment is rooted in the common law maxim that a "man's house is his castle." *Payton v. New York*, 445 U.S. 573, 596 (1980). At common law, warrantless entry of the home was "drastically limited." *Miller v. United States*, 357 U.S. 301, 306-07 (1958). For purposes of making an arrest, such authority was strictly confined to felony offenses and a handful of well-defined circumstances based on specific exigencies that made delay in securing a warrant untenable. *See id.* at 307-08. For purposes of the search and seizure of personal property, warrantless entry of private homes was even further restricted, as "common-law sources . . . did not identify *any* positive justification for a warrantless search of a house—a silence that meant there was no such justification." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 646 (1999).

The Fourth Amendment expanded upon these common law precepts, providing broad protections against unbridled search and seizure in the home in response to the specific abuses the colonists suffered under British rule—namely, the use of "general warrants" and "writs of assistance" that lacked specificity as to the person and place to be searched and were not based on any individualized suspicion. As early as the 1600s, the use of such warrants came under attack in England. They were decried as instruments of arbitrary power, and popular opposition to them quickly solidified as they were used to ransack the homes of vocal critics of the British government. During the 1700s, colonists also began to speak out against general

warrants, and their use was one of the chief grievances that inspired the movement for independence from British rule.

Anger at the abuse of general warrants and writs of assistance continued in the post-colonial period, as the leaders of the new republic called for the nation's new national charter to include an explicit provision protecting against such arbitrary exploitations of power. The text of the Fourth Amendment, both as originally drafted and in the form that was ultimately adopted, reflects the Framers' staunch opposition to the use of general warrants to invade the sanctity of the home. It requires not only that all searches and seizures be reasonable, but also that all warrants be supported by "probable cause" and "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This detailed text reflects the Framers' core concern with preventing government searches in the absence of some individualized suspicion that a specific search would produce evidence of criminal wrongdoing. Fundamentally, the Framers wrote the Fourth Amendment to strip law enforcement officers of the arbitrary power to rifle through a person's most private spaces—particularly within the home—without the independent check of a neutral magistrate.

The decision below is at odds with these core principles reflected in the text and history of the Fourth Amendment. *First*, the extension of the "community caretaking" exception—which originated in a case involving the search of a motor vehicle—to permit warrantless searches of people's *homes* flies in the face of the Framers' special solicitude for privacy expectations within the home. This Court has repeatedly declared that "[a]lthough vehicles are 'effects' within the meaning of the Fourth Amendment," there is a critical

"'constitutional difference between houses and cars.'" *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)); *see, e.g.*, *Cooper v. California*, 386 U.S. 58, 59 ("[S]earches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home."). That "constitutional difference" guided this Court's decision in *Cady* to craft a narrow exception to the warrant requirement for situations in which local police officers engage in functions with respect to "vehicle accidents in which there is no claim of criminal liability." 413 U.S. at 441. The decision of the court below to expand that exception "untether[s] the rule from [its] justifications" by "undervalu[ing] the privacy interests at stake" in the home, the apex of the Fourth Amendment's protection. *Arizona v. Gant*, 556 U.S. 332, 343, 344-45 (2009).

Second, a "community caretaking" exception, particularly as defined by the court below, would grant police officers the very sort of unbridled discretion the Fourth Amendment was designed to protect against. Police officers wield an immense amount of power, even when they are called upon—as so frequently is the case today—to perform functions outside their core law enforcement duties. Without clearly delineated restrictions on the power to search and seize during the exercise of those functions, *i.e.*, through the independent check of a neutral magistrate, the risk of abuse of power is impermissibly heightened. *See McDonald v. United States*, 335 U.S. 451, 456 (1948) ("Power is a heady thing . . . [a]nd so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."). Thus, by refusing to impose *any* concrete limitations on the discretion of police officers to search and seize

in the "community caretaking" setting, the decision of the court below threatens to return our country to a regime where government authority will be subject to manipulation and abuse. It would impermissibly "leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

For all of these reasons, this Court should reject the extension of the "community caretaking" exception to the home and recommit itself to the specific warrant requirement enshrined in the Fourth Amendment.

ARGUMENT

I. THE FRAMERS VIEWED THE FOURTH AMENDMENT AS A FUNDAMENTAL SAFEGUARD AGAINST UNRESTRAINED GOVERNMENT SEARCHES OF THE HOME.

Time and again, this Court has reaffirmed the "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)). This rule, rooted in the text and history of the Fourth Amendment, recognizes that the right of the people to be free from unrestrained search and seizure is at its apex in the home, where privacy interests are "most heightened," *California v. Ciraolo*, 476 U.S. 207, 213 (1986). Consistent with these principles, this Court has repeatedly "declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home." *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018); *see id.* (collecting cases).

"[W]hen it comes to the Fourth Amendment, the home is first among equals," *Florida v. Jardines*, 569 U.S. 1, 6 (2013), reflecting the Founding generation's

understanding that the home is "a place of perfect security," John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* 65 (3d ed. 1769). The drafters of the Fourth Amendment deemed privacy interests in the home "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals," without the independent check of a neutral and detached magistrate. *McDonald*, 335 U.S. at 455-56; *see Bovat v. Vermont*, 141 S. Ct. 22, 22 (2020) (Gorsuch, J., respecting the denial of certiorari) (noting the ways in which police officers, acting on their own, have "test[ed] the boundaries" of the Fourth Amendment's protection for the home); *United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting) (same). Thus, absent a specific and particularized warrant issued by an independent court officer, the Fourth Amendment guarantees that "[n]o man's dwelling, which is his castle, shall be broke open, or entered, without his own consent." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 643 (2009) (quoting Watchman, The Norwich Packet, and the Wkly. Advtr., Aug. 15, 1782 (no. 461), p. 3, col. 3).

The short yet powerful text of the Fourth Amendment makes clear the significance the Framers attached to the home:

> 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.

U.S. Const. amend. IV. "Houses" are the only specific location mentioned in the text, reflecting the home's unique sanctity in the eyes of the Framers. *See* Laura K. Donahue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1194 (2016) ("The object [of the Fourth Amendment] was to prevent government officials from intruding upon the sanctity of the home unless officials could present evidence, under oath to a magistrate, of a crime committed."). As this Court has put it, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972).

The concept of the home as a place of heightened personal security was a recurring theme in the English common law courts, whose jurisprudence informed the drafting of the Fourth Amendment. "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Miller*, 357 U.S. at 306-07. Such authority was largely confined to arrests for felonies, a category strictly limited to the most serious of crimes. *See id.* at 307. For lesser offenses, warrantless entry of the home was permitted only in a handful of well-defined circumstances based on specific exigencies that made delay in securing a warrant untenable. *See, e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* 138 (1787) ("where a person authorized to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors *in the following instances*" (emphasis added)); Richard Burn, *The Justice of the Peace, and Parish Officer* 46 (1758) (same). Absent those exigent circumstances, forcibly entering a home without a warrant was unquestionably "regarded as an unlawful search or

seizure under the common law." *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999).

Similarly, under the common law, an officer's right to enter a private home to search and seize personal effects was "severely limited." G. Robert Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. Pa. L. Rev. 499, 500 (1964); *see* Davies, *supra*, at 645 (arguing that "[t]he warrant was even more critical for justifying searches of houses than for entering the house to make an arrest"). Indeed, "common-law sources . . . did not identify *any* positive justification for a warrantless search of a house—a silence that meant there was no such justification." Davies, *supra*, at 646.

One oft-cited example of the common law's limitation on searches of the home is *Semayne's Case*, widely recognized as establishing the knock-and-announce rule. *See Ker v. California*, 374 U.S. 23, 47 (1963) (Brennan, J., concurring in part and dissenting in part). In *Semayne's Case*, the Court of King's Bench upheld—indeed, endorsed—the conduct of an Englishman who refused to permit a sheriff to enter his home to execute a writ of attachment on the belongings of his deceased co-tenant. *See* Blakey, *supra*, at 500 & n.9. Though the case involved a civil writ, the common law courts extended its holding to the criminal context, and "[o]ver a century later the leading commentators upon the English criminal law affirmed the continuing vitality of [the case's] principle." *Ker*, 374 U.S. at 47-48 (Brennan, J., concurring in part and dissenting in part) (citing 1 Matthew Hale, *History of the Pleas of the Crown* 583 (1736); 2 Hawkins, *supra*, c.14, s.1; Michael Foster, *Crown Law* 320-21 (1762)). That principle, at its core, is found in Sir Edward Coke's invocation of a famous maxim in his report of *Semayne's Case*: "the house of every one is to him as his castle and

fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603).

While the Fourth Amendment "codif[ies]" that maxim, *see* Stefan Ducich, *These Walls* Can *Talk! Securing Digital Privacy in the Smart Home Under the Fourth Amendment*, 16 Duke L. & Tech. Rev. 278, 292 (2018), its text goes much further: it explicitly links the home to "the right of the people to be secure," *see* U.S. Const. amend. IV. The Fourth Amendment's broad protections for personal security were in large part a response to specific abuses the Framing generation had suffered under British rule—namely, the use of "general warrants" and "writs of assistance" that lacked specificity as to the person and place to be searched and were not based on any individualized suspicion. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England."); 3 Joseph Story, *Commentaries on the Constitution of the United States* 748, § 1895 (1833) (stating that the Fourth Amendment's "introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution"). Understanding the Fourth Amendment as a response to those abuses further elucidates how the Amendment serves as a fundamental safeguard against broad and unrestricted government searches of private homes.

General warrants had long been used in England to conduct unrestrained searches of people's homes, despite the common law's recognition of the home's

sanctity. Indeed, because of the common law's special protections for the home, the British government was forced to enact statutes specifically abrogating those safeguards to effectuate its regime of abuses that precipitated the Fourth Amendment. *See* Davies, *supra*, at 646 ("[T]he absence of common-law justifications for warrantless house searches, or of common-law authority for search warrants other than for stolen property, explains why Parliament had to enact statutory search authority for customs officers."). For example, Parliament enacted the "Act of Frauds" in 1662, which empowered British officials to "enter, and go into any house, shop, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other package, there to seize, and from thence to bring, any kind of goods or merchandize whatsoever, prohibited and uncustomed." *See* Act of Frauds of 1662, 12 Car. 2, cl. 11, § V(2), reprinted in 8 *The Statutes at Large of England and Great-Britain* 78, 81 (1763). The Act of Frauds also authorized the use of writs of assistance, "a particularly pernicious tool," which not only "allowed royal authorities to search and seize as they saw fit," David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 6 (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622599, but also permitted them to "commandeer anyone—constables and ordinary citizens alike—to help in executing searches and seizures," Hon. M. Blane Michael, Madison Lecture, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 907 (2010).

Colonial opposition to the use of general warrants and writs of assistance was galvanized by a series of events on both sides of the Atlantic in the years

leading up to the American Revolution. After King George II died in late 1760, colonial customs officers had to reapply for writs of assistance to be issued in the name of the new king. *See id.* at 908. In Boston, where the local economy depended in part on trade in smuggled goods, a group of merchants objected to the new king's writs in *Paxton's Case*. *See id.*[2] Their attorney, James Otis, delivered a "declamation against general warrants" widely considered "one of the most celebrated orations in U.S. history." Donahue, *supra*, at 1249. Otis called the writ of assistance "the worst instrument of arbitrary power." 2 *Works of John Adams*, app. A at 523, 524 (Charles Francis Adams ed., 1850). In his words, "every hous[e]holder in this province, will necessarily become *less secure* than he was before this writ had any existence among us," Josiah Quincy Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, app. I at 489 (1865), for the writ permits officers of the Crown to invade private homes "when they please[, and] we are commanded to permit their entry," 2 *Works of John Adams*, *supra*, at app. A at 524. Otis thus advanced the bedrock principle "that a person's home is especially private and must be protected from arbitrary government intrusion." Michael, *supra*, at 908-09.

Although Otis did not succeed in preventing the issuance of the writs he fought in Boston, English courts promptly vindicated his arguments in a series of cases arising out of the Crown's use of general warrants to silence John Wilkes and other political enemies of King George III. These cases emphasized "the evil of permitting unchecked discretion to search and seize,"

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[2] There is no formal case report, and *Paxton's Case* is also sometimes referred to as the *Writs of Assistance Case* or *Petition of Lechmere*. *See* Davies, *supra*, at 561-62 n.20.

particularly within the most private spaces of the home. Gans, *supra*, at 8; *see* Davies, *supra*, at 603 ("[L]egal criticism of the general warrant was especially strong when the security of a house was at issue."). As one landmark decision put it, such "discretionary power . . . to search wherever [the officers'] suspicions may chance to fall" "may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1167 (C.P. 1763). Under such a regime, every Englishman could find that "[h]is house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1064 (C.P. 1765).

These British cases were widely covered in American newspapers, and "the reaction of the colonial press to that controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes." Cuddihy, *supra*, at 538. Indeed, "[t]he accounts of the trials exclaimed the importance of the issue for English liberty and the sanctity of the house while condemning general warrants as 'illegal,' 'unconstitutional,' 'void,' 'oppressive,' and 'unwarrantable.'" Davies, *supra*, at 563 & n.22 (collecting commentaries from colonial-era newspapers).

After the War for Independence was won, the fight to end the use of general warrants continued. While general warrants initially remained common in the new nation, Cuddihy, *supra*, at 602 ("General warrants proliferated and remained the keystone of American laws and practices regarding search and seizure until at least 1782."), the "specific warrant ultimately won out," *id.* By 1784, seven of the original thirteen

states plus Vermont had "formulated constitutions with restrictions on search and seizure," although the precise formulations of those restrictions varied. *Id.* at 603; *see Maryland v. King*, 569 U.S. 435, 466-67 (2013) (Scalia, J., dissenting) (quoting, for example, the Virginia Declaration of Rights § 10, which declared that "general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed," or to search a person "whose offence is not particularly described and supported by evidence," "are grievous and oppressive, and ought not be granted"); Barry Friedman, *Unwarranted: Policing Without Permission* 135 (2017) (describing how "between the Revolution and 1791 the states definitively turned against general warrants and in favor of specific ones").

When the Framers gathered to draft the new federal Constitution, delegates repeatedly raised concerns about potential abuses of governmental authority through the use of general warrants to ransack people's homes. *See* Davies, *supra,* at 583. One Maryland Anti-Federalist, writing under the name "A Farmer and Planter," protested that "excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for excisable goods, . . . break open your doors, chests, trunks, desks, and boxes, and rummage your houses from bottom to top." *Essay by a Farmer and Planter*, Md. Journal, Mar. 27, 1788, *in* 5 *The Complete Anti-Federalist* 74-75 (Herbert J. Storing ed., 1981). He noted the lack of any guarantee in the federal Constitution that excise officers under the new American government would behave any better. *See id.* In Massachusetts, the sister of James Otis, Mercy Otis Warren, similarly argued for a constitutional guarantee to prevent "any petty revenue officer"

from "enter[ing] our houses, search[ing], insult[ing], and seiz[ing] at pleasure." A Columbian Patriot, *Observations on the New Constitution, and on the Federal and State Conventions*, reprinted in *Pamphlets on the Constitution of the United States* 13 (Paul Leicester Ford ed., 1888).

Several state ratifying conventions also requested more explicit protection against unbridled search and seizure. For example, Virginia's proposed bill of rights provided that "all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted." Cuddihy, *supra*, at 684. New York, North Carolina, and Rhode Island used nearly identical language. *Id.* at 685.[3] The arguments presented in favor of including an express prohibition on general warrants in the federal Constitution received consistent and widespread newspaper coverage, and "[t]he magnitude of that publicity indicated the emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

Two key themes emerged from these conventions and debates: the idea that the fundamental right of personal security is at its peak within the four walls of

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[3] Founding-era state constitutions used similar language. For example, the Massachusetts Constitution of 1780, which served as a model for the Fourth Amendment, *see* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 982 (2011), barred all warrants as contrary to the "right to be secure from all unreasonable searches and seizures . . . if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure." Mass. Const. art. XIV (1780).

the home, and the strongly felt need for a limiting principle to regulate the discretion of officers engaged in searches that encroach on that personal security. These values were reflected in the first draft of the Fourth Amendment proposed by James Madison, which made clear the importance that he attached to individualized and particularized suspicion as predicates for governmental searches: "The rights of the people to be secured in their persons; their *houses*, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789) (Joseph Gales ed., 1834) (emphasis added). The language was subsequently modified in committee, but the explicit recognition of the sanctity of the home and the requirement of specific warrants remained materially the same. Cuddihy, *supra*, at 695-97.

The Fourth Amendment thus enshrines in our national charter the Framers' opposition to searches, especially of the home, that were not predicated on a warrant based on particularized suspicion of criminal wrongdoing. As the next section demonstrates, warrantless search and seizure in people's private homes in the name of "community caretaking" fundamentally violates those principles. "Community caretaking," as articulated by the court below, is a sweeping interest not readily susceptible to any meaningful limiting principle. Allowing the police to invade the sanctity of the home—the apex of Fourth Amendment protection—on such an open-ended rationale severely threatens the personal security that the Fourth Amendment guarantees.

II. THE EXTENSION OF THE "COMMUNITY CARETAKING" EXCEPTION RECREATES THOSE EVILS THAT THE FOURTH AMENDMENT WAS DESIGNED TO ERADICATE.

A. The Decision Below Ignores the Home's Unique Sanctity in the Eyes of the Framers.

As described above, the Fourth Amendment incorporated and extended the common law's special solicitude for personal privacy and security within the home. Guarding against the sort of unbridled discretion exercised by British officers under the writs-of-assistance regime, *see, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018), the Fourth Amendment requires a particularized warrant to search a person's home absent exigent circumstances, *see, e.g.*, *Payton*, 445 U.S. at 586; *Carloss*, 818 F.3d at 1004-05 (Gorsuch, J., dissenting) ("The founders understood, too, that a 'search' of a constitutionally protected space generally qualifies as 'unreasonable' when undertaken without a warrant, consent, or an emergency."). Consistent with this history, this Court has repeatedly recognized that "the Fourth Amendment protects the individual's privacy in a variety of settings[,] [but] [i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms." *Payton*, 445 U.S. at 589.

Notwithstanding these precedents, the court below did not so much as mention this historical backdrop, much less justify its departure from the view of the Framers—and this Court—that protection of "the sanctity of the home" is embodied in the Fourth Amendment, *Collins*, 138 S. Ct. at 1672 (quoting

Payton, 445 U.S. at 589). Instead, the court simply imported the standard for the "community caretaking" exception from *Cady v. Dombrowski*, a case involving the search of a vehicle, not a home. That approach was fundamentally flawed.

Cady itself accounted for the elevated privacy and security interests of the home reflected in the text and history of the Fourth Amendment by taking great pains to cabin its holding to the automobile context. The Court began its analysis from the premise that "[a]lthough vehicles are 'effects' within the meaning of the Fourth Amendment," there is an important "'constitutional difference between houses and cars.'" *Cady*, 413 U.S. at 439 (quoting *Chambers*, 399 U.S. at 52). The Court cataloged some of those differences, noting the ambulatory nature of vehicles and "the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." *Id.* at 442; *see id.* at 439-40 (collecting cases recognizing these distinctions). Ultimately, in announcing that the warrantless search of the disabled vehicle in *Cady* was lawful, the Court explained that its decision turned on its "recognition of the distinction between motor vehicles and dwelling places" and specifically the fact that the vehicle searched "was neither in the custody nor on the premises of its owner." *Id.* at 447-48.

These distinctions matter. The repeated invocation in Founding-era debates of the analogy of the home as a castle—a sturdy and guarded refuge where any person may retreat from government abuse—does not readily transfer to the motor vehicle context, at least in most cases. Moreover, the historical sanctity of the home embodied in the Fourth Amendment is

premised largely on the idea that security and privacy interests are "most heightened" there, *Ciraolo*, 476 U.S. at 213, a principle "with roots deep in the common law," *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *see* Michael, *supra*, at 908-09 (describing the "overarching theme[] that would become the bedrock of the movement against excessive search and seizure power: . . . the 'fundamental . . . Privilege of House'—the principle that a person's home is especially private" (footnote omitted)).

The same might not be said of motor vehicles, which, "unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements," *Collins*, 138 S. Ct. at 1670 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)), and where many items may be visible to any passerby, *see Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality op.) ("A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view."). Thus, as this Court has explained, to allow a police officer "to rely on the automobile exception to gain entry into a house" would "unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house," and "transform what was meant to be an exception into a tool with far broader application." *Collins*, 138 S. Ct. at 1672-73.

Of course, as this Court has recognized in recent years, evolving technology and ways of life may alter expectations of privacy. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 396-97 (2014) (noting that a modern-era smartphone may store just as much private information as a Founding-era home). Cars, of course, did

not exist at the Founding, and today, certain cars may have more privacy and dwelling-like features than in previous years, making the car more akin to the Founding-era conception of the home. However, at most, such facts might suggest that this Court should revisit *Cady*. It would defy logic for the inverse to be true—*i.e.*, that this Court should *extend* the "community caretaking" exception for vehicles to the home, a space that always has been, and remains, the epitome of American privacy and personal security. *See id.* (expanding protections historically afforded to the home to the cell phone rather than the inverse); *Kyllo*, 533 U.S. at 34 (tracing the roots of the home's privacy to the common law, while noting its widespread acceptance in modern times).

Indeed, this Court has noted the fundamental principle that no exception to the warrant requirement may be expanded if doing so would "untether the rule from the justifications underlying the . . . exception." *Gant*, 556 U.S. at 343. A rule becomes untethered from its justifications when extending it to a new context "undervalues the privacy interests at stake" and "creates a serious and recurring threat to the privacy of countless individuals." *Id.* at 344-45; *see Collins*, 138 S. Ct. at 1673 (refusing to extend the automobile exception to the warrant requirement to permit a police officer to enter a home or its curtilage to search a vehicle parked in the driveway); *Riley*, 573 U.S. at 386 (rejecting an extension of the rule governing "physical objects" to "digital content" due to heightened "privacy interests" in the latter). Such was the case in the court below: by expanding an exception narrowly tailored to the context of motor vehicles, the court below "undervalue[d] the privacy interests at stake" in the home,

the apex of the Fourth Amendment's protection. This Court should correct that error.

B. Extending the "Community Caretaking" Exception Would Grant a Discretionary Search and Seizure Power to Police That the Fourth Amendment Was Designed to Protect Against.

As detailed above, the Fourth Amendment was largely a response to the particular ways in which the British government had abused general warrants, but its adoption also reflected a broader concern about the intrusions into privacy that could result if the government enjoyed unlimited discretion to search and seize. *See* Michael, *supra*, at 906 (noting the "broader purpose of the Amendment: to circumscribe government discretion"); Cuddihy, *supra*, at 679 (noting an Anti-Federalist "desire to divest the central government not only of [the general warrant] but of all relatives of it that jeopardized privacy"). Thus, as this Court has repeatedly recognized, a core concern of the Fourth Amendment is ensuring that the government has individualized suspicion of wrongdoing before it intrudes on a person's privacy. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2213 (stating that the "basic purpose" of the Fourth Amendment "'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials'" (quoting *Camara v. Mun. Court of City & Cty. of S.F.*, 387 U.S. 523, 528 (1967))); *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (explaining that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion"). Allowing police officers to search a person's home whenever they claim to be involved in a "community caretaking" function violates this fundamental Fourth

Amendment precept because it permits exactly the sort of generalized search lacking in particularized suspicion of criminal wrongdoing (and the concomitant invasion of privacy) that the Fourth Amendment's requirement for particularized warrants was designed to prevent.

As an initial matter, "community caretaking" is a broad and nebulous interest, particularly as defined by the court below. In *Cady*, this Court defined "community caretaking functions" as those duties performed by local police officers when they "investigate vehicle accidents in which there is no claim of criminal liability." 413 U.S. at 441. The court below significantly expanded that concept of "community caretaking," defining the term as applying to *all* situations in which police perform "non-investigatory duties, . . . so long as the procedure employed (and its implementation) is reasonable." Pet. App. 13a-14a (quoting *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991)). Under this definition, police officers may search people's homes with impunity so long as they can show, perhaps after the fact, that they were not doing so as part of a criminal investigation.

The justification given by the court below for this expansive definition is just as concerning as its potential effect on law enforcement practices. The court explained:

> [A] police officer . . . must act as a master of all emergencies, who is expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety. At its core, the community caretaking doctrine is designed to give police elbow room to take appropriate

> action when unforeseen circumstances present some transient hazard that requires immediate attention.

Id. at 16a (internal citations and quotation marks omitted).[4] It is true that police today are called upon to fulfill a wide range of duties that other professionals—such as social workers, therapists, doctors, nurses, clergy, or teachers—might be better equipped to perform. *See* Barry Friedman, *Disaggregating the Police Function*, U. Pa. L. Rev. (forthcoming 2021), NYU School of Law, Public Law Research Paper No. 20-3 at 11-14, https://ssrn.com/abstract=3564469. But the breadth of ways in which police are involved in people's daily lives cuts *against*, not in favor of, giving the police greater latitude to search and seize without the independent check of a warrant signed by a magistrate. The increased presence of the police in people's daily lives, combined with a broader "community caretaking" exception to the warrant requirement, would result in a massive expansion of opportunities for the police to search people's homes without a warrant and without any individualized suspicion of criminal wrongdoing, in violation of the text and history of the Fourth Amendment.

Moreover, such unbridled authority would have a disproportionate effect on the poorest and most marginalized communities, where the problems that people face are most acute, yet access to professional resources are most scarce. *See id.* at 27 ("Cops respond

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[4] The court below specified that its use of the term "immediate" was not "imbued with any definite temporal dimensions" nor "meant to suggest that the degree of immediacy typically required under the exigent circumstances and emergency aid exceptions is always required in the community caretaking context." Pet. App. 21a.

frequently to calls from poorer neighborhoods—and as a result from communities of color or marginalized communities[—] . . . because the problems people face in those communities are more acute, and because the residents often lack the capacity or resources to deal with the problems in other ways."). Combined with the racial bias that pervades American policing even when police engage in those duties outside of criminal law enforcement, *see* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev. 650, 687-729 (2020) (detailing the ways in which American policing perpetuates racial bias and community segregation), the result would be a regime in which the homes of low-income people of color are particularly subject to the very privacy invasions that the Framers feared most. Significantly, a recurring theme in the common law decisions that informed the drafting of the Fourth Amendment was that *any* person, regardless of wealth or stature, should be able to seek refuge from the government in his or her home. *See, e.g.*, Donahue, *supra*, at 1238 (quoting William Pitt, the first Earl of Chatham: "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.").

Not only is the discretion granted to police under the lower court's expansion of the "community caretaking" exception broad and pervasive, it is also subject to the same manipulation that colonists experienced under the general warrants and writs of assistance that precipitated the Fourth Amendment. *See McDonald*, 335 U.S. at 456 (explaining that "the Constitution requires a magistrate to pass on the desires of the police

before the they violate the privacy of the home" because "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted"); *cf. Bovat*, 141 S. Ct. at 22 (Gorsuch, J., respecting the denial of certiorari) (cataloging the ways in which police officers have manipulated the "consent" exception to the warrant requirement); *Carloss*, 818 F.3d at 1003 (Gorsuch, J., dissenting) (same). A chief complaint of the colonists during that era was that British officers could ransack their homes to search for evidence of a crime *before* officers had probable cause to believe that a crime had been committed, and then use evidence found as part of that unbridled search to indict them. *See, e.g.*, *Messerschmidt v. Millender*, 565 U.S. 535, 560-61, 568 & n.8 (2012) (Sotomayor, J., dissenting) (noting the historical Fourth Amendment principle that "police cannot rationalize a search *post hoc* on the basis of information they failed to set forth in their warrant application to a neutral magistrate"); Donahue, *supra*, at 1212 (quoting Coke as rejecting the authority of British officers to enter people's homes based upon "a bare surmise").

The "community caretaking" exception creates similarly perverse incentives: police may conduct unbridled searches of people's homes for criminal evidence in the absence of probable cause when summoned to a home to address, for example, a mental health crisis, and, if the search fails to turn up such evidence or result in any charges, the police may invoke the "community caretaking" exception to escape liability. Indeed, that is essentially what happened in this very case: police lied to the home's occupant and claimed they had consent to seize property therein and then attempted to justify their in-fact-unconsented-to seizure as a form of "community caretaking" to avoid

being held liable for violating Petitioner's fundamental right to privacy guaranteed by the Fourth Amendment.

Finally, the "limitations" that the court below purported to impose on the "community caretaking" exception do not meaningfully limit police discretion, contrary to the court's gesticulations to that effect. *See, e.g.*, Pet. App. 19a (claiming that the expansion of the "community caretaking" exception does not "give police carte blanche to undertake any action bearing some relation, no matter how tenuous, to preserving individual or public safety"). The court below emphasized the need for "guardrails" to limit police discretion, but the only guardrails it set up were what it deemed "sound police procedure." *Id.* at 19a-20a. The court *rejected* Petitioner's argument that "sound police procedure" must involve "the application of either established protocols or fixed criteria" or "the least intrusive means of fulfilling community caretaking responsibilities." *Id.* at 20a (quoting *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 76 (1st Cir. 2007)). Instead, it declared that "sound police procedure" simply "encompasses police officers' 'reasonable choices' among available options." *Id.* (quoting *Rodriguez-Morales*, 929 F.2d at 787). Apparently, from the perspective of the court below, "reasonable choices" are not subject to any sort of concrete guidelines or limiting principles.

The court's "reasonable choices" standard sounds in the discretionary power that the Founders abhorred. "The Framers wrote the right to be secure from unreasonable searches and seizures into the Fourth Amendment precisely because [they] feared giving the federal government excessive discretion to search and seize." Gans, *supra*, at 14. As one scholar has explained, "eighteenth-century readers would

have regarded grants of broad and unfettered discretion as hallmarks of unreasonable searches and seizures." David Gray, *The Fourth Amendment in an Age of Surveillance* 162 (2017).

The cure for such unbridled discretion, of course, was the specific warrant. In the eyes of the Founding generation, "[s]pecific warrants were constitutionally reasonable. Allowing the government broad discretionary powers to search and seize was not. This ensured the judicial check on search and seizure the Framers demanded." Gans, *supra*, at 15 (citing Gray, *supra*, at 162-63). Consistent with these deep-seated principles, this Court has mandated that "[w]hen an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984) (quoting *McDonald*, 335 U.S. at 459-60 (Jackson, J., concurring)). A "reasonable choices" standard pays no mind to the degree of exigency involved—indeed, if "community caretaking" applied only to exigent circumstances, Respondents would not have conceded that there were no true exigencies present. *See* Pet. App. 11a-12a & n.5.

As Petitioner has put it, there is no "exigency-lite" exception to the Fourth Amendment. Pet'r Br. 32; *see Kentucky v. King*, 563 U.S. 452, 470 (2011) ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency."). If a true emergency presents itself, police retain the authority to invoke the well-established exigent circumstances or emergency aid exceptions to the warrant requirement. And contrary to Respondents' argument, refusing to extend the "community caretaking" exception would not disempower police to diffuse tense and

troubling—but non-urgent—situations through the power of search and seizure. It simply would require them to do what the Fourth Amendment mandates: "get a warrant," *Riley*, 573 U.S. at 403.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
BRIAN R. FRAZELLE
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

January 15, 2021 * Counsel of Record