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 *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope. Since its founding in 2015, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or *amicus curiae*.

Firearms Policy Foundation (FPF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

Independence Institute is a nonpartisan public policy research organization founded on the eternal

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored the brief in whole or part. Only *amici* funded its preparation and submission.

principles of the Declaration of Independence. The Institute's scholarship, including articles by Research Director David Kopel and Senior Fellow Robert Natelson, was cited last term in *New York State Rifle & Pistol Association v. City of New York* (Alito, J., dissenting); *Espinoza v. Montana Dept. of Revenue* (Alito, J., concurring); and *Rogers v. Grewel* (Thomas, J., dissenting from denial of cert.).

Additionally, Senior Fellow Natelson was previously cited in *Upstate Citizens for Equality, Inc v. United States* (2017) (Thomas, J., dissenting); *Arizona State Legislature v. Arizona Independent Redistricting Com'n* (2015) (Roberts, C.J., dissenting); *N.L.R.B. v. Noel Canning* (2014) (Scalia, J., concurring); *Town of Greece, N.Y. v. Galloway* (2014) (Thomas, J., concurring in part); *Adoptive Couple v. Baby Girl* (2013) (Thomas, J. concurring); and *Arizona v. Inter Tribal Council of Arizona, Inc.* (2013) (Thomas, J., dissenting).

The Institute's *amicus* briefs in *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010) (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

Amici have an interest in this case because it concerns the sanctity of the home and the original meaning of the United States Constitution.

SUMMARY OF ARGUMENT

The sanctity of the home is central to American freedom. It has been central to the idea of freedom since the Roman Republic, and it was cherished by Englishmen for centuries leading up to the American Revolution.

Embodied in the Castle Doctrine, the inviolability of the home was celebrated by leading English legal authorities, including Edward Coke, William Hawkins, and William Blackstone. As William Pitt the Elder famously declared, even the poorest soul in the country had the right to defy the king in his own home.

But the English government nevertheless violated the sanctity of the home to seize property and to suppress speech, religion, assembly, political opposition, and firearm ownership. The English constantly complained about such infringements, but the violations continued.

American colonists, by contrast, had no tolerance for home intrusions. Violations of the home often resulted in hostility. Eventually, the colonial response to abusive home intrusions became so violent that even many lawful searches could not be conducted.

American resistance to home invasions ultimately led to the American Revolution. According to John Adams, when James Otis delivered his fiery speech against writs of assistance, American independence was born.

Many debates over the United States Constitution and the Bill of Rights focused on the need for robust and explicit protections for the home. Ultimately, the home became central to the Bill of Rights. The First through Fifth Amendments collectively create a zone of safety and protection in the home. Thus, the home has remained every American's castle throughout all of American history.

The decision below, however, permits home intrusions whenever the officer acts "within the realm of reason" while executing community caretaking responsibilities. Such a standard would allow many of the home intrusions the founders vehemently opposed. Indeed, extending the community caretaking exception to the home would undermine the constitutional text, the founders' intent, and centuries of tradition.

ARGUMENT

I. The sanctity of the home has long been viewed as essential to liberty.

Marcus Tullius Cicero once asked: "What is more sacred, what more inviolably hedged about by every kind of sanctity, than the home of every individual citizen?" He continued: "Within its circle are his altars, his hearths, his household gods, his religion, his observances, his ritual; it is a sanctuary so holy in the eyes of all." Marcus Tullius Cicero, CICERO, THE SPEECHES, WITH AN ENGLISH TRANSLATION 263 (N.H. Watts ed., 1923).

Nearly two millennia later, William Blackstone, "agreeing . . . with the sentiments of ancient Rome," explained that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." 4 William Blackstone, COMMENTARIES 223 (3d ed. 1769). "For this reason," Blackstone explained, "no doors can in general be broken open to execute any civil process." *Id.* Indeed, "a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house." *Id.* at 223–24. *See also* 1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 158 (3d ed. 1739) ("an Assembly of a Man's Friends in his own House, for the Defence of the Possession thereof . . . or for the Defence of his Person . . . is indulged by Law; for a Man's House is look'd upon as his Castle").

The inviolability of the home was expressed in English law since the fifteenth century. "As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass." *Miller v. United States*, 357 U.S. 301, 307 (1958). The same opinion prevailed in the decades before the American Revolution. *See* 2 Hawkins, PLEAS OF THE CROWN, at 86–87 ("[W]here one lies under a probable Suspicion only, and is not indicted . . . no one can justify the Breaking open Doors in Order to apprehend him.").

The Castle Doctrine was formalized by the early sixteenth century. The adage that "a man's house is his castle" comes from a 1499 case; it explained that the right of Englishmen to defend themselves from attackers was greatest in the home:

> If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace. But a man's house is his castle and defense, and where he has a peculiar right to stay.

Y.B. Trin. 14 Henry 7 (1499), reported in Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) ("Anonymous." No case name).

Towards the end of the century, a leading manual on the office of Justice of the Peace noted that "our law calleth a man's house, his castle, meaning that he may defend himselfe therein." William Lambarde, EIRENARCHA 257 (1591).

The best-known Castle Doctrine decision is *Semayne's Case*, from 1604. George Berisford died while still owing a debt to Peter Semayne, so Semayne secured a writ for the Sheriff of London to seize Berisford's goods and papers from his home to satisfy the debt. But Berisford's home now belonged to Berisford's former

joint tenant, Richard Gresham, who refused to let the sheriff in. When Semayne sued Gresham for frustrating the execution of the warrant, the King's Bench ruled in Gresham's favor. Sir Edward Coke summarized the court's decision by emphasizing that one's home is his "castle," "fortress," and "surest refuge":

> That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favored in law; so that although a man kills another in his defence, or kills one per infortun', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree . . . every one may assemble his friends and neighbours to defend his house against violence . . . because domus sua cuique est tutissimum refugium [to everyone his house is his surest refuge].

Semayne's Case, 77 Eng. Rep. 195, 5 Coke Rep. 91a (K.B. 1604).

The home did not only protect against violence and, sometimes, arrest. It protected against all types of intrusion. William Pitt the Elder (Prime Minister 1766–68) famously explained in 1763,

> 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 cannot enter!—all his force dares not cross the threshold of the ruined tenement!

William Pittenger, ORATORY SACRED AND SECULAR 146 (1878).

The home was also sacred for protecting property. As Lord Camden—popular in the American colonies and an inspiration for the Fourth Amendment—put it: "The great end for which men entered into society was to secure their property . . . every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing . . . for bruising the grass and even treading upon the soil." *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)).

Unless there was a warrant based on solid evidence, the home was also protected from government officials in pursuit of criminals. According to Coke, "for justices of the peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stoln goods, is against Magna Carta" as well as statutory law. Edward Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176–77 (1797); *see also* Michael Foster, CROWN LAW 321 (1762) ("bare Suspicion touching the Guilt of the Party will not

warrant a Proceeding to this Extremity [entering the home without consent], though a Felony hath been actually Committed.").

II. In England, the sanctity of the home was sometimes violated to seize property and to suppress speech, religion, assembly, political opposition, and firearm ownership.

Although the Castle Doctrine was firmly established, the English government did not always strictly obey the law. From at least 1590 onward, home searches were weaponized to suppress religious and political dissent as well as firearm ownership.

In 1590, Henry Barrow, a Separatist Puritan, complained about the government's power "to breake open and ransack . . . houses by day or by night, to spoile and carrie away what and whome they please without controulement, their warrants being made indefinite, without anie certaine perscription or limitation." 3 ELIZABETHAN NON-CONFORMIST TEXTS: THE WRITINGS OF HENRY BARROW 1587–1590, at 504 (Leland H. Carlson ed., 1962). Barrow was executed for his disfavored religious views in 1593.

In 1591, the Privy Council ordered the homes of Peter Wentworth and Anthony Cope to be searched for "all letters, bookes, or writinges whatsoever that . . . may be moved in Parliament . . . especially suche notes, collections, books or papers as conteine matter towchinge the establishing of the succession of the Crowne of England." The Council further ordered that any

resistance should be overcome by "break[ing] open dores, lockes and such other places." 21 ACTS OF THE PRIVY COUNCIL OF ENGLAND 392–93 (John Roache Dasent ed., 1890).

Disfavored religious practices and political speech continued to be suppressed via home intrusions throughout the seventeenth century.

In 1605, Parliament granted authorities the ability "to search the Howses or Lodgings of every Popishe Recusant . . . for Popishe Bookes and Reliques of Popery." 3 Jac. I ch. 5 (1605). Additionally, authorities were ordered to confiscate "all such armour, gunpowder and munition . . . any Popishe Recusant . . . shall have in his house." *Id.*

Dissenting Protestants and political dissidents were also targeted. "A proclamation against the disorderly printing, uttering and dispersing of books, pamphlets, &c." did in 1623 "straitly prohibit and forbid that no person whatsoever . . . imprint . . . any seditious, schismatical or other scandalous books or pamphlets whatsoever." SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I, at 394 (G.W. Prothero ed., 4th ed. 1913). The following year, "[a] proclamation against seditious, popish and puritanical books or pamphlets" forbade any "person or persons whatsoever to print any book or pamphlet concerning matters of religion, church[,] government or state" unless it was "first . . . perused, corrected and allowed under the hand of the Lord Archbishop of Canterbury, the Lord Archbishop of

York, the Bishop of London, the Vice-Chancellor of one of the Universities of Oxford or Cambridge." To enforce the censorship, authorities were commanded to "do their utmost . . . for the discovery and searching out of all offences and offenders." *Id.* at 395–96.

In defiance of the government, people continued to hold religious gatherings in their homes. As a 1634 government report noted with disapproval, people "meet together in great numbers in private houses and other obscure places, and there keep private conventicles and exercises of religion by law prohibited." 6 CALENDAR OF STATE PAPERS OF THE REIGN OF CHARLES I, 1633–1634, at 538 (John Bruce ed., 1863). Officers of the Peace were, therefore, instructed to "enter any house where they shall have intelligence that such conventicles are held, and in every room thereof search for persons assembled and for all unlicensed books." *Id.*

A 1643 ordinance ordered law enforcement officers to "make diligent search in all places" where banned speech was printed or currently existed in written form. "[I]n case of opposition," the authorities were "to break open Doors and Locks." 1 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642–1660, at 185–86 (C.H. Firth & R.S. Rait eds., 1911).

Because the above orders had failed to eliminate forbidden speech, a 1647 statute extended prior restraints on publications, and ordered enforcement via warrantless searches. The statute made it illegal to "Make, Write, Print, Publish, Sell or Utter . . . any Book, Pamphlet, Treatise, Ballad, Libel, Sheet or

Sheets of News whatsoever" without it being licensed by a House of Parliament. Authorities were "authorized and required . . . to enter into any Shop or House where they shall be informed, or have good cause to suspect any such unlicensed Pamphlets and Papers are Printed, Sold or Uttered, and to take and seize the same, and likewise all Presses and Implements of Printing." *Id.* at 1022.

During the English Civil War, *Mercurius Pragmaticus*, an anti-Parliament newspaper, complained about the aggressive home searches for pro-Royalist publishers and printers—searches conducted by government agents with general search warrants:

> not a Presse dares wagge her tayl, but one of these scumms of Raskality come with a Warrant . . . to seize on our goods, and commit our Persons to their stinking Dungeons; others come in the Night, breake open doores, with naked swords, holding them to the throats of Women and Children, menacing, and frightening them, whilst others of their crew break open Chests, Boxes and the like, stealing what everything of value they can lay their theevish fingers on.

MERCURIUS PRAGMATICUS, no. 45, Feb. 13–20, 1649, at 5–6.

After the English Civil War ended in 1651, religious liberty allowed for some Protestants, but that liberty was "not extended to Popery or Prelacy, and the use of the Prayer Book was still unlawful," even in the home. J.R. Tanner, ENGLISH CONSTITUTIONAL CONFLICTS

OF THE SEVENTEENTH CENTURY, 1603–1689, at 181 (1928).[2]

The Restoration of the Stuart monarchy in 1600 led to new abuses of general warrants. In 1681, Parliament impeached the Lord Chief Justice William Scroggs because, inter alia, he "granted divers General Warrants, for attaching the Persons and seizing the Goods of His Majesty's Subjects, not named or described particularly in the said warrants; by Means whereof many of his Majesty's Subjects have been vexed, their Houses entered into, and they themselves grievously oppressed, contrary to law." 13 JOURNALS OF THE HOUSE OF LORDS, 1675–1681, at 737.

The Glorious Revolution of 1688 aimed to stop the worst abuses. Parliament in 1662 had enacted a tax of two shillings for every hearth or stove on one's property. Immediately after the Glorious Revolution, new King William III and his spouse Queen Mary II urged the repeal of the tax, the enforcement of which required warrantless inspections, "very grievous to the People." 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 278 (1942).

The repeal bill excoriated the tax as "a Badge of Slavery upon the whole People Exposeing every mans

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[2] "Prelacy" in this context refers to hierarchical religious denominations led by Bishops—such as the Roman Catholic Church or the traditional Church of England. The "Prayer Book" was the Church of England's *Book of Common Prayer*. During the English Civil War and the decade thereafter, Puritans seized control of the Church of England and prohibited many of its former practices and procedures.

House to be Entred into and Searched at pleasure by Persons unknowne to him." Repeal would "Restore[] their Rights and Liberties." 1 William & Mary ch. 10, §§ 1–2 (1688).

But home searches continued. In 1688, justices of the peace were instructed to "search for all Arms Weapons Gunpowder or Ammunition which shall be in the House . . . of any . . . Papist or reputed Papist." 1 William & Mary ch. 15 § 1 (1688). A 1695 statute required Catholics in Ireland to forfeit all their guns and ammunition and authorized searches of their homes. 7 William III ch. 5 (1695).

A licensing act that censored literature was not renewed in 1695 because a House of Commons committee complained that it "subjects all Mens Houses, as well Peers as Commoners, to be searched at any Time, either by Day or Night, by a Warrant . . . directed to any Messenger, if such Messenger shall, upon probable Reason suspect that there are any unlicensed Books there." THE EIGHTEENTH CENTURY CONSTITUTION 401 (E. N. Williams ed., 1970).

Throughout most of the eighteenth century in England, officers were permitted to search private houses to enforce excise taxes. When the abuses became extreme in 1763, the London city government complained that "private houses of peers, gentlemen, freeholders, and farmers, are made liable to be entered and searched at pleasure." 6 THE ANNUAL REGISTER 154 (7th ed. 1796). Echoing the 1688 Parliament, London's municipal government denounced the searches as a

"badge of slavery." They were "an intolerable oppression, affecting private property, and destructive of the peace and quiet of private families." *Id.*

III. American colonists had no tolerance for violations of the home.

A. Colonial Resistance.

Colonial Americans were intimately familiar with the English legal treatises declaring their homes their castles. Thomas Jefferson wrote that Coke's *Institutes* and Blackstone's *Commentaries* "are possessed & understood by every one." 7 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 127 (J. Jefferson Looney ed., 2010).

Colonists viewed their homes as their inviolable castles. "[E]arly American colonists reviled search and seizure on the grounds that they unduly interfered with private life. Colonial enmity extended beyond general warrants to any government entry into the home. Response to such searches tended to be immediate and visceral." Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1240 (2016). "The question was not whether a warrant was general or specific; efforts to serve either kind of instrument resulted in hostility." *Id.* at 1240–41.

In 1663, a Rhode Island constable attempting to execute a search warrant in the name of the king was refused by three men with axes. The men explained that they respected the king and the court, but no one

had authority over their home: "ther answer was that the king they owned and the Court they owned but they would not come out: but weare Resoulfed [resolved] to knocke Downe any man that should pry in upon them for ther howse was ther Castle and this was the min[d] of one and all." 2 RHODE ISLAND COURT RECORDS 1662–1670, at 16 (1922). None of the three home defenders were convicted for violently opposing the search. *Id.* at 16–18.

"Between 1678 and 1681, the citizens of Schenectady and Albany repeatedly stopped Sheriff Richard Pretty from searching their houses and carts to police the Indian trade." William J. Cuddihy, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, at 207 (2009) (citing 2 MINUTES OF THE COURT OF ALBANY, RENSSELAERSWYCK AND SCHENECTADY, 1675–80, at 361–62 (A. J. F. Van Laer ed., 1928)).

When a New Hampshire sheriff went house-to-house attempting to collect money and seize goods to cover taxes that had been imposed without consent in 1684, "the sheriff was resisted and driven off with clubs; the women having prepared hot spits and scalding water to assist in the opposition . . . he was beaten, and his sword was taken from him; then he was seated on an horse, and conveyed out of the province to Salisbury with a rope about his neck and his feet tied under the horse's belly." 1 Jeremy Belknap, THE HISTORY OF NEW HAMPSHIRE 110–11 (John Farmer ed., 1831); *see also* 1 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE 1623–1686, at 551 (Nathanial Bouton ed., 1867) (Deposition of Thomas Thurton).

None of the townspeople involved in running the sheriff out of town were convicted. *Id.* at 551–54.

In 1698, when customs officers searched a New York City home for illegally imported East India goods, "a Tumult of the Merchants was made who came to [the] house, and . . . the said officers were locked up and imprisoned for three hours" in the home. 4 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 324 (E.B. O'Callaghan ed., 1854).

Four years later, Jonathan Mendum of York, Massachusetts, prevented the constable from executing a general warrant and searching his home for stolen goods. Mendum received a light punishment: public admonition and a small fine. 4 PROVINCE AND COURT RECORDS OF MAINE 277–78 (Neal W. Allen ed., 1958). "The leniency with which . . . truculent houseowners were punished demonstrated the popularity of excluding the constable from one's dwelling in colonial New England." Cuddihy, THE FOURTH AMENDMENT, at 185.

In 1733, the home of Thomas Cresap—who later organized and led the Sons of Liberty in Maryland, *see* Mynna Thruston, COL. THOMAS CRESAP 9 (1923)—was surrounded by the sheriff of Lancaster County and dozens of other Pennsylvanians who challenged his claim to the land. Refusing to surrender, "Cresap declared his house was his Castle and he would Defend it." 28 PROCEEDINGS OF THE COUNCIL OF MARYLAND, 1732–1753, at 62 (1908). When the men broke in, Cresap shot one before they overwhelmed him. In the

end, some of the intruders, rather than Cresap, were convicted for the incident.

The following year, a sea captain was killed in Charleston, South Carolina while trying to prevent a marshal from boarding his vessel by firing a cannon at him. The public rallied in support of the captain. One among those assembled declared,

> my house is my castle, and so is my ship, and therefore . . . I lay it down as a fundamental Law of Nations, that if the greatest Officer the King has, was to come with a thousand Warrants against me for any crime whatsoever, if he offers to take me out of my castle, I can kill him, and the law will bear me out.

Cuddihy, THE FOURTH AMENDMENT, at 188 (quoting THE SOUTH CAROLINA GAZETTE, no. 40, Oct. 26–Nov. 2, 1734, at p. 2, col. 1).

The incidents of self-help against home intrusions by government officials were inherently disorderly, but a last resort. As was understood, not preventing forcible intrusions by officials sometimes resulted in violence against the occupants of the home.[3]

[3] For example, a Virginian in 1702 complained to the governor that a sheriff forcibly entered his home to collect a tax he had already paid, and "beat [his] wife very much and abuse her after a very Grievous manner and wounded her in severall places and threaten her so much that she is afraid to stay att home." The sheriff returned to "breake open a doore of [the] house" and nearly killed a young child in the process. 16 VIRGINIA COLONIAL ABSTRACTS: RICHMOND COUNTY RECORDS 1692–1704, at 82 (1961).

As described in Part IV, *infra*, the United States Constitution aimed to obviate the need for self-help by subjecting home intrusions to strict controls.

In particular, the old English system of prior restraints would be reversed. There would be no need for advance permission freely to exercise religion or the right of the press. Rather, the *government* would now be controlled by prior restraints: no home intrusions except when judicial permission has been secured in advance, based upon probable cause.

But before there could be a United States Constitution, there had to be an American Revolution. That Revolution was caused, in part, by the escalation of the British government's intrusions into American homes, as described next.

B. The Road to Revolution.

In 1761, Parliament authorized writs of assistance, allowing the British army to conduct warrantless searches to repress the widespread smuggling (for import/export tax avoidance) occurring in New England. Massachusetts Advocate-General James Otis refused to defend the legality of the writs of assistance. Instead, he resigned and represented pro bono the Americans challenging the writs, in *Paxton's Case*, 1 Quincy 51 (Mass 1761). Otis's oral argument against the writs became the most famous legal speech in colonial America:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

James Otis, Against Writs of Assistance (Feb. 24, 1761, argument before Superior Court of Massachusetts), *in* 2 Charles Francis Adams, THE WORKS OF JOHN ADAMS 524 (1856) (John Adams's notes recording Otis's speech). John Adams later recalled, "American independence was then and there born. Every man of an immense, crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance." 2 John Stetson Barry, THE HISTORY OF MASSACHUSETTS 266 (1856).

In 1765, customs officer John Robinson conducted large-scale warrantless searches after a crowd recaptured goods he had previously seized. With a group of roughly 70 armed men, he searched "all the Houses and stores wherever he pleased." Cuddihy, THE FOURTH AMENDMENT, at 493. Robinson's search produced intense backlash from the public as well as officials. *Id.* at 491–96.

The best-known search in colonial America occurred at Daniel Malcom's Boston home in 1766. Law enforcement believed that Malcom's cellar contained smuggled liquor, so several officers searched Malcom's home under the authority of a writ of assistance the comptroller had obtained the year before. Malcom refused to open the cellar. When the officers threatened to break into the cellar, Malcom armed himself with pistols and a sword and threatened them. The officers left to regroup, and by the time they returned, Malcom had barricaded his home. Unable to force their way in, the officers ordered Malcom's neighbors to help—but the neighborhood overwhelmingly sympathized with Malcom and refused. The officers eventually gave up. *See id.* at 496–501. Malcom was not prosecuted for refusing the search. *Id.* at 530.

Afterwards, Malcom continued to deny the smuggling accusations, but explained that he refused the search anyway because "he thought it cruel hard that the private recesses of his house should be liable to be searched on every trifling Information, be it true or false." *Id.* at 550 (quoting deposition of John Pigeon). Malcom exclaimed that "he knew the Laws and that no body had a right to come into his House." *Id.* at 551 (quoting deposition of William Sheaffe). As one witness explained, Malcom "looked upon his House as his Castle" and was "determined to know if the Officers had any right to break [it] open." *Id.* (quoting declaration of Benjamin Goodwin). Another witness explained that "the breaking open a man's House . . . was not common

in this Country." *Id.* (quoting declaration of Caleb Hopkins).

"Although extreme, Malcom's views typified the mood of the day in Massachusetts." *Id.* Captain William MacKay of Boston echoed Malcom's sentiment:

> I always understood a man's House was his Castle and that it could not be broke open unless for murder, Treason, and Theft. . . . There never was such a thing as Private Dwellings being search'd before and if such things were allow'd, there was an end of everything.

Id. (quoting declaration of William MacKay). The writ of assistance issued in Malcom's case was apparently the last one issued in Boston. "The Malcom episode was . . . a tombstone on the productive use of writs of assistance in Massachusetts." *Id.* at 501.

Parliament's Townshend Revenue Act of 1767 allowed customs officers "to enter houses or warehouses, to search for and seize goods prohibited to be imported or exported . . . or for which any duties are payable, or ought to have been paid." DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY, 1606–1913, at 146 (William MacDonald ed., 1918).

Patriot lawyer John Dickinson called the Townshend Acts an "engine of oppression," because "the officers of the customs [were] impowered to enter into any HOUSE . . . in America to search for or seize prohibited or unaccustomed goods, etc." Dickinson argued that "such a power was dangerous to freedom, and expressly contrary to the common law, which ever

regarded a man's house as his castle, or a place of perfect security." John Dickinson, LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 70–71 (Books on Demand 2020).

"'Farmer' [Dickinson's pseudonym] had a pervasive, deep impact on colonial legal opinion and provided one of the foremost American precedents for the Fourth Amendment. . . . its influence reached throughout the colonies." Cuddihy, THE FOURTH AMENDMENT, at 546.

Soon after, in 1772, Boston's "Committee of Correspondence"—twenty-one patriots including Samuel Adams, James Otis, and Dr. Joseph Warren—created "The Boston Pamphlet."[4] "[S]tat[ing] the Rights of the Colonists," the Boston Pamphlet articulated rights later identified in the Declaration of Independence and the Constitution, and complained of "the Infringements and Violations thereof." *The Votes and Proceedings of the Freeholders and Other Inhabitants of the Town of Boston, In Town Meeting Assembled, According to Law*, at iii (1772). The rights included the right to life, liberty, and property, "together with the Right to support and defend them," as well as the "Right peaceably and quietly to worship God, according to the Dictates of his Conscience." *Id.* at 2, 3.

[4] Samuel Adams moved for the creation of the Committee at a Boston Town Meeting and is believed to have written the first draft of the pamphlet. *See* TRACTS OF THE AMERICAN REVOLUTION 1763–1776, at 234 (Merrill Jensen ed., 2003 reprint).

The Pamphlet explained that, "The Supreme Power cannot justly take from any Man, any Part of his Property without his consent." *Id.* at 10. For the government to "have a Right, at Pleasure, to give and grant the Property of the Colonists" was "utterly irreconcilable to the[] Principles" of "natural Law and Justice, and the great Barriers of all Free States. . . ." *Id.* "What Liberty can there be," the Pamphlet asked, "where Property is taken away without Consent?" *Id.* at 11. Among other infringements, the Pamphlet complained about quartering troops. *Id.* at 18.

Regarding searches and seizures, the Pamphlet lamented that Board of Custom Commissioners had been

> invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives. . . . his Majesty gives and grants unto his said Commissioners . . . and to all and every the . . . Deputy Collectors . . . full Power and Authority . . . to go into any House, Shop, Cellar, or any other Place, where any Goods, Wares or Merchandizes lie concealed, or are *suspected* to lie concealed, whereof the customs and other duties, have not been, or shall not be, duly paid . . . ; and the said House, Shop, Warehouse, Cellar, and other Place to search and survey, and all and every the Boxes, Trunks, Chests and Packs then and there found to break open.
>
> . . . .

> These Officers may under color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ransack Mens Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.

Id. at 15–17. Six hundred pamphlets were printed and distributed to every town throughout Massachusetts. *Id.* at 36.

The Committee's arguments were echoed by the First Continental Congress in 1774, which complained that "[t]he Commissioners of the Customs are empowered to break open and enter houses without the authority of any Civil Magistrate founded on legal information." *Memorial to the Inhabitants of the British Colonies*, FIRST CONTINENTAL CONGRESS (Oct. 21, 1774), *reprinted in* 1 Peter Force, AMERICAN ARCHIVES: FOURTH SERIES 921, 925 (1837).

The Congress informed Quebecers that British legislation allowed excisemen into "houses, the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law." *A Letter to the Inhabitants of the Province of Quebec*, Oct. 26, 1774, *in* 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788, at 41 (1823).

Among the grievances the New Jersey Assembly sent to the king in 1775 was that "[t]he Officers of Customs are impowered to break open and enter Houses without the Authority of any Civil Magistrate founded on legal information." VOTES AND PROCEEDINGS OF THE

General Assembly of the Colony of New-Jersey [Jan. 11–Feb. 13, 1775], at 59 (Burlington, 1775).

C. Ratification of the Constitution.

The debates over ratifying the Constitution without a declaration of rights often discussed the lack of protections for home intrusions.

Luther Martin represented Maryland at the Constitutional Convention and walked out two weeks before it ended because he felt that it provided the federal government with too much power. Explaining himself to the Maryland House of Assembly, Martin described "the power to lay excises" as "a power very odious in its nature, since it authorises officers to go into your *houses*, your *kitchens*, your *cellars*, and to examine into your *private concerns*." Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, *in* 2 The Complete Anti-Federalist 55 (Herbert J. Strong ed., 1981). Martin worried that every item could be subjected to excise, leaving homes vulnerable to constant abuse. Cuddihy, The Fourth Amendment, at 679.

One of Martin's fellow Marylanders, writing as "A Farmer," agreed. He argued against general warrants, emphasizing that a dwelling was the "asylum of a citizen" and "the sanctuary of a freeman." *Id.* (quoting A Farmer, *no. 1*, Maryland Gazette, Feb. 15, 1788, at p. 2, col. 2).

Another writer, "A Farmer and Planter" warned: "Excise is a new thing in America . . . but it is not so in Old England, where I have seen the effects of it, and felt the smart. . . . excise-officers have the power to enter your houses at all times . . . under the pretense of searching for exciseable goods . . . break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top." 5 THE COMPLETE ANTI-FEDERALIST, at 75.

Maryland's state convention was convinced that clear language was needed to safeguard the home: "for, Congress having the power of laying excises, (the horror of a free people,) by which our dwellinghouses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (Jonathan Elliot ed., 1836).

In neighboring Virginia, Patrick Henry argued that "unless the general government be restrained by a bill of rights," excisemen will "go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear." Henry asked, "When these harpies are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people hear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a [stingy] hand." 3 *id.* at 44.

A fellow Virginian, "Cato Uticensis"—believed to be George Mason—warned that without a Bill of Rights, "you subject yourselves to see the doors of your houses, them impenetrable Castles of freemen, fly open before the magic wand of the exciseman." Cato Uticensis, VIRGINIA INDEPENDENT CHRONICLE (Oct. 17, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 75 (John P. Kaminski, et al. eds., 1988).

In the *New York Journal*, "A Son of Liberty" expressed fear that the Constitution without a Bill of Rights would allow "our bed chambers . . . to be searched by the brutal tools of power" and that the "most delicate part of our families [will be] liable to every species of rude or indecent treatment." A Son of Liberty, NEW YORK JOURNAL, Nov. 8, 1787, *in* 13 THE DOCUMENTARY HISTORY, at 481–82 (John P. Kaminski, et al. eds., 1981). "Men of all ranks and conditions [would be] subject to have their houses searched by officers . . . under various pretences, whenever the fear of their lordly masters shall suggest, that they are plotting mischief against their arbitrary conduct." *Id.* at 481.

Meanwhile, Philadelphia's *The Independent Gazetteer* sarcastically included "[g]eneral search warrants" as "[a]mong the blessings of the new-proposed government." *Blessings of the New Government*, THE INDEPENDENT GAZETTEER, Oct. 6, 1787, *in* 13 THE DOCUMENTARY HISTORY, at 345.

IV. The First through Fifth Amendments collectively secure the home.

To Americans, the sanctity of the home was essential to free speech, free exercise of religion, freedom of the press, defense of self and family, prevention of military occupation, privacy, and the security of property. Although the sanctity of the home was sometimes violated in England, Americans never tolerated home intrusions. As a result, America's founders provided the home with robust protections in the Bill of Rights.

The First, Second, Third, Fourth, and Fifth Amendments collectively create a zone of safety and protection in the home.

The Second, Third, and Fourth Amendments provide the most explicit home protections. The Second Amendment ensures that citizens have the ability to defend their homes. Indeed, "[t]he Second Amendment . . . elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The Second Amendment would not mean much if people were not allowed to "keep" arms in their homes.

Next, the Third Amendment protects against home intrusions by restricting the quartering of soldiers in "in any house."

The Fourth Amendment guards all "houses" against irregular intrusions, including those not supported by probable cause. "[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 intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "[P]hysical 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., S. Div.*, 407 U.S. 297, 313 (1972). That this case involves a firearm in the home does not lessen the right's protections. *Cf. Florida v. J.L.*, 529 U.S. 266 (2000) (there is no "firearm exception" to the Fourth Amendment's ban on searches based on unverified anonymous tips).

The First Amendment guarantees of speech, press, and petition ensure that people can publicize objections to home intrusions—as Americans often did. Moreover, the home is an essential place for the free exercise of religion: for all faiths, the site of family prayers, shrines, and small religious gatherings, and especially for Protestants, personal study of the Bible.

Indeed, First Amendment protections are so robust in the home, even the possession of obscene materials cannot be criminalized there: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

The Fifth Amendment, by guaranteeing that private property is not taken for public use without just compensation, limits government power to seize one's home or the property in it. If a home must be taken, "just compensation" ensures that a new home can be acquired.

As Justice John Marshall Harlan II wrote, American constitutional

> "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Surely, the "continuum" of liberty includes all of the home protections explicit and implicit in the first half of the Bill of Rights. The sanctity of the home is fundamental to American liberty, and not only because the Fourth Amendment protects "houses."

V. Extending the "community caretaking" exception to the home contradicts the Bill of Rights and leads to intrusions the Bill of Rights was written to prohibit.

"We have . . . lived our whole national history with an understanding of the ancient adage that a man's house is his castle." *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quotation marks and citations omitted). Extending the community caretaking exception to the home would undermine the constitutional text, the founders' intent, and centuries of tradition.

The court below described the community caretaking doctrine as "a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities." *Caniglia v. Strom*, 953 F.3d 112, 123 (1st Cir. 2020) (citations omitted). "Police officers enjoy wide latitude," the court said, "in deciding how best to execute their community caretaking responsibilities and, in the typical case, need only act 'within the realm of reason' under the particular circumstances." *Id.* (citations omitted).

Under the reasoning, police entry into a home without a warrant and without probable cause is presumptively lawful. The intrusions would later be judicially affirmed unless a court finds the officers' actions to be outside "the realm of reason." The Fourth Amendment's strong textual protection of the home would be replaced by the equivalent of the rational basis test. *See* George A. Mocsary, *A Close Reading of an Excellent Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE

41, 55 (2018) (explaining that reasonableness review is equivalent to rational basis review).

This broad exception to the Fourth Amendment's protections would allow intrusions into the home whenever police officers could reasonably claim to be caring for the community. This would allow many of the home intrusions the founders vehemently opposed.

The decision below moves American law in a direction towards the writs of assistance at issue in *Paxton's Case*. It is true that James Otis's eloquent argument against the writs eventually led to American Independence, but the British government won the actual case. 1 LEGAL PAPERS OF JOHN ADAMS 107 (Kinvin L. Wroth & Hiller B. Zobel eds., 1965).

The government lawyer supporting the writs was also eloquent. He argued that rights must give way to the good of the community because officers "cannot fully exercise their Offices" without the writs. *Id.* at 136. Thus, while "[i]t is true the common privileges of Englishmen are taken away . . . the necessity of the Case and the benefit of the Revenue . . . justifies" it. After all, "the Revenue [is] the sole support of Fleets & Armies abroad, & Ministers at home . . . without which the Nation could neither be preserved from the Invasion of her foes, nor the Tumults of her own Subjects." For reasons "infinitely more important" than the violation of rights, it was in the community's interest that "[h]ouses be broke open." *Id.* at 138.

Almost all the abusive intrusions described above were—in the eyes of their perpetrators—undertaken for the perceived caretaking of the community. Under the circumstances of the times, the officers—from the *Semayne's Case* sheriff onward—were acting within "the realm of reason."

Should the decision below be affirmed, an American would no longer be "as well guarded as a prince in his castle." *See* Otis, *supra*. Instead, the security of the home would be no more extensive than what an officer deems reasonable.

CONCLUSION

For the above reasons, and those stated by the Petitioner, the decision below should be reversed.

Respectfully submitted,

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