No. 24-624

In the Supreme Court of the United States

WILLIAM TREVOR CASE, *Petitioner,*

v.

STATE OF MONTANA

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

This case presents an important, recurring issue about the extent to which the Fourth Amendment protects the home from warrantless searches. At common law, one of the "special protections" afforded to the home was that, absent the homeowner's consent, the government was required to obtain a warrant before entering in all but the most extreme circumstances. Indeed, some early commentators disputed whether even a warrant was sufficient for entering a home. More "lenient" commentators made allowances for warrantless entry when the police were pursuing felons, while others would permit entry, but only with a warrant. But the weight of Founding-era authority confirmed the expectation that, absent clear evidence that someone was threatened with imminent harm, the government could not enter a home without a warrant.

This Court reaffirmed the sanctity of the home in *Caniglia* v. *Strom*, 593 U.S. 194, 199 (2021). *Caniglia* emphasized that allowing warrantless entry into the home for community caretaking—duties beyond law enforcement or keeping the peace—would have been completely at odds with the privacy expectations and demands of the Framers.

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus'* intent to file this brief.

Despite this history and precedent, in this case the Supreme Court of Montana allowed warrantless entry into the home under a "community caretaker" exception supported by nothing more than the wildly lenient "articulable facts" standard for a *Terry* stop. See *Terry* v. *Ohio*, 392 U.S. 1 (1968). This Court should grant certiorari, reverse the decision below, and hold that warrantless entry to a *home* under exigent circumstances requires at least probable cause that an emergency is in fact occurring. Restoring that fundamental requirement for warrantless home entry will also establish a bulwark against diluted standards for warrantless electronic surveillance and access to phones and other devices that contain private information at least as intimate and personal as what is found in a home.

Proper resolution of this question is of paramount importance to *Amicus* Project for Privacy & Surveillance Accountability (PPSA), a nonprofit, nonpartisan organization concerned about a range of privacy and surveillance issues—from the surveillance of American citizens under the guise of foreign-intelligence gathering, to the monitoring of domestic activities under the guise of law enforcement.

STATEMENT

After police officers learned that William Case had threatened suicide, they entered his home without a warrant and seized evidence later used to convict him of a felony. App.3a-7a. Because the officers "were going in to assist him," they felt unrestrained by the Fourth Amendment's warrant requirement. App.4a. Upon arriving, the officers looked through a window

and saw an empty holster and a notepad, but neither saw Case nor noticed anything to indicate that he was distressed or injured. App.4a.

Aware that Case had previously "attempt[ed] to elicit a defensive response" from police, the officers waited around forty minutes before entering. App.5a. They suspected Case did not require immediate aid, "but rather was likely lying in wait for them to commit suicide by cop." App.29a. After entering and while sweeping the house, one officer saw a "dark object" "near Case's waist," believed it was a gun, and shot Case, who fell. App.6a. Police retrieved a gun from a laundry hamper next to where Case fell. *Ibid.* Case was charged with felony assault on a peace officer.

At the trial court, Case unsuccessfully moved to suppress the evidence obtained during the warrantless search of his home. App.6a-7a, 43a. The Montana Supreme Court affirmed, holding that Montana's "community caretaker" exception justified the warrantless entry, and reasoning that this version of the exception complied with *Caniglia* because of its exigency requirement. App.18a-20a. The dissent, however, noted that this ruling extended the exception to circumstances this Court had rejected in *Caniglia*. App.27a-28a (McKinnon, J., dissenting).

SUMMARY

I. The Court should grant review to correct the overly lenient rule used below, which is incompatible with Founding-era common law expectations of privacy. The Court has long looked to common-law sources to determine the reasonableness of a search or a seizure. See *Carpenter* v. *United States*, 585 U.S. 296, 304-305 (2018). No Founding-era or common-law authority of which *amicus* is aware would have allowed the police to enter a person's home without a warrant in a community-caretaking capacity based on nothing more than the permissive standard justifying a *Terry* stop. To the contrary, the home was considered so sacred that, absent a warrant or consent, the government could enter it only in the most extreme circumstances. This hesitancy to allow warrantless searches, even when justifiable by some potential public benefit, supports a requirement that police have probable cause that an emergency exists before making a warrantless entry.

II. Another powerful reason to grant review is the diluting effect such a low bar for emergency aid searches would cause in other contexts—especially regarding electronic devices. Such devices hold vast amounts of personal information that, historically, would only have been found in the home. Lowering the burden of proof required to justify the warrantless search of the place the Constitution protects most robustly would lead law enforcement and the courts to dilute protections for other, less historically safeguarded areas, such as electronic devices, which would be devastating to the privacy of all Americans.

ADDITIONAL REASONS TO GRANT REVIEW

Amicus agrees with Petitioner (at 13-21, 28-33) that the ruling below, in requiring only a low level of suspicion to invoke the emergency-aid exception to enter a home without a warrant, is incompatible with this Court's Fourth Amendment precedent, and presents an important circuit split. As explained below, it is similarly inconsistent with Founding-era law related to warrantless entry of homes in emergency circumstances, and, if used to surveil electronic devices, poses a much greater threat to privacy than is apparent even from the location-specific circumstances of this case.

This Court should grant certiorari, correct the error of the court below, and ensure that Americans' homes and electronic devices are protected by a probable cause requirement for the emergency-aid exception to the Fourth Amendment's warrant requirement.

I. Founding-era Expectations of Privacy Require at Least Probable Cause of Exigent or Emergency Circumstances for Warrantless Home Entry.

At common law, a warrant was required to enter a person's home in all but the most extreme circumstances. And where a warrantless entry was permitted because of imminent threats, warrantless entry required readily observable proof of such a threat. Because common law expectations of privacy have long guided this Court's understanding of the Fourth Amendment, the Court should grant review to clarify that application of the emergency-aid exception

requires probable cause that an emergency exists at the time of entry.

A. Founding-era common law sets the expectations and standards for resolving modern Fourth Amendment questions.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures[.]" U.S. Const. amend. IV (emphasis added). The fundamental default rule for a reasonable search is that it be pursuant to a "Warrant[]" based "upon probable cause[.]" *Ibid.* Recognizing the Amendment to be an "affirmance" of the common law on these points,[2] the Court respects "historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" *Carpenter* v. *United States*, 585 U.S. 296, 305 (2018) (quoting *Carroll* v. *United States*, 267 U.S. 132, 149 (1925)).

In this regard, the common law furnishes two "basic guideposts": (1) the Fourth Amendment protects the "privacies of life" from "arbitrary power," *ibid.* (quoting *Boyd* v. *United States,* 116 U.S. 616, 630 (1886)); and (2) the "central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance,'" *ibid.* (quoting *United States* v. *Di Re*, 332 U.S. 581, 595 (1948)). This case implicates both guideposts. As explained in Section II.A., at common law the "privacies of life" were nowhere more present

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

than in the home. If the emergency-aid exception allowed the police to enter the home without a warrant, consent, or even the existence of probable cause, one meaningful obstacle to government overreach would be forever lost.

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

Fortunately, at common law, non-consensual warrantless entry into the home was allowed only in the most extreme circumstances, and never supported by less than "probable suspicion." At common law, officers had a duty "to keep the peace[.]"[3] In performing this duty, however, the police still had to get a warrant to enter a person's home in all but the most extreme cases. The mere possibility of a threat to an individual based on only a third-party report, with independent knowledge that the threat might not materialize without interference, would *not* have been such an extreme case, and would not be considered sufficient proof of imminent harm. This is apparent in both legal commentary and case law during and after the Founding period.

1. English courts considered a man's house his "castle and fortress." *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604). As William Pitt famously put it: "The poorest man may, in his cottage, bid defiance to

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

all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."[4]

Because of this fundamental principle, at common law, outside of certain rare "circumstances," "the Crown could not intrude on the sanctity of the home without a warrant."[5] The home was not to be "violated" unless "absolute necessity" compelled this to "secure public benefit."[6] Otherwise, in "all cases where the law" was "silent" and "express principles d[id] not apply," the "extreme violence" of entering a home without permission was forbidden.[7] The Fourth Amendment, "little more than the affirmance" of the common law,[8] was meant by the Framers to continue this tradition and prevent the "evil" of warrantless "physical entry of the home." *Welsh* v. *Wisconsin*, 466 U.S. 740, 748 (1984) (citation omitted).

Aside from pursuing a felon or raising a hue and cry,[9] there was at common law only one other scenario

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

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

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

[7] *Ibid.*

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

[9] The "hue and cry" exception was available only in a narrow class of cases where the victim of a serious offense sought the assistance from the Crown in apprehending a felon who had fled. See Br. of Project for Privacy & Surveillance Accountability, Inc.

that potentially allowed warrantless home entry: interrupting an "affray" to prevent imminent harm[10]—but only upon strong evidence of such necessity.

The first American edition of Giles Jacobs' law dictionary describes an affray as "a skirmish or fighting between two or more" in which there is "a stroke given, or offered, or a weapon drawn."[11] If a peace officer personally witnessed an affray, there was "no doubt" that he could "do all such things" to end the disturbance.[12] Contemporary common-law commentators like Joseph Shaw noted that, "[w]hen an Affray is in a House, the Constable, on his being refused Entrance, may break it open to keep the Peace."[13]

The authority of the government to enter a house without a warrant, however, was limited to cases in which the officer actually heard or observed the affray and the necessity to enter to prevent harm. As noted by Joseph Chitty, an officer could "break open the doors" in order to "*suppress* the tumult" if the affray is

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and Restore the Fourth, Inc. as *Amici Curiae* Supporting Petitioner at 9-15, *Lange* v. *California*, 594 U.S. 295 (2021) (No. 20-18) (exploring the common-law exigent-circumstances exception and the hue and cry), https://tinyurl.com/2wbuj9sk.

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

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

[12] *Ibid.*

[13] 1 Joseph Shaw, *The Practical Justice of the Peace* 569 (London, Henry Lintot, 4th ed. 1744).

"within the view or hearing of a constable" or a "violent cry of murder" was heard within a house.[14]

Two respected common-law commentators, William Hawkins and Matthew Hale, both wrote that a warrant was required before entering a home if an officer did not personally observe or hear the affray. Hawkins explained that "a Constable hath no Power to arrest a Man for an Affray done out of his own View" without a warrant, for "it is the proper Business of a Constable to preserve the Peace, not to punish the Breach of it."[15] Hale agreed: If the affray was past, "and no danger of death" remained, a constable "could not arrest the parties without a warrant from the justice of the peace[,]" much less enter the home.[16] The extent of arrest powers for an affray based "on the information and complaint from another" appears to only have extended to cases where the constable arrived while the affray was ongoing, and Hale stated "[i]t is difficult to find any instance where a constable hath any greater power than a private person over a breach of the peace out of his view."[17]

Even in the case of a "felony actually committed, or a dangerous wounding whereby felony is likely to

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[14] 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 56 (Springfield, G & C Merriam 1836) (emphasis added).

[15] 1 William Hawkins, *A Treatise of the Pleas of the Crown* 137 (London, Eliz. Nutt 1716).

[16] Hale (1847), *supra* note 10, at 89.

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

ensue," Blackstone still restricted warrantless entry to a house to cases of "probable suspicion."[18]

These sources confirm that the government was permitted to intrude on the home only in a narrow set of extreme circumstances, and only when supported by strong evidence of an emergency that corresponds to at least probable cause.

2. "The command of the Fourth Amendment" embodies fundamental "lesson[s]" about the "violent, obnoxious and dangerous" character of "breaking an outer door." *Ker* v. *California*, 374 U.S. 23, 54 (1963) (plurality opinion) (citing 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 275-276 (28th ed. 1837)). Carrying these lessons forward, early American cases allowed warrantless entry into the home *only* in the most urgent circumstances, and only when supported by strong evidence equivalent to at least probable cause.

For example, in *McLennon* v. *Richardson* the Massachusetts Supreme Judicial Court noted that, even in England in the 1600s, the "authority of a constable to break open doors and arrest without a warrant" was "confined to cases where treason or felony has been committed, or there is an affray or a breach of the peace *in his presence*." 81 Mass. 74, 77 (1860) (emphasis added) (citations omitted). Breaches-of-the-peace at common law generally entailed violent crimes that involved "assaulting, striking, or by

[18] 4 William Blackstone, Commentaries on the Laws of England 289 (1769).

fighting."[19] To the extent this could be read to support any emergency-aid exception, it required that the emergency be personally witnessed by the constable, a higher standard than probable cause.

This common-law rule did not change as the country became more established. For example, the New Jersey Court of Errors and Appeals allowed an officer to enter a home without a warrant to stop an affray short of a felony[20] only if the affray was committed in the officer's presence: "[i]f the affray be in a house, the constable may break open the doors to

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[19] Donohue, *supra* note 5, at 1226 (quoting Saunders Welch, *Observations on the Office of Constable* 6 (London, printed for A. Millar 1754)); see also *id.* at 1226 n.262 (quoting William Sheppard, *The Offices and Duties of Constables* 34 (London, Richard Hodgkinsonne 1641) ("[A] breach of the peace was understood as 'not onely that fighting, which wee commonly call the Breach of the Peace, but also that every Murder, Rape, Manslaughter, and felonie whatsoever, and every Affraying, or putting in feare of the Kings people.'" (spelling in original)).

[20] "Felony," as used at common law and in the treatises cited by later American cases, was more than merely a statutory distinction, and referred to the most serious of crimes, making apprehension for misdemeanors and prevention of affrays a better analogy for emergency-aid searches. See, *e.g.*, *Gardner* v. *State*, 26 A. 30, 32 (N.J. Sup. Ct. 1892) ("In the classification of criminal offenses at common law, felony was a nomen generalis, which comprised all offenses which occasioned a forfeiture of either lands or goods or both, to which capital or other punishment was super-added, according to the degree of guilt." (citations omitted)), *aff'd*, 30 A. 429 (N.J. 1893) (per curiam); *Felony,* Black's Law Dictionary 483 (1st ed. 1891) ("In American Law. The Term has no very definite or precise meaning * * * The statutes or codes of several of the states define felony as any public offense on conviction of which the offender is liable to be sentenced to death or to imprisonment in a penitentiary or state prison.").

preserve the peace; and if the affrayers fly to the house, and he freshly follow, he may break open the doors to take them without warrant. But he cannot, without a warrant, arrest a man for an affray or breach of the peace out of his view, unless it embrace a felony." *Delafoile* v. *New Jersey*, 24 A. 557, 558 (N.J. 1892) (citations omitted). This continued the rule that entries for mere peacekeeping or safety be supported by the officer's personal observation of an affray, which is at least equivalent to probable cause.

3. No common-law authority of which *Amicus* is aware would have allowed government officers to enter a person's home for emergency aid outside of the context of apprehending a fleeing criminal or preventing an affray. This Court first articulated such an exception in 1978,[21] and state court cases do not seem to date back much further.[22] Moreover, the seminal cases involving the exception in this Court involve circumstances analogous to the "affray" of English common law. See *Michigan* v. *Fisher*, 558 U.S. 45, 48 (2009) ("just as in *Brigham City* [v. *Stuart,* 547 U.S. 398 (2006)], the officers could see violent behavior inside"); *Brigham City*, 547 U.S. at 406 ("As the officers watch, [a juvenile] breaks free and strikes one of the adults in the face, sending the adult to the sink

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

[22] *Id.* at 585 n.106. State cases seem to analogize to private trespassing cases, rather than Fourth Amendment cases, as precedent. See, *e.g.*, *People* v. *Roberts*, 303 P.2d 721, 723 (Cal. 1956) (citing *Ploof* v. *Putnam*, 71 A. 188, 189 (Vt. 1908)).

spitting blood."); *Mincey* v. *Arizona*, 437 U.S. 385, 387 (1978) ("As the police entered the apartment" for a narcotics raid, "a rapid volley of shots was heard from the bedroom. [Undercover] Officer Headricks emerged and collapsed on the floor. When other officers entered the bedroom they found [petitioner] lying on the floor, wounded and semiconscious.").

Most relevant for present purposes, at the very least, this exception requires an "objectively reasonable basis to believe that there is a *current, ongoing crisis* for which it is reasonable to act now." *Caniglia* v. *Strom*, 593 U.S. 194, 206 (2021) (Kavanaugh, J., concurring) (emphasis added).[23] Here, by contrast, Case never requested the officers' aid; they responded only to the report from his ex-girlfriend. App.3a. Besides an empty holster and a notepad, the officers saw and heard no evidence of a potential emergency when they arrived at the home. App.4a. Indeed, they waited at least forty minutes before entering, belying the argument that there was an imminent threat to Case's life. App.5a. They also acknowledged that Case was likely waiting for them and likely would not harm himself without their interference, suggesting that, rather than resolving the threat, their entry into Case's home contributed to it. App.29a. Montana's decision to apply the emergency-aid exception in these circumstances

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

creates such a low bar as to render it meaningless, and is inconsistent with Founding-era decisions.

Indeed, the test adopted by the court below used language virtually indistinguishable from that required for automobile and public place searches for safety-related reasons. Compare App.12a-15a ("objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril" (citation omitted)) with *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) (requiring only "specific and articulable facts" to search an automobile trunk for weapons (citation omitted)); and *Terry* v. *Ohio*, 392 U.S. 1, 7, 21 (1968) (requiring "specific and articulable facts" to frisk for weapons). But, by adopting the same language that this Court has used when discussing the standard applied to searches of areas less protected than the home, the lower court ignored what this Court has called the "unmistakable distinction between vehicles and homes." *Caniglia*, 593 U.S. at 199.

Such a dangerous flouting of this Court's precedents should not be allowed to stand. This Court should grant review and reverse in an opinion clarifying that the Fourth Amendment requires probable cause for the emergency-aid exception to apply.

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

While the common law's limited application of, and higher evidentiary burden for, an emergency-aid exception is sufficient reason to grant review and reverse here, it is not the only reason. Although the Fourth Amendment certainly protects electronic devices and communications, if protection is diluted for the home itself—the "first among equals," *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013)—certainly such dilution will rapidly extend to electronic devices and electronic surveillance. If the government may enter the home without a warrant based only on a reasonable belief, far short of probable cause, that an emergency exists, the government may treat electronic sources of information the same way, posing an even greater threat to privacy and the ultimate integrity of the Fourth Amendment. The insidious branding almost writes itself: "Big Brother" may be "watching you," but it's for your own good![24] The need to protect Americans' privacy from unlimited electronic surveillance is another powerful reason to grant review and reject the rule applied below.

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

A. Electronic surveillance involves private, personal information implicating the same Fourth Amendment concerns as home entry.

This Court has correctly recognized that electronic devices today hold many of the "privacies of life" that were once found only in the home. *Riley* v. *California*, 573 U.S. 373, 403 (2014) (citation omitted). Indeed, as Justice Alito has explained, "because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests[.]" *Id*. at 408 (Alito, J., concurring in part and in the judgment). Indeed, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id*. at 393 (majority opinion).

The Court has thus correctly emphasized that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[.]" *Id*. at 396 (emphasis in original). Indeed, "[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form[.]" *Id*. at 396-397.

Beyond records and information, even the choice of applications that a person installs on her phone can reveal significant private details. There are "apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; * * * [and] apps for improving your romantic life." *Id.* at 396. And many Americans use their electronic devices for even

the most sensitive of activities, such as mental-health counseling,[25] or sending sexually explicit images of themselves.[26] Cell phones also track their owner's location,[27] and location data can indicate where a person worships, where she banks, where she studies, or where she spends her free time.

The all-encompassing information stored on phones and other devices contain "several interrelated consequences for privacy." *Riley*, 573 U.S. at 394. Foremost among them is the likelihood that "distinct types of information" on phones could "reveal much more in combination than any isolated record" and could "date back to the purchase of the phone[.]" *Ibid*. Also, there is a "pervasiveness" that "characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day." *Id*. at 395.

Indeed, today electronic devices—with all of their sensitive information—are everywhere. As of mid-2024, "[t]he vast majority of Americans—98%—now own a cellphone of some kind," with 91% of Americans

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

[26] Elizabeth Kinsey Hawley, *Sexting Felonies: A Major Problem for Minors*, Communicating Psych. Sci. (Aug. 2020), https://tinyurl.com/4aszmauh; Sasha Harris-Lovett, *In survey, 88% of U.S. adults said they had sexted and 96% of them endorsed it*, L.A. Times (Aug. 8, 2015), https://tinyurl.com/3cm945sk.

[27] Novotney, *supra* note 25 ("[S]ome [counseling] apps do report that they use a member's IP address to determine their exact location and send police if a therapist is concerned about a member's safety[.]").

owning a smartphone.[28] Americans also own a range of other information devices: Nearly 81% of U.S. adults now own desktop or laptop computers and 64% own tablet computers.[29] And Americans are increasingly online, with 96% of Americans using the internet, likely with some regularity[30]—a point that this Court has no doubt come to appreciate as it has considered the changes in technology that are at the forefront of its consideration in *Free Speech Coalition, Inc.* v. *Paxton*, No. 23-1122 (docketed Apr. 16, 2024; argued Jan. 15, 2025). With the overwhelming majority of Americans connected to an electronic device today, and the vast majority of those electronic devices being connected to the internet, the danger of lowering the hurdle to government search or surveillance of such devices is tremendous.

Because of the ubiquity of electronic devices and the incredible amount of private, personal information they contain, searches of a person's personal electronic devices implicate many of the same privacy concerns as searches of a home. Simply put, searching a person's electronics today is as, if not more, intrusive than searching her home. And diluting protections against warrantless home searches will almost certainly dilute

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

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

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

protections against warrantless searches of electronic devices.

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

Given the historic solicitude for the sanctity and privacy of the home, it seems inevitable that lowering the burden for warrantless home invasion would lower the burdens for warrantless invasion of all other repositories of private information. It would take little effort for law enforcement to use, or abuse, a purported concern for a person's safety to justify tracking them, reading their communications or diaries, or otherwise searching their electronic devices.

For example, lowering the bar for warrantless emergency-aid searches would allow warrantless surveillance even if "there is no claim of criminal liability" and the search is "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973). But this would severely erode the limits on the government's authority to surveil these devices at will. After all, electronic devices can reveal a host of caretaking- or emergency-relevant information about a person's mental, emotional, and physical well-being. Officers thus would be free to argue that the Fourth Amendment excuses mass surveillance to identify and assist all those in need of assistance during a potential emergency. This could spell the end of privacy for many or even most Americans.

Unlike home searches, moreover, the government can perform electronic searches remotely. See Fed. R. Crim. P. 41(b)(6) (allowing judges to "issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information."). Advances in technology thus increase the potential for government abuse. A "government agent in Virginia" may "hack into a website located on a server in Kansas, or even Russia."[31] That same agent could also remotely "verify that the same computer that had been connected at [one] IP address was now connected at" another. *United States* v. *Heckenkamp*, 482 F.3d 1142, 1148 (9th Cir. 2007). And once the government has access to a device, it may easily access everything stored on it.

Worse still, the government can acquire such access through garden-variety, remote hacking, which "has the potential to be far more intrusive than any other surveillance technique[.]"[32] Through hacking, the government can "conduct novel forms of real-time surveillance, by covertly turning on a device's microphone, camera, or GPS-based locator technology, or by capturing continuous screenshots or seeing anything input into and output from the device."[33]

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[31] Jeremy A. Moseley, *The Fourth Amendment and Remote Searches: Balancing the Protection of "The People" with the Remote Investigation of Internet Crimes*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 355, 356 (2005).

[32] *Government Hacking*, Privacy Int'l, https://tinyurl.com/mr2xnyb4 (last visited Feb. 2, 2024).

[33] *Ibid*.

And if the government can hack a device for one purpose, then it very likely has the wherewithal to hack it for any other, and the potential for such surveillance even without emergency is limitless. Whether to learn the "suspect's identity," to "obtain a suspect's [past] communications," or to "intercept future conversations," "[a]s security and privacy technology becomes more prevalent, law enforcement hacking will only become more commonplace."[34]

Imagine, for example, that the police suspected that a person posed a risk to himself or others. Without a probable cause requirement for the emergency-aid exception, the police would be free to conduct a warrantless search of the person's smartphone to evaluate the risk. The police would then be free to browse through the person's search history, text messages, call logs, and photos—all in the name of preventing an emergency. During that search, the police might also stumble across evidence of unrelated illegal activity.

That evidence could then be freely seized and used against the person. After all, another "exception to the warrant requirement is the seizure of evidence in 'plain view.'" *Cady*, 413 U.S. at 452 (Brennan, J., dissenting). This doctrine applies when an officer with "prior justification for an intrusion"—*e.g.*, to respond to an emergency—"inadvertently [comes] across a piece of evidence incriminating" a person. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971). If the police do not violate the Fourth Amendment when they

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

search a home or a phone while acting under a valid warrant exception, then anything illegal they see in that capacity may be used against a person in a criminal prosecution. See, *e.g.*, *Kentucky* v. *King*, 563 U.S. 452, 462-463 (2011) ("law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made").

Seemingly benevolent searches would then become an engine for criminal prosecutions even though no warrant was ever obtained, and no probable cause ever existed. The emergency-aid exception would thus become a license for the government to discover criminal activity that—in all other circumstances—would only have been discoverable through a warrant supported by probable cause. As Justice Jackson famously put it, the government will likely "push to the limit" "any privilege of search and seizure without warrant which [the Court] sustain[s]." *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).[35] A probable cause requirement for any application of the exception would appropriately cabin its use and decrease the likelihood of overreliance or abuse.

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

CONCLUSION

The common law did not casually recognize exceptions that would have allowed the police to enter a person's home without a warrant. This Court should grant review to reiterate that courts are to construe exceptions narrowly and reject any invitation to ease the evidentiary requirements necessary to justify a warrantless search. Only by granting review and rejecting the approach adopted below can the Court continue to ensure that the "privacies of life" that define every person's home—and their electronic devices—are fully protected by the Fourth Amendment's probable cause requirement.

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