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 *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER


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## TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 2

I. *CADY*'S "COMMUNITY CARETAKING" EXCEPTION PERMITS WARRANTLESS SEARCHES ONLY OF VEHICLES, NOT HOMES ..... 2

II. WARRANTLESS HOME SEARCHES PERMITTED BY THE FIFTH AND EIGHTH CIRCUITS CAN BE JUSTIFIED ON OTHER GROUNDS ..... 6

III. THE COURT SHOULD NOT CREATE A NEW EXCEPTION THAT WOULD PERMIT THE WARRANTLESS ENTRY AT ISSUE HERE ..... 11

A. The Exception Recognized By the First Circuit Lacks a Meaningful Limiting Principle ..... 11

B. The First Circuit's Decision Is Likely to Have Adverse Consequences ..... 12

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Cady v. Dombrowski*,
413 U.S. 433 (1973) ..... 2, 4, 5, 6

*California v. Acevedo*,
500 U.S. 565 (1991) ..... 4

*Caniglia v. Strom*,
953 F.3d 112 (1st Cir. 2020) ..... 7

*Cardwell v. Lewis*,
417 U.S. 583 (1974) ..... 4

*Carpenter v. United States*,
585 U.S. __, 138 S. Ct. 2206 (2018) ..... 3, 13

*Florida v. Jardines*,
569 U.S. 1 (2013) ..... 3

*Groh v. Ramirez*,
540 U.S. 551 (2004) ..... 13

*Hester v. United States*,
265 U.S. 57 (1924) ..... 3

*Katz v. United States*,
389 U.S. 347 (1967) ..... 3

*Kentucky v. King*,
563 U.S. 452 (2011) ..... 11

*Mincey v. Arizona*,
437 U.S. 385 (1978) ..... 11

*Payton v. New York*,
445 U.S. 573 (1980) ..... 11

*Ray v. Township of Warren*,
626 F.3d 170 (3d Cir. 2010) ..... 6

*Riley v. California*,
573 U.S. 373 (2014) ..... 12, 13

*Silverman v. United States*,
365 U.S. 505 (1961) ..... 3

*Soldal v. Cook Cty. Ill.*,
506 U.S. 56 (1992) ..... 3

*South Dakota v. Opperman*,
428 U.S. 364 (1976) ..... 4

*Steagald v. United States*,
451 U.S. 204 (1981) ..... 14

*Sutterfield v. City of Milwaukee*,
751 F.3d 542 (7th Cir. 2014) ..... 14

*United States v. Bomengo*,
580 F.2d 173 (5th Cir. 1978) ..... 7

*United States v. Bute*,
43 F.3d 531 (10th Cir. 1994) ..... 6

*United States v. Erickson*,
991 F.2d 529 (9th Cir. 1993) ..... 5, 6

*United States v. Jacobsen*,
466 U.S. 109 (1984) ..... 2, 3

*United States v. Jones*,
565 U.S. 400 (2012) ..... 3, 13

*United States v. Pichany*,
687 F.2d 204 (7th Cir. 1982) ..... 5, 6

*United States v. Smith*,
820 F.3d 356 (8th Cir. 2016) ..... 7, 8, 9, 10

*United States v. Stefonek*,
179 F.3d 1030 (7th Cir. 1999) ..... 13

*United States v. York*,
895 F.2d 1026 (5th Cir. 1990) ..... 7, 8

**CONSTITUTIONAL PROVISION**

U.S. CONST. amend. IV ..... *passim*

## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization headquartered in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

At every opportunity, the Institute will resist the erosion of fundamental civil liberties, which many would ignore in a desire to increase the power and authority of law enforcement. The Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

## SUMMARY OF ARGUMENT

The warrantless searches and seizures to which American colonists had been subjected under English rule were among the driving forces behind enactment of the Bill of Rights in general and the Fourth Amendment in particular. Both as drafted and as applied by the Court, the Fourth Amendment clearly creates a reasonable expectation of privacy in the home. The sacrosanct nature of the home is such

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[1] The parties have consented to the filing of this brief, either by blanket consent filed with the Clerk or individual consent. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

that the circumstances under which warrantless home searches are permitted are few and far between. That explains why one of the few exceptions to the warrant requirement that the Court has previously recognized—the so-called "community caretaking" exception—is expressly limited in scope to vehicles, where the reasonable expectation of privacy is much narrower than in the home.

Or at least it ***was*** so limited. The Fifth and Eighth Circuits, and now the First Circuit, have since applied the community caretaking ***exception*** to permit warrantless searches of the home. If permitted to stand, this application of the exception will swallow the rule. The First Circuit's decision is contrary to both the holding and the rationale of the Court's precedents, particularly *Cady v. Dombrowski*, 413 U.S. 433 (1973). The decision below has no limiting principle, and it is likely to have a number of adverse consequences. The Institute, therefore, respectfully requests that it be reversed.

## ARGUMENT

### I. *CADY*'S "COMMUNITY CARETAKING" EXCEPTION PERMITS WARRANTLESS SEARCHES ONLY OF VEHICLES, NOT HOMES

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." As the Court noted in *United States v. Jacobsen*, "[t]his text protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." 466

U.S. 109, 113 (1984). Searches conducted outside the judicial process without prior approval by a judge or magistrate are per se unreasonable, unless they fall within a recognized exception. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

The expectation of privacy in the home is unquestionably reasonable. The Court has long recognized that, with regard to the protections of the Fourth Amendment, the home is "first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961) (right to be free from unreasonable government intrusion in home is "core" to the Fourth Amendment)); *see also Hester v. United States*, 265 U.S. 57 (1924) (distinguishing "houses" from open fields on the grounds that houses are specifically enumerated in the text of the amendment). Historically, analyses of whether government action was permissible under the Fourth Amendment focused on whether the government obtained information by "intruding on a constitutionally protected area" such as the home. *Carpenter v. United States*, 585 U.S. __, 138 S. Ct. 2206, 2213 (2018) (citing *United States v. Jones*, 565 U.S. 400 (2012)). While the Court has clarified that the protections of the Fourth Amendment are not limited to private spaces, its decisions have not eroded the protections accorded to the home. *See, e.g. Soldal v. Cook Cty. Ill.*, 506 U.S. 56, 64 (1992) ("There was no suggestion that this shift in emphasis [from property to privacy] had snuffed out the previously recognized protection for property under the Fourth Amendment.").

The Court has several times contrasted searches of homes with searches of vehicles for Fourth

Amendment purposes. This distinction has rested on two grounds: (1) the inherent mobility of automobiles, and (2) the diminished expectation of privacy in vehicles relative to the home. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). "'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (citation omitted). *See also California v. Acevedo*, 500 U.S. 565 (1991) (clarifying the scope of the "automobile exception" to the warrant requirement under the Fourth Amendment).

The decision recognizing the caretaking function exception to the warrant requirement is entirely consistent with these precedents. In *Cady v. Dombrowski*, the Court noted that "[t]he constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from 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." 413 U.S. at 442. The Court also noted that, in light of regulation of motor vehicles and police involvement in responding to car trouble or traffic accidents on public streets, local police frequently have occasion to interact with vehicles in situations where there is no claim of criminal liability. These "caretaking"

searches are thus not necessarily prohibited by the warrant requirement. *Id.* at 441. The Court, however, explicitly premised its recognition of an exception to the warrant requirement for caretaking searches on the distinction between vehicles and homes. *Id.* at 447-48 ("The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking 'search' conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained.").

The Third, Seventh, Ninth, and Tenth Circuits have all correctly recognized that the Court explicitly relied on the constitutional distinction between fixed places and vehicles in recognizing a limited exception for caretaking searches conducted outside the home. In *United States v. Pichany*, the Seventh Circuit declined to extend the caretaking exception to a warrantless search of a warehouse, noting that "the most obvious difference is that *Cady* involved the search of an impounded automobile while the present case involves the search of a business warehouse. Accepting the government's argument would require us to ignore express language in the *Cady* decision confining the 'community caretaker' exception to searches involving automobiles." 687 F.2d 204, 208 (7th Cir. 1982). Similarly, in *United States v. Erickson*, the Ninth Circuit declined to extend the caretaking exception to a warrantless search of a home, noting that "*Cady* clearly turned on the 'constitutional difference' between searching a house and searching an automobile." 991 F.2d 529, 532 (9th Cir. 1993). The Tenth Circuit cited the above

reasoning in both *Erickson* and *Pichany* in declining to extend the caretaking exception to a warrantless search of a building. *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994). More recently, the Third Circuit concurred with the Seventh, Ninth, and Tenth Circuits. Consistent with these other circuits, the Third Circuit similarly noted that the decision in *Cady* was "expressly based on the distinction between automobiles and homes for Fourth Amendment purposes." *Ray v. Township of Warren*, 626 F.3d 170, 177 (3d Cir. 2010).[2]

## II. WARRANTLESS HOME SEARCHES PERMITTED BY THE FIFTH AND EIGHTH CIRCUITS CAN BE JUSTIFIED ON OTHER GROUNDS

In contrast, the Fifth, Eighth, and First Circuits have held that the community caretaking exception can justify a warrantless entry into a home. The application of the exception to these cases not only disregards the reasoning underpinning the Court's decision in *Cady* but also unnecessarily muddies legitimate exceptions that apply to the home.

It was in the context of the clear constitutional distinction between vehicles and homes that the Court recognized the community caretaking exception to the warrant requirement of the Fourth Amendment. The Fifth and Eighth Circuits, and now the First Circuit, have expanded the community caretaking exception beyond its intended purpose. In

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[2] That court ultimately found, however, that—in light of the circuit split with regard to the scope of the community caretaking exception—police officers who had entered a residence in reliance on the exception were still entitled to qualified immunity. *Id.*

the process, the Fifth and Eighth Circuits neglected to apply exceptions other than community caretaking that could have justified the warrantless home entries at issue.

The First Circuit accurately pointed out that "[t]hreats to individual and community safety are not confined to the highways." *Caniglia v. Strom*, 953 F.3d 112, 124 (1st Cir. 2020). As shown in *United States v. York*, 895 F.2d 1026 (5th Cir. 1990), and *United States v. Smith*, 820 F.3d 356 (8th Cir. 2016), however, the courts could have, and should have, used other available methods to address those threats rather than expand the scope of the community caretaking exception to the home.

In *United States v. York*, the Fifth Circuit upheld a warrantless entry into a home because the officers were involved in community caretaking. 895 F.2d at 1030. The language in the court's decision regarding events before York "ordered the officers to leave," *id.* at 1028, however, more closely resembled consent than community caretaking. The court explicitly stated that it "need not decide whether Bill [York's house guest] also had the authority to give valid consent for a search of the premises" but it also repeatedly stressed the living situation between York and his house guest as a factor in its decision that no search prohibited by the Fourth Amendment had taken place. *Id.* According to the court, "activities or circumstances within a dwelling may lessen the owner's reasonable expectation of privacy by creating a risk of intrusion that is 'reasonably foreseeable.'" *Id.* at 1029 (quoting *United States v. Bomengo*, 580 F.2d 173 (5th Cir. 1978)).

> In the present case, the actions of the . . . deputies were made reasonably foreseeable when York became intoxicated and belligerent and threatened Bill and his children, whom he had allowed to occupy his home. Had Bill lacked this permitted nexus to the interior of York's home, Bill's reaction to York's abusive treatment probably would not have authorized the deputies to step inside York's home. But because Bill and his children were guests, invited to live for a time in York's home, the threatening actions of York combined with this permitted occupancy to make it reasonable for Bill to enlist the aid of the police in removing from York's premises possessions that were incidents of his family's daily life.

*Id.* The court further reasoned that "[w]hen York invited Bill and his family to share his residence, he necessarily invited the normal incidents of joint occupancy . . . ." *Id.* at 1030.

In *United States v. Smith*, the Eighth Circuit more directly addressed the community caretaking exception as applied to the home. Again, however, the language in the opinion more closely tracked another exception to the warrant requirement of the Fourth Amendment—specifically, exigent circumstances—than community caretaking. In this case, the police received a call from a resident of a halfway house who expressed concern about the safety of another resident, Wallace, and raised the possibility that she was being held against her will by her ex-boyfriend,

Smith. 820 F.3d at 358. The resident informed the police that there was a no-contact order between Wallace and Smith and that Smith was known to use drugs, had a temper, and likely had "weapons." *Id.*

Based on this information, officers went to Smith's home, the same location where one of the officers recently responded to a report of a man discharging firearms outside his home. *Id.*[3] When confronted by the officers, Smith told them that Wallace was not in his home. *Id.* The officers then learned that Wallace was not present at the local jail, hospitals, detox facilities, or similar locations, Smith was heard yelling at Wallace on the phone that day, the other resident of the halfway house who initially contacted the police thought Wallace had gone to Smith's home because some of her personal belongings were there but that she intended to return to the halfway house by 5 p.m., and there were warrants out for Smith's arrest on unrelated charges. *Id.* at 358-59. Although the officers were able to arrest Smith as he took out his garbage, they subsequently noticed someone looking out the back window of Smith's home, at which point they announced themselves and entered the home. *Id.* at 359.

The court explained that the actions of the officers were not a violation of Smith's Fourth Amendment rights because of the community caretaking exception. In its opinion, however, the court emphasized the current danger that Wallace may have faced inside Smith's home as the basis for

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[3] It turned out that the man who allegedly was discharging firearms was the previous owner of the home and not the ex-boyfriend. At the time, however, the officers did not have that information. *Id.*

its decision. "The officers in the present case received a call from a concerned member of the community regarding the safety of another community member. On the scene, the officers learned further details indicating serious concern for Wallace's safety and establishing multiple reasons why she would be at Smith's residence and held against her will or in danger." *Id.* at 361. Despite Smith's arguments that his arrest negated any "emergency situation," the court disagreed, stating:

> [A]s far as the officers reasonably knew at the time, Wallace could have been incapacitated within the residence in any number of ways that would prevent her from emerging from the residence following Smith's arrest. Wallace's lack of response to any calls or messages on her cell phone since leaving the half-way house further suggested that she was unable to respond. The fact that officers saw a face in the window undermined Smith's claim that he was the only person in the home at the time and a reasonable officer on the scene could believe the person seen in the window required their assistance. The justification for the officers' entry arises from their obligation to help those in danger and ensure the safety of the public.

*Id.* at 361-62 (citations omitted). Accordingly, the court concluded that "the officers reasonably believed an emergency situation existed that required their immediate attention in the form of entering Smith's residence to search for Wallace." *Id.* at 362. In other

words, the warrantless entry was justifiable based on the "immediate aid" exception that the Court recognized in *Mincey v. Arizona*, 437 U.S. 385 (1978).

The decisions of the Fifth and Eighth Circuits may have been correct based on the facts and circumstances of the respective cases, but the justification did not need to be—and should not have been—the community caretaking exception.

## III. THE COURT SHOULD NOT CREATE A NEW EXCEPTION THAT WOULD PERMIT THE WARRANTLESS ENTRY AT ISSUE HERE

Consistent with the plain language of the Bill of Rights, the Court has long recognized the home's status as the "archetype" of Fourth Amendment privacy. *Payton v. New York*, 445 U.S. 573, 587 (1980). For more than two hundred years, the Court has recognized just two exceptions to the warrant requirement inside the home: voluntary consent and exigent circumstances that are "so compelling that a warrantless search is objectively reasonable . . . ." *Kentucky v. King*, 563 U.S. 452, 460 (2011). The Court should not create a new, third exception. Unfortunately, this is exactly the effect of the First Circuit's decision.

### A. The Exception Recognized By the First Circuit Lacks a Meaningful Limiting Principle.

The First Circuit's decision threatens to replace the Fourth Amendment's warrant requirement with a reasonableness regime that would balance away the sanctity of the home and fundamentally alter the relationship between the citizenry and the police. Furthermore, the First Circuit's two asserted

"guardrails"—sound police procedure and non-investigatory nature—are illusory. There is no meaningful limiting principle or "clear guidance . . . through categorical rules." *Riley v. California*, 573 U.S. 373, 398 (2014).

For example, in the case at issue, police procedures did not specify any restrictions on the police officers' authority with respect to the caretaking function. In fact, the chief of the local police department, Col. Winquist, "the person who establishes policy for the Cranston Police Department" J.A. 248 at ¶ 11, acknowledged as much. *See* J.A. 249 at ¶16 ("The situation involving Plaintiff was not part of the criminal process. Col. Winquist believes that Cranston Police Department does not have a GO [General Order] which sets forth its limits of authority in situations such as those involving Plaintiff."); J.A. 250 at ¶ 18 ("Col. Winquist does not believe that this GO [GO 320.80 entitled "Civil Procedure"] applies to the situation involving Plaintiff."), at ¶ 19 ("Col. Winquist does not believe that this GO [GO 320.80] limits the authority of the Cranston police to act pursuant to the community caretaking function when there is imminent harm to the public."). Here, there were no "established protocols or fixed criteria" bounding the conduct of the police. Pet. App. 20a. Even assuming there had been, however, there is no guarantee that the resulting police procedure will strike the appropriate balance between the rights of the public and effective policing.

### B. The First Circuit's Decision Is Likely to Have Adverse Consequences.

If the decision below stands, courts may permit a caretaking search "[s]o open-ended" that it "can only

be described as a general warrant . . . ." *United States v. Stefonek*, 179 F.3d 1030, 1033 (7th Cir. 1999) (quoted with approval in *Groh v. Ramirez*, 540 U.S. 551, 563 (2004)). Similarly, if the "archetype" home is no longer protected, then every building or structure is threatened, no matter its location or status, as are its contents. Once a person's home ("first among equals") falls to a caretaking search, the police would have tremendous latitude to conduct a search of the premises, its curtilage, vehicles, and even computers and cell phones. *Cf. Riley*, 573 U.S. at 388. Using individual cell phone data, the government would have no trouble accessing a person's whereabouts for months (or years) at a time. *Cf. Carpenter*, 138 S. Ct. at 2217. Tracking a person's location may reveal "familial, political, professional, religious, and sexual associations," *id.* (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring))—just like rummaging through the home. Furthermore, once inside the home, police officers wearing the nearly ubiquitous body cameras could capture and digitize images, and then "linger" over them indefinitely. As the methods and tools available to police continue to evolve, it is also not difficult to image the application of those methods and tools in the community caretaking context. Rather than have a police officer respond to a call or engage in a search, why not use drone surveillance or gain access to a computer and commandeer the camera and microphone to watch and listen remotely?

Regarding the scope of the search and seizure in the case at issue, the police seized not just the single firearm displayed during the domestic argument, but also searched for and seized the husband's other firearm, the magazines for both

firearms, and the ammunition. Pet. App. 6a, 56a; J.A. 214 at ¶40. Regarding the basis for the wife's concern, the police were under the misapprehension that the firearm caused the wife's trepidation about returning to the house the morning after the argument. In fact, as she testified at her deposition, her worry was that she might find her husband "hanging from the rafters." *Compare* J.A. 207 at ¶ 12 and J.A. 261 at ¶ 63 *with* J.A. 165 ("I was afraid that I was going to find Ed hanging from the rafters, that's what I was worried about."). Under the First Circuit's rationale, had the police more rightly understood the wife's concern, apparently they could have seized all of the rope or other cordage in the house and garage, after conducting a "top-to-bottom" search of the home "as almost any closet, drawer, or container theoretically could contain . . . potential implements of self-harm." *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 568 (7th Cir. 2014). Likewise, if the instrumentality had been a knife, the First Circuit's rationale apparently condones a search for and seizure of every knife or other sharp-edged tool in the house.

In the context of a warrantless search of the home, the virtually unbounded scope of the community caretaking exception poses a "significant potential for abuse." *Steagald v. United States*, 451 U.S. 204, 215 (1981). The Court can and should bring an end to this potential by reversing the decision below.

## CONCLUSION

The decision of the First Circuit should be reversed. It is contrary to the text of the Fourth Amendment and the Court's precedents applying it. The community caretaking exception was limited in

scope to vehicles for reasons that simply do not apply in the case of a warrantless search of a home. The Constitution establishes an orderly, democratic process for amending its provisions. If the Fourth Amendment is to be amended at all, it should be through the democratic process after vigorous public debate—a debate in which the Institute, among others, would oppose the narrowing of civil liberties that the First Circuit has undertaken. Unless and until the Bill of Rights is amended, the lower courts should not be permitted to chip away at its provisions.

Respectfully submitted,

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