Case No. S247235

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioners,

v.

WILLIE OVIEDA,
Respondent,

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B277860
Santa Barbara County Superior Court, Case No. 1476460
(Hon. Jean Dandona)

REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF WILLIE OVIEDA AND AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF REAL PARTY IN INTEREST WILLIE OVIEDA

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Pursuant to California Rule of Court 8.520, the American Civil Liberties Union Foundation of Southern California ("ACLU SoCal") respectfully requests leave to file, as *amicus curiae*, the accompanying brief in support of Defendant-Appellant's Willie M. Ovieda's request that this Court reverse the Court of Appeals. (Cal. Rule Ct. 8.520(f).) ACLU SoCal writes in support of Defendant-Appellant's appeal from the Court of Appeals' ruling in favor of Plaintiff and Respondent.[1]

Counsel for ACLU SoCal acknowledges that such application was due to be filed with the Chief Justice by February 14, 2019, and respectfully requests that the Chief Justice allow the brief to be filed two court days late, on February 19, 2019. Counsel for proposed *amicus* became ill in the course of preparing the attached brief, delaying its drafting in a manner not anticipated. Counsel has also communicated with the Parties about the late filing, and Counsel for both Defendant-Appellant Mr. Ovieda and Plaintiff and Respondent have authorized counsel for proposed *amicus curiae* to represent that neither objects to the instant filing of this brief and that neither objects to the instant late filing, made on February 19, 2018. Counsel therefore respectfully requests that this Court exercise its discretion and allow the instant late filing of the present application to serve as *amicus curiae*.[2]

ACLU SoCal is a civil rights organization dedicated to defending the

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[1] Pursuant to California Rule of Court 8.520(f)(4), proposed *amicus* ACLU SoCal hereby certifies that no Party or counsel for a Party in the pending appeal has (1) authored the attached proposed amicus brief, in whole or in part, nor (2) made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Counsel for proposed *amicus* was unable to complete the attached brief until today, February 19, 2019, and was therefore unable to file the instant application sooner, in light of the requirement that such brief accompany such application. (Cal. Rule Ct. 8.520(f)(5).)

constitutional rights of the most vulnerable, including those accused of criminal offenses, persons deprived of their liberty, and persons with disabilities. Since its founding in 1923, ACLU SoCal has frequently participated in matters before the courts in matters implicating human rights and civil rights and civil liberties. ACLU SoCal therefore has a strong interest in the application of the Constitution to entries into homes and searches or seizures, including those purportedly to aid individuals who are seriously injured or at imminent risk of serious injury, whether or not they are suspected or accused of a criminal offense by the state. *Amicus* has a significant interest in a robust Fourth Amendment and case law that confers an expansive view and heightened protection of the need for the quiet enjoyment of privacy against governmental intrusion *in the home*.

ACLU SoCal has filed *amicus* briefs in a number of cases addressing the proper scope of searches under the Fourth Amendment, including *People v. Macabeo*, 1 Cal. 5th 1206 (2016) (addressing scope of search incident to arrest in connection with search of cell phone); *People v. Buza*, 231 Cal. App. 4th 1446 (2014) *review granted and opinion superseded,* 342 P.3d 415 (Cal. 2015) (regarding constitutionality of requiring arrestees to provide DNA samples); and *United States v. Pool,* 621 F.3d 1213 (9th Cir. 2010) (same); *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010) (addressing constitutionality of employer's search of pager text messages). ACLU SoCal has also represented parties in numerous cases regarding the appropriate scope of police authority to conduct searches in different circumstances, including *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012) (challenge to the FBI's surveillance of mosques in Orange County); *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930 (C.D. Cal. 2009) (suit over warrantless raid-style searches of African American-run barbershops); *Fitzgerald v. City of Los Angeles*, 485 F. Supp. 2d 1137 (C.D. Cal. 2007) (suit targeting unlawful searches and detentions in Skid Row area of Los Angeles); and

United States v. City of Los Angeles, 2001 U.S. Dist. LEXIS 26968 (C.D. Cal. Jan. 4, 2001) (representing community intervenors in consent decree brought by United States Department of Justice, which addressed in part issues around searches).

Amicus seeks to aid the Court by presenting arguments grounded in analysis of U.S. Supreme Court and federal court jurisprudence not presented or adequately addressed by the Parties along with potential practical consequences of a ruling against Defendant-Appellant.

CONCLUSION

For the foregoing reasons, ACLU SoCal respectfully requests that the Chief Justice allow the brief to be filed two court days late, on February 19, 2019.

Dated: February 19, 2019

Respectfully submitted,

By: /s/
Ian M. Kysel

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
Attorneys for Amicus

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INTRODUCTION

I. Introduction

"At the very core of the Fourth Amendment 'stands the right of a [person] to retreat into [their] own home and there be free from unreasonable governmental intrusion." (*Kyllo v. United States*, 533 U.S. 27, 31 (2001) (internal citations and quotations omitted).) As the U.S. Supreme Court has repeatedly recognized, the home bears special protection under the Fourth Amendment, rooted in the text of its guarantee of the "right of the people to be secure in their persons, houses, papers, and effects." (U.S. Const. amend. IV.) The Court has recognized that, where the warrant requirement is concerned, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (*Payton v. New York*, 445 U.S. 573, 590 (1980).) These protections extend to intrusions for all reasons, not just for purposes of criminal investigation. Indeed, the Court has underscored that it would be "anomalous" to view the warrant requirement as "fully protect[ing]" the home "only when [an] individual is suspected of criminal behavior" because "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of [their] home may be broken by official authority. (*Camara v. Mun. Court*, 387 U.S. 523, 530-31 (1967).). The U.S. Supreme Court has jealously guarded this protection and never permitted an exception to the warrant requirement for searches of the home other than in circumstances that constitute exigent or emergency circumstances.

The government asks this Court to change that. It seeks to defend the warrantless search in this case, not under any recognized exception to the warrant requirement for entry into private homes, such as that for emergency aid, but by asking this Court adopt a new justification for warrantless entry of private homes by officers of the state seeking to perform "community

caretaking" functions, such as "assist[ing] those who cannot care for themselves," "resolv[ing] conflict," "creat[ing] and maintain[ing] a feeling of security in the community," "helping stranded motorists," or "returning lost children to anxious parents." (Resp't's Answer Br. on the Merits at 13-14; *People v. Ray*, 21 Cal.4th 464, 467, 471 (1999) (Opinion of Brown J., with Kennard and Baxter concurring).) The rule sought by the government and adopted by the Court of Appeal would fundamentally changes Fourth Amendment protections for the home by, for the first time, allowing police to enter a home without either a warrant or any exigency or emergency.

The new exception urged by the government builds on *dicta* about "community caretaking" from a U.S. Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433 441, 442-443, 447-448 (1973), approving a search of a car – an "effect," rather than a "house" – for the proposition that officers of the state should have such powers to enter into and search and seize within houses. (Resp't's Answer Br. on the Merits at 19-20.).) But *Cady* carefully cabined what has become known as the inventory exception to the warrant requirement, specifically distinguishing between cars and homes and directing that their rationale for permitting searches of *effects* could and should not justify searches of *houses*. (*Cady*, 413 U.S. at 430-442.)

The U.S. Supreme Court has *never* recognized a "community caretaking" justification for a warrantless entry into a home, and has repeatedly affirmed that warrantless entry into and search or seizure within the home is permissible only in "an exigency or emergency" where officers have "an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such [serious] injury." (*Brigham City*, 547 U.S. at 400. *Accord*, *Fisher*, 558 U.S. 45, 47 (2009); *Ryburn v. Huff*, 565 U.S. 469, 474 (2009).) Nor has this Court ever adopted such a rule – while Justice Brown suggested the rationale in an opinion joined by two other Justices in *Ray*, 21 Cal.4th at 467, 471, "community caretaking"

as a basis for warrantless searches of the home has never been adopted by a majority or even plurality of this Court, and should now be rejected as unconstitutional.

The government's rule would work a sea change in Fourth Amendment law by permitting, as a matter of federal constitutional law in this jurisdiction, police to entry into private homes without a warrant and regardless of whether the facts support a reasonable inference a person is at imminent risk of serious injury within. The rule the government seeks would have profound results: allowing searches of homes in response to tens or perhaps hundreds of thousands of 911 calls because officers might view such circumstances as justifying entry, search and seizure as a way to care for the community rather than in response to an exigency or emergency, without a warrant and regardless of whether there is consent. As a further consequence, such a rule is likely to make those experiencing a physical or behavioral health crisis *less* likely to seek aid, for fear that police do view their expectation of privacy in the home as reasonable.

The government's proposal may be well-intentioned. But the U.S. Supreme Court has admonished that the Fourth Amendment must interpreted "so as to prevent stealthy encroachment upon or gradual depreciation of the rights secured by [it], by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers." (*Gouled v. United States*, 255 U.S. 298, 303-304 (1921) (internal citations omitted) *abrogated on other grounds by Warden, Maryland Pennitentiary v. Hayden*, 387 U.S. 294 (1967).) Anything other than a narrow ruling upholding that the warrant requirement applies to home entries absent a true exigency or emergency threatens to, "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." (*Johnson v. United States*, 333 U.S. 10,

17 (1948) (internal quotations and citations omitted).) We strongly urge this Court to reverse the ruling of the Court of Appeals.

II. Statement of Facts and Procedural History

Defendant-Appellant Mr. Ovieda (hereinafter "Mr. Ovieda") makes much of the facts underlying the entry and search of his home and attached garage; the government makes little of them.[1] Though the record is limited, there are a few key facts which, together, demonstrate that the warrantless entry and search at issue here was unconstitutional.

On June 17, 2005, sometime after 8:46 pm, police officers entered Mr. Ovieda's home without a warrant to conduct a search. (Clerk's Transcript (hereinafter "CT") 29.) Officers testified that they made the plan to enter and search his house while Mr. Ovieda and others were still inside and before all witnesses had been interviewed;[2] officers in fact entered and searched only *after* they detained Mr. Ovieda (handcuffing him *after* he *consented* to a search of his person (Reporter's Transcript (hereinafter "RT") 39:2-4)) and *after* all witnesses had exited and been interviewed. (*See, e.g.*, RT 44:22-28; 39:2-6.) No evidence in the record suggests officers ever sought Mr. Ovieda's consent to enter and search his home.[3]

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[1] *Compare* Appellant's Opening Br. at 17-20 *with* Resp't's Answer Br. on the Merits at 10-11.

[2] Officer Corbett, who conducted the search, testified that after Mr. Case emerged from Mr. Ovieda's home but while both Mr. Ovieda and Ms. Woellert were inside the home, he "spoke with other officers on scene . . . and made a plan to conduct a protective sweep and then start to interview people and get Mr. Ovieda secure." (RT 24: 27-25:3.) Note that Officer Corbett also testified that this plan may have been made even before Mr. Case exited the home and was interviewed. (RT 26:24-27:5 ("We got there. We surrounded the house. We made a plan. We spoke with Mr. Case on the phone.").)

[3] *See* CT 66 ("[Mr. Ovieda] was upset that his residence was searched without his permission."). It is not clear what the factual basis of the government's

At trial, officers described the situation as, at least initially, "emotional," "dynamic," and "volatile" (RT 9:2; 13:1-2), and invoked and presented testimony to support three justifications for their warrantless entry and search: First, a desire to render aid to unidentified others; second, a desire to prevent harm to Mr. Ovieda, arising from reports that Mr. Ovieda had expressed suicidal ideation a matter of hours before officers arrived and that he owned weapons that had since been removed from his home, by searching for and seizing his guns; and, third, a desire to investigate illegal activity.

As to the first justification, testimony shows that at the time that police entered Mr. Ovieda's home, every reasonable inference suggested it was unoccupied. Police testified that they knew of the involvement of only five people other than Mr. Ovieda who may have been connected to events leading to the officers' arrival. Police dispatchers determined that the two 911 callers, Mr. Ovieda's brother and sister, were never present at Mr. Ovieda's home during the expression of suicidal ideation. (RT 8:27-28; 41:15-23.) Officers determined that a third person, Mr. Ovieda's roommate and the owner of the home, was in another state. (RT 43:10-26.) Mr. Case and Ms. Woellert, the fourth and fifth, exited the home when asked by officers to do so via telephone. (RT 9: 23-25; 11:1-7.) In light of this, officers concluded that "[they] didn't have any specific information that led [them] to believe somebody else was inside" at the time of entry. (RT 42:28-43:1.) Not a single additional fact was cited by officers to support an inference that there was anyone inside who might have been seriously injured or face an imminent threat of serious injury or indeed might exist and need

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statement that "police were unable to obtain the consent" of Mr. Ovieda. (Resp't's Answer Br. on the Merits at 34 n. 16.). It is not common parlance to suggest that one is unable to obtain content without first making an attempt to do so.

to be cared for at all, but officers specifically described this speculation as motivating the warrantless entry and search.[4]

As to the second justification, preventing harm to Mr. Ovieda, testimony shows that at the time they entered and searched his home, officers had handcuffed Mr. Ovieda and "safely detain[ed]" him in the back of a patrol car. (RT 39:2-6; 51:25.) Before the entry and search, officers also "interviewed" Mr. Ovieda, who told them that he had not made "suicidal comments,"[5] though he was depressed; Mr. Ovieda also told officers that he did not "hav[e] any access to firearms." (RT 39:4-5; 39:7-10; 42:9-13.) Indeed, officers testified that, by that point, they had already interviewed Mr. Case and determined that he had removed Mr. Ovieda's firearms from the

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[4] Testimony by Officer Corbett states that he "conducted what we call a protective sweep to secure the premises to make sure there were no additional parties inside, nobody armed, nobody injured, no one in need of assistance" and did so because "[t]here could be a myriad of things that could occur. For example, there could be a child hiding out of fear, there could be somebody injured, somebody may have been injured by the suicidal subject, could be a domestic situations" and because "we felt duty bound to secure the premises and make sure there were no people inside that were injured or in need of assistance" (RT 11:18-22; 12:2-6; 12:17-24.) However, Officer Corbett also confirmed that he was never given any information from the key witness on the scene, Mr. Case, which could have suggested that there was anyone else in the home. (RT 23:6-8.) Testimony by Officer Garcia states that the "safety search" or "safety sweep" was conducted "to confirm there were no other people, nobody else [sic] was hurt" and that "due to the circumstances, the mention and possibility of live firearms inside, we wanted to confirm no one else was inside hurt or possible waiting to cause anyone harm." (RT 39:26-40:1; 40:26-41:1.) However, as noted, Officer Garcia also testified that, "[officers] didn't have any specific information that led [them] to believe someone else was inside" at the time of entry. (RT 42:28-43:1.)

[5] At some point, officers also learned that Mr. Ovieda had apparently previously attempted to take his own life. (RT 38:15-19.)

home as many as several hours earlier (ending such access).[6] Nothing in the record shows whether officers sought the advice of or requested the presence of behavioral or other health experts on the scene *before* making a warrantless entry of his home – nor, even, that they asked Mr. Ovieda any particular questions about his health.[7] Yet the clear implication is that officers intended to search and did seize Mr. Ovieda's firearms in order to

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[6] The transcript suggests that witnesses on the scene stated to officers that Mr. Ovieda had expressed a desire to access and use the firearms he owned, and may have briefly held a handgun, hours earlier, but that Mr. Case and Ms. Woellert had successfully prevented Mr. Ovieda from having access to such weapons by removing them from the home. Officer Corbett's nearly contemporaneous police report indicated that dispatch had advised officers that "[Mr. Ovieda] had been in possession of a gun, however some friends had taken the gun away[];" but he testified that before entering, he understood that "Mr. Ovieda had been suicidal and . . . was [previously] trying to attempt to access firearms." (RT 9:26-10:3; 20: 16:18.) Officer Garcia testified that he understood on arrival that "the subject who was having the suicidal thoughts or comments had possibly been in possession of a firearm within . . . an hour or two prior to our response," (RT 35:16-20.) but also that he learned on the scene, from Mr. Case, that "Willie [Ovieda] had attempted to grab a firearm," had "made comments to [Mr. Case] that [Mr. Ovieda] wanted to end it as [Mr. Ovieda] tried to grab hold of a firearm" and that Mr. Case and Ms. Woellert had "restrain[ed] [Mr. Ovieda] in order to remove the firearms from his possession" and that Mr. Case and Ms. Woellert had indeed then removed what they believed to be all of the firearms from the house. (RT 37:6-27.). Later, Officer Garcia testified that he understood that "Mr. Ovieda had grabbed a handgun . . . Once he reached for the handgun, Mr. Case and [Ms. Woellert] attempted to take it from him. After they removed that handgun from him . . . Mr. Ovieda then reached into the closet, attempting to grab another firearm which was found to be a rifle, and at that point is when Mr. Case's wife was able to physically detain Mr. Ovieda as Mr. Case removed those firearms that he could find and safely secure them in the [detached] garage." (RT 46:13-24.)

[7] As noted below, at some point officers did seek to have mental health professionals evaluate Mr. Ovieda. (*See infra* FN 10 and accompanying text.)

prevent harm to him.[8] (CT 64 ("The defendant's firearms were removed from the residence due to his suicidal statements.")

As to the third justification, investigating illegal activity, Officer Garcia testified under oath that, "we conducted our investigation and interview with everyone involved, [and] we did it safely to make sure no one [was] . . . involved in any *illegal possession* or use of weapons or firearms."[9] (RT 43:5-9 (emphasis supplied).) There is nothing further in the record examining whether this justification was in fact the predominant one; it is plain that this justification cannot legally support the warrantless entry.

Following their warrantless entry and search, officers discovered contraband that Mr. Ovieda now seeks to suppress. They then arrested Mr. Ovieda pursuant to open misdemeanor warrants. (CT 64.) It is not clear when officers learned about the open warrants or determined that they would take Mr. Ovieda into custody. Mr. Ovieda appears not to have been formally charged for offenses related to the contraband until two days later. (CT 1-3.)

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[8] While the entire Police Report does not appear to be part of the record, the County of Santa Barbara Probation Department Presentencing Report summarizing the Police Report indicates that "[t]he defendant's firearms were removed from the residence due to his suicidal statements." (CT 64.) Trial testimony similarly implies was that officers believed that securing firearms was necessary because Mr. Ovieda had previously expressed suicidal ideation, but officers were not examined about this at trial. Officer Garcia testified that the entry and search was also conducted to confirm "there were no other dangerous weapons or firearms out in the open" (RT 39:28-40:1) because "we did not know if there were any other weapons or firearms that were not found by the friends on scene . . . A safety sweep of the house due to the circumstances was necessary to determine that." (RT 43:2-5.)

[9] The Trial Court expressly "found the officers' testimony credible regarding . . . what they were concerned about" and did not otherwise specifically discuss Officer Garcia's sworn testimony that officers were partially motivated by an interest in investigating suspected illegal conduct. (RT 53.)

At some point, officers contacted Santa Barbara Crisis and Recovery Emergency Services ("CARES"), a mobile crisis response staffed by mental health professionals,10 which evaluated Mr. Ovieda and "determined that [Mr. Ovieda] was not a danger to himself or others." (CT 64.) It is not clear whether officers contacted Santa Barbara CARES as a matter of protocol or affirmatively, based on their investigation. It is also not clear whether this evaluation and determination occurred at Mr. Ovieda's home before officers arrested him or at the Santa Barbara County Jail, where officers later transported him. (CT 64.)

The relevant procedural history is addressed at length in the parties' briefs. (*See* Appellant's Opening Br. at 14-17; Resp't's Answer Br. on the Merits at 11-13.).

ARGUMENT

III. Argument

The rule the government advances, which would permit an entry and search of Mr. Ovieda's home without any specific reason to believe there was anybody in the home who needed aid and when Mr. Ovieda was already detained and without an exigency or emergency. This would create an exception that threatens to eviscerate the Fourth Amendment's warrant requirement. Indeed, the rule proposed by the government could create a precedent squarely at odds with U.S. Supreme Court jurisprudence and the Fourth Amendment in such factual situations for four reasons:

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[10] Santa Barbara County Department of Behavioral Wellness, Behavioral Health Services for Adults https://www.countyofsb.org/behavioral-wellness/adultservices.sbc (last visited Feb. 12, 2019) ("Consolidates intake, mobile crisis response and access to service for mental health and alcohol and drug emergencies. Staffed by mental health professionals, CARES provides crisis support on a 24/7 basis").

First, the Supreme Court has repeatedly and emphatically held that warrantless entries into and searches or seizures in the home are permissible under the Fourth Amendment only in an exigency or emergency. Second, the Supreme Court has refused to extend the "community caretaking" exception, which permits searches of "effects" in specific circumstances, to permit entry into or search or seizure within the home, contrary to the expansive new exception urged by the government (i.e., "[an] objectively reasonable need to act in furtherance of a community caretaking function" (Resp't's Answer Br. on the Merits at 22). Third, any broad ruling by this Court affirming this new non-exigency, non-emergency exception to the Fourth Amendment's protection of the home from warrantless entry, search or seizure would be radically inconsistent with reasonable expectations of privacy in the home and would threaten the protections the Fourth Amendment provides. Finally, no exception to the Fourth Amendment's warrant requirement justifies the entry and search of Mr. Ovieda's home at issue here.[11]

A. The Fourth Amendment Permits Warrantless Entry and Search of a Home for the Purposes of Protection Only Where Exigent or Emergency Circumstances Make it Objectively Reasonably to Provide Emergency Assistance to Someone who is Seriously Injured or to Prevent Imminent Serious Injury Within

The U.S. Supreme Court and this Court have repeatedly affirmed the special protections conferred on the home by the Constitution's Fourth Amendment and continued vitality of the warrant requirement. (*See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth

[11] Because the Parties have extensively litigated and interpreted state law precedent, *amicus* will focus on federal court decisions interpreting the Fourth Amendment.

Amendment stands the right of a [person] to retreat into [their] own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.") (internal citations and quotations omitted); *Riley v. California*, 573 U.S. 373, 402-03 (2014) (applying warrant requirement to searches of cellphones incident to arrest); *People v. Rogers*, 46 Cal. 4th 1136, 1156 (2009) ("Because a warrantless entry into a home to conduct a search and seizure is presumptively unreasonable under the Fourth Amendment, the government bears the burden of establishing that exigent circumstances or another exception to the warrant requirement justified the entry.") (internal citation omitted).).

The rationale for and scope of such protections are not grounded merely in protections against investigations of crime, but rather in an expansive view and heightened protection of the need for the quiet enjoyment of privacy against governmental intrusion *in the home*. (*Payton v. New York*, 445 U.S. 573, 585 (1980) ("[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (internal quotations and citation omitted); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into [their] own home and there be free from unreasonable governmental intrusion."); *People v. Dumas*, 9 Cal.3d 871, 882 (1973) ("The courts have implicitly recognized that [people] require[] some sanctuary in which [their] freedom to escape the intrusions of society is all but absolute. Such places have been held inviolate from warrantless search except in emergencies of overriding magnitude, such as pursuit of a fleeing felon or the necessity of action for the preservation of life or property.") (internal citations omitted).)

The U.S. Supreme Court has held that, because entry into and searches or seizures within a home are presumptively unreasonable, such presumption

can be overcome – and an exception to the warrant requirement allowed – only when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." (*Kentucky v. King*, 563 U.S. 452, 459-60 (2011) (internal quotations and citation omitted). *See also Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) ("We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid . . . But a warrantless search must be strictly circumscribed by the exigencies which justify its initiation.") (internal quotations and citations omitted).) The Court has recognized a limited number of such exigencies that allow warrantless entry into a home, including "to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in "'hot pursuit' of a fleeing suspect." (*Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotations and citations omitted). The exception permitting officers to enter a home in an exigency or emergency to render aid to a seriously injured occupant or protect an occupant from imminent serious injury, is thus one of only a very few paradigmatic exigencies recognizes by the Court. (*King*, 563 U.S. at 460.)[12]

In all the Court's cases, *exigency* remains the common requirement for warrantless entry into a home: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (*Payton*, 445 U.S. at 590. *Accord*, *King*, 563 U.S. at 460 (quoting *Payton*); *Wayne v. United States*, 318

F.2d 205, 212 (D.C. Cir. 1963) ("[T]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency") (Opinion of Burger, J.).) The dramatic expansion the government seeks here – to extend the grounds on which police may enter a home beyond an emergency, to include non-exigent "caretaking" functions – finds no place in the U.S. Supreme Court's cases.

The U.S. Supreme Court has recently considered multiple challenges to warrantless entries into and searches and seizures within homes where officers were motivated by a desire to render aid to or protect others from harm. In these cases, that Court has repeatedly held the Federal Constitution's warrant requirement protects individuals' heightened expectations of privacy in their home by only permitting entry and search or seizure in an exigency or emergency – where there are facts supporting an objectively reasonable inference that such action was necessary to render aid to someone who was seriously injured or to prevent imminent serious injury within the home. Three cornerstone decisions of the U.S. Supreme Court establish the bounds of the exception to the Fourth Amendment's warrant requirement applicable here.

The first clear articulation of the standard for such exception came in 2006. (*Brigham City*, 547 U.S. 398.) In *Brigham City*, officers responded to a call about a loud party and, upon arrival, heard shouting. (*Id.* at 400-01.) Officers made their way onto the curtilage and witnessed an altercation inside a home in which four adults were attempting to forcibly restrain a juvenile who punched one of them in the face hard enough to cause the adult to spit blood into a nearby sink; the adults pressed the juvenile against a refrigerator hard enough that it began to move across the floor. (*Id.*) Officers knocked, announced their presence, entered, cried out and the altercation ceased. (*Id.* at 401.) The Court held that officers may enter without a warrant in such circumstances when they have "an objectively reasonable basis for believing

that an occupant is seriously injured or imminently threatened with such injury." (*Id.* at 400.) The Court rejected the argument that the conduct occurring within the house was not serious enough to justify entry, reasoning that "the officers were confronted with *ongoing* violence occurring *within* the home," and "had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." (*Id.* at 405-06 (emphasis in original).) In so doing, the Court squarely placed its decision within the exigency exception to the warrant requirement, emphasizing, "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." (*Id.* at 403 (internal quotations and citations omitted).)

In *Michigan v. Fisher*, 558 U.S. 45 (2009, the U.S. Supreme Court, *per curiam*, re-affirmed *Brigham City*'s standard for emergency aid, clearly grounding it in the exigency exception to the warrant requirement. For example, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." (Id. at 47.) *Brigham City* identified one such exigency: "the need to assist persons who are seriously injured or threatened with such injury." (*Id.* at 47 (*citing Brigham City*, 547 U.S. at 403 and *Mincey*, 437 U.S. at 393-94).) Thus, law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." (*Id.* at 47 (*citing Brigham City*, 547 U.S. at 403 and *Mincey*, 437 U.S. at 393-94).) The *Fisher* Court considered a warrantless entry by officers responding to a compliant about a disturbance and finding "considerable chaos": a damaged pickup truck and fence posts in the yard, three broken windows, and blood visible on clothes inside the truck, the hood of the truck and the door to the house, inside of which Mr. Fisher was screaming and throwing things, with a bleeding wound on his

hand. (*Id.* at 45-46.) Mr. Fisher refused to answer the door; the Court noted that in those circumstances the officers had no way of knowing whether Mr. Fisher was alone. (*Id.* at 46, 48 ("[I]t would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child").) The Court upheld the search, describing it as "[a] straightforward application of the emergency aid exception, as in *Brigham* City." (*Id.* at 48.) The Court explained its decision not in terms of allowing entry without exigency, but in terms of the degree of certainty officers must have that an emergency exists before entering, concluding, "[o]fficers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception." (*Id.* at 49.)

Finally, in *Ryburn v. Huff*, 565 U.S. 469 (2012) (*per curiam*), the U.S. Supreme Court again affirmed the limited scope of this exception, granting officers qualified immunity on grounds that, "[a] reasonable police officer could read these decisions [including *Brigham City*] to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence." (*Id.* at 474.) In *Huff*, officers were investigating school officials' reports of a threat by a student to "shoot up" the school. (*Id.* at 470.) The District Court granted officers qualified immunity, holding that the information about threats obtained by the school, combined with the Huffs' evasive behavior at the home and Ms. Huff "r[unning] back into the house while being questioned . . . led the officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger," a belief the trial court concluded was "objectively reasonable." (*Id.* at 474-75.) The U.S. Supreme Court upheld the District Court's decision, holding that, "reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing

that violence was imminent," and that, based on the "rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners' belief that entry was necessary to avoid injury to themselves or others was eminently reasonable." (*Id.* at 477.) The *Huff* Court squarely placed its justification for warrantless entry into the home within the exigency rule of *Brigham City*, citing that case for the principle that, "'[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" (*Id.* at 474, quoting *Brigham City*, 547 U.S. at 403.) The federal courts of appeal have similarly limited warrantless entry to the home to exigencies or emergencies. The Ninth Circuit has affirmed that entries and searches of homes motivated by concern for others must be evaluated by this standard. (*See, e.g., United States v. Snipe, 515* F.3d 947, 949, 952 (9th Cir 2008) (overruling earlier circuit precedent in light of *Brigham City* and setting out a new test for "determining whether the emergency doctrine applies," whether: "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need."). The Seventh Circuit has likewise carefully considered the issue and applied *Brigham City.* (*See Sutterfield v. City of Milwaukee*, 751 F.3d 542, 553-566 (7th Cir. 2014) ("For the reasons that follow, we believe that the entry into Sutterfield's home was justified by the emergency aid doctrine, which the Supreme Court has deemed a subset of the exigent circumstances doctrine).)[13] The Tenth Circuit has repeatedly affirmed the

[13] As the government notes, the *Sutterfield* court wrestled with the application of the community caretaker doctrine to an entry to detain a person whose doctor had contacted the police to request an emergency detention in order

Brigham City line of cases. (*McInerney v. King*, 791 F.3d 1224, 1231 (10th Cir. 2015) (affirming *Brigham City* and also stating that the "emergency aid exigency exception . . . was informed by the practical recognition of critical police functions quite apart from or only tangential to a criminal investigation") (citation omitted);[14] *United States v. Martinez*, 643 F.3d 1292 (10th Cir. 2011) ("The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid – such a 'possibility' is ever present.").)

Thus the U.S. Supreme Court in *Brigham City, Fisher*, and *Huff*, along with circuit courts following those cases, have allowed warrantless entry into and search or seizure within the home only where officers had "an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such [serious] injury," and all explain the standard as a part of the exception to the warrant requirement for "an exigency or emergency." (*Brigham City*, 547 U.S. at 400, 403. *Accord*, *Fisher*, 558 U.S. at 47 ("Brigham City identified one [] exigency [permitting warrantless search]": the need to assist persons who are seriously injured or threatened with such injury. Thus, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.") (internal citations and quotations omitted); *Huff*, 565 U.S. at 474 ("In Brigham City, we held

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to protect them (Ms. Sutterfield) from self-harm, but declines to apply the community caretaking doctrine to resolve the case. *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 551 (7th Cir. 2014).

[14] Cases like *McInerney* demonstrate that much of the justification the government cites in support of a proposed sharp diminution of the scope of the warrant requirement – the practical reality that officers of the state engage in conduct other than investigating crime – at most supports for the power granted under the emergency aid exception to make a warrantless entry under the exigency standard set out in *Brigham City* and its progeny.

that officers may enter a residence without a warrant when they have an objectively reasonable basis for believing that an occupant is imminently threatened with serious injury.") (internal citations and quotations omitted).) In none of these decisions did the U.S. Supreme Court invoke a broad "community caretaking" rationale for warrantless entry that would extend to non-exigent, non-emergency circumstances, as the government urges this Court to do here.

B. The "Community Caretaking" Doctrine Should Not Be Dramatically Expanded to Justify Non-Exigent Warrantless Entry into the Home

The U.S. Constitution recognizes no free-floating "community caretaking" exception to the Fourth Amendment that allows police to enter homes without a warrant whenever they can point to an "objectively reasonable need to act in furtherance of a community caretaking function." (*Cf.* Resp't's Answer Br. on the Merits at 22 (internal quotations omitted).) While the U.S. Supreme Court has of course recognized that officers of the state play an important community caretaking role (and even that this role can affect when a search or seizure of an "effect" is reasonable), the Court has never extended the "community caretaking" doctrine to allow police officers' good intentions to justify intrusion into a home without either a warrant or a legitimate exigency or emergency.

In 1973, the U.S. Supreme Court decided *Cady v. Dombrowski*, 413 U.S. 433 (1973), blessing a warrantless search of the trunk of a vehicle that had been towed for the police to a private service station after an accident – because the car's owner was a police officer in another jurisdiction whose service revolver was reasonably believed to be present within and vulnerable to intrusion by vandals. (*Id.* at 446-48.) *Cady* contains *dicta* justifying its decision by reference to the fact that *local* police officers (only recently regulated by the Federal Fourth Amendment as incorporated against the

states in *Mapp v. Ohio*, 367 U.S. 643 (1961)), "frequently . . . engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." (*Cady*, 413 U.S. at 441.) But *Cady* took great pains to distinguish the Fourth Amendment's application to cars, as "effects," as fundamentally different from its application to homes. (*Id.* at 440-42.) Among other things, the Court pointed to the fact 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." (*Id.* at 441-42 (discussing the extensive regulation of motor vehicles and traffic and the frequency with which a vehicle can become disabled or involved in an accident).) Contrary to the government's bald assertion that, "[t]here is no logical basis for distinguishing homes from automobiles for purposes of determining the appropriate standard of reasonableness to govern noncriminal searches" (Resp't's Answer Br. on the Merits at 24), the *Cady* Court emphasized precisely that distinction in order to make clear that what has come to be known as the "inventory exception" does not and could not be reasonably applied to home entries, searches or seizures – in other words, to prevent the expansion of its rule in the manner the government now seeks. (*Id.* at 439-40 ("[F]or the purposes of the Fourth Amendment there is a constitutional difference between houses and cars . . . stated in different language . . . whether a search and seizure [of a car] is unreasonable within the meaning of the Fourth Amendment . . . might be the *opposite* in a search of a home . . . ") (internal quotations and citations omitted) (emphasis supplied). *See also Colorado v. Bertine*, 479 U.S. 367, 372, 374, 381 (1987) (discussing "police caretaking procedures designed to

secure and protect vehicles and their contents within police custody" and recognizing what has come to be called the "inventory exception" to the Fourth Amendment while citing *Cady's* community caretaking *dicta* in a discussion about the necessity to ensure that it remains a "narrow exception.").

In the years between *Cady* (1973) and *Brigham City* (2006), state and lower federal courts wrestled with whether the activity of non-investigatory "community caretaking" performed by police should broaden the circumstances under which officers should be permitted to conduct a warrantless entry into a home when they seek to care for others. In 1999, in *People v. Ray*, 21 Cal.4th 464 (1999), Justice Brown, writing an opinion for herself and two other Justices of the California Supreme Court, proposed that the, "assistance role of law enforcement" would "go downhill" if officers were required to seek a warrant "to discharge community caretaking functions" and thus had to tell "concerned citizens," that in the absence of such a warrant "[w]e can't help you.'" (*Id.* at 480 (internal quotations and citation omitted) (Opinion of Brown J., with Kennard and Baxter concurring)) These three Justices proposed that any exception permitting officers to render aid in an exigency or emergency be viewed instead as a subset of a broader "community caretaking exception" that would permit entry into and search and seizure within homes whenever "a prudent and reasonable officer [] perceived a need to act in the proper discharge of his or her community caretaking function[]." (*Id.* at 476-477.) But although the government repeatedly refers to Justice Brown's opinion as the "lead opinion" in *Ray* (presumably because it appears first in the reporter), its view did not gain the support of a plurality of this Court, much less a majority.[15]

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[15] The government acknowledges that the opinion is neither binding nor precedential. (Resp't's Answer Br. on the Merits at 16, 16 n. 6.)

The case resolved because another three Justices concurred in the result on grounds that the facts supported entry on an exigency/emergency theory closer to the later ruling of *Brigham City*. (*Id.* at 480-82 (Opinion of George, CJ., with Werdegar and Chin concurring in the result but not the reasoning.).) Despite repeated efforts by the government to urge this Court to adopt the expansive rule outlined in the one three-Justice opinion in *Ray*, 21 Cal. 4th 464, this Court has declined to confer such a broad power on officers of the state.[16]

Other state and federal courts have also considered the role of police in caring for the community in cases delimiting the scope of the Fourth Amendment, including in cases decided both before and after *Brigham City*. While some of these cases mention community caretaking of officers, the overwhelming bulk of the jurisprudence permits searches of home for the purpose only when they also occur in the context of an emergency or exigency. The government, for example, quotes Professor LaFave at length for what it portrays as a "catalog[]" of the proposition that "courts [that] have upheld the reasonableness of community caretaking entries into private areas

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[16] *See, e.g.*, *People v. Troyer*, 51 Cal. 4th 599, 606 (2011) (citing Justice Brown's decision in *Ray*, 21 Cal. 4th 464, but only for the proposition that the emergency aid exception permits officers to enter "when someone is in need of immediate aid."); *People v. Panah*, 35 Cal. 4th 395, 465-66, 466 n. 24 (2005) (evaluating the case under the exigent circumstances exception while noting, "[t]he [government] argues the first search was also justified by the community caretaker exception to the Fourth Amendment warrant requirement but, as we conclude the exigent circumstances doctrine applies, we need not reach this issue." (internal citation to *People v. Ray* omitted); *People v. Camacho*, 23 Cal.4th 824, 837 n. 4 (2000) (holding that police violated the Fourth Amendment when they peered into Camacho's home but "declin[ing] to reach [the government's] contention the search was lawful because it occurred in the context of the police officers' community caretaking function . . . " (internal quotations and citation to *People v. Ray* omitted.)).

in a wide variety of circumstances." (Resp't's Answer Br. on the Merits at 16, citing 3 LaFave, Search and Seizure § 6.6(a) (5th ed. 2017).) But the government seriously mischaracterizes LaFave. First, the "catalog" to which they point consists mainly of cases that invoked exigency, not non-exigent "community caretaking" as the government suggests, as the basis for entry by police to provide aid. Second, the government ignores LaFave's discussion of precisely this issue and its observation that searches of the home have been grounded in exigency, not mere "community caretaking":

> [T]he question is sometimes put in terms of whether the 'community caretaking function' recognized in *Cady v. Dombrowski* . . . is involved. Because the case stressed the distinctions between motor vehicles and dwelling places, it is commonly responded that the *Cady* doctrine is limited to vehicles. But, as discussed herein, that has not stopped courts from recognizing that reasons similar to those discussed in *Cady* can sometimes provide sufficient grounds for a warrantless search of premises. These latter cases do not simply rely on the community caretaking doctrine established in *Cady*, but instead apply what appears to be a modified exigent circumstances test, with perhaps a lower threshold if the officer was acting in a community caretaking role.

(3 LaFave, SEARCH AND SEIZURE § 6.6 n 4 (internal quotations and citations omitted).) Professor LaFave commends the decision on this point by the New Jersey Supreme Court in *State v. Vargas*, 63 A.3d 175 (N.J. 2013) (not cited by the government), which held:

> Neither *Cady* nor its United States Supreme Court progeny even remotely suggests that the community-caretaking doctrine was intended as an independent basis for a warrantless entry and search of a home. We reject the State's position that

> the community-caretaking doctrine, standing alone and in the absence of some form of exigent circumstances, allows the police to conduct warrantless searches of homes. To accept the State's argument would render the emergency-aid doctrine obsolete and undermine the heightened protections afforded to the home under our Federal and State Constitutions.

(*Id.*, at 189.)

Perhaps unsurprisingly, though not acknowledged by the government in their search for a new and broad exception, all but one of the cases cited by LaFave, and cited and discussed by the government address the presence of exigent or emergency circumstances even while discussing the community caretaking role of officers involved. (*See* Resp't's Answer Br. on the Merits at 16-17; *People v. Slaughter*, 803 N.W. 2d 171, 174 (Mich. 2011) ("We conclude that the community caretaking exception applies to firefighters no less than to police officers *when they are responding to emergency situations that threaten life or property.*") (emphasis supplied)); *State v. Deneui*, 775 N.W.2d 221, 244 n. 18 (S.D. 2009) (upholding a search on community caretaking grounds, while pointing to exigency justifying the entry: "[o]f course they could have obtained a search warrant, but that entirely ignores the reason they entered the home without a warrant: to ensure that no one was in imminent danger from toxic fumes. Had there been anyone still inside, securing the home and waiting for a search warrant may have been too late for the occupants."); *State v. Pinkard*, 785 N.W.2d 592, 606 (Wis. 2010) (upholding a search and finding that "[t]he officers believed that the occupants of Pinkard's residence were in danger of death or physical harm.").) Of the cases cited, only the Court of Special Appeals of Maryland has applied a "community caretaking" rationale without specifically viewing the facts as constituting an exigent or emergency circumstance (though describing the case, involving a suspected ongoing burglary or breaking and

entry, as one in which, "the police enter a home or other structure in order to come to the aid of a possibly injured or threatened owner or to protect the property of that owner."). (*State v, Alexander*, 721 A.2d s58, 269, 276-281, 277 n. 2 (Md. Ct. Spec. App. 1998).)

The government cites to the Sixth Circuit and Eighth Circuit as representing a jurisprudential trend within the federal courts purportedly supporting the unprecedented expansion they seek. (See Resp't's Answer Br. on the Merits at 17.) This too is misleading. The Sixth Circuit held in 1996 – well before *Brigham City* – that "the governmental interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighborhood is sufficiently compelling to justify warrantless intrusions under some circumstances," upholding such entry as required by the "new exigency" reflected by officers responding to a loud noise complaint reiterated by "four [to] eight pajama-clad neighbors" when officers could see several stereo speakers in plain view from outside the house. (*United States v. Rohrig*, 98 F.3d 1506, 1509, 1519, 1521-22 (6th Cir. 1996) (citing the *Cady* dicta on community caretaking and noting that the Fourth Amendment analysis of exigency and the government's interest related to the entry, "has less relevance as one moves away from the the traditional law enforcement functions and toward what the Supreme Court has referred to as 'community caretaking functions'").) While *Rohrig* is perhaps the high-water mark of community caretaking principles applied to home searches, the Sixth Circuit has since read this precedent extremely narrowly in light of *Brigham City,* and has characterized *Rohirg* as a case justified on the basis of exigency. (*See United States v. Washington*, 573 F.3d 279, 285-89 (6th Cir. 2009) (discussing *Brigham City* and, while not overruling *Rohrig*, describing it as one of only a few types of permitted warrantless entries recognized in, "circumstances in which [] exigenc[ies] exist," and, further declining to permit a warrantless home entry "under []

circumstances, which were not urgent or life-threatening"). Most recently, the Sixth Circuit has emphasized the distinction between cars and the "significant privacy interests in the home" in the context of community caretaking entry of a car, suggesting little room for the survival of a broad community caretaking exception in that Circuit. (*United States v. Lewis*, 869 F.3d 460, 463-64 (6th Cir. 2017) (approving a warrantless community caretaker entry to a car to come to a person's aid in a WalMart parking lot).)

The government also points to the Eighth Circuit, which has cited the community caretaking rationales under *Cady* in upholding searches of homes without a warrant only three times – in a 2006 opinion decided weeks prior to *Brigham City* and two others following the first without citing the *Brigham City* standard. (*United States v. Quezada*, 448 F.3d 1005, 1008 (8th Cir. 2006); *United States v. Brandwein*, 796 F.3d 980 (8th Cir. 2015); *United States v. Smith*, 820 F. 3d 356, 361 (8th Cir. 2016).) Two of the opinions, in the same breath as they invoked community caretaking, stressed that officers were responding to emergency circumstances. (*See Smith*, 820 F. 3d at 361 ("We are satisfied that the officers acted in their community caretaking function when they entered Smith's residence. The circumstances resemble those in [*United States v.*] *Harris[*, 747 F.3d 1013 (8th Cir. 2014) and *Quezada,* in which officers responded to potential emergency situations to aid members of the community."); *Quezada*, 448 F.3d at 1008 ("[W]e do not have to decide the legal relevance, if any, [of the] subjective intent of the officer . . . because the district court found on an ample record that Deputy Ruth entered the apartment to investigate a possible emergency situation.").) The third directly declines to decide whether "community caretaking" could alone justify the warrantless entry. (*Brandwein*, 796 F.3d 984 ("[W]e find it unnecessary to resolve whether community caretaking justified the entry.").) Certainly, neither *Quezada* nor *Brandwein* nor *Smith* hold what the government asks here, that community caretaking doctrine extends far

beyond *Brigham City* to allow the warrantless search of a home even where there is no exigency or emergency.

Other federal courts of appeals, including the Ninth Circuit, have flatly declined to extend *Cady*'s community caretaking rationale to home searches. (*See, e.g.*, *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993) ("The fact that a police officer is performing a community caretaking function, however, cannot itself justify a warrantless search of a private residence."); *Ray v. Twp. of Warren*, 626 F.3d 170, 77 (3d Cir. 2010) ("The community caretaking doctrine cannot be used to justify warrantless searches of a home"); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) ("[T]he community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches"); *United States v. Pichany*, 687 F.2d 204, 205 (7th Cir. 1982) (holding that the community caretaking exception does not extend to the search of an unlocked warehouse during a burglary investigation).

> In addition, the government asserts it would be "mistaken" to view the U.S. Supreme Court as having impliedly rejected a standard that permits warrantless community caretaking entries in non-exigent, non-emergency circumstances. (Resp't's Answer Br. on the Merits at 29.) But this assertion is at odds with the cases. The U.S. Supreme Court, together with the weight of lower court jurisprudence, have foreclosed non-exigent, non-emergency, warrantless searches of the home under a community caretaking rule.

First, as set forth above, **Part III.A**, the U.S. Supreme Court in *Brigham City*, *Fisher*, and *Huff* consistently justified warrantless entry into homes based on "an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such [serious] injury;" further, each explain this standard as part of the exception to the warrant requirement requiring "an exigency or emergency." (*Brigham City*,

547 U.S. at 400, 403.) The Court has never invoked any broad "community caretaking" exception to the Fourth Amendment's warrant requirement to permit entries to the home to protect welfare in non-exigent circumstances. Indeed, none of the three cases even cited to *Cady*'s *dicta* regarding the "community caretaking" function of officers of the state.

Second, a number of *Brigham City amici*[17] urged the U.S. Supreme Court to affirm that the ability to render emergency aid in a home without a warrant was derived from the community caretaker function of police. (*See, e.g.*, Brief of Amicus Curiae States of Michigan, Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Maryland, Montana, Nebraska, North Dakota, Oregon, Pennsylvania, Vermont, Washington, Wyoming, Scott County, Minnesota and Wayne County, Michigan in *Brigham City v. Stuart*, No. 05-502, 2006 U.S. S. Ct. Briefs LEXIS 299, at * 15-26 (Feb. 21, 2006).) One *amicus* devoted an entire section of their brief to the community caretaking exception, both arguing that the Court should anchor its decision in the *Cady dicta* and that it should draw from Justice Brown and two other Justices of *this* Court's reasoning in *People v. Ray*, 21 Cal. 4th at 472-73, extending such an exception to "circumstances short of a perceived emergency." (Brief of Amicus Curiae of Americans for Effective Law Enforcement, Inc. et al. in *Brigham City v. Stuart*, No. 05-502, 2006 U.S. S. Ct. Briefs LEXIS 248, at * 14-17 (Feb. 8 2006).) On the other side, *Brigham City Amicus* the United States Solicitor General, while recognizing that police, "routinely perform community caretaking and public safety functions," urged the Court to reject the approach of the courts (with a citation to the expansive three-justice opinion in *People v. Ray* relied on by the government here) which had held that entry can be justified by the

[17] Note that because both *Fisher* and *Huff* were disposed of *per curiam*, there are not such extensive *amicus* positions to evaluate.

"predominant subjective purpose [of] the provision of emergency aid" because such approach, "had generated disarray in the case law" and "confusion for officers." (Brief for the United States as Amicus Curiae in City of Brigham v. Stuart, No. 05-502, 2006 U.S. S. Ct. Briefs LEXIS 273, at * 17, 21-22, 22 n. 7 (2006).) Instead, the Solicitor General urged the Court to, "adopt instead an objective inquiry into the reasonableness of emergency entries to protect lives and safety" because such an approach "better conforms with the Constitution's textual command of reasonableness, more closely hews to this Court's precedent, will bring needed coherence to the law, and will make the boundaries of the exception more comprehensible and reliable for officers on the ground confronting situations filled with confusion and ambiguity." (*Id.* at * 23-24 (citation omitted).)

The U.S. Supreme Court, of course, declined the invitation by some *amici* to extend the "community caretaking" doctrine to a broad category searches of the home made with such purpose, regardless of exigency or emergency, and accepted that of *amici* like the United States Solicitor General, anchoring its *Brigham City* rule in its longstanding treatment of exigencies and emergencies and crafting the narrow rule described above. In short, the Fourth Amendment rule of the Court of Appeal below and that advanced by the government is inconsistent with the weight of the jurisprudence, including because it has already been considered and rejected by the U.S. Supreme Court.

C. Expanding Generalized "Community Caretaking" Principles to Allow Warrantless Entry into Private Homes in Non-Exigent, Non-Emergency Circumstances Would Significantly Erode Californians' Privacy and Risk Deterring Those in a Physical or Behavioral Health Crisis From Seeking Aid

The government justifies its request for a dramatic expansion of the grounds for warrantless entry into private homes by repeatedly invoking the

idea of helpful officers of the state providing assistance to the community – but the government ignores the extraordinary and harmful impact such a rule would have. Not only would the government's new exception negate a core purpose of the Fourth Amendment, it would also create a disincentive to call 911 for help when people are in a physical or behavioral health crisis.

First, given the volume of 911 calls in this state, hundreds of thousands of Californians could face entries to their home or searches and seizures if a rule encouraged officers to engage in "assistance" entries any time they were responding to a report involving purported suicidal ideation, potentially assaultive behavior or suspected firearm possession. Second, fear about the likelihood of warrantless home entries would deter those in physical or behavioral health crisis from calling authorities for assistance. These consequences weigh strongly against this Court adopting any expansive exception practically limiting the privacy protections Californian's enjoy in their homes under the U.S. Constitution's Fourth Amendment.

a. The Millions of Californians who Call 911 Each Year Should Not Fear That Officers of the State Will Enter Their Home Simply Because They Call 911

The government stresses that the officers in this case considered the situation "'emotional,' 'dynamic,' and 'volatile.'" (Resp't's Answering Br. at 11.) But that is likely true of most emergency calls, and illustrates the sweeping impact of the rule the government seeks. In recent years, Californians have dialed 911 to ask for help millions of times. The most recent data from just four of the largest jurisdictions from which data is available for only the last three years shows over *seven million* 911 calls:

	Los Angeles[18]	San Diego[19]	San Francisco[20]	Sacramento[21]
2016	1.02 million	586,703		332,512
2017	1.05 million	365,087		327,590
2018	1.11 million			315,075
2016-present	~3.18 million	~0.95 million	~2.28 million	~0.98 million

Doubtless, many if not the vast majority of these millions of 911 calls involved an emotional, dynamic or volatile situation. In San Francisco, as many as eighty percent of calls for service are for people who are in crisis. (CBS KPIX, San Francisco Police Trained to De-Escalate Violence in Encounters with Mentally Ill Suspects (February 12, 2016) https://sanfrancisco.cbslocal.com/2016/02/12/sfpd-training-mentally-ill-confrontations/.) In Los Angeles, the state's largest city, 911 call data shows

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[18] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2016-2018),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019).

[19] City of San Diego, Data SD, *Police Calls for Service (results for 2016-2018),* https://data.sandiego.gov/datasets/police-calls-for-service/ (last accessed February 12, 2019). (2017 data may be partial year).

[20] City and County of San Francisco, DataSF, *Police Department Calls for Service (results for 2016-2018),* https://data.sfgov.org/Public-Safety/Police-Department-Calls-for-Service/hz9m-tj6z (last accessed February 12, 2019) (showing data from March 31, 2016 to the present).

[21] City of Sacramento, Sacramento Open Data, *Sacramento Dispatch Data (results for 2016-2018)* http://data.cityofsacramento.org/datasets/396e0bc72dcd4b038206f4a7239792bb_0?geometry=-122.472%2C38.394%2C-120.908%2C38.77 (last accessed February 12, 2019).

that (again, in just the last three years) the Los Angeles Police Department responded to hundreds of thousands of 911 calls involving reports of purported suicidal ideation or actions,[22] potentially assaultive behavior, including domestic, family or intimate partner violence, or alleged use or possession of firearms.[23]

	Los Angeles[24]	911 Calls likely involving suicidal ideation or actions	911 Calls likely involving assaultive behavior, including domestic violence	911 calls likely involving firearms

[22] Four percent of adults age 18 and older in the United States had thoughts about suicide in 2016, and 0.5 percent attempted suicide. (National Institute of Mental Health, Suicide, at https://www.nimh.nih.gov/health/statistics/suicide.shtml.)

[23] *Amicus* recognizes that not all of these 911 calls would have required officers to respond to a home. However, the rule urged by the government – permitting assistance entries of houses, once officers satisfy a low community caretaking threshold – would cover home entries even when the person at risk is outside the home (Resp't's Answer Br. on the Merits at 29), suggesting that in many cases, officers of the state might claim the power to make an assistance home entry regardless of where the 911 emergency is reported to have occurred.

[24]City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2016-2018),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019)

2016	1.02 million	6,743[25]	54,156[26]	13,575[27]

[25] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2016),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019) (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following: "AMB SUICIDE" "ATT SUICIDE" "POSS AMB ATT SUICIDE" "POSS AMB SUICIDE" "POSS ATT SUICIDE" "POSS SUICIDE" "SUICIDE")

[26] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2016),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019) (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following "AMB ATT J/O" "AMB DOM VIOL" "AMB DOM VIOL J/O" "ASSAULTING" "ATTACK" "BATTERY" "CZN HLDG DOM VIOL" "DOM VIOL" "DOM VIOL IN PROGRESS" "DOM VIOL J/O" "DOM VIOL R/O" "FIGHT" "MAN ASSLTG WMN" "POSS AMB DOM VIOL" "POSS DOM VIOL I/P")

[27] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2016),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019) (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following, "ADW" "ADW POSS DOM VIOL" "AMB SHOTS FIRED" "AMB SHOTS FIRED J/O" "GANG ACT SHOTS FIRED" "GROUP SHOTS FIRED" "GROUP W/ GUN" "GRP POSS GUN" "GRP POSS GUN SHOTS FIRED" "GUN" "I/P SHOTS FIRED" "J/O SHOTS FIRED" "JUV GRP SHOTS FIRED" "JUV GRP W/ GUN" "JUV W/ GUN" "MAJ GRP POSS SHOTS F" " MAJ GRP SHOTS FIRED" "MAJ GRP W/ GUN" "MAN POSS GUN" "MAN SHOTS FIRED" "MAN W/ GUN" "MAN W/ GUN SHOTS FIRE" "POSS SHOTS FIRED J/O" "SHOTS FIRED" "SHOTS FIRED I/P" "SHOTS FIRED INVEST" "SHOTS FIRED J/O" "SUSP NOW SHOTS FIRED" "SUSP SHOTS FIRED J/L" "WMN POSS GUN" "WMN SHOTS FIRED" "WMN W/ GUN" "WOMAN W/ GUN SHOTS FI")

2017	1.05 million	11,627[28]	50,597[29]	8,853[30]

[28] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2017),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019) (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following: "AMB SUICIDE" "ATT SUICIDE" "AMB ATT SUICIDE" "POSS AMB ATT SUICIDE" "POSS AMB SUICIDE" "POSS ATT SUICIDE" "POSS SUICIDE" "SUICIDE")

[29] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2017),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019 (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following "AMB ATT J/O" "AMB DOM VIOL" "AMB DOM VIOL J/O" "ASSAULTING" "ATTACK" "BATTERY" "DOM VIOL" "DOM VIOL I/P" "DOM VIOL IN PROGRESS" "DOM VIOL J/O" "DOM VIOL R/O" "FIGHT" "MAN ASSLTG WMN" "POSS AMB DOM VIOL" "POSS DOM VIOL I/P")

[30] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2017),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019 (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following, "ADW" "ADW POSS DOM VIOL" "AMB SHOTS FIRED" "GANG ACT GUN" "GANG ACT SHOTS FIRED" "GROUP SHOTS FIRED" "GROUP W/ GUN" "GRP POSS GUN" "GRP POSS SHOTS FIRED" "GUN" "I/P SHOTS FIRED" "J/O SHOTS FIRED" "JUV GRP SHOTS FIRED" "JUV GRP W/ GUN" "JUV W/ GUN" "MAJ GRP W/ GUN" "MAN POSS GUN" "MAN SHOTS FIRED" "MAN W/ GUN" "MAN W/ GUN SHOTS FIRE" "POSS SHOTS FIRED J/O" "SHOTS FIRED" "SHOTS FIRED I/P" "SHOTS FIRED INVEST" "SHOTS FIRED J/O" "SUSP NOW SHOTS FIRED" "SUSP SHOTS FIRED J/L" "WMN POSS GUN" "WMN W/ GUN" "WOMAN W/ GUN SHOTS FI")

2018	1.11 million	12,532[31]	49,152[32]	8,635[33]

[31] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2018),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019 (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following: "AMB ATT SUICIDE" "AMB SUICIDE" "ATT SUICIDE" "POSS AMB ATT SUICIDE" "POSS AMB SUICIDE" "POSS ATT SUICIDE" "POSS SUICIDE" "SUICIDE")

[32] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2018),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019 (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following "AMB ATT J/O" "AMB DOM VIOL" "AMB DOM VIOL J/O" "ASSAULTING" "ATTACK" "BATTERY" "DOM VIOL" "DOM VIOL IN PROGRESS" "DOM VIOL J/O" "DOM VIOL R/O" "FIGHT" "MAN ASSLTG WMN" "POSS AMB DOM VIOL" "POSS DOM VIOL" "POSS DOM VIOL I/P")

[33] City of Los Angeles, Los Angeles Open Data, *LAPD Calls for Service (results for 2018),* https://data.lacity.org/browse?category=A+Safe+City&limitTo=datasets&q=LAPD+Calls+For+Service&sortBy=relevance&utf8=%E2%9C%93 (last accessed February 12, 2019 (This is a sum of all calls recorded in the dataset of Los Angeles Police Department 911 calls and tagged with any of the following, "ADW POSS DOM VIOL" "AMB SHOTS FIRED" "GANG ACT GUN" "GROUP W/ GUN" "GRP POSS GUN" "GRP POSS GUN SHOTS FIRED" "GUN" "J/O SHOTS FIRED" "JUV GRP SHOTS FIRED" "JUV GRP W/ GUN" " MAJ GRP SHOTS FIRED" "MAN POSS GUN" "MAN SHOTS FIRED" "MAN W/ GUN" "MAN W/ GUN SHOTS FIRE" "POSS SHOTS FIRED J/O" "SHOTS FIRED" "SHOTS FIRED I/P" "SHOTS FIRED INVEST" "SHOTS FIRED J/O" "SUSP NOW SHOTS FIRED" "SUSP SHOTS FIRED J/L" "WMN POSS GUN" "WMN W/ GUN" "WOMAN W/ GUN SHOTS FI")

2016-present	~3.18 million	30,902	153,905	31,063

The government baldly asserts that amorphous public interests in warrantless non-exigent, non-emergency searches "will frequently align with the interests of the individuals whose homes are searched" in "assistance searches." (Resp't's Answer Br. on the Merits at 26.) But they offer no support for their view that the public will welcome nonconsensual searches of their homes, and their view is completely at odds with the principles underlying the Fourth Amendment. Indeed, the Fourth Amendment and traditional notions of privacy give little reason to credit even the suggestion of Justice Brown in *People v. Ray*, 21 Cal. 4th 464, that, "when doors are open, we will hope that [officers of the state] will take steps to find out what is going on . . . That is what law-abiding, tax-paying citizens desire and expect of their local constabulary." (*Id.* at 479 (internal quotations and citation omitted).) Fourth Amendment principles, rather, dictate the inverse: that all people have a reasonable expectation of privacy in their home regardless of whether they are suspected of a criminal offense (and regardless of whether the doors are open).[34] (*See e.g.*, *Camara*, 387 U.S. at 530-31

[34] *Cf. United States v. Black*, 482 F.3d 1044, 1046 (9th Cir. 2007) (Kozinski, J., dissenting from order denying petition for rehearing *en banc*) ("The majority gives the government a pass because the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override considerations of privacy . . . The problem with this approach is that the government has any number of such crimes-du-jour: terrorism, child pornography, child abuse, drugs, hate crimes – the list is endless. When confronted with such serious crimes, it is the job of the police to be suspicious; the job of the courts is to insist that police develop evidence supporting these suspicions before they defile the sanctity of the home . . . [W]e expect police to err on the other side of caution by staying out unless and until they obtain a warrant or satisfy the demanding constitutional

(Rejecting idea that the "right to be secure from intrusion into personal privacy" is less weighty than the self-protection dimensions of Fourth Amendment protections of the home and stating, "we cannot agree that the Fourth Amendment interests at stake in [administrative health and safety home inspections] are merely 'peripheral.' It is surely anomalous to say that the individual and [their] private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior . . . even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of [their] home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.") (citation omitted).)[35]

A rule that would allow nonconsensual warrantless entries and searches or seizures within homes (including to determine whether there are unknown other people who, if they exist, might be injured or to protect someone already safely detained by officers outside the home) would presumably permit tens if not hundreds of thousands of warrantless entries, searches and seizures under such circumstances in homes across California each year.[36] These sweeping consequences militate in favor of a narrow ruling that explicitly recognizes the potential implications for the expectations of privacy Californians have in their home.

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standard for a warrantless search. The majority's unfortunate phrase will be widely seen as a green light for the police to 'err on the side of caution' by breaking into people's homes based on half-baked suspicions . . . If the right accorded the greatest protection by the Fourth Amendment – the right to privacy of the home – can be so casually brushed aside, no right is safe.") (internal quotations and citation omitted).)

[36] Of course, officers of the state are already able to seek consent to entry in the context of both investigatory and assistance work and also empowered to enter without a warrant in a range of exigent circumstances.

b. Californians in Physical or Behavioral Health Crisis Should Not be Deterred From Asking for Help for Fear That Officers Will Enter Their Homes

The sweeping rule sought by the government threatens another serious harm beyond the threat to privacy: if calling the police can result in a warrantless search of the caller's home based solely on the officer's judgment that the situation is emotional, dynamic and volatile or that they "perceived a need to act in the proper discharge of his or her community caretaking duties" (Resp't's Answering Br. at 9, 11) – without probable cause, without a warrant, and without any basis to believe there is an emergency or exigent circumstances – Californians, particularly those in physical or behavioral health crisis, may be significantly less likely to call the police. This significant disincentive to calling 911 runs counter to the state's interest in preserving life and the common good.

A large number of individuals with physical or behavioral health conditions, particularly when in crisis, enter the health system via a call for 911. For example, one recent international meta-analysis found that more than twelve percent of individuals with behavioral health conditions had the police involved in their pathway to behavioral health services. (James D. Livingston, *Contact Between Police and People with Mental Disorders: A Review of Rates*, 67 PSYCHIATRIC SERVICES 850, 851-52 (2016) (noting that rates in the United States were higher than those reported elsewhere.).) For many with serious health conditions, 911 (and a police response) are often the only or the primary way to seek care, especially in a crisis. (*Cf. United States v. Najar*, 451 F.3d 710, 719 (10th Cir. 2006) ("911 calls are the predominant means of communicating emergency situations.") (internal quotation and citation omitted).) Neither these individuals, nor their family members, should feel compelled to choose between seeking healthcare for

themselves or a loved one and a fear of the consequences of a likely search of their home.

Giving officers of the state broad community caretaking power to disregard individuals' expectations of privacy in their homes when officers face an "emotional," "dynamic" or "volatile" emergency call and assert a benevolent purpose will no doubt discourage calls to the police. Besides the general harm to privacy involved in a nonconsensual police search of the home, the likelihood of reducing calls to authorities may be greatest for those in behavioral health crisis. Multiple studies suggest that for those who have a substance use disorder, the prevalence of serious psychiatric disorders is extremely high. (*See* Patrick Flynn and Barry Brown, *Co-Occurring Disorders in Substance Abuse Treatment: Issues and Prospects*, 24 J. Substance Abuse Treatment 36 (2009) (reviewing evidence of co-occurrence as low as 7% for the co-occurrence of schizophrenia and drug use disorder in one study to as high as 44% for all mood disorders and drug use disorder in another study.).) This data suggest that a significant proportion of those in the midst of a behavioral health crisis could have unlawful substances in their home, such as drugs in plain view. Were police to have the broad power to enter homes, other than in emergency or exigent circumstances, that the government seeks here, it would most likely deter those in behavioral health crisis or their loved ones from feeling safe calling 911. Indeed, the risk of facing criminal consequences for contraband that might be discovered during a search could delay a call for help or preclude it altogether.

Sadly, for those in physical or behavioral health crisis as for persons with disabilities more broadly, calls to 911 can already be fraught, including when symptomatic conduct is perceived as a threat that escalates an

encounter with police.[37] It is estimated that about half of fatal police encounters involve persons with psychiatric disabilities.[38] In addition to counseling extreme caution in relation to exigent or emergency

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[37] Persons with significant psychiatric disabilities face the greatest risk of injury or death during their encounters with law enforcement because, during mental health crises, individuals with psychiatric disabilities are often shot or beaten when they cannot follow the orders of police officers. However, people with other disabilities are also at great risk in police interactions. *See, e.g., Jackson v. Inhabitants of Town of Sanford,* Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (denying defendant's motion for summary judgment where plaintiff, who had a physical disability resulting from a stroke, was pulled over and arrested by police officers because they perceived his disability-related conduct to be the result of drug or alcohol abuse."); *Estate of Saylor v. Regal Cinemas, Inc.,* F.Supp. 3d 409, 413-14 (D. Md. 2014) (Describing facts of case of Ethan Saylor, a 26-year-old man with Down Syndrome, who died during an altercation with off-duty Maryland police officers who were working as security guards at a movie theater. Although Mr. Saylor's full-time aide explained his disability to the officers, stated that his mother was coming to help, and requested that the officers wait afor Mr. Saylor to calm down, the officers refused, and forcibly dragged him from his seat, causing fatal injuries.).

[38] Such data is incomplete but troubling. Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill,* KQED News (Sept. 30, 2014), https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill (("A KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident."); Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed,* Portland Press Herald (Dec. 9, 2012) ("A review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems."); *id.* (noting that, in New Hampshire, seven of nine people (78 percent) shot and killed by police between 2007 and 2012 had mental health issues, according to state attorney general reports; in Syracuse, N.Y., three of five people (60 percent) shot by police in 2011 were mentally ill, according to news reports; in Santa Clara County, officials reported that nine of 22 people (41 percent) shot during a recent five-year period were mentally ill); Turkel, *supra* note 22 (finding that 42 percent of 57 police shootings in Maine since 2000 involved persons with mental health problems, and that 19 of 33 fatalities (58 percent) were persons with mental health problems).

circumstances,[39] this urges caution about suggesting that officers of the state – in particular police officers who generally have neither specific medical or behavioral health expertise – should be given broad powers to enter people's homes without a warrant simply because they have a purpose or goal (even one that might be reasonable in another context, place or time) of providing assistance.

In sum, any broad "community caretaking" rule that empowers police to enter homes without either a warrant or any demonstrated exigency or emergency could have significant and negative consequence for many who dial 911 and may actively dissuade those in crisis and their families from seeking aid for fear that officers of the state will enter their homes, regardless of whether they consent. *Amicus* urges this Court to reject such a dangerous rule.

D. Officers Did Not Need to Search Mr. Ovieda's Home To Protect His Safety or That of Others

Under either an exigency standard or "reasonableness," the facts of this case do not justify officers' warrantless search of Mr. Ovieda's home. Officers had no basis to believe that anyone else besides Mr. Ovieda was in the house, so their search was not justified to protect others; and officers had

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[39] *Amicus* notes that it is increasingly viewed as strongly preferable for individuals with behavioral health expertise to respond to individuals in the midst of a behavioral health crisis instead or at least alongside law enforcement personnel. Such an approach may reduce the likelihood that an encounter between officers and the person in crisis results in violence. Some models pair a social worker or mental health worker with police as they respond to calls (which seems very nearly to have happened here). Other models omit police altogether for some calls – while still being part of the 911 emergency response system. (*See* United States Substance Abuse and Mental Health Services Agency, *Crisis Services: Effectiveness, Cost-Effectiveness, and Funding Strategies* 8-17 (2014) (discussing the structure and effective of a number of programs, including mobile crisis services, peer crisis services, and crisis hotlines and warmlines.)

had a less invasive and more effective alternative than a warrantless entry, had they believed Mr. Ovieda posed a danger to himself.

Officers had no basis to search the house to render aid to others, because they had no basis to believe anyone else was present. At the time that officers entered Mr. Ovieda's home, they had interviewed each of the three people who were present – Mr. Case, Ms. Woellert, and Mr. Ovieda – outside of the home about the events inside. Based on those interviews, at trial, officers could not identify a single fact that led them to have reason to believe that there were other people in the home who needed protecting. Mere speculation cannot justify a warrantless entry of the home. (*See Martinez*, 643 F.3d at 1299 ("The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid – such a 'possibility' is ever-present.").)

As to Mr. Ovieda, at the time that officers entered his home, they had already detained him in handcuffs in a patrol car. No warrantless entry was thus necessary to protect Mr. Ovieda from imminent harm – he was not injured and was in police custody. The Fourth Amendment cannot support an entry, search or seizure in circumstances where the person sought to be protected from imminent harm has in fact already been detained by police.

Even were exigency not required, a search of the home was not justifiable to prevent any future harm Mr. Ovieda might have posed to himself. Indeed, officers may have lacked sufficient factual basis to believe Mr. Ovieda posed a risk to himself at all. As noted above, it does not appear from the record whether officers asked Mr. Ovieda further questions about his behavioral health after he denied, once detained (and before officers entered his home), having earlier made suicidal comments. It is also unclear whether officers already intended to arrest Mr. Ovieda on his outstanding misdemeanor warrants and take him to jail before they entered his home, which would have eliminated any risk he posed to himself until he was

released. Finally, though it does not appear to have occurred before the warrantless entry, the Santa Barbara Crisis and Recovery Emergency Services ("CARES") team (a crisis response staffed by mental health professionals) evaluated Mr. Ovieda at the officers' request and determined that Mr. Ovieda was not a danger to himself or others.[40] Even if the Santa Barbara CARES team's evaluation occurred after the search, officers certainly could have sought it before searching the home.[41]

If officers had reasonable grounds to believe that Mr. Ovieda posed a threat to himself as a result of a psychiatric health disorder (and did not want to arrest him on outstanding warrants), they could have sought Mr. Ovieda's continued detention in a psychiatric hospital for up to 72 hours for assessment, evaluation and crisis intervention under California Welfare and Institutions Code section 5150 (hereinafter "section 5150") – or, indeed, awaited the arrival of the Santa Barbara CARES team to make such an evaluation. California law would have permitted officers to initiate this process based on their concern even without the Santa Barbara CARES team. (Cal. Welf. Inst. Code § 5150 *et seq.*) This statutory scheme ensures *both*

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[40] *See* CT 64; Santa Barbara County Department of Behavioral Wellness, Behavioral Health Services for Adults https://www.countyofsb.org/behavioral-wellness/adultservices.sbc (accessed February 12, 2019) ("Consolidates intake, mobile crisis response and access to service for mental health and alcohol and drug emergencies. Staffed by mental health professionals, CARES provides crisis support on a 24/7 basis")

[41] Had the CLEAR team made this determination before the entry into Mr. Ovieda's home, of course, it seems impossible to imagine the Court determining that officers were nonetheless justified – under any standard – in entering Mr. Ovieda's home. *Amicus* suggests that these unsettled factual matters, along with officers sworn testimony that at least part of their goal in entering was to investigate suspected illegal activity, make this case a particularly poor vehicle for announcing a constitutional standard that would permit entry into homes in non-exigencies or non-emergencies.

that persons detained as a danger to themselves have access to mental health evaluation and care *and* that they are afforded specific procedural protections that safeguard substantive and procedural rights enshrined in the Constitution's due process clause. If the section 5150 standards had been met, California law also would have given authorities the ability to seize Mr. Ovieda's firearms or other deadly weapons. (Cal. Pen. Code § 1524(a)(10); Cal. Welf. Inst. Code §§ 8100, 8102).[42] Such a detention, had it been justified and pursued, would have been substantially more likely to address whatever concerns officers might have had about Mr. Ovieda's posing an imminent risk of future self-harm if released. Simply doing a cursory search for firearms or other weapons in conjunction with releasing Mr. Ovieda, even if such weapons had been lawfully seized, seems very poorly tailored to addressing even a justified concern for Mr. Ovieda's well-being. Where there is no basis or desire to initiate a detention under section 5150, officers can ask an individual for consent to search their home

CONCLUSION

IV. Conclusion

Based on the foregoing, *amicus* respectfully urges this Court reject the government's request for a dramatic expansion of the grounds for warrantless searches of the home to include non-exigent, non-emergency searches based on community caretaking doctrine, and to find that the entry into and search of Mr. Ovieda's home violated the Fourth Amendment.

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[42] Officers also had the further mechanism of securing a Gun Violence Restraining Order under California's "red flag" statute. *See* CAL. PENAL CODE §§ 18100 *et seq.*

Dated: February 19, 2019

Respectfully submitted,

By: /s/
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CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204(c)(1) that this

Amici Curiae Brief of American Civil Liberties Union Foundation of Southern California in Support of Respondent is proportionally spaced, has a typeface of 13 points or more, contains 13,798 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: February 19, 2019

/s/
Ian M. Kysel
Attorney for Amicus

CERTIFICATE OF SERVICE

I, Michelle Castañeda, declare as follows: I am employed with the ACLU of Southern California Foundation, whose address is 1313 W. 8th Street, Los Angeles, CA 90017. I am over the age of eighteen years, and am not a party to this action. On February 19, 2019, I served the foregoing documents described as:

REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF WILLIE OVIEDA
AND
AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF REAL PARTY IN INTEREST WILLIE OVIEDA

(See Attached Service List)

On the interested parties by the following means:

BY U.S. MAIL: I caused the Parties to be served, as indicated below, via U.S. Mail. I enclosed a true copy of the document in sealed envelope addressed to the party at the address listed below. I caused the envelope to be placed for collection and mailing, following our ordinary business practices. I am readily familiar with the business' practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 19, 2019 at Santa Ana, California.

By /s/ Castañeda

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