

State of Minnesota  
in Supreme Court

State of Minnesota,

*Respondent,*

vs.

Jennifer Lynn Nagle,

*Appellant.*

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BRIEF OF *AMICI CURIAE*  
RESTORE THE FOURTH, INC., & RESTORE THE FOURTH MINNESOTA  
SUPPORTING APPELLANT JENNIFER LYNN NAGLE

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## Amici Identity, Interest, & Authority to File<sup>1</sup>

### A. The Amici's Identity

The Amici are two non-partisan, nonprofit organizations:

**Restore the Fourth, Inc.** (“Restore the Fourth”) is dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution, which protects privacy against unwarranted government intrusions. Restore the Fourth advances this mission by overseeing local chapters nationwide whose members include lawyers, scholars, advocates, and ordinary citizens. Each chapter devises grassroots activities to bolster political recognition of Fourth Amendment rights. Restore the Fourth also files amicus briefs in key search-and-seizure cases. *See, e.g.,* Brief of *Amici Curiae* Restore the Fourth, Inc., et al., *State v. Torgerson*, 995 N.W.2d 164 (Minn. 2023) (No. A22-0425); Brief of *Amicus Curiae* Restore the Fourth, Inc., *Carpenter v. United States*, 585 U.S. 296 (2018) (No. 16-402).

**Restore the Fourth Minnesota** (“RT4-MN”) is Restore the Fourth’s Minnesota chapter. RT4-MN advocates for personal privacy and against mass government surveillance. In 2020, RT4-MN helped establish a broad anti-surveillance coalition with the ACLU and other local groups. In 2021, RT4-MN successfully helped the city of Minneapolis enact a ban on police usage of facial recognition. In 2023, RT4-MN joined Restore the Fourth’s amicus brief in *State v. Torgerson*, 995 N.W.2d 164 (Minn. 2023).

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<sup>1</sup> The Amici certify under MRCAP 129.03 that: (1) no counsel for a party authored this brief either in whole or in part; and (2) no person or entity has contributed money to the preparation or submission of this brief other than the Amici, their members, and their counsel.

## B. The Amici's Interest in *Nagle*

The interest of the Amici in *Nagle* is public in nature. *Nagle* concerns the extent to which the Constitution permits search warrants for homes based on uncorroborated informant tips. No place is more sacred under the common law or under the Fourth Amendment than the home. Over two centuries ago, William Pitt captured this principle when he declared that “[t]he poorest man may in his cottage bid defiance to all the forces of the Crown.” *State v. Larsen*, 650 N.W.2d 144, 147–48 (Minn. 2002).

Given this “ancient and venerable” right, one would expect search warrants for homes to be meticulously justified by law enforcement and closely reviewed by the courts. *Id.* In reality, the opposite is true. Just look at *Nagle*’s case: the courts below validated a search warrant for *Nagle*’s home that rested entirely on an *uncorroborated* informant’s tip. While the warrant led the police to find illegal narcotics, this revelation came at the expense of every Minnesotan’s right to privacy in their home.

“[Whenever] a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose.” *Draper v. United States*, 358 U.S. 307, 315 (1959) (Douglas, J., dissenting). Yet, the Court must pronounce rules “for the innocent and guilty alike.” *Id.* The Amici thus file this brief to bolster “the judiciary’s role as the only effective guardian of Fourth Amendment rights.” *Illinois v. Gates*, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting).

## C. The Amici's Authority to File in *Nagle*

On October 17, 2024, the Court granted leave to file this amici brief.

## Argument

This case presents a fundamental question about the privacy of all Minnesotans in their own homes. The court of appeals determined that the Fourth Amendment (and, by extension, the Minnesota Constitution) validated a search warrant for Jennifer Lynn Nagle's home based on an uncorroborated informant tip. Wrong-house raids across the nation over the last decade point in the opposite direction. They show the propensity of uncorroborated informant tips to victimize innocent families, destroy homes, and reduce the Fourth Amendment to empty words.

The Court should take this history into account in deciding this case. The Court should also take into account the history of the founding era. American colonists despised the Crown's use of writs of assistance and confidential, paid informers to invade the colonists' homes at any time. The Framers drafted the Fourth Amendment's oath-or-affirmation rule to end such abuses through an elevation of personal officer knowledge (like investigative legwork) over uncorroborated informant tips.

Finally, the Court should not lose sight of the two guideposts that the Supreme Court articulated in *Carpenter v. United States*, 585 U.S. 296 (2018) as a key measure of Fourth Amendment rights. The anti-arbitrary-power guidepost cuts against uncorroborated informant tips considering all the ways that these tips risk wrong-house raids. The anti-surveillance-state-guidepost yields the same conclusion given all the ways in which the government may turn people into informers on subjects well beyond narcotics. The Court thus should not hesitate to reverse.

- I. **“Wrong house” raids are a common phenomenon made possible in significant part by search warrants that courts have granted based on uncorroborated informant tips.**

Forty minutes after midnight on March 13, 2020, three police officers burst into Breonna Taylor’s home in Louisville, Kentucky.<sup>2</sup> Three minutes later, officers shot Breonna six times, killing her.<sup>3</sup> Breonna was a 26-year-old emergency-room technician and this was her “first night off after a few consecutive days with 12-hour shifts.”<sup>4</sup> Startled out of bed when the police arrived, Breonna and her boyfriend Kenneth Walker yelled to ask who was there.<sup>5</sup> Receiving no answer and fearing for their lives, Kenneth “grabbed a gun he legally owned and fired.”<sup>6</sup> When the dust settled, no real evidence linked Breonna’s home to narcotics or to an ex-boyfriend of Breonna’s who the police arrested the same morning at another place ten miles away.<sup>7</sup> Meanwhile, Breonna “bled to death in her hallway.”<sup>8</sup>

In short: the police raided the “wrong house.”<sup>9</sup>

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<sup>2</sup> Tessa Duvall, *Breonna Taylor Shooting: A Minute-by-Minute Timeline of the Events That Led to Her Death*, LOUISVILLE (KY.) COURIER JOURNAL, Sept. 23, 2020, <https://tinyurl.com/4znmjsj2>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Theresa Waldrop, *Breonna Taylor Killing: A Timeline of the Police Raid & Its Aftermath*, CNN, Aug. 4, 2022, <https://tinyurl.com/mptvxpzc>.

<sup>7</sup> *See* Duvall, *supra* note 2.

<sup>8</sup> Waldrop, *supra* note 6.

<sup>9</sup> By “wrong house,” Amici mean government searches of homes that are wrong because police literally searched the wrong address or because police searched the right address but without proper justification.

One of the cornerstones of liberty is every person's "right to be free from unauthorized entry into one's abode." *State v. Larsen*, 650 N.W.2d 144, 147–48 (Minn. 2002). Two centuries ago, William Pitt articulated this right in vivid terms: "[t]he poorest man may in his cottage bid defiance to all the forces of the Crown." *Id.* Cases like Breonna's, however, reveal the emptiness of that guarantee today for countless individuals nationwide, particularly minorities and the poor. Again and again and again in recent years, police have wrongfully raided private homes, killing (or maiming) residents, destroying property, and terrorizing neighborhoods.<sup>10</sup>

- Yolanda Mays (2024): "[Minneapolis police] officers went to a home in Brooklyn Center to question two persons .... [Records] show that the officers weren't even at the right home. .... [Police] kicked in the door. Homeowner Yolanda Mays was not home at the time, but her 74-year-old uncle was in the basement."<sup>11</sup>
- Courtney Price (2024): "An [Elyria,] Ohio toddler was sent to the hospital with burns and was struggling to breathe after police raided what may have been the wrong address and used flash-bang devices, according to the boy's mother who shared doorbell [camera] footage that contradicts the police account."<sup>12</sup>

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<sup>10</sup> Police commit wrong house raids so frequently that comedian John Oliver has devoted a whole episode of his satirical news show *Last Week Tonight* to the subject. See *Raids: Last Week Tonight with John Oliver* (HBO), Mar. 1, 2001, available at <https://youtu.be/WYdi1bL6s10>.

<sup>11</sup> Ryan Raiche & Ricky Campbell, *Records Show MPD Had Wrong House When They Broke Down Door over Plastic Doll*, KSTP.COM EYEWITNESS NEWS (ABC AFFILIATE), May 17, 2024, <https://tinyurl.com/2e9e898t>.

<sup>12</sup> Marlene Lenthag, *'It's the Wrong House': Audio of Ohio Police Raid That Left a Baby Injured Raises New Questions*, NBC NEWS, Jan. 16, 2024, <https://tinyurl.com/bdemr5m4>; see also Caitlin O'Kane, *New Bodycam Footage from Ohio Police Raid Shows Officers Using Flash-Bang [Grenade]*, CBS NEWS, Jan. 17, 2024, <https://tinyurl.com/5n76y8ex>.

- Kelly Angell (2023): “[D]ozens of [Pittsburgh] SWAT officers ... surrounded Kelly Angell’s home. Inside were Angell’s spouse and five daughters, one of whom is autistic .... ‘I kept hearing them say 1102 Paulson Avenue, and I immediately said there is a mistake, you have the wrong address,’ Angell said.”<sup>13</sup>
- Ruby Johnson (2022): “[Denver] officers smashed the door to [Johnson’s] garage ..., broke apart a ceiling panel, damaged a collectible doll and left the house in shambles. The officers found nothing. Johnson had nothing to do with ... stolen goods ....”<sup>14</sup>
- Adela Carrasco (2021): “[Joliet, Illinois] officers barged into the bedrooms of [Adela] Carrasco’s grandchildren, who ranged in age from 12 to their early twenties, and pointed guns at them while shouting obscenities. There was only one problem: [t]he search warrant for [Elian] Raya listed his address as 226 South Comstock. Carrasco lived at 228 South Comstock.”<sup>15</sup>
- Renee Dunigan (2021): “[Michigan state] troopers broke down the door to her house. Dunigan, her daughter and grandchildren ages 14, 10 and 3 were inside .... [A]ll five of them complied and tried to ask what was going on. However, police left the residence and admitted [that] they were at the wrong house.”<sup>16</sup>

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<sup>13</sup> Talia Kirkland, *After Mistaken SWAT Raid, Pittsburgh Police Make Policy Changes to Protect Homeowners*, WPXI-TV, May 15, 2024, <https://tinyurl.com/2sbe36j4> (interviewing Kelly Angell).

<sup>14</sup> Shelly Bradbury, *Jury Awards \$3.76 Million to Denver Woman Over SWAT Raid of Her Montbello Home*, DENVER POST, Mar. 4, 2024, <https://tinyurl.com/yt2fpv3f>; see also Holly Yan, et al., *Denver Police Raided the Wrong House After Officers Relied on a Phone Tracking App*, CNN, Mar. 8, 2024, <https://tinyurl.com/we8ntuzw> (“Denver police relied solely on Apple’s ‘Find My’ app and stormed the wrong home.”).

<sup>15</sup> C.J. Ciaramella, *Illinois Family Files Lawsuit After Police Execute Wrong-Door Raid & Allegedly Detain Them for 6 Hours*, REASON, Nov. 3, 2019, <https://tinyurl.com/8h96ubw9>; see also Anthony Ponce, *Ring Video Shows Suburban Police Forcefully Enter Wrong Home in Joliet: Complaint*, FOX 32 (CHICAGO), Nov. 2, 2023, <https://tinyurl.com/munz2m97>.

<sup>16</sup> Ann Pierret, *Flint Family Says Police Barged Into Their Home Improperly*, ABC-12 NEWS, June 8, 2021, <https://tinyurl.com/3amwct2v>.

- Diamonds Ford (2020): “[Ford] never heard the [Jacksonville, Fla.] SWAT officers identify themselves ... and thought she was firing at an intruder, as evidenced by the fact that Ford called 911 .... [Ford] awoke to ... the bedroom window being broken.”<sup>17</sup>
- Anonymous Family (2020): “[Nashville, Tenn.] officers, with guns drawn, breach[ed] the door of [an innocent family’s] home at 6:05 a.m. .... [Police] Chief John Drake said he’s deeply disturbed by the [police] body footage of the raid and believes the officers took shortcuts, saying the [officers’] information was ‘stale.’”<sup>18</sup>
- Anjanette Young (2019): “[Young] sobbed and told [Chicago] officers that they were at the wrong home. ... [O]fficers realized about a minute after they entered the apartment that the target was not present and was not associated with Young’s address ... [but Young] remained handcuffed for about 17 minutes.”<sup>19</sup>
- Dennis Tuttle (2019): “A jury found [Houston police officer] Gerald Goines guilty of two counts of murder in the ... deaths of Dennis Tuttle, 59, and his 58-year-old wife Rhogena Nicholas. The couple, along with their dog, were fatally shot after officers burst into their home using a ‘no-knock’ warrant ....”<sup>20</sup>

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<sup>17</sup> *Calls Mount to Drop Charges Against Black Woman Who Shot Officer During Raid on Her Home*, CBS NEWS, Feb. 10, 2021, <https://tinyurl.com/3nwxva72>; see also Diamonds Ford & Maurice Chammah, *I ‘Stood My Ground’ – But It Was the Police Raiding My House*, The MARSHALL PROJECT, Dec. 8, 2023, <https://tinyurl.com/n6u7tkrp> (first-hand account).

<sup>18</sup> *Kaylin Jorge, 3 Nashville Police Officers Decommissioned After Raiding Wrong Home*, Aug. 19, 2020, <https://tinyurl.com/ye6j4y75>; see also Peter Martinez, *Nashville Police Chief ‘Greatly Disturbed’ After Cops Raid Wrong Home*, CBS NEWS, Aug. 19, 2020, <https://tinyurl.com/mruhmuhx>.

<sup>19</sup> *Minyvonne Burke, Black Woman Handcuffed Naked in Raid at Wrong Home Set to Get \$2.9 Million from Chicago*, NBC NEWS, Dec. 14, 2021, <https://tinyurl.com/5ff4mr4e>; see also Emmanuel Camarillo, *In Botched Anjanette Young Raid, Chicago Police Board Votes to Fire Sergeant in Charge*, CHI. SUN-TIMES, Jun. 15, 2023, <https://tinyurl.com/buertcp5>.

<sup>20</sup> *Former Houston Officer Found Guilty of Murder in Deaths of Couple During Drug Raid*, ASSOCIATED PRESS (VIA NBC NEWS), Sept. 25, 2024, <https://tinyurl.com/4chta8ua> (detailing multi-week jury trial).

- Spencer Renck (2018): “DEA agents ... crept up to a house in Cleveland, Tennessee, before dawn ... [and] burst inside. ... Then they opened the basement door and found a man with a gun. They tackled him and told him he was under arrest, wanted for murder. ... [I]t was the wrong house and the wrong man.”<sup>21</sup>
- Sharnia Phillips (2017): “[Chicago police] raid[ed] the wrong home ... while searching for gang members and guns, forcing an innocent woman out into the cold .... [P]olice were searching for the grandchildren of [Phillips’] former tenant, who had not lived at the [Phillips] home in at least six months.”<sup>22</sup>
- Michael & Stacie Hutchison (2016): “[The Hutchisons] reached a \$5,000 settlement with the [Kentucky] city of Bowling Green after police erroneously served a search warrant on their home. ... [The] Hutchison[s] were forced to the floor of their home and handcuffed after police breached the front door ....”<sup>23</sup>
- Marianne Dianzand (2015): “[Worcester, Mass. police] forcibly handcuffed Dianzand while she was naked in front of her two daughters, ages seven and 18 months. Dianzand was frisked by a female officer and left naked for over ten minutes while officers determined if they were in the correct apartment.”<sup>24</sup>
- Jason Westcott (2014): “Acting on false information from an unreliable informant, [Tampa, Fla.] cops broke into Westcott’s house while he and his boyfriend were sleeping. Minutes later, Westcott was dead, his body riddled with shotgun and pistol bullets.”<sup>25</sup>

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<sup>21</sup> Gianluca Mezzofiore & Amanda Watts, *A Tennessee Man Is Tackled by a SWAT Team in a Raid – But It’s the Wrong House, and [the] Wrong Man*, CNN, May 25, 2018, <https://tinyurl.com/595ydkhk>.

<sup>22</sup> Todd Feurer, *Victim of Botched Chi. Police Raid in 2017 to Get \$300,000 Settlement*, CBS NEWS, Oct. 2, 2023, <https://tinyurl.com/yezuy35y>.

<sup>23</sup> *Bowling Green Couple Reaches Settlement After City Searches Wrong Home*, WKMS, Apr. 17, 2017, <https://tinyurl.com/m8dt3afj>.

<sup>24</sup> Garrett Quinn, *Worcester SWAT Team Raids Wrong House, Terrifies Family*, BOSTON MAG., Aug. 24, 2015, <https://tinyurl.com/2zeffukh>.

<sup>25</sup> Justin Garcia, *Deadly Tampa Police Raid Results in Settlement*, TAMPA BAY TIMES, July 26, 2023, <https://tinyurl.com/2hexj58a>.

And that's just the tip of the iceberg. CBS News in Chicago reports that after receiving their "first tip" in 2018 about Chicago police "wrongly raiding a family's home," the story quickly became "bigger than just one case."<sup>26</sup> The news station uncovered "more than a dozen incidents – with doors broken, homes ransacked and innocent families left traumatized."<sup>27</sup> Such discoveries bear out Justice Robert Jackson's prescient observation long ago that "there are many unlawful searches of homes ... of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Law enforcement bears much of the blame for this prevalent abuse. Like the Texas SWAT team commander who "[did] not even check the number of [a] house before instructing the SWAT team to execute [a] warrant." *Jimerson v. Lewis*, 94 F.4th 423, 431 (5th Cir. 2024) (Dennis, J., dissenting). Or the Tennessee police officers who – by the police chief's own admission – "did not exercise due diligence in confirming that the ... subject of [a] search ... even lived" at a wrongly-raided apartment.<sup>28</sup> See e.g., *Penate v. Sullivan*, 73 F.4th 10, 22 (1st Cir. 2023) (wrong-house raid in Worcester, Mass.) ("[T]he police did not investigate who lived at the apartment, and ... having failed to do so ... used a SWAT team to force the door and enter without knocking and with guns drawn.").

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<sup>26</sup> Dave Savini, et al., *[Un]warranted: A CBS 2 News Documentary*, CBS NEWS (CHI.), Oct. 6, 2019, <https://tinyurl.com/bdfvtm22>.

<sup>27</sup> *Id.*

<sup>28</sup> Jorge, *supra* note 18 (quoting Nashville police chief John Drake).

But as many wrong-house raids demonstrate, courts are often just as much to blame for these abuses as the police are. The officers who burst into Breonna Taylor’s home did so under a court-issued search warrant.<sup>29</sup> The court granted this warrant based on a host of police falsehoods and misrepresentations that the court never questioned<sup>30</sup> – most significantly, a supposed tip from a U.S. postal inspector that Breonna “was receiving packages for her ex-boyfriend [i.e., a convicted drug dealer].”<sup>31</sup> “In fact, [U.S.] postal inspectors said there was no evidence Taylor was receiving packages at her apartment.”<sup>32</sup> This is a recurring theme across wrong-house raids, including many of the cases listed above.<sup>33</sup> “[P]olice often rely on faulty information from confidential informants to obtain search warrants .... signed by unquestioning low-level judges.”<sup>34</sup>

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<sup>29</sup> See Duvall, *supra* note 2 (“[Judge] Shaw signs off on the [no-knock] search [warrant] for [Breonna] Taylor’s apartment.”).

<sup>30</sup> See Nichols Bogel-Burroughs & Serge F. Kovalski, *Breonna Taylor Raid Puts Focus on Officers Who Lie for Search Warrants*, N.Y. TIMES, Aug. 6, 2022, <https://tinyurl.com/3knw99n8>; U.S. Dep’t of Justice (DOJ), Press Release, Former Louisville, Kentucky, Police Detective Pleads Guilty to a Federal Crime Related to the Death of Breonna Taylor (Aug. 23, 2023), <https://tinyurl.com/y7n9xkpu> (summarizing officer’s guilty plea over falsehoods in warrant application for Breonna Taylor’s home).

<sup>31</sup> Andrew Wolfson & Billy Kobin, *Former Louisville Cop Pleads Guilty to Lying on Breonna Taylor Search Warrant*, LOUISVILLE COURIER JOURNAL, Aug. 23, 2023, <https://tinyurl.com/38r948du>.

<sup>32</sup> See Duvall, *supra* note 2.

<sup>33</sup> E.g., Ponce, *supra* note 15 (“[T]roopers received information from a witness .... [who] lied to them.”); Quinn, *supra* note 24 (“Police said they were tipped off ... by a ‘confidential informant.’”).

<sup>34</sup> Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 610 (2022) (citing “[n]umerous recent investigations”).

Take the case of the Mendez family. Chicago police burst into the Mendez home, aiming guns at 9-year-old Peter Mendez, his little brother Jack, and their parents<sup>35</sup> “For several minutes Jack and Peter cried and pleaded for officers not to shoot and kill their father.”<sup>36</sup> In “body camera footage,” officers can be “heard whispering that they were in the wrong apartment, but that didn’t stop them from searching the home and Peter’s school backpack.”<sup>37</sup> The raid left Peter and Jack traumatized.<sup>38</sup>

Here’s how Chicago police obtained the warrant for the raid. Officer Joe Cappello “made a drug arrest the day before and flipped that suspect into becoming a confidential informant called a John Doe.”<sup>39</sup> “The John Doe then gave Cappello the name and an address ... of a so-called major drug dealer. But Cappello never investigated to see if John Doe’s tip was even true or if the address was correct.”<sup>40</sup> Cappello also was never asked about this by the court that granted the warrant. Indeed, the court signed the warrant without asking Cappello any questions at all.<sup>41</sup>

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<sup>35</sup> See Lauren Petty, *Family Sues CPD, Says Cops Raided Wrong Home & Traumatized Kids*, NBC-5, Aug. 15, 2018, <https://tinyurl.com/4cperbst>.

<sup>36</sup> *Id.*

<sup>37</sup> *Chicago Police Raided the Wrong Homes With Guns Drawn*, WCBI, Oct. 29, 2019, <https://tinyurl.com/32d44xze>.

<sup>38</sup> Petty, *supra* note 35.

<sup>39</sup> *Chicago Police Officers Reveal Major Missteps as They’re Questioned on Video for Lawsuit About Raiding Wrong Home*, CBS NEWS (CHI.), Oct. 3, 2019, <https://tinyurl.com/53rvp8y6> (relating deposition testimony)

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (“Attorney: ‘Did Judge Burns ask you any questions about your ... search warrant, or any of the information ...?’ Cappello: ‘No.’”).

One might be tempted to believe something like the Mendez case could never happen in Minnesota. But it has. In 2007, Minneapolis police raided the home of Vang Khang and Yee Moua.<sup>42</sup> The two were watching TV as their six children slept.<sup>43</sup> Six broken windows and 22 bullet holes later – and, thankfully, no fatalities – police disclosed they were “acting on a tip” and were granted a search warrant on this basis.<sup>44</sup> Police blamed the informant. But as veteran journalist Radley Balko observes:

[Informants] aren't accountable to the public. Most, in fact, are pretty shady characters. The police ought to be independently corroborating *every* informant's tip before they go kicking down doors. Even a reliable informant could inadvertently transpose numbers, or get a street name wrongs. So don't blame this on the informant. It's the job of the officers he's working with to corroborate the information he gives them.<sup>45</sup>

It's the job of courts, in turn, to reject uncorroborated informant tips as sufficient basis to search homes – the “most sacred of personal spaces.” A-32. Otherwise, more wrong-house raids will occur. And that cannot be ignored given this Court's duty to assure “preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

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<sup>42</sup> See Terry Collins, *A Bad Address, a Shaken Family*, MINN. STAR TRIB., Dec. 19, 2007, <https://tinyurl.com/56ey4w28>.

<sup>43</sup> See *id.*

<sup>44</sup> Brandt Williams, et al., *Faulty Information Lead Police to Raid Wrong House*, MPR NEWS, Dec. 17, 2007, <https://tinyurl.com/yuyv3x4w>.

<sup>45</sup> Radley Balko, *More on the Vang Khang Raid*, REASON, Dec. 18, 2007, <https://tinyurl.com/bdh3hkvw> (emphasis in original).

**II. The Framers despised the Crown’s use of informants and wrote the Fourth Amendment’s oath-or-affirmation rule to deter warrants based on uncorroborated informant tips.**

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST., amend. IV. The Amendment further dictates: “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.* Through this language, “[a]ll unreasonable searches and seizures are absolutely forbidden,” as are all warrants missing probable cause, an oath, or sufficient particularity. *See Nathanson v. United States*, 290 U.S. 41, 46 (1933) (“No warrant inhibited by [the Fourth Amendment] can be made effective ....”).

To determine what the Fourth Amendment requires in any given context, it is always a good idea to “begin with history” – the events of the founding era that gave rise to “the norms that the Fourth Amendment was meant to preserve.” *Virginia v. Moore*, 553 U.S. 164, 168 (2008). After all, the Fourth Amendment’s words “are not just a literary composition” – “[t]hey are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words.” *United States v. Rabinowitz*, 339 U.S. 56, 69–70 (Frankfurter, J., dissenting). The Fourth Amendment “was the answer of the Revolutionary statesmen to the evils of searches without warrants and [of] searches with warrants unrestricted in scope.” *Id.* The Framers presumed “their words would receive the significance of the experience to which they were addressed – a significance not to be found in the dictionary.” *Id.* at 70.

The Fourth Amendment “grew in large measure out of the colonists’ experience with ... writs of assistance.” *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). The Crown granted customs officers “blanket authority to search where they pleased for goods imported in violation of the British tax laws.” *Stanford v. Texas*, 379 U.S. 476, 481 (1965). “A writ of assistance was a court order to individuals to assist customs officers ....”<sup>46</sup> “[T]he writ did not authorize a search; it merely vouched for the identity of the customs officers who by their commissions were authorized to search.”<sup>47</sup> With the writ in hand, custom officers could force colonists to help them “enter into and search any suspected vaults, cellars, or warehouses” for untaxed goods. *Boyd v. United States*, 116 U.S. 616, 623 (1886).

At the same time, “it was one thing to have a legal power of entry and another to know when and where to make use of it.”<sup>48</sup> “Random searches ... might often be so much wasted effort.”<sup>49</sup> Customs officers needed “a reliable tip-off” insofar as “no amount of legislation could lead a customs officer to where ... smuggled merchandise lay hidden.”<sup>50</sup> So customs officers like Charles Paxton used “what we now would refer to as confidential informants to learn of places where smuggled goods were.” *Commw. v. Haynes*, 116 A.3d 640, 649 (Pa. Super. Ct. 2015). “The

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<sup>46</sup> Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1053 n.18 (2011).

<sup>47</sup> *Id.* (internal punctuation and alterations omitted).

<sup>48</sup> M.H. SMITH, THE WRITS OF ASSISTANCE CASE 127-28 (1978).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

informer” quickly became “essential to the ... enforcement regime of the Boston customs house in the 1750s.”<sup>51</sup> Customs officials advertised that “if any Person or Persons will give Information,” such persons would be “handsomely rewarded” and “their Names concealed.”<sup>52</sup>

These Crown spies – and the customs officers behind them – enraged the American colonists, who now found themselves up against an “[all] too permeating police surveillance.” *United States v. Di Re*, 332 U.S. 581, 595 (1948). A “concerted and sustained movement” emerged “to resist discretionary and promiscuous [Crown] searches and seizures.”<sup>53</sup> Sixty-three Boston merchants hired James Otis to challenge in court the power wielded by customs officers. *Haynes*, 116 A.3d at 649–50. Otis did so in a 1761 speech that later inspired John Adams to proclaim: “[t]hen and there the child Independence was born.” *See Riley v. California*, 573 U.S. 373, 403 (2014). Otis decried the writs of assistance and every wrong that followed from them to be “the worst instrument of arbitrary power.”<sup>54</sup>

Five years later, in 1766, customs officers “arrived with a writ to search” the home of Daniel Malcom – “a merchant suspected of storing undutied liquors” in his private cellar.<sup>55</sup> The “real accuser” behind this

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<sup>51</sup> M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 128* (1978).

<sup>52</sup> *Id.*

<sup>53</sup> Tracey Maclin, *Informants & the Fourth Amendment: A Reconsideration*, 74 WASH. ULQ 573, 581 (1996) (observing that it was not “until the 1760s” that organized colonial resistance emerged to Crown searches).

<sup>54</sup> 2 WORKS OF JOHN ADAMS 523 (C. Adams ed. 1850).

<sup>55</sup> Sacharoff, *supra* note 34, at 655–56.

search “was not present.”<sup>56</sup> Colonists at the scene “refused” to “assist the officers” – as the writ required – unless the officers brought forward “the Informer” behind the search, as “that was the way in the old Country.”<sup>57</sup> The crowd maintained that even an “ordinary search warrant” would not be valid “without the real accuser.”<sup>58</sup> “The crowd also seemed concerned that anonymous informants were paid for their information by sharing in [any seized] goods.”<sup>59</sup> “[T]he crowd wanted [Malcom’s] real accuser to be ‘discovered or delivered up.’”<sup>60</sup> “As night drew on, the customs officers withdrew in defeat,” ultimately never executing the search.<sup>61</sup>

These experiences informed the Framers’ drafting of the Fourth Amendment. As noted above (and leaving aside the particularity rule), the Amendment dictates: “no warrants shall issue, but upon probable cause, supported by oath or affirmation.” *Id.* The Framers could have stopped at the words “but upon probable cause,” which in the case of informant tips “requires a magistrate judge to inquire into whether the officer’s informant is reliable and has firsthand knowledge.”<sup>62</sup> But the Framers went on to say that warrants must also be “supported by oath or affirmation” – words governing the use of informant tips.

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<sup>56</sup> Sacharoff, *supra* note 34, at 655–56.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 660.

“Colonial practice uniformly involved the real accuser swearing [an] oath in person,” as evinced by “contemporary criminal law treatises and justice-of-the-peace manuals.”<sup>63</sup> In adding the words “supported by oath or affirmation” to the Fourth Amendment, the Framers intended to deter warrants premised on an officer’s recitation of “thirdhand accounts” (i.e., informant tips) without any “personal knowledge” on the officer’s part (i.e., investigative corroboration) that would let him “swear the oath.”<sup>64</sup> The Framers sought to protect individuals against what Daniel Malcom and other Boston merchants experienced at the hands of customs officers wielding the arbitrary power of writs of assistance backed by informers with every financial incentive to make reckless accusations.<sup>65</sup>

A century after the founding, federal courts picked up on this idea.<sup>66</sup> In 1877, while riding circuit, U.S. Supreme Court Justice Joseph Bradley found the Fourth Amendment did not permit warrants based on “some officer” who “swears ... he has reason to believe ... the person charged ... committed the offense” where this belief rested on “the relation of others whose names are not disclosed” – in short, uncorroborated informant tips. *In re Rule of Ct.*, 20 F. Cas. 1336, 1337 (C.C.N.D. Ga. 1877) (bold added); see *Veeder v. United States*, 252 F. 414, 418 (7th Cir. 1918) (“The inviolability of the accused’s home [under the Fourth Amendment] is to be determined by the [sworn] facts, not by rumor, suspicion, or guesswork.”).

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<sup>63</sup> Sacharoff, *supra* note 34, at 606.

<sup>64</sup> *Id.*

<sup>65</sup> See Sacharoff, *supra* note 34, at 655–56.

<sup>66</sup> See *id.* at 668–70.

The text and history of the Fourth Amendment then afford a ready answer to the modern problem of “warrants that too often lead police to invade the wrong address, or the right address for a person who has been falsely accused.”<sup>67</sup> Wrong informant tips slip past courts because courts often do not “see, examine, scrutinize, or even learn the names of these informants.”<sup>68</sup> The oath-or-affirmation rule overcomes this blind spot by requiring police to do the legwork necessary for an officer to be able to swear by the tip. The alternative is to “read the oath requirement out of the Fourth Amendment because it [otherwise] performs no function that the probable-cause standard does not already perform.”<sup>69</sup>

Breonna Taylor might still be alive today had this rule governed the search warrant in her case. At a minimum, the rule would have required the court to look closer at the postal-inspector tip and ask if any personal officer knowledge corroborated this tip – or whether officers could bring the inspector forward to share his personal knowledge directly with the court. Police may then have withdrawn the warrant application – or the inspector “would likely have testified” that Breonna “was not receiving suspicious packages.”<sup>70</sup> Either way, the Fourth Amendment would have done what it is supposed to do for every person, including Jennifer Lynn Nagle here: protect the sanctity of a [person’s] home and the privacies of life” against unwarranted police intrusion. *Boyd*, 116 U.S. at 623.

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<sup>67</sup> Sacharoff, *supra* note 34, at 611.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 660.

<sup>70</sup> *Id.* at 616.

III. The *Carpenter* guideposts, which cover all search-and-seizure cases, bolster the conclusion that the Fourth Amendment bars search warrants based on uncorroborated informant tips.

In this case, police fashioned an uncorroborated informant tip into a warrant that they used to search Jennifer Lynn Nagle’s home, uncovering “drug paraphernalia and methamphetamine.” A-14, A-24. “[But] a search is not to be made legal by what it turns up.” *See Di Re*, 332 U.S. at 595. So while no wrong-house raid occurred here, this broader context must be considered in assessing the validity of the search warrant in Nagle’s case. Put another way: “[w]e must remember” that the police will “**push to the limit**” any “privilege of search and seizure” that the Court upholds here. *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting) (bold added).

*Carpenter v. United States*, 585 U.S. 296 (2018) cements this point through its articulation of two “basic guideposts” for deciding Fourth Amendment questions. *Id.* at 304–05. **The first guidepost:** the Fourth Amendment “secure[s] the ‘privacies of life’ against ‘arbitrary power.’” *Id.* **The second guidepost:** a “central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’” *Id.* Applied here, each of these guideposts reaffirms the hostility of text and history toward search warrants based on uncorroborated informant tips

On the first guidepost: uncorroborated informant tips encourage arbitrary invasions in the form of wrong-house raids. If all police have to do to get a warrant is cite an informant tip – knowing the courts will not demand any corroboration – officers will ‘search first, ask questions later.’ And this is precisely what Chicago police operating under this principle

have done, as CBS News in Chicago reported in 2019: “[a]fter reviewing thousands of police and court documents, watching hours of body worn camera footage and interviewing nearly more than two dozen family members and children, we uncovered a routine practice of police officers failing to verify information before raiding homes.”<sup>71</sup>

On the second guidepost: allowing police to search homes based on uncorroborated informant tips is the calling card of a surveillance state. Because Nagle’s case involved a narcotics informant, it is easy to presume that police will limit their use of uncorroborated tips to this context. But as new out-of-state laws “encourag[ing] neighbors to report neighbors to the government” about pregnancy reveal, tomorrow’s informants may be quite different from today’s.<sup>72</sup> One must also recall that “[o]bjectionable spying has always included ... [police] use of informants to investigate ... and infiltrate groups disfavored by government officials.”<sup>73</sup>

The court of appeals considered none of this in upholding the search warrant for Nagle’s home. “Yet if we are to preserve our system of checks and balances and keep the police from being all powerful, these judicial controls should be meticulously respected.” *Abel v. United States*, 362 U.S. 217, 247 (1960) (Douglas, J., dissenting). Fidelity to the text, history, and guideposts of the Fourth Amendment demands nothing less.

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<sup>71</sup> Savini, et al., *supra* note 26.

<sup>72</sup> Adam Serwer, *The Rise of the Right-Wing Tattletale*, THE ATLANTIC, Oct. 3, 2024, <https://tinyurl.com/44w4yzbp> (detailing new laws recently enacted by states like Texas that invite citizens to become informers).

<sup>73</sup> Maclin, *supra* note 53, at 623.

## Conclusion

“Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights ....” *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). The court of appeals’ decision advances this trend, allowing uncorroborated informant tips to diminish the hard-won privacy that the Fourth Amendment guarantees everyone in their own home. The phenomenon of wrong-house raids, the Fourth Amendment’s oath-or-affirmation rule, and the *Carpenter* guideposts all support reversal. In doing so, they make clear this case’s importance as a matter of preserving the “fundamental distinction[] 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).

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## Certification of Brief Length

The undersigned counsel certifies that this amici brief satisfies MRCAP 132.01. This brief: (1) is printed using 13-point, proportionally-spaced fonts; and (2) complies with the relevant word-limit, containing 5,636 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software that counsel used to prepare this brief (Microsoft Word 2010).

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