No. A164180

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APELLATE DISTRICT, DIVISION FIVE

Coalition on Homelessness,

Appellant,

v.

City and County of San Francisco, et al.,

Respondents.

On Appeal from a Final Judgment of the
San Francisco Superior Court
Case No. CPF-19-516456, Hon. Ethan Schulman

APPLICATION TO FILE AMICUS BRIEF

PROPOSED AMICUS BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS AMICI CURIAE SUPPORTING APPELLANT AND REVERSAL

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Dec. 20, 2022

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court, Amici National Police Accountability Project and Roderick & Solange MacArthur Justice Center certify that they are nonprofit organizations that do not have individual financial stakes, and that they know of no other person or entity that has a financial or other interest in this case.

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Application to File an Amicus brief

Pursuant to California Rule of Court 8.200(c), proposed amici curiae National Police Accountability Project and Roderick & Solange MacArthur Justice Center ("Amici") respectfully request permission to file the attached brief as amici curiae in support of Petitioners and reversal. Undersigned counsel certifies that this brief was not authored in whole or in part by any party or any counsel for a party, and that no person or entity other than amici made any monetary contributions to fund the preparation or submission of this brief.

Interests of the Amici Curiae

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including over one hundred in California. Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients.

The Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC's mission is to vindicate the rights of people abused by our oppressive criminal legal system, hold people with power accountable, and reshape the law going forward. To that end, RSMJC attorneys have played a key role in civil rights battles in areas including police misconduct and overreach; the criminalization of poverty, and the imposition of unlawful fines and fees. RSMJC has served as merits counsel, amicus counsel, or amicus curiae in numerous cases around the country related to these issues, in both state and federal courts.

INTRODUCTION

The City of San Francisco and its officials tow the cars of indigent people for debt collection even though those vehicles pose no urgent hazard to anyone. They justify doing this without a warrant based exclusively upon the "community caretaking" exception to the warrant requirement. But community caretaking has never excused a warrant unless there is a genuine emergency, hazard, or urgent circumstance that poses an immediate threat to road safety. Concededly safe and legally parked cars present no such emergency or hazard that would justify a warrantless seizure. Even then, binding U.S. Supreme Court precedent only excuses a warrant under the community caretaking exception when police act not as investigators or law enforcers, but rather, as community stewards. Debt collection, however, is a squarely law enforcement function that cannot masquerade as community caretaking under the law.

This Court should reject the Superior Court's misapplication of community caretaking. Its misapplication expands the exception so much that it risks swallowing the warrant requirement whole, allowing law enforcement to claim their routine enforcement functions as community protection—thereby avoiding the need to ever secure a warrant. This Court endorsing that proposition—particularly in light of recent U.S. Supreme Court precedent limiting the doctrine—would undermine civil rights across entire categories of routine interactions between police and the public.

This appeal presents the narrow question of whether the community caretaking doctrine can justify San Francisco's warrantless debt tows. Amici urge this Court to hold that it cannot, which should resolve the appeal. But notably, the Government

Respondents cite no other exception to the warrant requirement they believe could justify these warrantless seizures. Nor could they. Other doctrines involving civil forfeiture, car searches, disabled vehicles, and other warrant exceptions simply cannot apply under California law.

And the stakes could not be higher. A car is not only one of most people's most valuable assets, but also secures the right to travel and, for many, serves as a domicile. These circumstances highlight precisely why the warrant requirement exists—which is to protect people's rights and property from unwarranted intrusion. This Court should reject San Francisco's invitation to eviscerate the warrant requirement.

To underscore the already high stakes here: the community caretaking function of law enforcement operates within a much broader context of policing in the United States. And simply put, law enforcement responses to non-emergency situations pose *substantial* danger to people, especially people with mental health issues and people of color. In virtually all contexts in which cities or officials might seek to invoke the community caretaking exception, everyone—cities, police, the public—would be better served by other sorts of first responders instead. On top of the clear legal reasons to reverse, the Court should consider carefully that context before authorizing a view of community caretaking that would expand law enforcement's reach.

ARGUMENT

I. Misapplying the "community caretaking" exception to the warrant requirement to an avowedly non-emergency context contravenes binding U.S. and California Supreme Court precedents and undermines constitutional rights.

This appeal turns on the Superior Court's proposed misapplication of the "community caretaking" exception to the warrant requirement. The proposed misapplication amounts to an enormous expansion of that exception because it would allow avowedly non-emergency enforcement actions to take place without judicial authorization, defying federal and state precedent and undermining the constitutional protections of the warrant requirement. This Court should reject Respondents' and the Superior Court's proposed misapplication for two key reasons. First, the U.S. Supreme Court itself has recently rejected precisely this kind of expansion of the community caretaking doctrine, and confirmed careful limits on its proper application. Second, the California Supreme Court has adopted exactly the same view of the limits on the exception.

A. U.S. Supreme Court precedent forecloses the proposed misapplication.

The U.S. Supreme Court has repeatedly rejected warrantless seizures of vehicles as violations of the Constitution, absent some carefully limited exceptions. Here, the Superior Court relied upon the community caretaking exception to the warrant requirement. But the Supreme Court intended that exception—which allows for some lawful seizures of vehicles posing an active emergency or danger to the public, and some searches of those already-lawfully seized vehicles—to have clear limits in

nature and scope. In the seminal case setting out the doctrine specifically in the context of a warrantless car seizure, the Court noted that it "deserved emphasis" that the car in question had been "disabled as a result of [an] accident" and that the driver was "intoxicated (and later comatose)" such that he could not personally "make arrangements to have the vehicle towed and stored." *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973). In upholding a warrantless search there, the Court specifically distinguished the fact of the accident—i.e. an emergency—from a car that had been "simply momentarily unoccupied on a street." *Id.* at 447. The Court in *Cady* also explicitly held that community caretaking could only justify not obtaining a warrant if an officer's conduct was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

Subsequently, the Court carefully characterized its limited allowance of warrantless searches of impounded cars under the caretaking exception as applying only to cars that are already "within police custody." *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). These inventory searches after a valid impoundment were only authorized to protect property owners themselves, because they "protected the property from unauthorized interference" or "theft, vandalism, or negligence," before it could be recovered. *Id.* at 373. The Court did not characterize the community caretaking exception as a stand-alone exception justifying the warrantless seizure of a vehicle in the first instance. *See also Opperman v. South Dakota*, 428 U.S. 364, 375 (1976) (upholding an inventory search because "police were indisputably engaged in a caretaking search of a lawfully impounded automobile," "the presence in plain view

of a number of valuables inside the car," and the owner "was not present to make other arrangements for the safekeeping of his belongings").

The Supreme Court recently confirmed those important limits to the doctrine and cabined it further. Just last year, the Court rejected a law enforcement attempt to expand the community caretaking doctrine into a freestanding exception. *Caniglia v. Strom*, 141 S.Ct. 1596, 1599 (2021). It again specifically characterized the allowance in *Cady* as for "a vehicle already under police control," *id*., and observed that the name of the doctrine itself "comes from a portion of the [*Cady*] opinion explaining the frequency with which vehicle[s] can become disabled or involved in accidents on public highways." *Id*. (cleaned up, internal citation omitted).[1] But further, one of the concurrences suggested that "there is no overarching community caretaking doctrine" at all, and that the *Cady* Court "merely used the phrase 'community caretaking' in passing." *Id*. at 1600 (Alito, J., concurring).

Regardless, the fact that police sometimes perform genuine non-investigative emergency functions does not let the community caretaking exception eviscerate the warrant requirement absent just such an emergency. That "police officers perform many civic tasks in modern society" is "not an open-ended license to perform them anywhere." *Id*. at 1599. And to whatever extent police might have some license to

[1] Respondents confoundingly do not discuss *Caniglia* or its characterization of *Cady* at all, relying solely on the community caretaking discussion in *South Dakota v. Opperman*, 428 U.S. 364 (1976). *See* Resp. Br. at 28. But besides ignoring the more recent binding law in *Caniglia*, Respondents can get no help from *Opperman*, because the cars at issue there were illegally parked, rather than being towed, as here, from avowedly legal spots solely for debt collection. *See Opperman*, 428 U.S. at 368. And the other cases that Respondents cite are not caretaking cases at all.

perform those tasks, *Caniglia* holds that such license does not extend to warrantless seizures except, possibly (and maybe not even then), in cases of "imminent risk," "emergency," or "urgent need of medical attention." *Compare id.* at 1601 (Alito, J., concurring); and *id.* at 1604 (Kavanaugh, J., concurring) (discussing "emergency-aid situations"); *with* AR Supp. 52 (stating that tows are for non-emergency "unpaid parking citations"). Simply put, *Caniglia* squarely rejected a stand-alone community caretaking exception to the warrant requirement and limited whatever remained of the community caretaking exception by characterizing the narrow allowance in *Cady*, *Opperman*, and *Bertine* as solely for genuine emergencies. Which debt tows are not.

B. California Supreme Court precedent forecloses the proposed misapplication.

The California Supreme Court's limitations on the community caretaking doctrine track the U.S. Supreme Court's holdings in *Cady*, *Caniglia*, and other cases. Recently, the California Supreme Court rejected the same generalized application of the community caretaking exception to non-emergency situations that the government sought in *Caniglia* and that Respondents seek here. *People v. Ovieda*, 7 Cal.5th 1034, 1051 (Cal. 2019) ("*Cady* and its progeny did not create a generalized exception to the warrant requirement for nonemergency community caretaking functions"). Like the *Caniglia* Court, the *Ovieda* Court characterized *Cady* as involving "searches of vehicles in police custody," where "[t]he caretaking function entailed only the securing of items in those vehicles." *Id.* It specifically rejected exactly the misapplication to non-emergency circumstances that Respondents seek here—towing safely and legally parked cars solely for unpaid tickets. *Id.* (rejecting application

because the "community caretaking exception asserted in the absence of exigency is not one of the carefully delineated exceptions to the residential warrant requirement recognized by the United States Supreme Court"). Subsequent state appellate decisions applying *Ovieda* confirm this, too. *See, e.g.*, *People v. Rubio*, 43 Cal.App.5th 342, 345 (Cal. Ct. App. 2019) (rejecting application of community caretaking exception based upon only hypothetical exigency); *People v. Ayon*, 80 Cal.App.5th 926, 945 (Cal. Ct. App. 2022) (Danner, J., concurring) (quoting *Ovieda* to underscore that even "benign intent," as in community caretaking, "cannot save an invalid [search]").

Courts in other states that have grappled with applying the caretaking doctrine have limited the doctrine, too. Some states, even prior to *Caniglia*, specifically "only applied the community caretaking function as an exception to the warrant requirement in the limited context of inventory searches, and even then only when the State meets a strict two-prong standard." *Randall v. State*, 101 N.E.3d 831, 837 (Ind. Ct. App. 2018) (internal citation omitted).[2] Whether in reference to this State's own binding precedent or to discussion by other states' courts, the proposed application of law by the Superior Court finds no support.

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[2] Some other states have lamented inconsistencies in application of the doctrine. *See State v. Deneui*, 775 N.W.2d 221, 236-37 (S.D. 2009) (observing that lower federal and state court "decisions reveal how inconsistently the exception has been applied"); *see also State v. McCormick*, 494 S.W.3d 673, 686 (Tenn. 2016) (discussing inconsistent application of requirements; *State v. Smathers*, 753 S.E.2d 380, 384 (N.C. Ct. App. 2014) (discussing inconsistent application). But even those more equivocal state decisions predate *Caniglia*, and to the extent that they articulate a view of *Cady* that the *Caniglia* Court rejected, they may lack ongoing viability as precedent.

* * *

Ultimately, the entire doctrine comes down to whether there is "imminent risk" or the need for "emergency aid," *Caniglia*, 141 S.Ct. at 1601 (Alito, J., concurring); *see also id.* at 1604 (Kavanaugh, J., concurring). Respondents ask this Court to misapply an exception carefully cabined to emergencies to an avowedly non-emergency context. This goes beyond any reasonable bounds, with virtually no guardrails, and flies in the face of *Caniglia*, *Ovieda*, and other binding case law. This Court should reject Respondents' argument. It risks swallowing the warrant requirement whole. *See People v. Torres*, 188 Cal.App.4th 775, 788 (Cal. Ct. App. 2010) ("if the community caretaking function extended so broadly […] it would expand the authority of the police to impound regardless of the violation") (*citing Miranda v. City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005)).

II. No other exception to the warrant requirement justifies these seizures under the Fourth Amendment.

Respondents make clear that the *sole* basis on which they rest their warrantless debt tows is community caretaking. They expressly decline to identify any other exception to the warrant requirement that would apply to justify these tows. Instead, Respondents defend the Superior Court's misapplication of the community caretaking exception to non-emergency circumstances by mingling their discussion of community caretaking with various out-of-state cases involving entirely different warrant exceptions and doctrines. *See* Resp. Br. at 32-34 (discussing cases from, e.g., Wisconsin about due process under an administrative scheme). But Respondents' choice is immaterial. The Ninth Circuit and California Supreme Court have

foreclosed every other possible exception to the warrant requirement from authorizing Respondents' conduct. First, the practice at issue would not amount to a valid automobile seizure because it is not incident to arrest. Second, because Respondents have conceded that the cars they tow pose no urgent safety hazard, they have eliminated any possible exigency justification. Third, Respondents' practice does not amount to valid forfeiture, because the vehicles in question have avowedly not been used for criminal activity. This Court should decline to consider unasserted alternative grounds for affirmance, but to whatever extent it discusses them, it should confirm that no other possible warrant exception applies to Respondents' debt tows.

1. Respondents' practice is not a valid seizure under the automobile exception.

First, the practice at issue here does not amount to a valid seizure under any of the relevant precedents regarding the automobile exception to the warrant requirement. Police officers may only seize a car without a warrant incident to the arrest of a driver, and even then "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," because the person might obtain a weapon or destroy evidence. *Arizona v. Gant*, 556 U.S. 332, 343 (2009); *see also U.S. v. Bagley*, 765 F.2d 836, 843 (9th Cir. 1985) ("lawfulness of the automobile seizure […] require[s] probable cause to believe the automobile contains contraband or evidence of a crime"). But as the Superior Court recognized and as Respondents concede, they do not tow the cars at issue here because of an initial valid investigative purpose, much less probable cause that a crime has been

committed. *See* AR Supp. 52. Respondents do not tow the cars because they have probable cause to believe that a crime has occurred—they do so simply because the owners have outstanding debt. And they are certainly not seizing the car in the immediate aftermath of a contentious arrest. Under the circumstances, the automobile exception cannot apply to Respondents' practice.

2. Respondents' practice is not a valid search under the exigency exception.

Second, relatedly, Respondents cannot resort to justifying the practice based upon purported public safety concerns that form the basis of the exigency exception to the warrant requirement. That exception only applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Kentucky v. King*, 563 U.S. 452, 460 (2012) (cleaned up). Circumstances giving rise to exigency sufficient to justify a warrantless seizure may include "law enforcement's need to provide emergency assistance to an occupant of a home, 'hot pursuit' of a fleeing suspect, or enter[ing] a burning building to put out a fire and investigate its cause." *Missouri v. McNeely*, 569 U.S. 141, 147 (2013) (internal citations omitted). *None* of these circumstances apply to Respondents' practice of towing safely and lawfully parked vehicles that admittedly pose no imminent safety risk or hazard. *See* AR 585; AR Supp. 62. Officers are not providing assistance, not in hot pursuit, not putting out a fire, nor collecting evidence of a crime before someone destroys it.[3] Under the circumstances, this exception cannot apply.

[3] Indeed, the exigency exception does not permit warrantless seizures even where the destruction of evidence is imminent or where evidence could be destroyed in the time it takes to secure a warrant—without more. *McNeely*, 569 U.S. at 142;

3. Respondents' practice is not a valid forfeiture.

Although Respondents cite cases like *Tate v. D.C.* in support of applying an exception that would allow them to seek forfeiture of property, that exception does not apply here, either. For one thing, to whatever extent that case apparently invents a new freewheeling exception to the warrant requirement in the civil forfeiture context, binding precedent forecloses its application here, where California law applies. *People v. Woods*, 21 Cal.4th 668, 674 (Cal. 1999) (excusing a warrant only permissible if there is already a "specifically established and well-delineated exception" to the warrant requirement that applies). As Appellant explains, the reasoning of *Tate* is also fully incompatible with both California Supreme Court and Ninth Circuit precedent. *See* Reply Br. 32-33; *see also Miranda*, 429 F.3d at 866 (forfeiture exceptions cannot apply to "vehicles seized outside of the criminal context").

* * *

Even if Respondents had attempted to rely on some other exception to the warrant requirement beyond community caretaking—which they have not—no such exception would apply. Under binding precedent, a warrant is plainly required. And regardless, courts have rejected using the impoundment of cars as a cudgel to compel the payment of fines or fees, including specifically traffic citations. If compelling payment "is the reason for enactment of the laws, they are a pretext for seizing, towing and holding vehicles ransom until prior parking or other traffic related warrants and

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Schmerber v. California, 384 U.S. 757, 770 (1966) (discussing dissipation of blood alcohol content evidence, and rejecting exigency exception without additional factors).

commitments are paid. While attempting to collect unpaid traffic tickets may be laudable, the Constitution may not be scuttled, as it has been here, while pursuing the goal." *Sutton v. City of Milwaukee*, 521 F.Supp. 733, 741 (E.D. Wis. 1981), *rev'd on other grounds*, *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982); *see also United States v. Vertol H21C Registration No. N8540*, 545 F.2d 648, 652 (9th Cir. 1976) ("governmental agencies [cannot] summarily take property as security for the eventuality that civil penalties must, in fact, be paid"). In this case, where Respondents acknowledge that they impound cars to compel payment of parking ticket debts, *see* Resp. Br. at 11, their practices should not be upheld.

III. Legal safeguards matter particularly here because of the property interest and individual rights at stake.

The Respondents' proposed misapplication of the community caretaking exception matters particularly because the property interest and individual rights at stake here matter so much. Despite having other lawful means to collect outstanding debts, the Government proposes to deprive people of their automobiles without judicial authorization. But people have a substantial property interest in their cars—an interest only heightened here where, as the Appellants alleged at the outset of their lawsuit, many of the affected people also use their car as a domicile. And even if they did not, cars facilitate other important individual rights, including the right to travel, as well as allowing people to earn money and otherwise participate in civic life.

First, the law has long recognized the weight of people's individual interests in their cars. This notably includes the property interest in the car itself. *Stypman v. City & Cnty. of San Francisco*, 557 F.2d 1338, 1341 (9th Cir. 1977) (observing that

the "[l]oss of the use and enjoyment of a car deprives the owner of a property interest"); *Draper v. Cooms*, 792 F.2d 915, 922 (9th Cir. 1986) (same); *see also United States v. Jones*, 565 U.S. 400, 410 (2012) (analyzing one's car as "property" and concluding that tagging the vehicle with a GPS tracking device was an unconstitutional trespass onto a personal effect).

Besides the clear property interest in the car itself, people also have other rights and interests bound up with their cars. They have a privacy interest—protected by the Fourth Amendment—against incursions by law enforcement. "One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Byrd v. United States*, 138 S.Ct. 1518, 1527 (2018); *see also Clement v. City of Glendale*, 518 F.3d 1090, 1094 (9th Cir. 2008) ("Normally, of course, removal of an automobile is a big deal, as the absence of one's vehicle can cause serious disruption of life in twenty-first century America"). People also depend on their cars for the purpose of exercising their right to travel. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999) (referring to that right as "firmly embedded in our jurisprudence"); *see also United States v. Guest*, 383 U.S. 745, 757 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stevens, J., concurring) (referring to the right to travel as a "virtually unconditional personal right, guaranteed by the Constitution to us all"). That right also adheres, specifically, to the indigent. *Edwards v. California*, 314 U.S. 160 (1941).[4]

[4] The circumstances of Respondents' practice in San Francisco at the outset of the lawsuit—and still the practice of municipal governments elsewhere in the state—underscore the interests at stake here. *See* Opening Br. at 19. County and local governments often tow vehicles that are not only an individual's or family's only

This all suffices on its own—towing cars of vulnerable Californians without a warrant or an applicable exception violates the Fourth Amendment.

IV. Expanding the community caretaking doctrine to non-emergency situations poses real danger to people and communities

Besides the clear law against the proposed misapplication, this Court should also reject Respondents' invitation to dramatically expand the community caretaking doctrine here because of the real danger that "community caretaking" exposes people to in the context of modern policing—where "caretaking" includes many practices outside of the context of towing vehicles over unpaid debts. Expanding the community caretaking doctrine outside of an imminent caretaking need could allow law enforcement to gather admissible evidence in more situations and blur the line between non-investigative caretaking and enforcement action. The misapplication also encourages governments, like Respondents, to send police to non-emergency situations. Substantial reporting and data show that police responses to non-emergency situations impose real dangers on individuals, communities, and police themselves. These dangers loom largest for communities of color and people with disabilities, but apply to everyone. Instead, in virtually all of the contexts in which an officer might exercise a community caretaking function, people and communities

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means of transportation, but also, their only means of shelter. As a practical matter, the fact that some people may use their cars for shelter or as a domicile means that the experience the seizure of a car as akin to a foreclosure or eviction, rather than a simple impoundment *See*, *e.g.*, *Navarro v. City of Mountain View*, No. 21-cv-5381-NC, *9 (N.D. Cal. Nov. 8, 2021) (noting the potential scope of the "expectation of privacy to homes that happen to be parked on public streets").

would benefit from other, non-police first responders. Under the circumstances and the practical realities of American policing, this Court should reject Respondents' and the Superior Court's proposed expansion of the community caretaking exception.

First, both individuals and officers face danger in any encounter, explicitly investigatory or otherwise. Part of this is because officers are "trained to presume danger" in virtually any encounter, and react accordingly in ways that increase the likelihood of "anticipatory killings." David Kirkpatrick, Steve Eder, Kim Barker, and Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, THE N.Y. TIMES (Oct. 31, 2021).[5] From 2016-2021, that manifested in more than 400 killings of unarmed people by law enforcement during vehicle stops, *id.*, including specifically in situations described by officers and in case law as community caretaking. *See id.* (discussing police encountering killing a woman "asleep with her boyfriend in a Dodge Journey outside a Dallas apartment building before dawn").

Officers bring the background presumption of danger to all sorts of encounters with civilians. While vehicle stops at least plausibly involve the possibility of a weapon, community caretaking functions, by their nature, generally do not. This includes, for example, welfare checks. Welfare checks involving police can pose great danger to people at a vulnerable moment. Clinicians' practice guidance specifically warns that welfare checks pose a substantial "risk for harm . . . given that no help was sought or requested and that the patient might be very surprised and/or distressed by the unexpected arrival of police." Hal S. Wortzel, et al., *Welfare Checks*

[5] *Available at*: https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html

and Therapeutic Risk Management, Journal of Psychiatric Practice, 25:6 (Nov. 2019).[6] *Cf.* Section I, *supra* (discussing *Cady*, *Caniglia*, and rendering emergency medical aid as part of community caretaking).

Second, and relatedly, the risk of force/violence in encounters with police is higher for some communities than others. Even explicitly non-investigative, ostensibly caretaking encounters involve startlingly high rates of violence for civilians. People with mental illness—i.e., among those most likely to have police respond for an explicitly non-investigatory welfare check—are "16 times more likely to be killed during a police encounter than other civilians approached or stopped by law enforcement." Overlooked in the Undercounted – The Role of Mental Illness in Fatal Law Enforcement Encounters, Treatment Advocacy Center (Dec. 2015).[7]

Because of the rise of dementia and other illnesses involving cognitive decline as people age, this burden falls disproportionately on seniors. *See* Christie Thompson, *As Police Arrest More Seniors, Those With Dementia Face Deadly Consequences*, The Marshall Project (Nov. 22, 2022).[8] Regardless of age, despite comprising fewer than 4% of American adults, people with mental illness are involved in at least 10% of police encounters, if not more, and roughly half of all fatal police encounters. *Id.* at 1;

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[6] *Available at*: https://journals.lww.com/practicalpsychiatry/Fulltext/2019/11000/Welfare_Checks_and_Therapeutic_Risk_Management.8.aspx

[7] *Available at*: https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf

[8] *Available at*: https://www.themarshallproject.org/2022/11/22/police-arrests-deadly-texas-florida-seniors-dementia-mental-health

see also Abigail Abrams, *Black, Disabled, and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, TIME (June 25, 2020).[9] That includes more than 1400 people from 2016-21. Rob Waters, *Enlisting Mental Health Workers, Not Cops, in Mobile Crisis Response*, Health Affairs 40:6 (June 1, 2021).[10] The lay press has covered numerous high-profile examples of police killing people during mental wellness checks. *See* Doug Criss and Leah Asmelash, *When a police wellness check becomes a death sentence*, CNN (Oct. 19, 2019) (collecting some notable incidents).[11] This danger reflects a historical trend of "shifting responsibility for responding to acutely ill individuals from mental health professionals to police," Overlooked at 2, and the deployment of officers to situations "that demand[] not enforcement or coercion but care." *Black, Disabled, and at Risk*. People with mental illness and other disabilities would be best served by prioritizing non-police first responses rather than incentivizing more community caretaking by law enforcement officers. *See id.*; *cf.* Section I, *supra* (discussing *Cady*, *Caniglia*, and rendering emergency medical aid as part of community caretaking).

The danger of law enforcement encounters, caretaking and otherwise, also heightens for communities of color. Black men, for example, "are about 2.5 times more likely to be killed by police" than white men. Frank Edwards, Hedwig Lee, and Michael Esposito, *Risk of being killed by police use of force in the United States by*

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[9] *Available at*: https://time.com/5857438/police-violence-black-disabled/

[10] *Available at*: https://www.healthaffairs.org/doi/10.1377/hlthaff.2021.00678

[11] *Available at*: https://www.cnn.com/2019/10/19/us/wellness-check-police-shootings-trnd

age, race–ethnicity, and sex, Proceedings of the National Academy of Science, 116:34 (Aug. 20, 2019).[12] Latino men are nearly one and a half times more likely to be killed by law enforcement than white men. *Id.* As with others to have considered these issues, the authors of that analysis attribute those divergences to "police and prisons become catch-all responses to social problems" and ultimately find that "restricting the use of armed officers as first responders to mental health and other forms of crisis would likely reduce the volume of people killed by police." *Risk of being killed by police*, at 16796. These disparities have significant negative effects besides the obvious needless loss of life, too—Black men, in particular, experience "stereotype threat" as part of "different psychological experiences of police encounters" than white counterparts. Cynthia Najdowski, *Stereotype Threat in Police Encounters: Implications for Miscarriages of Justice*, Behavioral Scientist (Feb. 8, 2016).[13] Because that perception might result in "defensiveness, antagonism, or hostility," everyone involved in these encounters, including law enforcement officers themselves, becomes less safe.

Successful programs across the country demonstrate why more caretaking functions should be undertaken by non-police first responders to avoid dangerous outcomes. A program that has existed since the 1980s—to be clear, long predating recent debates about police funding—in Eugene, Oregon that reroutes 911 and non-emergency calls related to mental health, substance use, or homelessness to medical

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[12] *Available at*: https://www.pnas.org/doi/pdf/10.1073/pnas.1821204116

[13] *Available at*: https://behavioralscientist.org/stereotype-threat-in-police-encounters-implications-for-miscarriages-of-justice/

personnel and crisis-care workers has had remarkable success. Notably, in fielding more than 24,000 calls a year, it required police backup in just 150 calls in 2019. *Black, Disabled, and at Risk*. Programs like that have proliferated in the years since across jurisdictions. *See Enlisting Mental Health Workers, Not Cops*, *supra* (discussing similar programs in Phoenix, Denver, Olympia, Oakland, Chicago, and San Francisco). These programs often involve separate community safety departments that field calls and dispatch crisis responders, social workers, and even peer-to-peer support, with great effectiveness. Harry Gass, *Police Reform: Why Albuquerque Sends Social Workers on Patrol*, Christian Science Monitor (Nov. 12, 2021).[14] Indeed, these sorts of programs serve not only civilians and communities, but law enforcement officers themselves. To the extent that people feel more ease in these interactions and have fewer opportunities for dangerous encounters with officers not trained to handle these types of responses, community trust in law enforcement increases, aiding officers' ability to do their jobs. *See Death Sentence*, *supra*; *see also* Cedric L. Alexander, *Ex-cop: Atatiana Jefferson's killing further erodes police legitimacy*, CNN (Oct. 14, 2019).[15]

The Superior Court's proposed expansion of the community caretaking doctrine here flies in the face of increased recognition that caretaking functions should shift away from, not toward, police. Endorsing that holding, if it leads to more police

[14] *Available at*: https://www.csmonitor.com/USA/Justice/2021/1112/Why-Albuquerque-s-latest-experiment-in-policing-doesn-t-involve-officers

[15] *Available at*: https://www.cnn.com/2019/10/14/opinions/atatiana-jefferson-police-shooting-death-alexander/index.html

encounters with civilians under the umbrella of caretaking, would pose real dangers to civilians and police alike, including especially people with mental health issues and communities of color. This Court should not endorse or sanction such an approach.

CONCLUSION

For the aforementioned reasons, as well as for the reasons articulated in Appellants' briefing, the judgment of the San Francisco Superior Court should be reversed.

Respectfully submitted,

/s/ Jim Davy

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Dec. 20, 2022

CERTIFICATE OF COMPLIANCE

I certify that that this brief, exclusive of the certificate, the cover, the signature block, and the tables, contains fewer than 14,000 words according to the word count function of Microsoft Word version 16.68, in compliance with Rule 8.204(c)(1) of the California Rules of Court.

/s/ Eliana Machefsky
Eliana Machefsky

Declaration of Eliana Machefsky in Support of Brief of Amici Curiae

I, Eliana Machefsky, declare as follows:

I am an attorney at law, duly licensed to practice before all courts in the State of California. I am an attorney at The National Police Accountability Project, and counsel for Amici. I am a licensed attorney in California and am an active member in good standing of the California Bar.

I submit this declaration in support of the attached Amicus Brief of NPAP and RSMJC.

I make this declaration based upon my personal knowledge, and I am competent to testify if called upon as a witness.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

/s/ Eliana Machefsky
Eliana Machefsky

Dec. 20, 2022

CERTIFICATE OF SERVICE

I, Eliana Machefsky, declare:

I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and I am not a party to the within-entitled action. My business address is

On December 20, 2022, I electronically filed via my electronic service address (fellow.npap@nlg.org) the attached documents:

- Application to file amicus brief of the National Police Accountability Project and Roderick & Solange Macarthur Justice Center
- Amicus brief of the National Police Accountability Project and Roderick & Solange Macarthur Justice Center
- Declaration of Eliana Machefsky in support of the amicus brief of the National Police Accountability Project and Roderick & Solange Macarthur Justice Center

with the Clerk of the Court using the TrueFiling system which will then send a notification of such filing to the following:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 20, 2022 at Berkeley, California.

/s/ Eliana Machefsky
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