SUPREME COURT OF THE UNITED STATES

No. 97–1147

MINNESOTA, PETITIONER *v.* WAYNE THOMAS CARTER

MINNESOTA *v.* MELVIN JOHNS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

[December 1, 1998]

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

The Court's decision undermines not only the security of short-term guests, but also the security of the home resident herself. In my view, when a homeowner or lessor personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures.

I do not here propose restoration of the "legitimately on the premises" criterion stated in *Jones* v. *United States*, 362 U. S. 257, 267 (1960), for the Court rejected that formulation in *Rakas* v. *Illinois*, 439 U. S. 128, 142 (1978), as it did the "automatic standing rule" in *United States* v. *Salvucci*, 448 U. S. 83, 95 (1980). First, the disposition I would reach in this case responds to the unique importance of the home– the most essential bastion of privacy recognized by the law. See *United States* v. *Karo*, 468 U. S. 705, 714 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant . . . . Our cases have not deviated from this basic Fourth

Amendment principle."); *Payton* v. *New York*, 445 U. S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."). Second, even within the home itself, the position to which I would adhere would not permit "a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search." *Rakas*, 439 U. S., at 142. Further, I would here decide only the case of the homeowner who chooses to share the privacy of her home and her company with a guest, and would not reach classroom hypotheticals like the milkman or pizza deliverer.

My concern centers on an individual's choice to share her home and her associations there with persons she selects. Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they have the prerogative to exclude others. See *id.*, at 149 (legitimate expectation of privacy turns in large part on ability to exclude others from place searched). The power to exclude implies the power to include. See, *e.g.*, Coombs, Shared Privacy and the Fourth Amendment, or the Rights of Relationships, 75 Calif. L. Rev. 1593, 1618 (1987) ("One reason we protect the legal right to exclude others is to empower the owner to choose to share his home or other property with his intimates."); Alschuler, Interpersonal Privacy and the Fourth Amendment, 4 N. Ill. U. L. Rev. 1, 13 (1983) ("[O]ne of the main rights attaching to property is the right to share its shelter, its comfort and its privacy with others."). Our Fourth Amendment decisions should reflect these complementary prerogatives.

A homedweller places her own privacy at risk, the

Court's approach indicates, when she opens her home to others, uncertain whether the duration of their stay, their purpose, and their "acceptance into the household" will earn protection. *Ante*, at 6.[1] It remains textbook law that "[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *Karo*, 468 U. S., at 714–715. The law in practice is less secure. Human frailty suggests that today's decision will tempt police to pry into private dwellings without warrant, to find evidence incriminating guests who do not rest there through the night. See Simien, The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches, 41 Ark. L. Rev. 487, 539 (1988) ("[I]f the police have no probable cause, they have everything to gain and nothing to lose if they search under circumstances where they know that at least one of the potential defendants will not have standing."). *Rakas* tolerates that temptation with respect to automobile searches. See Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 Vand. L. Rev. 1289, 1321 (1981) (criticizing *Rakas* as "present[ing] a framework in which there may be nothing to lose and something to gain by the illegal search of a car that carries more than one occupant"); see also *Rakas*, 439 U. S., at 169 (White, J., dissenting) ("After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person."). I see no impelling reason to extend this risk into the home. See *Silverman* v. *United States*, 365 U. S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free

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[1] At oral argument, counsel for petitioner informed the Court that the lessee of the apartment was charged, tried, and convicted of the same crimes as respondents. Tr. of Oral Arg. 10–11.

from unreasonable governmental intrusion."). As I see it, people are not genuinely "secure in their . . . houses . . . against unreasonable searches and seizures," U. S. Const., Amdt. 4, if their invitations to others increase the risk of unwarranted governmental peering and prying into their dwelling places.

Through the host's invitation, the guest gains a reasonable expectation of privacy in the home. *Minnesota* v. *Olson*, 495 U. S. 91 (1990), so held with respect to an overnight guest. The logic of that decision extends to shorter term guests as well. See 5 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §11.3(b), p. 137 (3d ed. 1996) ("[I]t is fair to say that the *Olson* decision lends considerable support to the claim that shorter-term guests also have standing."). Visiting the home of a friend, relative, or business associate, whatever the time of day, "serves functions recognized as valuable by society." *Olson*, 495 U. S., at 98. One need not remain overnight to anticipate privacy in another's home, "a place where [the guest] and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Id.*, at 99. In sum, when a homeowner chooses to share the privacy of her home and her company with a short-term guest, the twofold requirement "emerg[ing] from prior decisions" has been satisfied: Both host and guest "have exhibited an actual (subjective) expectation of privacy"; that "expectation [is] one [our] society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring).[2]

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[2] In his concurring opinion, JUSTICE KENNEDY maintains that respondents here lacked "an expectation of privacy that society recognizes as reasonable," *ante*, at 3–4, because they "established nothing more than a fleeting and insubstantial connection" with the host's home, *ante*, at 4. As the Minnesota Supreme Court reported, however, the stipulated facts showed that respondents were inside the apartment with the

As the Solicitor General acknowledged, the illegality of the host-guest conduct, the fact that they were partners in crime, would not alter the analysis. See Tr. of Oral Arg. 22–23. In *Olson*, for example, the guest whose security this Court's decision shielded stayed overnight while the police searched for him. 495 U. S., at 93–94. The Court held that the guest had Fourth Amendment protection against a warrantless arrest in his host's home despite the guest's involvement in grave crimes (first-degree murder, armed robbery, and assault). Other decisions have similarly sustained Fourth Amendment pleas despite the criminality of the defendants' activities. See, *e.g.*, *Payton*, 445 U. S., at 583–603 (murder and armed robbery); *Katz*, 389 U. S., at 348–359 (telephoning across state lines to place illegal wagers); *Silverman*, 365 U. S., at 508–512 (gambling offenses). Indeed, it must be this way. If the illegality of the activity made constitutional an otherwise unconstitutional search, such Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.

Our leading decision in *Katz* is key to my view of this

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host's permission, remained inside for at least 2½ hours, and, during that time, engaged in concert with the host in a collaborative venture. See 569 N. W. 2d 169, 175–176 (1997). These stipulated facts– which scarcely resemble a stop of a minute or two at the 19th of 20 homes to drop off a packet, see *ante*, at 5– securely demonstrate that the host intended to share her privacy with respondents, and that respondents, therefore, had entered into the homeland of Fourth Amendment protection. While I agree with the Minnesota Supreme Court that, under the rule settled since *Katz*, the reasonableness of the expectation of privacy controls, not the visitor's status as social guest, invitee, licensee, or business partner, 569 N. W. 2d, at 176, I think it noteworthy that five Members of the Court would place under the Fourth Amendment's shield, at least, "almost all social guests," *ante*, at 1 (KENNEDY, J., concurring).

case. There, we ruled that the Government violated the petitioner's Fourth Amendment rights when it electronically recorded him transmitting wagering information while he was inside a public telephone booth. 389 U. S., at 353. We were mindful that "the Fourth Amendment protects people, not places," *id.*, at 351, and held that this electronic monitoring of a business call "violated the privacy upon which [the caller] justifiably relied while using the telephone booth," *id.*, at 353. Our obligation to produce coherent results in this often visited area of the law requires us to inform our current expositions by benchmarks already established. As Justice Harlan explained in his dissent in *Poe* v. *Ullman*, 367 U. S. 497, 544 (1961):

> "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yardstick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.'" *Ibid.* (quoting *Irvine* v. *California*, 347 U. S. 128, 147 (1954) (Frankfurter, J., dissenting)).

The Court's decision in this case veers sharply from the path marked in *Katz*. I do not agree that we have a more reasonable expectation of privacy when we place a business call to a person's home from a public telephone booth on the side of the street, see *Katz*, 389 U. S., at 353, than when we actually enter that person's premises to engage

in a common endeavor.[3]

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For the reasons stated, I dissent from the Court's judgment, and would retain judicial surveillance over the warrantless searches today's decision allows.

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[3] JUSTICE SCALIA's lively concurring opinion deplores our adherence to *Katz*. In suggesting that we have elevated Justice Harlan's concurring opinion in *Katz* to first place, see *ante,* at 7, JUSTICE SCALIA undervalues the clear opinion of the Court that "the Fourth Amendment protects people, not places," 389 U. S., at 351. That core understanding is the *leitmotif* of Justice Harlan's concurring opinion. One cannot avoid a strong sense of *déjà vu* on reading JUSTICE SCALIA's elaboration. It so vividly recalls the opinion of Justice Black *in dissent* in *Katz*. See 389 U. S., at 365 (Black, J., dissenting) ("While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses . . . for me the language of the Amendment is the crucial place to look."); *id.,* at 373 ("[B]y arbitrarily substituting the Court's language . . . for the Constitution's language . . . the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy."); *ibid.* ("I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.'"). JUSTICE SCALIA relies on what he deems "clear text," *ante,* at 7, to argue that the Fourth Amendment protects people from searches only in the places where they live, *ante,* at 6. Again, as Justice Stewart emphasized in the majority opinion in *Katz,* which *stare decisis* and reason require us to follow, "the Fourth Amendment protects people, not places." 389 U. S., at 351.