No. 12-646

In The Supreme Court of the United States

FLORINE AND WALTER NELSON,
JILL CERMAK, AND BRUCE HENRY,

Petitioners,

v.

THE CITY OF ROCHESTER, NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Supreme Court, Appellate Division, Fourth Judicial Department

MOTION OF THE INSTITUTE FOR JUSTICE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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MOTION OF THE INSTITUTE FOR JUSTICE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Comes now the Institute for Justice ("IJ") and files this motion pursuant to Sup. Ct. R. 37.2(b), for leave to file an *amicus curiae* brief in support of the Petitioners in the above-styled case presently before this Court on petition for *certiorari*.

In support of this motion, IJ avers that it requested the consent to the filing of an *amicus curiae* brief from each of the parties to this case, but consent was withheld by Respondent, the City of Rochester, New York.

IJ is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

IJ requests the opportunity to present an *amicus curiae* brief in this case because IJ has a strong interest in cases at the intersection of Fourth Amendment rights and property rights, and actively litigates such cases nationwide, including cases challenging mandatory inspections of rental homes. *See*, *e.g.*, *McCaughtry v. City of Red Wing*, 808 N.W.2d 331

(Minn. 2011); *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); *Brumberg v. City of Marietta*, Case No. 04-1-5794-34 (Super. Ct. of Cobb Cnty., Ga., Filed July 21, 2004).

This case is of particular interest to IJ because it presents an opportunity to ask this Court to consider the unfortunate consequences of *Camara v. Municipal Court*, 387 U.S. 523 (1967), which has given local governments nearly unlimited power to conduct suspicionless floor-to-ceiling searches of the private homes of law-abiding citizens for the general purpose of ensuring compliance with property codes. IJ has watched as some courts have interpreted *Camara* to require issuance of administrative warrants automatically, while others struggle to determine if *Camara* imposes at least minimal limits on such warrants. As a result, these suspicionless government invasions of the home have proliferated nationwide and become almost commonplace, contrary to the very purpose of the Fourth Amendment.

IJ's accompanying *amicus* brief presents a unique and experienced perspective on this issue that focuses on the effect of administrative searches on the privacy interests and property rights of renters and homeowners, as well as the conflict between *Camara* and other decisions of this Court. IJ's brief explains how this case presents a unique opportunity for the Court to close the Pandora's box opened by *Camara* and correct this widespread abuse of Fourth Amendment rights.

Wherefore, IJ respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. IJ actively litigates cases at the intersection of Fourth Amendment rights and property rights, including cases challenging mandatory inspections of rental homes. *See*, *e.g.*, *McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011); *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); *Brumberg v. City of Marietta*, Case No. 04-1-5794-34 (Super. Ct. of Cobb Cnty., Ga., filed July 21, 2004).

In filing this *amicus* brief in support of Petitioner, *amicus* IJ urges this Court to reconsider the holding of *Camara v. Municipal Court*, 387 U.S. 523 (1967),

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

which permits suspicionless floor-to-ceiling searches of the private homes of law-abiding citizens for the general purpose of ensuring compliance with property codes.[2]

Amicus IJ has notified both parties of its intent to file an *amicus* brief pursuant to Sup. Ct. R. 37.2(a). Petitioners have filed a blanket consent notice with respect to *amicus* briefs. Respondents have declined to consent to the filing of any *amicus* briefs in this matter. Accordingly, *amicus* IJ has filed the accompanying Motion for Leave to File an *Amicus Curiae* Brief pursuant to Sup. Ct. R. 37.2(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

Forty-five years ago, this Court created a gaping exception to the Fourth Amendment protection against the unreasonable search of a private home in *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Camara* created a new rule: If the government is not searching for evidence of a traditional crime, it can enter anyone's home and search everywhere, even (as this case shows) looking through personal papers in its quest

[2] Given the precise issues raised in *Camara*, there is some question about whether its pronouncements on the standards for granting administrative warrants should be treated as dicta or as a holding. For simplicity's sake, *amicus* IJ refers to these pronouncements as a holding in this brief, reserving the issue for future briefing.

for evidence of code violations. It can conduct these sweeping searches of homes without any evidence of probable criminal or even civil code violations, but simply because a certain period of time has passed since the last search. Relying on this *carte blanche* to enter private homes, municipalities throughout the country have instituted administrative inspection programs.[3] Yet the Fourth Amendment plainly intended to prohibit government agents from ransacking private homes without suspicion, and the *Camara* decision stands as the lone exception to this Court's jurisprudence protecting the sanctity of the home.

Camara opened a Pandora's box for intrusions on Fourth Amendment rights that the Court likely neither anticipated nor condoned. Today, *Camara* has become a license for wholesale invasions of the "houses, papers, and effects" of law-abiding citizens.

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[3] *See*, *e.g.*, *Boston Sets Up Stricter Apartment Inspection Plan*, Boston Herald, Dec. 19, 2012, *available at* http://bostonherald.com/business/real_estate/2012/12/boston_sets_stricter_apartment_inspection_plan; Lynn Thompson, *Seattle City Council OKs Registration, Inspection of Rentals*, Seattle Times, Oct. 1, 2012, *available at* http://seattletimes.com/html/localnews/2019316566_rentals02m.html; Kristin Longley, *Flint Considers Increasing Time Between Rental Inspections*, MLive.com, June 5, 2011, *available at* http://www.mlive.com/news/flint/index.ssf/2011/06/flint_considers_increasing_tim.html; *see also* Brief of *Amici Curiae* Cato Institute, et al., in Support of Appellants at 11–18, *McCaughtry v. City of Red Wing*, No. A10-0332 (Minn. Sept. 20, 2012) *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/Red-Wing-filed-brief.pdf (citing over twenty examples of localities with mandatory property inspection programs).

U.S. Const. amend. IV. Deferential courts have interpreted *Camara* to require only minimal standards of judicial review for the issuance of administrative warrants, and have thus imposed very few limits on such warrants, ensuring only that searches are done on a regular schedule pursuant to a statutory scheme. That is exactly what happened here.

Since *Camara* was decided, administrative inspections have become much more invasive. Inspectors now frequently search *every* interior area of a home, including closets and cabinets, and even, as in this case, may read residents' personal papers in search of evidence of zoning violations. Today, government inspectors sometimes take video footage and photographs of the interiors of people's homes during their search, which are made available to the public. Inspectors also sometimes bring police officers with them during their inspections, or report suspicious findings to police officers afterward. These intrusive regulatory inspections of people's homes—without any individualized suspicion of wrongdoing—are gross invasions of personal privacy and property rights that run counter to the very purpose and history of the Fourth Amendment.

This case presents an opportunity for this Court to reconsider the validity of *Camara* in light of these developments and more recent decisions of this Court that call *Camara*'s holding into question. The facts of this case demonstrate that, relying on *Camara* to justify acting as a rubber stamp, administrative inspections and warrants have gotten wildly out of hand.

Indeed, the fact that the New York Court of Appeals did not think the case was worth review shows that invasive inspections and administrative warrants permitting them are now viewed as business as usual in municipalities throughout the country. The facts here show what *Camara* has led to:

- Rochester, New York requires periodic searches of rental homes by government inspectors who look for any code violation under federal, state, and local law. Rochester Mun. Code ("RMC") § 90-16(I); Charter of the City of Rochester, New York, Art. I, Part B, § 1-10 ("Charter").

- Many of these codes overlap with criminal violations, which inspectors may report to the police. *See*, *e.g.*, Charter § 3-15(B) ("public nuisance" defined as violations of various felony Penal Laws and other codes); Cermak R. 646–47. A police officer may also accompany an inspector during an inspection to provide protection, when authorized by an inspection warrant. Charter § 1-24(C).

- Inspectors search *every* part of a rental home, including bedrooms, closets, bathrooms, and medicine cabinets. Cermak R. 177–78, 635–36; *see also*, *e.g.*, NY PROP. MAINT. CODE §§ 305.3, 308.1 (requiring that "[a]ll interior surfaces . . . shall be maintained in good, clean and sanitary condition," and "[a]ll structures shall be kept free from insect and rodent infestation.").

- Inspectors actually read renters' personal papers to look for evidence of non-familial relationships or other code violations. Cermak R. 179; *see*, *e.g.*, RMC § 120-208 (prohibiting occupancy of a single-family home by more than four unrelated persons).

- Inspectors take photographs, and may take video, of the interiors of the homes; these images are stored electronically as public records, and are made available to the public under Freedom of Information laws. Charter § 1-10; App. 50–58; Cermak R. 643–44.

- The trial court upheld the warrant applications here against a Fourth Amendment challenge on the grounds that Rochester's Code requires periodic inspections and the statutory period for inspections had expired, relying upon *Camara*'s statement that "the passage of time" constitutes a justification for such warrants. *See* App. 19–26, 35–42; *see also* Nelson R. 398. The New York Appellate Division upheld the issuance of the warrants, relying on "the principles enumerated in *Camara*." App. 6–7.

- The inspection warrants remain in effect for 45 days and allow for multiple entries during that time period. App. 50–58; Charter § 1-24(D).

- There are criminal penalties, including fines and imprisonment, for those who

refuse to comply with, or even "unduly delay," the inspections. Charter § 1-25.

- Two of the Petitioners in this case are grandparents who have lived in their home for over twenty years and seek to preserve its privacy. Nelson R. 113–17. After they denied inspectors entry to their home, the City moved to have them held in "contempt of Court." Nelson R. 6, 27, 91–99.

In Part I, *amicus* IJ demonstrates how *Camara* is an aberration in this Court's Fourth Amendment jurisprudence. *Camara* is at odds with subsequent cases that have continued to recognize the Fourth Amendment's strong protection of the sanctity of the home and the right to exclude unwanted visitors. The holding of *Camara* is also called into question by subsequent cases that have disfavored suspicionless intrusions on privacy interests, particularly when done for broad, general purposes such as ensuring compliance with laws and regulations. In addition, this Court has recently reaffirmed its commitment to preserving the historical, property-based protections guaranteed by the Fourth Amendment and the common law that preceded it.

In Part II, *amicus* IJ discusses how this case presents an ideal opportunity to revisit and reconsider the holding of *Camara*, as the clear laws and simple facts allow for a clean analysis of the legal issues at stake. *Amicus* IJ also notes that a case presenting these issues is unlikely to reach this Court with much

frequency, despite the routine violation of rented homes throughout the country. This Court should grant *certiorari* to clarify the protections of the Fourth Amendment for law-abiding citizens in their homes against suspicionless government searches.

ARGUMENT

As this Court has repeatedly held, "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The Court's holding in *Camara*, however, presents a shockingly broad exception to this rule, permitting government inspectors to intrude into the homes of law-abiding citizens without any individualized suspicion of wrongdoing. Given the proliferation of mandatory administrative home inspections in localities across the country, this is an exception that threatens to swallow the rule.

I. Subsequent Decisions By This Court Have Called the Rationale of *Camara* Into Question.

The holding of *Camara* stands as an outlier against this Court's subsequent Fourth Amendment jurisprudence, which is far more respectful of the privacy of the home and the property right to exclude

unwanted visitors from one's home, and far less willing to permit such deep intrusions on privacy interests for such broad purposes.

This Court has also recently returned to analyzing potential Fourth Amendment violations based on common-law notions of trespass and property rights. *See United States v. Jones*, 132 S. Ct. 945, 949–50 (2012). Since the very purpose of the Fourth Amendment was to prohibit general warrants and writs of assistance from authorizing suspicionless and invasive searches of the private homes of law-abiding citizens for the purpose of ensuring compliance with customs and tax regulations, it makes little sense for this Court to permit similarly invasive and suspicionless searches of the private homes of law-abiding citizens for the purpose of ensuring compliance with building and zoning regulations.

A. This Court continues to recognize that the privacy of the home receives the strongest possible protections under the Fourth Amendment.

Despite the glaring exception of *Camara* to the longstanding rule that the privacy of the home and the property right to exclude unwanted visitors receives the strongest protection under the Fourth Amendment, this Court has continued to recognize this bedrock principle in subsequent cases. For example, in *Wilson v. Layne*, this Court cited early Seventeenth-Century English common law and Blackstone's

Commentaries of the Laws of England in support of these ancient protections, noting that "[t]he Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home." 526 U.S. 603, 610 (1999). The opinion emphasized that "[p]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 313, (1972)). Likewise, in *Kyllo*, this Court reinforced the "Fourth Amendment sanctity of the home" from government intrusion, noting that "any physical invasion of the structure of the home, 'by even a fraction of an inch,' was too much." 533 U.S. 27, 37 (2001) (quoting *Silverman*, 365 U.S. at 512). And in *Georgia v. Randolph*, this Court explained that, "[w]e have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's house is his castle'" 547 U.S. 103, 115 (2006) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)). The *Randolph* Court concluded that, "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." 547 U.S. at 115 (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)). Thus, despite the anomalous holding of *Camara*, this Court has repeatedly continued to recognize that the home receives a special degree of protection under the Fourth Amendment.

B. The intrusions upon privacy interests in suspicionless administrative searches of private homes are much greater, and for far broader purposes, than the Court has permitted in other cases since *Camara*.

Since *Camara* was decided, this Court has imposed strict limits on suspicionless intrusions on privacy and property rights. *Camara* stands at odds with these rulings, particularly on (1) the narrow range of government interests which the Court has held justify such suspicionless intrusions on privacy interests and property rights, and (2) the degree of intrusion upon privacy interests and property rights that may be imposed by suspicionless searches.

1. Since *Camara*, this Court has only permitted suspicionless intrusions on Fourth Amendment interests for specific and narrowly constrained government interests.

Since *Camara*, this Court has not permitted suspicionless intrusions on the Fourth Amendment interests of law-abiding citizens for the broad, general purpose of ensuring compliance with laws and regulations. *See*, *e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000) (rejecting "the 'general interest in crime control' as justification for a regime of suspicionless stops.") And when the Court has permitted rare exceptions to the rule against suspicionless searches or seizures, they have been narrowly

constrained in scope. *See*, *e.g.*, *id.* at 34 (noting that "brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving and intercepting illegal immigrants" are permissible).

Similarly, excepting *Camara*, the Court has permitted suspicionless administrative inspections only for very specific enforcement purposes, "provided that those searches are appropriately limited." *Edmond*, 531 U.S. at 37. Such searches have included inspections of "closely regulated" business facilities (where there is a reduced expectation of privacy), *see*, *e.g.*, *New York v. Burger*, 482 U.S. 691, 702–04 (1987), and inspections of fire-damaged premises to investigate the cause of the fire, which are "not programmatic but are responsive to individual events" and thus involve "a more particularized inquiry" than a general administrative code inspection. *Michigan v. Tyler*, 436 U.S. 499, 507 (1978). In other words, *Camara* stands alone in authorizing the government to conduct suspicionless searches for the general purpose of ensuring compliance with codes and regulations.

2. In comparison to subsequent cases, the *Camara* Court overstated the importance of the government interest in ensuring compliance with property codes.

In *Camara*, the Court found that "securing city-wide compliance with minimum physical standards

for private property" was a governmental interest important enough to justify recurring suspicionless administrative searches of private homes. 387 U.S. at 535. But this stands in stark contrast to the opinion in *Edmond*, which noted that "[w]e cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." 531 U.S. at 44. Indeed, if a "general interest in crime control" is an insufficient governmental interest to justify brief, suspicionless traffic stops outside the home, it is hard to imagine how the government's interest in preventing property code violations can be sufficient to justify lengthy and invasive suspicionless searches of private homes. Surely crime control is *at least* as important as ensuring property code compliance, if not more so. (The penalties and punishments involved certainly indicate that preventing crime is far more important a governmental interest than ensuring compliance with property codes.) Indeed, this Court has noted that the priority of criminal enforcement over civil matters has a long history in Fourth Amendment law, quoting Blackstone for the principle that "no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (quoting William Blackstone, 4 *Commentaries on the Laws of England* 223 (1765–69)).

Because the government interest at stake in administrative code inspections is no more substantial

(and arguably much less significant) than its interest in general crime control, the concerns this Court has expressed with respect to the comparatively minimal intrusion posed by traffic checkpoints should be taken much more seriously in the context of invasive suspicionless searches of private homes. As the *Edmond* court noted, "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." 531 U.S. at 42. But in many localities, *Camara* has permitted a general interest in ensuring compliance with property codes to justify far more intrusive searches of private homes, which are becoming a routine part of the lives of residents.[4]

3. In the rare cases where suspicionless intrusions have been permitted, this Court has often emphasized their brevity and minimal intrusion on privacy interests.

In the rare instances when it has approved of limited exceptions to the rule against suspicionless searches and seizures, this Court has frequently emphasized that they are brief and impose only minimal intrusions on the privacy interests and property rights of law-abiding citizens. For example, suspicionless seizures of law-abiding citizens during a brief traffic

[4] *See* note 3, *supra*.

stop at a DUI checkpoint were allowed in part because "the intrusion . . . is slight." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Similarly, in justifying traffic checkpoints near national borders, this Court explained that, "intrusion on Fourth Amendment interests is quite limited. . . . it involves only a brief detention of travelers during which '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'" *United States v. Martinez-Fuerte*, 428 U.S. 543, 557–58 (1976). The present case, however, involves the floor-to-ceiling search of a private home rather than a mere traffic stop, and this Court has noted that a stop is "considerably less intrusive than a search." *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

4. In comparison to subsequent cases, the *Camara* Court seriously understated the privacy interests at stake.

The *Camara* Court also failed to adequately consider the invasiveness of the intrusion on the privacy of the home. In *Camara*, the Court claimed that "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. But the floor-to-ceiling ransacking of the entire interior of one's home, including cabinets, closets, and personal papers, is not

a "relatively limited" invasion of privacy but rather the exact conduct that the Fourth Amendment was designed to prevent. In fact, it is hard to imagine any more invasive violation of the privacy of the home than a government inspector rifling through one's medical cabinet, bathroom cupboards, or bedroom, all while taking photographs or recording video.

People often keep valuable or sensitive personal property in their homes that they don't necessarily want the government (or the public) to know about, even though it may be perfectly legal. A landlord represented by *amicus* IJ in a challenge to rental inspections in Red Wing, Minnesota has explained that even a short visit inside someone's home reveals a great deal of private information:

> [O]ne tenant of mine has a makeshift Catholic chapel in his apartment. I can tell whether the person is living with another person and whether that person is male or female; whether they are lazy, messy, or excessively neat; whether they are reclusive and lonely; whether they are doing well financially or scraping by; whether they are ill; whether they have innocent hobbies like music and sports or offensive hobbies like pictures of half-naked women or 'Goth' posters. Artwork hanging on walls reveals a lot about an individual tenant. I often see money and jewelry lying around on dressers and countertops. I'm not looking for any of

> these things, but you just see them as you are entering any room.[5]

Cf. Jones, 132 S. Ct. at 955 (Sotomayor, J., concurring) (expressing concern that GPS monitoring of a person can produce "a wealth of detail about her familial, political, professional, religious, and sexual associations").

The *Camara* Court's claim that a search of every inch of one's home is a "relatively limited invasion of . . . privacy" not only makes little sense as a practical matter, but this Court has since flatly rejected the idea that even a limited search of the home is a "limited invasion" of privacy: "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37. Following the holding of *Camara* practically requires the Court to append an asterisk to statements such as this, with fine print noting that the prying government eyes of code inspectors with an administrative warrant may freely view such intimate details.

The notion that such a search is only a "limited invasion" of privacy also conflicts with this Court's consistent understanding, as shown by its most recent decisions, of the importance of the sanctity of the

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[5] Brief of Appellants at 18–19, *McCaughtry v. City of Red Wing*, No. A10-0332 (Minn. Sept. 20, 2012), *available at* http://ij.org/images/pdf_folder/private_property/redwing/opening-brief-mn-supreme_9-20-12.pdf.

home, as well as the historical purpose of the Fourth Amendment in protecting the privacy of the home. *See*, *e.g.*, *Randolph*, 547 U.S. at 115; *Kyllo*, 533 U.S. at 37, *Wilson*, 526 U.S. at 610; *see generally* Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 Regent U. L. Rev. 215 (1995). This Court has long held that the Fourth Amendment represents the principle articulated in William Pitt's famous 1766 speech condemning general warrants:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

United States v. Ross, 456 U.S. 798, 822 n.31 (1982) (quoting *Miller*, 357 U.S. at 307). But if a poor man has a right to keep the king from entering his ruined tenement, how can it be that a local government may so easily circumvent this ancient protection of the sanctity of the home by simply sending a code inspector to determine whether it is in fact a ruined tenement (or, just a home with one too many people or one too few lighting fixtures)? *See*, *e.g.*, RMC § 120-208 (prohibiting occupancy of a single-family home by more than four unrelated persons); Rochester Prop. Code § 90-9(B)(8) (every "bathroom, toilet room, laundry room, furnace room, boiler room, interior

stairway, public hall and kitchen" must have "at least one electrical lighting fixture").

The intrusions on personal privacy occasioned by the searches of private homes are compounded where such searches are recorded on video or photographs and made available to the public. This practice exposes sensitive personal information to anyone who wishes to seek it out, and was likely not contemplated by Justice White when he penned the majority opinion in *Camara* before the advent of broad Freedom of Information laws.[6]

In addition to developments in the recording and dissemination of information, the continued growth of the administrative state—and the concurrent proliferation of mandatory administrative searches of homes—further contribute to the widespread threat to privacy interests posed by the *Camara* holding. The number and complexity of laws and regulations governing land use and buildings has grown at an exponential rate.[7] At the same time, mandatory

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[6] *See* Hon. Ralph J. Marino, *The New York Freedom of Information Law*, 43 Fordham L. Rev. 83 (1974), *available at* http://ir.lawnet.fordham.edu/flr/vol43/iss1/3 (noting that "[o]n September 1, 1974, New York became one of the first states to effect a 'Freedom of Information Law.' ").

[7] *See*, *e.g.*, Matt Johnson, *Montgomery's Zoning Issues, Part 1: Complicated Zoning*, *Greater Greater Washington*, May 11, 2010, at http://greatergreaterwashington.org/post/5760/montgomerys-zoning-issues-part-1-complicated-zoning/ (noting that Montgomery County's Zoning Code was 15 pages when originally enacted

(Continued on following page)

administrative inspections of residents' homes have also proliferated.[8] Therefore, in order to "prevent such intrusions from becoming a routine part of American life," as it did in *Edmond*, 531 U.S. at 42, this Court should reevaluate the holding of *Camara*.

C. Since *Camara*, this Court has returned to examining potential Fourth Amendment violations under a common-law understanding of trespass and property rights.

The same year as *Camara*, the Court decided *Katz v. United States*, where it famously held that "the Fourth Amendment protects people, not places" 389 U.S. 347, 351 (1967).[9] Many subsequent Fourth Amendment cases have applied the test described in Justice Harlan's concurrence in *Katz*, which made Fourth Amendment rights dependent on whether one has a "reasonable expectation of privacy." *Id*. at 360.

But the Court has also continued to recognize that the Fourth Amendment is to be interpreted in light of the traditional protections of the common law. For example, in a unanimous opinion in *Wilson v.*

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in 1928, 274 pages when rewritten in 1974, and had grown to over 1,000 pages by 2010).

[8] *See* note 3, *supra*.

[9] The Court has since clarified that, in fact, the Fourth Amendment protects *both* people and property. *See Jones*, 132 S. Ct. at 951 ("*Katz* did not narrow the Fourth Amendment's scope").

Arkansas, the Court noted that, in interpreting the Fourth Amendment, it looks to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." 514 U.S. 927, 931 (1995). More recently, every current member of this Court has agreed that the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Jones*, 132 S. Ct. at 950, 132 S. Ct. at 950 (five-Justice majority opinion) (quoting *Kyllo*, 533 U.S. at 34); *id*. at 958 (four-Justice concurring opinion agreeing with majority and also quoting *Kyllo*).

While there will likely be no end to disputes about the extent to which one has a reasonable expectation of privacy outside the home under the *Katz* test, the Court has been clear that the privacy of the interior of the home is still governed by traditional protections of private property from trespass under the common law. "[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." *Kyllo*, 533 U.S. at 34 (further explaining that the Fourth Amendment protects "any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area'") (quoting *Silverman*, 365 U.S. at 512).

Last term, this Court explicitly acknowledged that it had, in recent years, digressed from this property-based approach to evaluating Fourth Amendment claims. "[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. . . . Our later cases, of course, have deviated from that exclusively property-based approach." *Jones*, 132 S. Ct. 945, 949–50. The Court acknowledged that *Katz* offered an approach for resolving Fourth Amendment issues where trespass on property was not at issue, but rejected "apply[ing] *exclusively* Katz's reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed." *Id*. at 953. The Court explained that while its modern Fourth Amendment jurisprudence might offer protections beyond the historical, common law understanding of protections against unreasonable trespass on property, it could never offer less protection than when the Fourth Amendment was adopted: "[w]hat we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a *minimum* the degree of protection it afforded when it was adopted." *Id*. *Camara* does not afford that minimum degree of protection. Instead, it allows aggressive and thorough searches of people's homes, without their consent and without any suspicion of wrongdoing. Such searches are contrary to the vision of the Framers, and this Court should grant *certiorari*.

II. This Case Presents an Ideal Opportunity to Reconsider *Camara*.

This case presents an ideal opportunity for this Court to reconsider *Camara*. It plainly demonstrates in the starkest possible terms what *Camara* has led to today: suspicionless searches of the private homes of law-abiding citizens justified by nothing more than the expiration of a certificate after a three- or six-year period. This case presents an opportunity for this Court to clarify the protections for all three types of property ("houses, papers and effects") specifically listed in the Fourth Amendment. It also presents this Court with a unique opportunity because, although the problem is widespread, cases presenting these issues are unlikely to often reach the point of petitioning this Court for *certiorari*.

A. The legal issues are clearly presented by the plain language of the City of Rochester's Charter and Municipal Code.

The City of Rochester's Charter and Municipal Code establish a mandatory government inspection scheme for homes that are not occupied by their owner, and create an administrative warrant process that requires no individualized suspicion of criminal activity.

The codes enforced by City inspectors are wide-ranging, and include the "Property Conservation Code, Building Code, Plumbing Code, Fire Prevention

Code, Zoning Code, Health Ordinance, New York State Uniform Fire Prevention and Building Code, *or any other federal, state, county or City law, ordinance, rule or regulation* relating to the construction, alteration, maintenance, repair, operation, use, condition or occupancy of a premises located within the City, which law, ordinance, rule or regulation is enforced by the City." Charter § 1-10 (emphasis added).

Rather than requiring probable cause that a code violation has occurred, the City's mandatory home inspection scheme simply relies on the passage of time to justify the suspicionless searches of the homes of law-abiding citizens. The issuance or renewal of a Certificate of Occupancy ("Certificate") is required for dwellings that are not occupied by their owner. RMC § 90-16(A). Certificates are valid for either three years or six years, depending on the type of dwelling. RMC § 90-16(H)(1)(a)-(b). Issuance or renewal of a Certificate is conditioned on the completion of an inspection of the home by the City that determines the dwelling is "in substantial compliance with applicable laws, ordinances or rules." RMC § 90-16(G)(1). Warrants may be issued solely on the basis that the occupants or owner of the dwelling have applied for a Certificate (or other permit) and have refused to consent to an inspection. Charter § 1-23(A)(2). Therefore, the mere passage of time (the three- or six-year period of the Certificate's validity) is sufficient to justify a search under the City's Code and Charter.

B. The facts are plain, and the procedural posture is clean, presenting a unique opportunity for the Court to rule on the Fourth Amendment rights of law-abiding citizens who are not suspected of any crime.

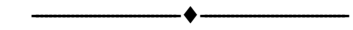
The facts of this case are relatively simple: Petitioners are three renters and a landlord who do not want to allow the City of Rochester to conduct suspicionless administrative code inspections of the interior of their homes (or property, in the case of the landlord) despite the City's mandatory requirement that such inspections be conducted on a regular basis. The City has offered no evidence supporting probable cause of criminal activity by the renters. *See*, *e.g.*, Nelson R. 388–98. Thus, the renter Petitioners in this case present a unique opportunity for this Court to rule on the Fourth Amendment rights of law-abiding citizens about which the government has no individualized suspicion, in contrast to the vast majority of Fourth Amendment cases which involve searches or seizures of criminal suspects or their property. One pair of Petitioners are renters in their seventies who are not suspected or accused of any crime or code violation—they simply don't want to permit government inspectors in their home of twenty years. Nelson R. 26–28, 113–17. Similarly, a third Petitioner is a renter who, among other objections, does not want strangers in her bathroom or her young daughter's bedroom. Cermak R. 90–91, 154–56.

The case is also well-positioned for a decision on the merits with no complicating procedural issues. The case has a clean procedural record, having been fully litigated in the lower courts. The trial court rejected Petitioners' Fourth Amendment challenge by noting that the RMC requires periodic inspections and the period for inspections had expired, relying on *Camara*'s statement that "the passage of time" constitutes a justification for such warrants. *See* App. 19–26, 35–42. The primary evidence the City presented in the warrant hearings was that the RMC required inspections to issue a Certificate, the property owners had applied for Certificates, and the tenants had not consented to warrantless searches of the properties. *See*, *e.g.*, Nelson R. 373–94. Importantly, the administrative warrants were issued for Petitioners' homes without any individualized factual showing of wrongdoing by the tenants. *See*, *e.g.*, Nelson R. 398. The Appellate Division then upheld the issuance of the warrants, citing *Camara*. App. 6–7.

C. The rights of law-abiding citizens are constantly being violated by administrative searches, but cases such as this are unlikely to reach this Court with any frequency.

This case presents an issue of national importance, but it is one that will not reach this Court often. Although mandatory administrative inspections are relatively common, it is rare that they are challenged. Few tenants have the financial resources to

mount a sustained legal challenge that will reach this Court. Few attorneys in private practice are likely to take such a case against the government on a contingency basis, and few public interest law firms are willing or able to take such cases. In addition, maintaining a challenge such as this long enough for it to reach this Court requires plaintiffs with an unusual amount of willpower, energy, and commitment to principle in the face of substantial cost, inconvenience, uncertainty, and even stigmatization by one's community. As a public interest law firm that challenges government abuses, *amicus* IJ has extensive experience interviewing potential clients for constitutional challenges like this and has found that these are an exceptional combination of traits which few potential plaintiffs possess. Finally, the tenants whose rights are violated will rarely be prosecuted for property code violations while the landlords who are prosecuted may lack standing to challenge these searches. It is thus likely to be very rare that a case presenting these issues makes it before this Court.



CONCLUSION

For the foregoing reasons, *amicus* IJ urges this Court to grant a petition for *certiorari* to reconsider the holding of *Camara* that administrative warrants may be issued without any individual suspicion.

Respectfully submitted,

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