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STATE OF WISCONSIN

SUPREME COURT

Case No. 2015AP1523

VINCENT MILEWSKI and MORGANNE MacDONALD,

Plaintiffs-Appellants-Petitioners,

v.

TOWN OF DOVER; BOARD OF REVIEW FOR THE TOWN OF DOVER; and GARDINER APPRAISAL SERVICE, LLC, as Assessor for the TOWN OF DOVER,

Defendants-Respondents.

NONPARTY BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS-PETITIONERS

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INTEREST OF NONPARTY

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is protecting private property rights, both because control over one's property is a tenet of personal liberty and because property rights are inextricably linked to other civil rights. For this reason, IJ litigates cases defending property rights and files amicus briefs in cases implicating these rights. *See, e.g.*, *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (amicus). In particular, IJ works to protect private homes from nonconsensual government inspections. IJ is interested in this case because the Court of Appeals' decision gravely threatens the Fourth Amendment rights of all Wisconsin homeowners.

INTRODUCTION

The Court of Appeals' decision threatens two of the Fourth Amendment's most basic protections: The government cannot cross the threshold of a home without a warrant, and it cannot punish an individual for exercising her Fourth Amendment rights. At its core,

the Fourth Amendment protects the rights of homeowners to demand a warrant when the government tries to enter their home. This is especially true in the context of regulatory searches of the home for untaxed goods. Indeed, Americans' resentment of these revenue-seeking searches, which were common during British rule of the Colonies, was a driving force behind the Amendment's adoption. Wisconsin law cannot prevent Plaintiffs from contesting their tax assessments because they exercised a basic right in requesting a warrant before the government entered their home. Such a consequence punishes homeowners for exercising Fourth Amendment rights and therefore violates the Fourth Amendment.

This brief first explains that this Court should rely on the Fourth Amendment's history and its interpretation to conclude that government entry into the home to conduct a tax assessment is a search. Second, it describes how other courts have held that the government cannot punish individuals for exercising their Fourth Amendment rights. Third, it explains why Wisconsin's statutory scheme for conducting tax assessments is not reasonable under the Fourth Amendment. Fourth, it concludes by urging the Court to rely on history and well-settled law to hold that the Fourth

Amendment prohibits barring Plaintiffs from challenging their assessment.

ARGUMENT

I. Government Entry Into the Home to Conduct a Tax Assessment Is a Search Within the Meaning of the Fourth Amendment.

The critical inquiry in this case is whether this search would have been a search at the time the Fourth Amendment was adopted. And, as Appellants show in their opening brief, see Brief of Appellants 19-24, there is no doubt that the search in this case would have historically been a search within the meaning of the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 583 (1979); *see also* Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* 982 (2d ed. 2014).

History plays an integral role in interpreting the Fourth Amendment. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 346 n.14 (2001); Clancy, at 16. In *United States v. Jones*, the U.S. Supreme Court made clear the critical inquiry in determining a search is whether the physical intrusion at issue "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." 565 U.S. 400, 405 (2012) (citing *Entick v.*

Carrington, 95 Eng. Rep. 807 (C.P. 1765)). The Court of Appeals did not even consider this inquiry.

The U.S. Supreme Court reestablished history's important role in Fourth Amendment interpretation in *Jones* when it returned to a common-law trespass approach in determining a Fourth Amendment search. *Id.* (finding that the government's installation of a GPS device to an automobile and tracking its movements constituted a search within the meaning of the Fourth Amendment). The Supreme Court ruled that if the government's intrusion involves a physical intrusion of the home, a search has occurred within the meaning of the Fourth Amendment. *Id.* ; *see Florida v. Jardines*, 133 S. Ct. 1409, 1417-18 (2013) (police bringing drug-sniffing dog to front porch of a home is a search because of home's special Fourth Amendment protection); *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015). In finding that a search had occurred, the Supreme Court relied on the framing-era rule that "no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser." *Jones*, 565 U.S. at 405 (citing *Entick*, 95 Eng. Rep. at 817).

The Court of Appeals failed to consider this *Jones* analysis in finding that a nonconsensual tax inspection is not a search within the meaning of the Fourth Amendment. It only relied on one case, *Wyman v. James*, a case involving the government's ability to condition the receipt of welfare benefits on the recipients' submission to an in-home interview, and it found no search here. 400 U.S. 309 (1971). This interpretation of the Fourth Amendment ignores the Supreme Court's modern interpretation. The only question the Court of Appeals should have asked is whether the search would have been considered a trespass when the Fourth Amendment was adopted. And the answer here is clearly yes.

Plaintiffs exercised core Fourth Amendment rights in refusing the government's warrantless intrusion into their home to assess taxes. They are entitled to the full protection the Fourth Amendment affords.

II. It Is Well-Settled that the Fourth Amendment Prohibits Punishing Plaintiffs for Exercising Their Fourth Amendment Rights.

Wisconsin law penalizes homeowners who refuse warrantless tax inspections of their homes by preventing them from ever challenging the resulting tax assessments. Wis. Stat. § 70.47(7)(aa) and Wis. Stat. § 74.37(4)(a) bar them from contesting their assessments for one reason: They exercised their Fourth Amendment rights. Wis. Stat. § 70.47(7)(aa) and Wis. Stat. § 74.37(4)(a) therefore threaten the ability of homeowners to invoke their Fourth Amendment rights.

The Court of Appeals' decision is contrary to federal and state decisions from across the country. Courts have repeatedly ruled that the government cannot punish someone for exercising her Fourth Amendment rights in the context of a revenue-seeking search like the one resisted by Plaintiffs. That is because a penalty unconstitutionally conditions an individual's choice to invoke the Fourth Amendment. Although Defendant Town of Dover contends that the Fourth Amendment's protections apply only to individuals who are the subject of investigatory searches, courts have found that

the nature of the search does not affect this Fourth Amendment prohibition.

A. The Court of Appeals' decision violates clear U.S. Supreme Court precedent.

The Supreme Court has long recognized that the Fourth Amendment prohibits the government from penalizing individuals for exercising their Fourth Amendment rights. Three cases clearly explain this prohibition in the context of warrantless regulatory inspections.

First, in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 540 (1967), the City of San Francisco arrested and convicted a tenant who refused the city's warrantless inspection of his home. In *Camara*, the inspector was looking for violations of the city's housing code but any discovered violations would incriminate the landlord—not the tenant. *See id.* at 526. Thus, the search was not investigatory in nature as to the tenant. The tenant nonetheless demanded a warrant before the government entered his home, and the city convicted the tenant for refusing the inspection. *Id.* at 540. The Supreme Court first held that the tenant had a Fourth Amendment right to demand the government get a warrant before entering his home. *Id.* at 534, 540. The Court then held his

conviction violated the Fourth Amendment because it penalized him for exercising his Fourth Amendment rights. *Id.* Importantly, the Court reasoned the tenant was entitled "to verify the need for or the appropriate limits of the inspection" without risking penalties, even if the intrusion into his home was regulatory in nature. *Id.*

That same day, the Supreme Court decided *See v. City of Seattle*, 387 U.S. 541, 546 (1967), and extended that same protection to owners of private commercial property. In *See*, the owner of a warehouse was convicted and fined for refusing to permit a warrantless fire inspection of his warehouse. *Id.* at 542. Relying on its decision in *Camara*, the Court found that the Fourth Amendment also protected the owner from being prosecuted for insisting the government obtain a warrant to enter his locked commercial warehouse. *Id.* at 546.

Just recently, the Supreme Court reaffirmed *Camara*'s holding in *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452-53 (2015). There, the City of Los Angeles enacted an ordinance requiring hotel operators to make their registries available to the police on demand. *Id.* at 2448. Under the ordinance, operators could be arrested on the spot and fined for refusing to give police access to their registries.

Id. The city's desire to search the hotel's registry had nothing to do with enforcing laws against hotel operators and was rather designed to "deter[] criminals from operating on the hotels' premises." *Id.* at 2452. The Court nevertheless found the city's ordinance violated the Fourth Amendment because a hotel operator could "only refuse to comply with an officer's demand to turn over the registry at his or her own peril." *Id.* at 2452-53. The Court explained that business owners could not be put to that kind of choice under the Fourth Amendment without being "afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* at 2452.

Camara, *See*, and *Patel* directly control the outcome in this case. As homeowners, Plaintiffs are entitled to receive the same protection under the Fourth Amendment as landlords, tenants, commercial property owners and business operators. This is true regardless of the type of penalty involved or the government's reason for conducting the search. Under the Fourth Amendment, Wisconsin law cannot put homeowners in the position where they can only demand a warrant if they suffer a penalty. This Court should rely on these cases and hold that punishing Plaintiffs for exercising their Fourth Amendment rights violates the Fourth Amendment.

B. The Court of Appeals' decision contravenes decisions of other federal and state courts across the country.

Other federal and state courts have also recognized that one cannot be punished for exercising her Fourth Amendment rights in the context of regulatory inspections. This same issue has arisen in cases involving administrative inspections of rental properties and government-mandated inspections of owner-occupied homes at the point of a property's sale. In these cases, courts repeatedly find that the Fourth Amendment bars the government from burdening an individual's ability to refuse a warrantless regulatory inspection. This is true whether the burden is a criminal penalty, a license denial, or even the payment of a modest fee.

Federal district courts commonly rely on *Camara* to protect the rights of landlords and tenants to refuse warrantless rental inspections without being subject to penalties. For instance, in *Baker v. City of Portsmouth*, 2015 U.S. Dist. LEXIS 132759, *14 (S.D. Ohio Sept. 30, 2015), the U.S. District Court for the Southern District of Ohio recently found a city's rental code violated the Fourth Amendment because it authorized warrantless inspections and left landlords and tenants faced with the choice of consenting to the warrantless inspection or facing civil penalties or criminal charges.

Likewise, the U.S. District Court for the Northern District of Texas has also found that landlords cannot be forced to choose between consenting to an inspection to rent their property and not being able to obtain a rental license. *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 902-03 (N.D. Tex. 2005) ("A valid consent involves a waiver of constitutional rights and must be voluntary and uncoerced.").

In addition, in *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1230 (N.D. Ill. 1998), the U.S. District Court for the Northern District of Illinois applied the same principle when a village attempted to charge a $60 fee to tenants who requested a warrant. The court found that a village could not charge a fee when it was forced to obtain a warrant because the fee placed "an unconstitutional burden" on the exercise of the tenants' Fourth Amendment rights. *Id.*

States' highest courts have similarly found that property owners cannot be forced to choose between exercising their Fourth Amendment rights and facing penalties. For example, in *Crook v. City of Madison*, 168 So. 3d 930, 939-40 (Miss. 2015), the Mississippi Supreme Court found that convicting a landlord for renting his property without a rental permit violated the Fourth Amendment

because it forced the landlord to involuntarily consent to a warrantless search of the property.

In addition, in *Sokolov v. Village of Freeport*, 420 N.E.2d 55, 57 (N.Y. 1981), the New York Court of Appeals struck down an ordinance that forbade renting or re-renting property without first consenting to a warrantless rental inspection of the property to obtain a rental permit when it became vacant. The court declared the ordinance unconstitutional because "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.* at 57 (quoting *United States v. Chicago, etc. R.R. Co.*, 282 U.S. 311, 328-29 (1931)).

The Fourth Amendment has also protected property owners who are subject to regulatory searches at the point of their property's sale. For example, in *Wilson v. City of Cincinnati*, 346 N.E.2d 666, 670 (Ohio 1976), the Ohio Supreme Court considered a challenge to a Cincinnati ordinance that required homeowners to obtain a Certificate of Inspection prior to entering a contract for the sale of the property. Under the ordinance, the seller could obtain the

certification only by agreeing to a search of the home and could be prosecuted for selling the home without the certificate. *Id.* The Ohio Supreme Court found the ordinance unconstitutional because the "import of *Camara* is that the Fourth Amendment prohibits placing [the property owner] in a position where she must agree to a warrantless inspection of her property or face a criminal penalty." *Id.* at 671.

Just as the Fourth Amendment protected property owners in these cases, the Fourth Amendment also protects homeowners here. Wis. Stat. § 70.47(7)(aa) and Wis. Stat. § 74.37(4)(a) force homeowners who exercise their Fourth Amendment rights to forfeit contesting their tax assessments. By compelling homeowners to choose between these two alternatives, these statutes unconstitutionally condition homeowners' choices to exercise their Fourth Amendment rights.

III. Wisconsin's Approach to Conducting Tax Assessments Is Not Reasonable.

The Court of Appeals found that even if the tax inspection here was a search within the meaning of the Fourth Amendment, "Wisconsin law regarding tax assessments is a reasonable statutory scheme" because the government's need to comply with the

Wisconsin Constitution's tax uniformity clause outweighs the "relatively low intrusion on the homeowner." Ct. App. Dec. ¶¶ 18-19, App. 133-34. The Court of Appeals reasoned that the government's ability to view a home's interior is more significant because "no other means are as effective to provide an accurate valuation." *Id.*

Yet in balancing these competing interests, the Court of Appeals did not consider any other means by which the government could accurately and uniformly assess property taxes. Other states have found less intrusive means to assess property taxes without forcing homeowners to waive their constitutional rights. For example, Iowa does not require interior tax inspections. Assessors simply use the fair market value, taking into consideration the sale price of the property or of comparable properties in normal transactions and the availability of interested buyers. Iowa Code § 441.21. And in New York, an assessor may not inspect a private residence absent a property's owner's consent. *See* N.Y. Real Prop. Tax Law § 500; 2 Op Counsel SBEA No. 78; *see also* N.Y. Real Prop. Tax Law § 524; *Yee v. Town of Orangetown*, 76 A.D.3d 104, 112 (N.Y. Sup. Ct. App. Div. 2d Dept. 2010). If consent cannot be obtained, the

assessor may get a warrant or may use any reasonable method to aid him in arriving at an appraised value. *Id.* The same is true in New Hampshire, which has an administrative warrant process if homeowners do not consent to an inspection. *See* N.H. Rev. Stat. § 74.17. Accordingly, a warrant requirement here would not derail the government's ability to accurately and uniformly assess property taxes.

In addition to considering the effectiveness of Wisconsin's regulatory scheme, the Court of Appeals also considered the intrusiveness of the search. However, it quickly discounted the level of intrusion a property tax inspection poses.

The government's entry into the interior of the home to conduct a tax assessment is just as intrusive as any other regulatory search of the home, if not more so. When assessors enter the home, they are looking to see whether anything of value has been added to the home that would increase the assessment. This requires entering a homeowner's most intimate spaces, including bedrooms, bathrooms, kitchens and basements; it is by no means a "limited" intrusion into a home. Without a warrant, a homeowner has "no way of knowing the lawful limits of the inspector's power to search,

and no way of knowing whether the inspector himself is acting under proper authorization" before the inspector enters the most private confines of the home. *Camara*, 387 U.S. at 532.

CONCLUSION

Throughout our nation's history, the Fourth Amendment has protected the sanctity of the home from prying government eyes. This is true whether the government wants to search the home to conduct a criminal investigation, to discover a housing code violation, or to determine appropriate taxes. Regardless of the government's motivation for entering the home, the Fourth Amendment protects the right of homeowners to demand a warrant when the government is at one's doorstep. The government cannot punish homeowners for exercising that sacred right.

DATED: December 9, 2016

Respectfully submitted,

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CERTIFICATION OF BRIEF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 2,987 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that, upon the Court's acceptance of the paper original of this brief, I will submit an electronic version of this brief, which complies with the requirements of Sec. 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served on all parties with the paper copies of this brief filed with the Court.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Nonparty Brief of Institute for Justice in Support of Plaintiffs-Appellants-Petitioners were served via U.S. Priority Mail, postage prepaid, on the 9th day of December, 2016 to counsel of record at their respective addresses as follows:

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