No. 05-502

IN THE
Supreme Court of the United States

BRIGHAM CITY, UTAH,
Petitioner,
v.
CHARLES W. STUART, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Utah

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, N.W.
Washington, D.C. 20006

JONATHAN D. HACKER
(Counsel of Record)
SHANNON M. PAZUR
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

BLANK PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISION

OTHER AUTHORITY

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as amicus curiae in support of respondents.[1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including the protection of Fourth Amendment liberties. NACDL has frequently filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in safeguarding the individual liberties guaranteed by the Fourth Amendment. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001); *Bond v. United States*, 529 U.S. 334 (2000); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

---

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

SUMMARY OF ARGUMENT

It is axiomatic that the protections of the Fourth Amendment are never more robust than when the government seeks to cross the threshold of the home. Accordingly, any nonconsensual home entry effectuated without a warrant is presumptively unreasonable and in violation of the Fourth Amendment. Neither of the only exceptions to that rule put at issue in this case – the emergency aid exception and the exigent circumstances exception – applies, and the police entry of respondent's home is therefore unconstitutional.

I. The emergency aid exception – which allows officers to enter a home without probable cause or any individualized suspicion of criminal wrongdoing in order to administer emergency medical assistance – does not apply because the officers in this case were acting in their traditional law-enforcement capacity. Petitioner and its *amici* argue that whether the officers' entry was effectuated for law-enforcement or non-law-enforcement purposes is irrelevant under the Fourth Amendment. But this Court always has insisted that any search – let alone a home entry – not supported by individualized suspicion of criminal activity may be sustained only when it is undertaken to advance a "special need" apart from law enforcement. As the Court's cases make clear, inquiry into the primary purpose of such "special needs" searches is both appropriate and necessary, as a condition of dispensing with the normal requirement of probable cause or individualized suspicion.

II. In any event, as three Utah courts properly found, the objective record facts in this case did not justify an entry under either the emergency aid or exigent circumstances exception. As to exigent circumstances, those courts held, the warrantless entry was unjustified because the nature of the incident did not demand immediate police entry. Petitioner now seeks to lower the bar, proposing a novel bright-line rule that exigent circumstances arise whenever there is a

physical altercation of any kind – a rule that would work an unprecedented expansion of the exigent circumstances exception. The proper analysis, consistent with this Court's precedents, requires consideration of the totality of the circumstances, including not only the seriousness of the incident but also the need for immediate police intervention. On the facts of this case, the police entry was premature: there was nothing to prevent the officers from maintaining their surveillance and waiting to see whether a serious threat of physical injury would in fact materialize. A warrantless home entry must be a last, and not a first, resort. By the same token, as the three State courts held, the objective facts of the case did not give rise to a reasonable belief that any occupant of the home was in need of emergency medical assistance from the police. A "smack" to the nose is unlikely to give rise to any need for medical treatment – let alone a need that could not be met here by the recipient of the smack himself, or by others in the home, so that immediate *police* assistance was required.

ARGUMENT

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "At the very core" of the 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)); *see also Georgia v. Randolph*, 547 U.S. _, No. 04-1067, slip op. at 10 (Mar. 22, 2006) ("'it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people'") (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998)). Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth

Amendment is directed." *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972).

As this Court has recognized for over half a century, the sanctity of the home merits protection that can be provided only by the Warrant Clause of the Fourth Amendment. Only the requirement of a warrant based on probable cause assures that the decision to invade home privacy is made by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *see also Payton v. New York*, 445 U.S. 573, 588 n.26 (1980).

> The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 14. Accordingly, the Court has recognized as a "cardinal principle" that warrantless home searches "'are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *see Kyllo*, 533 U.S. at 31 ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *Payton*, 445 U.S. at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.") (citation omitted).

This case is about the scope of those strictly limited exceptions. The Utah Supreme Court held that neither the

"exigent circumstance" exception nor the distinct "emergency aid" exception was satisfied here on the objective record facts. But rather than simply address that straightforward conclusion on its own terms, petitioner and its *amici* urge a genuinely radical revision of basic Fourth Amendment principles – one that would effectively replace the warrant and probable cause requirement that has long governed law-enforcement entries of private homes with an all-purpose inquiry into objective reasonableness. Although couched in seemingly innocuous terms, the regime they propose collapses the emergency aid and exigent circumstances exceptions into a single anemic standard that would allow the government to enter private homes to investigate criminal activity with no warrant, no probable cause, and no real reason to believe that immediate entry was required

No prior case of this Court authorizes that result. This case should not be the first – not least because the issues on which petitioner and the Solicitor General spend so much energy were neither addressed in nor pertinent to the decision below. For the reasons set forth in the margin, this Court need not even consider the doctrinal overhaul proposed by petitioner and the Solicitor General.[2] But if the

---

[2] The key to petitioner's and the Solicitor General's novel theory is the contention that the "purpose" of a warrantless home entry – specifically, whether the entry is made for law-enforcement purposes or some other "special need" – is categorically irrelevant under the Fourth Amendment. Even if this Court were to agree, it would not change the outcome of the decision below. Though the Utah Supreme Court did hold that the emergency aid exception may be invoked only when officers are acting in a non-law-enforcement capacity, it did not rely on that holding to decide the case. Instead, the court invalidated the entry because the objective circumstances facing the officers did not give rise to a reasonable belief that an immediate entry was necessary, either to render medical aid or to prevent serious injury. Pet. App. 14-15, 18-20. That holding sufficed to resolve the case below – and should be enough to resolve the case here. Indeed, given the fact-bound and case-specific

Court does consider it, the Court should reject it, as unsupported by precedent and inconsistent with the most basic Fourth Amendment principles.

I. THE EMERGENCY AID EXCEPTION IS NOT APPLICABLE WHERE OFFICERS ENTER A HOME IN A TRADITIONAL LAW-ENFORCEMENT CAPACITY.

Both the State and the Solicitor General argue that the "emergency aid" exception to the warrant and probable cause requirement applies whenever objective facts give rise to a reasonable belief that emergency medical assistance is called for – and regardless whether officers actually enter a home to provide emergency medical aid, or to investigate a crime. Pet. Br. 12-16; U.S. Br. 12-13. That is incorrect. Like other "special needs," the need to render emergency medical aid can justify a search – a search conducted in the absence of a warrant or probable cause – only when the searching officer is acting outside his traditional law-enforcement capacity. If, instead, an officer is pursuing normal law-enforcement ends, then a home entry must be analyzed under the normal warrant and probable cause standard.

A. All Nonconsensual Home Entries Made For The Purpose Of Criminal Investigation Must Be Supported By Probable Cause

This Court's cases have recognized certain distinct categories of nonconsensual warrantless home entries as permissible under the Fourth Amendment. One is typically described as the "exigent circumstances" exception to the warrant requirement. *See, e.g., Kirk v. Louisiana*, 536 U.S. 635, 637 (2002). This exception applies when the police have the

---

nature of the merits of the dispositive holding below, the Court may wish to dismiss the writ as improvidently granted.

objective probable cause sufficient to justify a warrant, but the exigencies of the moment preclude intervention and review by a neutral magistrate. "The Fourth Amendment to the United States constitution has drawn a firm line at the entrance to the home, and thus, the police need *both* [1] probable cause to either arrest or search *and* [2] exigent circumstances to justify a nonconsensual warrantless intrusion into private premises." *Id.* (emphasis added) (citation omitted). In other words, even where all agree that the government has probable cause to enter a private home to search for evidence of criminal wrongdoing, only an extremely narrow set of circumstances will rise to the level of an exigency sufficient to allow individual officers to do so without first obtaining the authority of a warrant. *See, e.g., United States v. Santana*, 427 U.S. 38, 43-43 (1976) (hot pursuit); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (same); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (destruction of evidence); *Michigan v. Tyler*, 436 U.S. 499, 509-10 (1978) (to protect or preserve life, e.g., burning building).

Another category of permissible warrantless searches involves those that are conducted *not* for the purpose of investigating criminal wrongdoing, but to advance "'special needs' *other than* the normal need for law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.7 (2001) (emphasis added). This doctrine "has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement," and operates as "an exception to the general rule that a search must be based on individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting); *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (student-athlete drug testing); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk-driving checkpoint); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border checkpoint). It is precisely because such searches do not involve "the often competitive enterprise of ferreting out

crime," *Johnson*, 333 U.S. at 14, that this Court's "special needs" cases have not required a demonstration of probable cause that the search will yield evidence of a crime. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989) ("the probable-cause standard is peculiarly related to criminal investigations") (internal quotation marks omitted). "The traditional warrant and probable-cause requirements are waived" in special needs cases only "on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes." *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring).

In the particular context of home entries, this Court has recognized only one non-law-enforcement purpose that will justify a nonconsensual warrantless entry unsupported by probable cause: the need to render emergency aid "'to protect or preserve life or avoid serious injury.'" *Mincey*, 437 U.S. at 392 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)). "[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Id.* As with other "special needs" situations, because emergency aid searches are performed pursuant to an officer's caretaking function rather than his criminal investigation function, such searches need not be supported by probable cause of criminal wrongdoing. Pet. App. 13 ("Because officers who act under the emergency aid doctrine are not conducting a law enforcement mission, they may do so without either obtaining a warrant or demonstrating the presence of probable cause or exigent circumstances.").

Petitioner and its *amici* contend that emergency aid searches are not akin to "special needs" searches, but should instead be treated as just another variant of the exigent circumstances doctrine – albeit a previously unknown variant in which a reasonableness inquiry substitutes for the probable

cause requirement. Pet. Br. 10-11; U.S. Br. 12-13. But the defining characteristics of emergency aid searches – that they are performed for a non-law-enforcement purpose and require no probable cause or individualized suspicion of wrongdoing – correspond precisely to the defining characteristics of special needs searches. Analytically, these searches fall under the special needs rubric, rather than that of exigent circumstances. Application of the emergency aid exception therefore should be guided by the principles animating the special needs cases – in particular, the requirement that the government establish its genuine non-law-enforcement purpose to justify invoking the exception.

B. Inquiry Into Primary Purpose Is Permissible – Indeed Required – Where The Government Seeks To Justify A Warrantless Search Conducted Without Probable Cause

Petitioner (joined by its *amici*) argues that inquiry into purpose is unnecessary – indeed, foreclosed – in analyzing the applicability of the emergency aid exception. If that were so, the import would be startling. As of now, as explained above, police officers acting in a law-enforcement capacity may enter a home without a warrant only if they have *both* probable cause to arrest or search *and* reason to believe that immediate entry is required, under the exigent circumstances exception. But the theory proposed by the State and the Solicitor General would dispense with one (critical) half of that equation: simply by invoking the emergency aid exception, officers pursuing traditional law-enforcement ends could effect a warrantless home entry *without* probable cause so long as there was reason to believe that immediate entry was required. The result would be a dramatic and unwarranted reduction in the protection afforded the home against law-enforcement entries and searches by the government.

In fact, the crucial premise behind petitioner's proposed rewriting of the law is incorrect. It is not the case that all inquiry into "purpose" is categorically impermissible under the Fourth Amendment. To the contrary, as this Court's cases make clear, whether a search conducted without probable cause or any individualized suspicion of wrongdoing may nevertheless be sustained under the Fourth Amendment turns critically on the primary purpose behind the search – specifically, whether it was conducted for law-enforcement or non-law-enforcement reasons.

1. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37. Where the government nonetheless seeks to justify such a search by pointing to a special need unrelated to law enforcement purposes, the Court has not hesitated to carefully examine the true "primary purpose" of the search. In evaluating the legality of a drug checkpoint in *Edmond*, the Court expressly held that what "principally distinguishes" permissible suspicionless searches from those that are constitutionally unsound is their "primary purpose." *Id.* at 40. Although the Court had previously upheld programs bearing a superficial resemblance to the one at issue in that case, it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 41. To the contrary, the Court has been "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." *Id.* at 43. Because the primary purpose of the checkpoint program at issue in *Edmond* "unquestionably" was that of "interdicting illegal narcotics," it was found to be inconsistent with the strictures of the Fourth Amendment. *Id.* at 40. The Court "decline[d] to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes." *Id.* at 44.

The purpose inquiry was acknowledged to be an exception to the usual Fourth Amendment analysis, but it was regarded as a necessary safeguard where a warrant and individualized suspicion are absent. Dissenting in *Edmond*, Chief Justice Rehnquist observed that the special needs inquiry into primary purpose serves an important function: "to both define and limit the permissible scope" of the "intrusive search" of a home. *Id.* at 55. As a result, the purpose of the search could very well determine its legality:

> [A] program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.

Id. at 47.

The Court reiterated the central relevance of the government's primary purpose in *Ferguson* finding that a hospital program of drug-testing for pregnant women was not subject to the "special needs" exception because "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." 532 U.S. at 80. In contrast, in each of the prior drug-testing cases, "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. The Court further noted that it had "tolerated suspension of the Fourth Amendment's warrant or probable cause requirement" in other special needs cases "in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement."

Id. at 79 n.15. In sharp contrast, "the collection of evidence for criminal law enforcement purposes" did not qualify as a special need so as to justify a warrantless, suspicionless search. *Id.* at 83 n.20.

Like the searches at issue in other special needs cases, a genuine emergency aid search is not supported by any individualized suspicion of wrongdoing, much less probable cause. The absence of this traditional Fourth Amendment safeguard requires an even more exacting review of a warrantless search than would otherwise be the case – including an inquiry into the individual officer's purpose in conducting the search. "[A]bsent probable cause, examining a government actor's motivation for conducting an emergency search provides a necessary safeguard against pretextual reliance on community caretaking interests to serve criminal investigation and law enforcement functions." *United States v. Cervantes*, 219 F.3d 882, 890 (9th Cir. 2000). *See also State v. Ryon*, 137 N.M. 174, 188 (2005) (adopting emergency aid test considering officer's purpose in conducting search); *State v. Mountford*, 769 A.2d 639, 644-45 (Vt. 2000) (same); *State v. Jones*, 947 P.2d 1030, 1037 (Kan. Ct. App. 1997) (same); *Gallmeyer v. State*, 640 P.2d 837, 842 (Alaska Ct. App. 1982) (same); *State v. Ferguson*, 629 N.W.2d 788, 792-93 (Wis. Ct. App. 2001) (same); *People v. Mitchell*, 347 N.E.2d 607, 610 (N.Y. 1976) (same).

Petitioner essentially concedes as much, explaining that the Court does engage in a "primary purpose" inquiry for "searches requiring no individualized suspicion." Pet. Br. 18-19 & n.2. What petitioner misses is that an emergency aid search *is* in fact a search requiring no individualized suspicion. It has never been thought, for instance, that an officer may not enter a home to render aid to a person lying unconscious at the foot of the stairs unless there is reason to believe that the person's injuries are the result of criminal activity, rather than a simple fall; the whole point of the

emergency aid exception is to dispense with the probable cause or individualized suspicion requirement so that an officer can provide aid outside the law-enforcement context.

It may be that petitioner is construing the term "individualized suspicion" to mean something like "individualized suspicion of an emergency situation." *See id.*; *see also* U.S. Br. 18 n.18 (equating probable cause of criminal activity with probable cause of an emergency). But as this Court repeatedly has made clear, the individualized suspicion that is absent in special needs cases – and required in all other contexts – is individualized suspicion *of wrongdoing. See, e.g.*, *Edmond*, 531 U.S. at 37 ("A search or seizure is ordinarily unreasonable in the absence of *individualized suspicion of wrongdoing*.") (emphasis added). This Court has never sanctioned a warrantless search *for purposes of criminal investigation* absent individualized suspicion of criminal wrongdoing. As explained above, as in other special needs cases, a genuine emergency aid search need not be supported by individualized suspicion of wrongdoing only because the state is not pursuing any law enforcement objective.[3]

2. Petitioner protests that the special needs cases do not permit examination of an individual officer's purpose – *viz.*, whether he acted in a law enforcement or caretaking capacity – but only the programmatic purpose of searches conducted

---

[3] Petitioner relies on *United States v. Knights*, 534 U.S. 112 (2001) in support of its argument that motive is irrelevant when a search is supported by individualized suspicion. But as already explained, emergency aid searches, like special needs searches, do *not* require individualized suspicion. In addition, the Court in *Knights* observed that the probationer's privacy interests were compromised by his legal status and by his agreement to be searched as a condition of release. *Id.* at 119 ("Knights's status as a probationer subject to a search condition informs" the Fourth Amendment analysis). *See also Ferguson*, 532 U.S. at 79 n.15 ("probationers have a lesser expectation of privacy than the public at large"). In contrast, respondents' privacy interests here were uncompromised until the officers made their warrantless entry.

pursuant to a general scheme. To be sure, in the special needs cases it has decided, the Court has directed its "primary purpose" inquiry at the programmatic level. *Edmond*, 531 U.S. at 47, 48. But that is simply because there is no reason to conduct such an inquiry at the level of the individual officer – for the program to pass muster in the first instance, decisions about who, when and how to search have been taken out of the individual officer's hands. Officer discretion is cabined at the programmatic level; no inquiry apropos the individual officer is necessary because that individual exercises virtually no discretion at all.[4] In other words, the officer has no "primary purpose" other than to follow established procedure.

In cases involving emergency aid, on the other hand, the necessary constraints on officer discretion are absent. Decisions about who and when and how to search are not made at a programmatic level, but by individual officers acting at their own discretion. But if the Court has "tolerated suspension of the Fourth Amendment's warrant or probable cause requirement [in the special needs cases] in part because there was no law enforcement purpose behind the searches," *Ferguson*, 532 U.S. at 80 n.15, then such an inquiry is required,

---

[4] *See, e.g.*, *Vernonia*, 515 U.S. at 650 (upholding a school drug testing policy of student athletes where "a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing"); *Sitz*, 496 U.S. at 453 (upholding Michigan's sobriety checkpoint program, in part because the "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle"); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989) (approving regulations concerning alcohol and drug testing of railroad employees "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program"); *Von Raab*, 489 U.S. at 667 (upholding Customs Service drug testing program: "A covered employee is simply not subject 'to the discretion of the official in the field.' The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position.") (quoting *Camera v. Mun. Ct.*, 387 U.S. 523, 532 (1967)).

at whatever level the purpose resides, in order to determine whether the closely-guarded exception applies. In other words, it is not the programmatic nature of the searches in the special needs cases that permits consideration of purpose, but the absence of a warrant and individualized suspicion. Were it otherwise, suspicionless drug-testing, traffic stops and other classic "special needs" searches could be conducted for law-enforcement purposes so long as they were performed on a discretionary, non-programmatic basis – a feature that would, on petitioner's account, insulate them from any inquiry into purpose.

Petitioner also contends that any consideration of an officer's subjective purpose is barred by *Whren v. United States*, 517 U.S. 806 (1996), and its progeny, but its reading stretches *Whren* far beyond its limits. In that case, the Court addressed the question whether an officer's impermissible motive can invalidate a seizure that is otherwise supported by probable cause. In answering that question in the negative, the Court repeatedly emphasized that "[s]ubjective intentions play no role in ordinary, *probable-cause* Fourth Amendment analysis." *Id.* at 813 (emphasis added). The Court distinguished previous decisions considering the subjective motive of officers in administrative and inventory searches, noting that in each of those cases the Court was "addressing the validity of a search conducted in the *absence* of probable cause." *Id.* at 811. The problem with considering evidence of subjective intent, it continued, is not "the evidentiary difficulty" of doing so. *Id.* at 814. Rather, the "principal basis . . . is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances" – i.e., when usual Fourth Amendment standards like probable cause have been met – "whatever the subjective intent." *Id.*

As a leading commentator has explained, "in light of the way in which the Court in *Whren* distinguished inventory

and administrative searches . . . , it apparently remains open to defendants, whenever the challenged seizure or search is permitted without probable cause because of the special purpose being served, to establish a Fourth Amendment violation by showing the action was in fact undertaken for some other purpose (i.e., mainstream law enforcement)." 1 Wayne R. LaFave, *Search and Seizure* § 1.4(f) (4th ed. 2004). *See also Cervantes*, 219 F.3d at 889-90 ("[B]y distinguishing between cases that require probable cause and those that do not, *Whren* suggests that the officer's motivation for conducting a search is still relevant where no probable cause exists, as is true in emergency doctrine cases."). The Court in *Edmond* found this distinction persuasive, noting that *Whren* "expressly distinguished cases where [the Court] had addressed the validity of searches conducted in the absence of probable cause." *Edmond*, 531 U.S. at 45. Indeed, *Whren* only "reinforces" the conclusion that "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Id.* at 45-46.

Finally, the fact that emergency aid searches concern the warrantless entry and search of a private residence further differentiates them from the *Whren* line of cases. "[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Martinez-Fuerte*, 428 U.S. at 561. In light of the heightened privacy interest in the home, the government may only dispense with the warrant and individualized suspicion requirements when it is genuinely pursuing a non-law-enforcement objective. Even the dissent in *Edmond*, while disagreeing that purpose should be relevant in evaluating the constitutionality of the checkpoint at issue there, differentiated that case from those involving "'the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection.'" 531 U.S. at 54 (Rehnquist, C.J., dissenting) (quoting *Marti-*

nez-Fuerte, 428 U.S. at 561). Accordingly, the reasoning of *Whren* does not extend to cases in which a search or seizure of a home is unsupported by probable case, or indeed by any quantum of individualized suspicion of wrongdoing.

II. EXIGENT CIRCUMSTANCES DID NOT EXIST TO JUSTIFY THE WARRANTLESS ENTRY

Petitioner does not contend – or point to any record evidence establishing – that the officers' actual, primary purpose in entering the home was to render emergency aid rather than to investigate and stop crimes in progress and arrest the offenders. As the Utah Supreme Court concluded, the officers entered the home "act[ing] exclusively in their law enforcement capacity, arresting the adults for alcohol related offenses, and providing no medical assistance whatsoever." Pet. App. 14. As a result, the warrantless entry at issue is not covered by the emergency aid doctrine, and can be justified, if at all, only under the exigent circumstances exception. Because the existence of probable cause is not at issue,[5] the sole question properly presented here is whether

---

[5] The baseline requirement for a warrantless home entry is exigent circumstances *and* probable cause. The Solicitor General suggests that "for protective sweeps ([*Maryland v.*] *Buie* [494 U.S. 325 (1990)]) and searches incident to arrest (*Chimel v. California*, 395 U.S. 752 (1969)), no showing of . . . particularized probable cause of a crime . . . is required before warrantless searches of parts of a home may be undertaken." U.S. Br. 16. Both examples, however, involve searches incident to arrest where the officers have arrest warrants based on particularized probable cause of a crime. The only question presented in those circumstances is the scope of the intrusion justified by that probable cause, once the officers have crossed the threshold into the home, and in the interest of protecting officer safety. Nothing in either *Buie* or *Chimel* suggests that a warrantless entry and search may be conducted with no probable cause and when officer safety is not in jeopardy. While this case does not turn on that distinction, as the presence of probable cause is not at issue, Pet. App. 9, it would be a dramatic departure from precedent for the Court to accept the argument that probable cause need not accompany an exigent circumstances entry and search.

the stipulated record facts reveal "exigent circumstances" requiring an immediate warrantless entry at the time the officers entered. The answer to that question is no, as the three Utah courts below correctly held.

Without a warrant, officers are not free to disregard the stringent protection afforded the home absent a genuine exigency demanding immediate entry. "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). Because this standard is and must be difficult to satisfy in light of the special status of the home, *see supra* at 3-4, few situations present the type of exigent circumstance justifying a warrantless entry, *see United States Dist. Ct.*, 407 U.S. at 318.

The only exigent circumstance asserted below was the purported need "to prevent physical harm to the occupants of the house." Pet. App. 10. The following record facts framed the courts' analysis below:

> The factual findings to which Brigham City stipulated indicate only that "[a]t one point, the juvenile got a hand loose and smacked one of the occupants of the residence in the nose."

Id. at 14 (quoting trial court, *id.* at 47). Further:

> The record reveals that the police officers heard the adults couple their efforts to physically restrain the juvenile with demands that he "calm down." The scene that played out before the officers prior to their entry into the kitchen was one in which the unanswered question was not whether the occupants of the kitchen were going to escalate the violence but instead whether the adults would be successful in accomplishing their goal of subduing the juvenile.

Id. at 19.[6]

On those facts, three courts found no exigent circumstances. Petitioner contends that the courts erred, because there is – or should be – a bright-line rule authorizing immediate, warrantless entry in all cases involving "any crime of violence," including the simplest of assaults. Pet. Br. 25-26. It is petitioner that errs. The correct approach is the long-standing totality of the circumstances inquiry followed in this Court's cases. Under that standard, the Utah courts' rejection of petitioner's exigent circumstances claim is unassailable.

A. A Claim Of Exigency Should Be Evaluated Under A Totality Of The Circumstances Test, Rather Than Under A Bright-Line Rule

In derogation of this Court's precedents and the sanctity of the home, petitioner proposes a novel, bright-line standard that "any crime of violence is of sufficient gravity to justify immediate police intervention," even in cases involving only a simple assault and no serious injury. Pet. Br. 25-26.[7] What is more, petitioner proposes that an exigency can be assumed whenever there is the *possibility* that a physical injury might occur. Pet. Br. 24 ("any physical altercation . . .

---

[6] Petitioner attempts to supplement the factual record in this Court despite the fact that both Utah appellate courts denied similar requests, citing petitioner's failure to properly challenge the factual findings. Pet. Br. 2 n.1; Pet. App. 4 ("Brigham City has urged us to expand our review of the facts to include all of the evidence received at the suppression hearing. Brigham City did not, however, ask us to review the court of appeals's denial of its attempt to expand the scope of reviewable facts."). Likewise, review here should be limited to the facts as stipulated below.

[7] The Solicitor General, though formally advocating a totality of the circumstances approach, endorses petitioner's proposal by arguing that "ongoing physical violence" *ipso facto* suffices to create a sufficient exigency. U.S. Br. 22-23; *see also id.* at 23-24 (stating that any physical altercation justifies entry).

creates a real and substantial risk that serious injury may result"). That standard is flawed both because it ignores this Court's repeated refusal to accept bright-line tests to establish an exigency, and because it would set the bar far too low, permitting warrantless entries in the absence of any real need for immediate police action.

The Court has repeatedly rejected categorical "exigent circumstance" exceptions to the warrant requirement for home entries.[8] *See, e.g.*, *Richards v. Wisconsin*, 520 U.S. 385, 390 (1997) (refusing to adopt bright-line rule that "exigent circumstances justifying a no-knock entry are always present in felony drug cases"); *Mincey*, 437 U.S. at 394-95 (rejecting "murder scene exception" that would have allowed for a warrantless search of a home anytime a homicide is involved); *Randolph*, 547 U.S. _, slip op. at 1 ("the Fourth Amendment does not insist upon bright-line rules" but "recognizes that no single set of legal rules can capture the ever changing complexity of human life") (Breyer, J., concurring). Nonetheless, petitioner asks the Court to "dispens[e] with case-by-case evaluation," *Richards*, 520 U.S. at 391-92, in favor of an exception that would swallow the rule.

As the Court in *Richards* explained, one reason categorical exceptions are disfavored is that they often contain "considerable overgeneralization." *Id.* at 393. That is, while many fact patterns subject to the categorical exception may provide sufficient basis for its invocation, many others may not. But a "blanket rule impermissibly insulates these cases from judicial review." *Id.* Likewise here, it cannot reasonably be contended that every "physical altercation" creates an exigency justifying a warrantless entry and search. "Instead, in each case, it is the duty of a court confronted with the

---

[8] Even petitioner recognizes that the Court has not sanctioned such black-and-white rules. *See* Pet. Br. 12 ("This Court has consistently examined cases involving exigent circumstances under an objective standard *based on the totality of the circumstances*.") (emphasis added).

question to determine whether the *facts and circumstances of the particular entry* justified dispensing with" the normal requirements for a home entry. *Id.* at 394 (emphasis added).

Even if it were appropriate to adopt a categorical approach to evaluating exigent circumstances, petitioner's proposed rule would invite warrantless searches where no real urgency can be found. The creation of a categorical exigency for crimes of violence, including simple assaults, would eviscerate the exigent circumstances doctrine. As the Supreme Court of Utah observed:

> If all that were required to authorize a warrantless entry into a home was probable cause that an assault of any severity whatsoever had occurred within the dwelling, the exigent circumstance component of the doctrine would disappear, subsumed within the probable cause requirement.

Pet. App. 19. Such a result would render the warrant requirement a nullity in a broad class of cases.

While a warrantless entry may be justified in *some* circumstances to avoid serious injury where probable cause is also present, petitioner's bright-line rule is wildly overinclusive. According to petitioner, because officers cannot predict which altercations will escalate and result in serious injury, they may act on the presumption that *all* altercations will *always* result in severe bodily harms. Not even petitioner suggests that such a conclusive presumption actually reflects reality for all situations, or even for most situations. The categorical rule instead is urged to relieve officers of the responsibility to make *any* on-the-spot assessments as to whether the need to intervene justifies a forced entry into a private home. To make things easier for officers, the totality of the circumstances analysis would be waived and all such entries would be deemed conclusively reasonable.

This Court has rejected precisely that justification for categorical exceptions to the warrant requirement.

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. . . . [T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey, 437 U.S. at 393. Thus, the government's interest in "maximum simplicity" advanced by a bright-line rule must yield to the Fourth Amendment's heightened protection of the home. The occurrence of a physical altercation is one factor to be considered under the totality-of-the-circumstances test, but it cannot create a *per se* exigency.

B. The Warrantless Intrusion Was Not Reasonable Under The Totality Of The Circumstances

Based on the totality of the circumstances, the Supreme Court of Utah held that exigent circumstances did not exist to justify the warrantless intrusion. Pet. App. 18-20. Although finding that the altercation between the adults and the juvenile "nudge[d] the line" of an exigent circumstance, the court nevertheless determined that an objective officer would not have believed that immediate entry was required because "the occupants of the kitchen were going to escalate the violence." *Id.* at 19.[9]

---

[9] To clarify, the Utah Supreme Court did not engage in any inquiry into subjective motive or primary purpose in considering the exigent circumstances exception, which applies in the traditional law-enforcement context and requires a showing of probable cause. The only purpose at issue in this case arises in connection with the emergency aid exception, discussed *supra*, Part I.

That conclusion is unassailable. Numerous factors that *could* have justified a warrantless entry simply were not present in this case. For example, neither officer safety nor domestic violence was at issue.[10] *Id.* at 17, 25. The occupants of the residence were not using, did not threaten to use, and (as far as the officers knew) did not even have access to any dangerous weapons.[11] Though petitioner speculates that a

---

[10] Contrary to petitioner's suggestion, Pet. Br. 26, the Utah Supreme Court noted that "[t]here was no finding that any of the parties to the altercation in the Brigham City home were cohabitants, and therefore, domestic violence considerations have no place in the evaluation of whether exigent circumstances justified the intrusion," Pet. App. 25. But even if domestic violence were a factor here, the police would still be required to assess the situation based on the totality of the circumstances, and enter only when an exigency is present. *See United States v. Davis*, 290 F.3d 1239, 1244 (10th Cir. 2002) (holding that "an officer's warrantless entry of a residence during a domestic call is not exempt from the requirement of demonstrating exigent circumstances"). To be sure, an officer's assessment of the totality of the circumstances may be informed by factors peculiar to the domestic violence context – e.g., that a victim of domestic violence may be more likely to deny the need for police intervention. But even in this context, the officer must make a reasonable judgment in light of all the facts known to him; suspicion of domestic violence does not vitiate the protections of the Fourth Amendment. *See Randolph*, 547 U.S. _, slip op. at 26-27 (Breyer, J., concurring) (emphasizing that totality-of-the-circumstances test applies even in domestic violence context).

[11] Courts have frequently grounded the existence of exigent circumstances on the fact that dangerous weapons were involved. *See, e.g., United States v. Janis*, 387 F.3d 682, 687-88 (8th Cir. 2004) (even if there had been no consent, exigent circumstances justified the warrantless entry in order to secure a handgun for the protection of others); *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3d Cir. 2003) (warrantless entry into home justified by exigent circumstances where officers believed a laser-sighted weapon was pointed at them); *United States v. Holloway*, 290 F.3d 1331, 1334-40 (11th Cir. 2002) (warrantless entry justified by exigent circumstances where officers responded to a report of gunshots and an altercation in a residence); *United States v. Lawlor*, 324 F. Supp. 2d 81, 85-89 (D. Me. 2004) (same); *cf. United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996) (in context of no-knock entry, "[t]he presence of a weapon creates an exigent circumstance, provided the gov-

knife could have been pulled because the altercation occurred in the kitchen, Pet. Br. 28-29, the stipulated record does not indicate that any weapons were involved or could have been involved.

Thus, while petitioner hyperbolically claims that the "officers here were confronted with all but the shots fired," Pet. Br. 29, the actual record reveals no shots, no gun, and no imminent risk of serious injury of any kind. Instead, in a far less dramatic scene, a juvenile who had "smacked" an adult in the nose was now being restrained and "calmed" by adults. Petitioner cites no cases in which such spare indications of risk of physical injury created an exigency under a totality of the circumstances standard – which is why petitioner urges a bright-line, "all assaults" rule instead.

But there is more than just the weakness of the factors *supporting* the officers' warrantless entry. On the other side of the ledger, a great number of factors indicated that the circumstances did *not* require the officers to intervene at the time that they did. For one thing, the offenses involved – including the assault – were not serious crimes. *See Welsh*, 466 U.S. at 753 ("application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed"). Indeed, the officers did not even arrest any individuals for the assault that supposedly justified immediate entry to avoid serious physical harm. The only charges ever filed in the case were for "contributing to the delinquency of a minor, disorderly conduct, and intoxication," Pet. App. 3 – quintessentially minor offenses.

---

ernment is able to prove they possessed information that the suspect was armed and likely to use a weapon or become violent").

Perhaps most important, the exigent circumstances inquiry asks not whether warrantless entry might have been justified at some point, had the facts developed in a particular way, but whether *immediate* entry was necessary at the time that it occurred. In this case, the answer to that question is no. This is not a case in which the officers were forced to guess at what was taking place inside and err on the side of safety. Quite the opposite, the officers were right outside the kitchen, watching the events unfold mere feet away, and fully able enter and seize control if and when it appeared that the situation was escalating to the point that it posed a serious threat of physical harm. That was true in part because of the officers' proximity to the events, but also – and importantly – because there was no gun or any other weapon within easy access of any of the persons in the kitchen. This was not, in other words, the kind of situation that was so volatile that it could spiral out of control before the officers would have time to enter and intervene – where, for instance, a gun could be used to inflict serious harm almost instantaneously. Here, there was nothing to prevent the police from continuing to monitor the situation from their prime vantage point, deferring entry unless and until there was an *imminent* threat to physical well-being that could be warded off only by police entry. *Cf.* Pet. App. 20 (noting other actions, short of entry, that officers could have taken to bring situation under control). When what is at stake is the special sanctity of the home, warrantless entry can be justified only as a truly last resort.

III. THE WARRANTLESS ENTRY CANNOT BE JUSTIFIED UNDER THE EMERGENCY AID EXCEPTION

As discussed in Part I, *supra*, the warrantless search of the home in this case does not fall within the narrow range of related "special needs" and "emergency aid" cases for which the warrant and probable cause requirements are inapplicable

– unlike those cases, which involve no law enforcement purpose and thus no need for probable cause, the officers in this case entered solely for law enforcement purposes. Three Utah courts so found and, as noted above, petitioner does not claim otherwise. Accordingly, the "emergency aid" exception invoked by petitioner is categorically unavailable.

It is also unavailable for the reason relied upon by the Utah Supreme Court – even if the entry had been for the non-law-enforcement purpose of rendering emergency medical aid to a person in need, the objective circumstances did not justify a nonconsensual, warrantless entry on that basis.

First, courts should be "especially reluctant to indulge [a] claimed special need" in circumstances like this because privacy interests are at their "zenith" in a home. *United States v. Scott*, 424 F.3d 888, 896 (9th Cir. 2005). *See also Payton*, 445 U.S. at 589 (in no setting "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home"). The "special needs" exception has been employed rarely, and typically only in situations involving diminished privacy expectations. *See, e.g., Vernonia*, 515 U.S. at 654-57 (public school children who participate in sports have a "reduced expectation of privacy"); *Martinez-Fuerte*, 428 U.S. at 561 ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."). When privacy interests are at their height, as they are here, exceptions to Fourth Amendment protections must be even more strictly limited.

Second, the stipulated record reveals nothing approaching a serious medical situation of any kind – much less a situation that could not be handled by the adults in the residence and therefore required police intervention. To the contrary, the putative "emergency" arose from the most trivial physical contact: "at one point, the juvenile got a hand

loose and smacked one of the occupants of the residence in the nose." Pet. App. 3. This "smack" prompted the officers to enter the house, whereupon the "findings of fact disclose nothing to indicate that the officers found it necessary to render medical assistance to the victim of the juvenile's blow or otherwise minister to an injury of the severity necessary to support the invocation of the emergency aid doctrine." *Id.* at 14. Had the officers actually witnessed an "emergency" objectively requiring them to give "aid," it was a gross dereliction of their duty to then ignore that need and go about arresting underaged drinkers. The truth, of course, is that the officers properly understood that no such medical emergency existed – what they misunderstood was their duty to avoid violating the sanctity of the home to enforce the law, absent a genuine exigency requiring immediate entry.

While it is true that the urgency of a situation may not always be fully apparent until the officer enters the home and gains additional information revealing the emergency to be more or less serious, that certainly was not the case here. It is undisputed that the officers had a clear view of the activities inside the residence from their vantage point just outside the kitchen window. The officers had all the information they needed to recognize that no person was in need of immediate protection from serious injury.

This Court in *Mincey* made clear an "emergency" justifying a warrantless entry does not arise with every abrasion or bloodied nose. An "emergency" exists within the meaning of this narrow exception only when there is an objective "need to protect or preserve *life* or avoid *serious injury*." 437 U.S. at 392 (emphasis added). Lower courts as well have correctly discerned that a warrantless entry made without probable cause for the non-law-enforcement purpose of rendering emergency aid may be effected only in grave circumstances. Pet. App. 13 ("'an unconscious, semiconscious, or missing person feared injured or dead' is in the

home"); *Cervantes*, 219 F.3d at 889 ("preservation of life or protection against serious bodily injury"); *United States v. Martins*, 413 F.3d 139, 147 (1st Cir.) ("to safeguard life or prevent serious harm"), *cert. denied*, 125 S. Ct. 644 (2005); *Holloway*, 290 F.3d at 1337 ("endangerment to life").

Petitioner argues that "serious bodily injury" should be interpreted expansively, citing definitions of similar terms from various state criminal codes. Pet. Br. 23-24. Whether an injury is serious enough to support a charge of aggravated assault, however, is a separate question from whether immediate intervention by the *police* is necessary to avoid serious physical harm. *See Mincey*, 437 U.S. at 392 (entry justified only when "person within is in need of immediate aid" from the police). Though the severity of an injury often will be related to the need for police action, the two concepts are distinct. An injury that might not threaten severe harm in most circumstances might nevertheless justify police intervention if the victim is for some reason unable to treat himself or to obtain medical assistance – as might be the case, for instance, if a child alone in a home were hurt. And by the same token, even a serious injury does not justify a nonconsensual police entry if the victim is able to treat himself or to obtain assistance from a family member or medical professional – which is why the paradigmatic case for the emergency aid exception always has been the unconscious victim, unable to help himself or to summon aid. *See* Pet. App. 13 (emergency aid doctrine limited to situations where there is a "'reasonable belief that an unconscious, semi-conscious, or missing person feared injured or dead' is in the home"). The critical inquiry is not simply the severity of the injury, but whether, under all the circumstances, the victim requires immediate *police* assistance to avoid serious physical harm.[12]

---

[12] Had any medical assistance been needed in this case, for example, there was no reason to think the adult who had been smacked was unable to obtain such aid on his own by, for instance, applying ice to the injury

Thus, although petitioner and the Solicitor General treat the emergency aid and exigent circumstances doctrines as one, they are analytically distinct. In most cases, only the most severe injuries will render a victim unable to help or to obtain help himself, justifying invocation of the emergency aid exception. Because the exigent circumstances exception does not turn on the same inquiry, a greater range of harm might satisfy that exception. *See* Pet. App. 15 ("the range of actual or imminent injury that will support an exigent circumstances intrusion is more expansive than that available under the emergency aid doctrine"). Moreover, that dichotomy is perfectly sensible, as the court below noted, if the right to privacy in the home is to be taken seriously at all. In the exigent circumstances context, the probable cause requirement protects against arbitrary or unwarranted intrusions, so that a lesser showing of physical harm is necessary to constrain police discretion. But under the emergency aid exception, where officers have no basis to believe that any occupants of a residence are engaging in criminal wrongdoing, they must believe, and reasonably so, that a very serious injury inside justifies their warrantless intervention. *See id.* at 13.[13]

But no matter how the inquiry is phrased, no reasonable officer could have believed in this case that the grave circumstances required to invoke the emergency aid doctrine were present in the kitchen they were observing through the

---

or even driving himself to the hospital or calling 911, or that the other adult occupants of the home were incapable of providing such assistance.

[13] While petitioner additionally contends that intervention to *prevent* serious harm is permissible under the emergency aid doctrine, that situation in most circumstances will be governed by the exigent circumstances doctrine. *See* Part II, *supra*. If an officer has reason to believe that serious harm is about to befall an occupant of a residence, he likely also has probable cause to believe that a crime is being (or is about to be) committed.

window. If officers can enter a residence without a warrant and without probable cause of criminal wrongdoing merely because one of the occupants is suffering the medical effects of a "smack[]" in the nose, Pet. App. 3, then the doctrine provides no meaningful protection to the cherished "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo*, 533 U.S. at 31.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, N.W.
Washington, D.C. 20006

JONATHAN D. HACKER
(*Counsel of Record*)
SHANNON M. PAZUR
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

March 28, 2006