No. 12-7822

IN THE
Supreme Court of the United States

WALTER FERNANDEZ,
Petitioner,
v.
CALIFORNIA,
Respondent.

On Writ of Certiorari to the California Court of Appeal, Second District

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

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QUESTION PRESENTED

Once a co-tenant has expressly told police officers that they may not enter his home, does the Fourth Amendment allow the officers to obtain valid consent to do so by removing the objecting tenant from the scene against his will and then seeking permission from the other tenant shortly thereafter?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association working in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than *amicus*, its members, or its counsel made such a contribution. All parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk.

due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with up to 40,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

This case concerns whether the Fourth Amendment permits the police to make a warrantless entry into the home of a potential criminal defendant over his express objection. The police made that entry, notwithstanding the rule of *Georgia* v. *Randolph*, 547 U.S. 103 (2006), by arresting the defendant, forcibly removing him, and then seeking consent to search from another occupant of the dwelling. NACDL and its members have a strong interest in ensuring proper application of Fourth Amendment principles in this context and in ensuring that the law accords appropriate respect to an individual's invocation of his constitutional right to exclude others from the sanctuary of his home. NACDL has appeared as *amicus curiae* in numerous Fourth Amendment cases in this Court, including *Randolph*, *supra*; *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013); *Florida* v. *Jardines*, 133 S. Ct. 1409 (2013); *Florida* v. *Harris*, 133 S. Ct. 1050 (2013); *United States* v. *Jones*, 132 S. Ct. 945 (2012); and *Arizona* v. *Gant*, 556 U.S. 332 (2009).

STATEMENT

Shortly after noon on October 12, 2009, Detectives Joseph Cirrito and Kelly Clark of the Los Angeles Police Department's Olympic Gang Enforcement Detail heard a radio dispatch about a knife assault, possibly involving members of the Drifters gang. J.A. 5, 57. The report described a bald suspect, with an "L.A." tattoo on his head,

wearing a light grey sweater. J.A. 4, 58. Other units responded to the crime scene; Detectives Cirrito and Clark drove to an alley behind a nearby apartment building where they thought members of the Drifters often gathered. In the alley, Cirrito saw a man wearing a light blue shirt and khaki pants run across the alley, climb the back stairway of the apartment building, and disappear inside a second-story unit. J.A. 60, 71-72. Cirrito radioed officers at the scene to inform them he may have located a possible suspect. J.A. 60.

Moments later, the detectives heard yelling emanating from the apartment the man had entered. J.A. 62, 75. Cirrito radioed for backup. *Ibid.* Additional units arrived, and Cirrito—now accompanied by at least four other officers—climbed the building's back stairs and knocked on the back door of the apartment. A young woman holding an infant opened the door. The bridge of her nose was swollen, and what appeared to be fresh blood was smeared on her hands and shirt. J.A. 63. The officers asked the woman—later identified as Roxanne Rojas, petitioner's girlfriend—what was wrong. Petitioner then appeared in the apartment's kitchen, unarmed, wearing nothing but boxer shorts, and apparently sweating. J.A. 64. Cirrito asked petitioner to step outside the apartment, to which he replied, "I know my constitutional rights. You can't come in." J.A. 77.

Suspecting petitioner had battered Ms. Rojas, Cirrito and another detective entered the apartment, restrained petitioner, handcuffed him, and led him down the back stairs into the alleyway. J.A. 77-78. While walking down the stairs behind petitioner, Cirrito noticed a stylized "L.A." tattoo atop his bald head. J.A. 65. The officers at the scene of the earlier knife assault then escorted the victim of the knife attack to the alley to identify peti-

tioner (who was still wearing nothing but boxer shorts). The victim identified petitioner as one of the assailants. J.A. 78-79.

Meanwhile, police officers remained in the second-floor apartment that petitioner shared with Ms. Rojas, their infant, and Ms. Rojas's four-year-old son. J.A. 94, 101. After the victim of the knife assault identified petitioner as one of his assailants, Detectives Cirrito and Clark returned to the apartment to seek Ms. Rojas's consent to search. J.A. 127. Clark took the four-year-old to a separate room for questioning, while Cirrito remained with Ms. Rojas. Ms. Rojas objected that the police could not question her child without her present. J.A. 93, 98-99. Cirrito responded that, if Ms. Rojas continued to object, the Department of Children and Family Services could take custody of her children. J.A. 93. Ms. Rojas relented, and shortly thereafter signed a form granting consent for the police to search the apartment. J.A. 93-94, 99-100. At the time the form was executed, somewhere between just under an hour and about two hours had lapsed following petitioner's arrest. J.A. 81, 94, 101. None of the numerous detectives and officers on the scene ever sought or obtained a search warrant.

During the search, officers found a butterfly knife and clothing purportedly used in the assault that morning. They also located Drifters paraphernalia, boxing gloves, and a sawed-off shotgun. J.A. 7. Following petitioner's unsuccessful attempt to suppress the fruits of the warrantless search, petitioner was convicted of robbery with findings that he had used a deadly weapon and acted with or for the benefit of a gang. J.A. 14-15. Petitioner was also convicted on one count of corporal injury on a spouse, cohabitant, or child's parent. J.A. 14. Petitioner pled *nolo contendere* to firearms charges in connection

with the shotgun found by the officers during their search. *Ibid.*

SUMMARY OF ARGUMENT

I. The Fourth Amendment forbids government agents from conducting a warrantless search of an individual's home—despite his clear objection—by arresting him, removing him from the scene, and then seeking consent for the search from another occupant.

A. The reasonableness of a warrantless search, even one based on the consent of a third party, is measured by the yardstick of "widely shared social expectations." *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006). There can be no doubt that our society has profound respect for the sanctity and privacy of the home and the possessions kept there. As a result, an individual's affirmative effort to exclude outsiders from his home should command great respect. Consistent with that, this Court held in *Randolph* that no sensible person would think himself entitled to enter a home, over the protest of a present and objecting resident, simply because another occupant consented to the entry.

Likewise, no sensible visitor confronted with an occupant's objection to entry would think it permissible to forcibly remove the objector and then obtain permission to enter from the remaining co-occupant. Allowing a warrantless search in those circumstances would demean not only the sanctity of the home, but also the legitimacy of consent between private citizens and the police. That legitimacy depends on the expectation that police will equally honor an individual's decision to consent and a decision to withhold consent. When police ignore an individual's decision to assert his constitutional right to exclude them from his home, personal autonomy suffers. Relations between the government and its citizens are

undermined as well. When the citizen advises the police of his choice and the police, rather than respect that decision, override it and enter his home nonetheless, it sends a clear message that individual choice will be respected only when it suits the government's purposes; when it does not, the police will engineer other means to the same end. That is anathema to the individual sovereignty over personal property and private affairs on which our Nation was founded. Moreover, other occupants—having seen the police arrest an objecting resident, take him away, and then turn to them for consent—may well conclude that they have no meaningful choice because their decision to refuse entry will not be respected either.

B. Longstanding principles of property law reinforce those social expectations. The right to exclude is an essential property right shared by co-tenants. It may be reasonable to assume that, in general, each co-tenant has authority to license entry by strangers on behalf of all. But once a resident clearly objects to entry, no such authority can be inferred. To the contrary, the law has long been clear that one co-tenant cannot unilaterally license strangers to enter the common property over another cotenant's objection. The law thus reflects the social understandings we all share: No reasonable person, having heard one resident prohibit entry, could conclude that it is permissible to accept another resident's license to enter nonetheless. Moreover, property law forbids one cotenant from acting to prejudice or diminish another's interests. Allowing one tenant to forever destroy a cotenant's privacy interests by admitting the police over his express objection cannot be squared with that prohibition.

II. There is no practical necessity to permit the kind of warrantless search that occurred here. The law amply

accommodates the needs of law enforcement without sanctioning the warrantless invasion of the most private of places—the home.

A. Where there is probable cause to arrest an individual at his residence, very often there will be probable cause to obtain a warrant to search the premises as well. Accordingly, the police generally can (and should) obtain a warrant, rather than rely on disputed permission to conduct a search. Even where a warrant is not readily available, well established exceptions to the warrant requirement—such as exigent circumstances, hot pursuit, and plain view—accommodate the needs of law enforcement and public safety without denigrating the right to refuse consent.

B. The minimal administrative burdens involved in applying for a search warrant provide no reason to excuse the failure to obtain one. Magistrates historically have been willing to grant most warrant applications. And advances in both technology and legislation enable police to use telephones, e-mail, and other tools to apply for and receive search warrants in a matter of minutes—without ever leaving the scene of the investigation.

C. The Fourth Amendment's balance of private and governmental interests tips strongly in favor of adhering to the warrant requirement. Allowing warrantless searches like the one here would damage weighty interests in personal privacy and security in the home. It would also offend norms of civic responsibility and mutual respect that are fundamental to our society. By contrast, allowing warrantless searches on disputed consent does not meaningfully advance any legitimate law enforcement interest.

ARGUMENT

In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), this Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120. The Court recognized "the great significance given to widely shared social expectations" in assessing the reasonableness of a search based on putative consent. *Id.* at 111. Those expectations are "influenced by the law of property," though not strictly "controlled by its rules." *Ibid.* Examining common social understandings and common-law property principles, this Court concluded that "the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant." *Id.* at 114. As a result, "[d]isputed permission" cannot justify police entry into or search of a private residence. *Id.* at 115.

The decision below defies those principles. Here, no less than in *Randolph*, shared social understandings reflected in real property law preclude the police from executing warrantless searches of the home based on disputed consent. Petitioner was "physically present" at his home and "express[ly] refused" to allow the police to enter. *Randolph*, 547 U.S. at 120. The fact that the police "arrested [petitioner] and removed [him] from the apartment," so that he was "no longer present," J.A. 31, 32, did not deprive him of the right to bar a search of his home. Neither common social understandings nor the law of property allows an outsider to override a resident's explicit exercise of his right to exclude by removing the objecting resident and then entering on the permission of another occupant. To the contrary, given the enormous

respect society accords the sanctity of the home, an individual's decision regarding who will and will not be admitted must be honored. Where the police exceed "[t]he scope of a license—express or implied"—to enter a private home, social understandings as well as principles of property law compel the conclusion that "the officer[s'] conduct was [not] an objectively reasonable search." *Florida* v. *Jardines*, 133 S. Ct. 1409, 1416, 1417 (2013).

I. SHARED SOCIAL UNDERSTANDINGS REFLECTED IN PROPERTY LAW DEMAND THAT OFFICERS RESPECT AN INDIVIDUAL'S PENDING ASSERTION OF HIS RIGHT TO EXCLUDE OUTSIDERS FROM HIS HOME

The Fourth Amendment protects against unreasonable government intrusions on privacy expectations "that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Legitimate expectations of privacy are shaped by "understandings that are recognized and permitted by society" and by "concepts of real or personal property law," although an expectation "need not be based on a common-law [property] interest" to be protected. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978). Whether a search based on putative consent is "reasonable" likewise depends on "widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." *Randolph*, 547 U.S. at 111; see *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974). Here, social understandings and property law point decidedly in the same direction: Once a resident tells the police he does not consent to entry or search of his home, they may not procure his absence through an arrest and then exploit that absence by obtaining consent to search from one of his co-tenants.

A. Respect For The Sanctity Of The Home And Self-Determination Bar Warrantless Entry Following The Involuntary Removal Of An Objecting Resident

The social expectations underlying *Randolph* reduce to this: "[N]o sensible person would go inside" shared premises upon "one occupant's invitation" where "a fellow tenant stood there saying, 'stay out.'" 547 U.S. at 113. That understanding flows from our society's recognition that one's home is his castle, the place where his personal autonomy and right to exclude others—not least the state—are at their zenith.

1. This Court has repeatedly recognized the special status of the home, and the sanctity of the privacy we seek for ourselves and our possessions therein. "'At 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 government intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). The home is not merely "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits," *Carey* v. *Brown*, 447 U.S. 455, 471 (1980), but also where individuals keep the "intimate details" of their lives, *Kyllo*, 533 U.S. at 37; see *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people."); *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604) ("[T]he house of every one is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose.").

Within the sanctity of the home, "*all* details are intimate details"—even those as seemingly mundane as the

"rug on the vestibule floor" or "the registration number of a phonograph turntable." *Kyllo*, 533 U.S. at 37-38. Residents reasonably expect that those details will remain "safe from prying * * * eyes," if for no other reason than that they are in their homes. *Id.* at 37. Society rightfully respects the right to shield one's home, and the effects therein, from the view of outsiders.

A person who chooses to share his quarters with another necessarily surrenders some of that privacy—both to his co-occupant and to those the co-occupant may admit without his knowledge. See *United States* v. *Matlock*, 415 U.S. 164, 170-171 (1974). But that does not diminish his ability to stand at the door of "his castle" and "bid defiance to all the forces of the Crown," *Miller* v. *United States*, 357 U.S. 301, 307 (1958) (quotation marks omitted). To the contrary, society continues to recognize that an individual's decision to *affirmatively refuse* others entry into his home is entitled to significant—indeed, controlling—weight. Thus, where co-occupants disagree over whether to admit an outsider to their shared residence, the balance is struck in favor of preserving privacy in the home. See *Randolph*, 547 U.S. at 115.

This Court has long recognized that "the Fourth Amendment draws 'a firm line at the entrance to the house.'" *Kyllo*, 533 U.S. at 39-40 (quoting *Payton* v. *New York*, 445 U.S. 573, 590 (1980)). Police conduct that normally would not even implicate the Fourth Amendment may nevertheless violate it when that conduct occurs at the home. Contrast *Illinois* v. *Caballes*, 543 U.S. 405, 408-409 (2005) ("the use of a well-trained narcotics-detection dog * * * during a lawful traffic stop, generally does not implicate legitimate privacy interests" and thus "is not a search subject to the Fourth Amendment"), with *Jardines*, 133 S. Ct. at 1414 (use of drug-sniffing dog "in

the curtilage of the house, which * * * enjoys protection as part of the home itself," constitutes "a search within the meaning of the Fourth Amendment"). And, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. Other constitutional guarantees, this Court has held, also carry special force within the home. See, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); *Lawrence* v. *Texas*, 539 U.S. 558, 567 (2003) ("adults may choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives").

Those principles make clear that neither common social understandings nor the Fourth Amendment permits police entry in the circumstances here. No sensible person, faced with a deadlock between one inviting and one objecting occupant, would think himself entitled to break the tie and enter the home by forcibly removing the objecting co-occupant. "There is no customary invitation to do *that*." *Jardines*, 133 S. Ct. at 1416.[2] To the contrary, society's unique respect for the sanctity of the home demands that "when people living together disagree over the use of their common quarters, a resolution must come

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[2] Here, moreover, the police confronted petitioner's *uncontradicted* objection to entry at the outset. They then removed petitioner and created a conflict between him and Ms. Rojas by seeking her consent after his arrest. See J.A. 31. There is no social understanding that would allow any outsider to do that.

through voluntary accommodation, *not by appeals to authority*." *Randolph*, 547 U.S. at 113-114 (emphasis added). Just as one co-occupant cannot "pull rank" and admit an outsider over the objection of another, see *id.* at 114, neither may *the outsider* engineer his own admission by asserting the authority of the state and silencing the objecting co-occupant through forcible removal. *Randolph* makes clear that only the objecting occupant, not the state, has the power to end a doorway impasse.

2. This case concerns not only society's respect for the sanctity of the home, but also its respect for the individual's right to make his own decisions by granting or refusing consent. "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States* v. *Drayton*, 536 U.S. 194, 207 (2002). Police officers thus "act in full accord with the law when they ask citizens for consent." *Ibid.* Such requests affirm the citizen's sovereignty over his personal property and private affairs. And they send the message that it is his decision, not the government's, whether to admit outsiders into the privacy of his home. Accordingly, "[i]t reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding." *Ibid.*

But it undermines the rule of law when "the citizen * * * advise[s] the police of his or her wishes" that they *not* enter his or her home and, rather than "act in reliance on that understanding," *Drayton*, 536 U.S. at 207, the police override it and enter anyway—without resort to the legal procedures (*e.g.*, obtaining a warrant) that serve as bulwarks of individual liberty. That is what happened here. Petitioner's explicit exercise of his constitutional right to refuse consent for a warrantless search of his home should have been dispositive. See

Randolph, 547 U.S. at 120. Rather than accept that result—or recur to a neutral magistrate to obtain a search warrant—the police procured petitioner's absence, disregarded his express objection, and conducted the search with the permission of his co-tenant, Ms. Rojas. Whatever the officers' subjective motivation, their conduct sends a clear and dangerous message: Individual choice will be respected only when it suits the government's purposes; when it does not, the police will engineer other means to the same end. That heads-the-government-wins, tails-the-citizen-loses approach demeans the dignity of voluntary agreement, and the individual's sovereignty over his own affairs, on which our social order rests.

Such an approach also taints the concept of consent in other ways. It creates the grave risk that a co-tenant's subsequent consent will not be truly voluntary, but instead tainted by official pressure. Here, for example, the search of petitioner's home was premised on the putative consent of Ms. Rojas. But Ms. Rojas did not invite the police into her home at the time petitioner told them "I know my constitutional rights" and "[y]ou can't come in." J.A. 77. And while the police perfunctorily asked Ms. Rojas if they could enter when they first arrived, she "didn't even get to answer" before officers "all just came in," seizing petitioner before her eyes. J.A. 92. Detective Cirrito later returned to her home and his fellow detective "pulled [Ms. Rojas's four-year-old] son outside" and "started questioning [him] without [her] permission"; when Ms. Rojas objected, she was told the officers could "take [her] kids from [her] right now." J.A. 93. That conduct could not help but make clear to Ms. Rojas that, whatever her wishes, the police would decide for them-

selves whether to respect them.[3] It is thus hardly a surprise that Ms. Rojas proceeded to sign a consent-to-search form. By then, she naturally "felt like [she] had no rights" and "was pressured into even giving them a consent." J.A. 93.

Such conduct sends the wrong message and undermines healthy government-citizen relations. Our society rests critically on the principles of individual responsibility, voluntary agreements, and self-determination. If those concepts are to have meaning, decisions regarding whether to allow or deny entry into the home must be respected by law enforcement, no less than they are respected by private individuals. Even where the police merely arrest a resident who refuses consent and then seek consent from an occupant who remains, that sequence of events undermines the voluntariness of any "consent" that follows. It also teaches the citizenry a lesson—that their wishes will not be respected unless the police so desire—that one would hope never to find in any civics textbook. This Court should not embrace a rule that would make such lessons commonplace.

The rule adopted below also creates a dangerous incentive for false accusations. If one co-occupant genuinely does want the police to search the premises over another's objection, she would merely need to inculpate the other co-occupant—rightly or wrongly—to defeat the objection. With a few simple words—"Yes, I saw him

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[3] This Court has recognized that, where police make an "implied threat"—"no matter how subtly" conveyed—"the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973). Here, Ms. Rojas was exposed not merely to the implied threat of arrest, but an explicit threat that her children would be taken away.

with the stolen jewelry"—the inviting co-tenant could create probable cause to have the objector arrested and removed, enabling herself to give the police permission to search. That result cannot be squared with *Randolph*'s statement that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." 547 U.S. at 113-114. Indeed, it *literally* allows the inviting co-occupant to force her preferred resolution by appealing to the authorities: "Officers, arrest that man!" The right to "bid defiance to all the forces of the Crown," *Miller*, 357 U.S. at 307, by refusing consent to enter should not be so easily circumvented.

3. That the police will often have probable cause to arrest the objecting inhabitant makes no difference. Probable cause to arrest (whether provided by another occupant or obtained independently) means only that the police may legitimately restrain and remove the objector. It does not mean that the police can nullify his explicit and otherwise controlling objection to a search of his home. This Court has rejected the notion that an individual's arrest is occasion for a full-bore "warrantless search of [the arrestee's] entire house." *Chimel* v. *California*, 395 U.S. 752, 755 (1969). Rather, a person's arrest licenses police only to secure "the area 'within his immediate control,'" *id.* at 763, and perhaps to conduct a "cursory" protective sweep that "lasts no longer than is necessary to dispel [a] reasonable suspicion of danger," *Maryland* v. *Buie*, 494 U.S. 325, 335-336 (1990).[4] In the absence of a warrant, neither a person's arrest, nor disputed consent, nor their combination should justify an hours-long, intrusive search through his home and pos-

[4] Indeed, here the police *did* conduct a protective sweep at the time of petitioner's arrest. Pet. Br. 3.

sessions. This Court has never recognized such an exception to the Fourth Amendment's warrant requirement. It should decline to do so here.

B. Property Law Reflects The Deeply Ingrained Social Expectation That An Outsider Cannot Enter A Home Over A Resident's Clear Objection By Obtaining Another's Consent

Randolph recognized that a "co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant." 547 U.S. at 114. Neither may a co-tenant admit a stranger immediately after the objecting co-tenant has left (or been removed from) the doorstep. Longstanding property law reflects society's understanding that an occupant's previously and unequivocally stated desire to exclude outsiders from his home does not lose force simply because he is absent at the precise moment the outsider crosses the threshold. Whether viewed through the lens of property law or common sense, the result is the same: The prior objection of one co-tenant renders a later invitation from another ineffective.

1. "[T]he right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (quotation marks omitted). By extension, co-tenants who share ownership or possession also share in the right to exclude.[5] No co-tenant may ex-

[5] 7 *Powell on Real Property* § 50.06[1] (M. Wolf ed., 2005) ("In actions against outsiders to try title, or for ejectment, or for possession, the individual tenant in common may generally sue alone, with the outcome applicable to all cotenants." (footnotes omitted)); *id.* § 52.03[4] ("Each tenant by the entirety is entitled to * * * protect [the property] against outsiders * * * ."); 4 *Thompson on*

clude any other co-tenant; each has an equal right to full use and enjoyment of the premises. But neither may a co-tenant interfere with another co-tenant's quiet enjoyment of the property. 7 *Powell on Real Property* § 50.03[1] (M. Wolf ed., 2005) ("Each cotenant * * * has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants.").

That limit on each tenant's use forecloses one from bringing unwanted visitors onto the property when another makes his objection known:

> A license * * * to a stranger, if availed of by the licensee, does involve an interference with the possession of the others, and the licensee can, it would seem, justify his entry only on the theory that the licensor had authority to act on behalf of the others in granting such a license. In so far as the license involves a permission merely to enter on the land, * * * an authority in one cotenant to grant such a license in behalf of all might well be inferred, but if one cotenant has implied authority to grant the license, any other cotenant should have implied authority to revoke it, the effect of which would be that *the license is valid only until one of the cotenants expresses his dissent.*

2 H. Tiffany & B. Jones, *The Law of Real Property* § 457, at 274-275 (3d ed. 1939) (emphasis added); see also 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 94 (1965) ("In the absence of authorization or ratification on the

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Real Property § 31.07(d) (D. Thomas ed., 2004) ("Because each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers. Title may be vindicated and trespassers removed from any part by an action of ejectment brought by any joint tenant.").

part of the cotenants, any dealing on the part of one cotenant in relation to the common property is a nullity insofar as their interests are concerned."). In other words, any co-tenant may veto another's desire to admit an outsider.

A co-tenant thus does not lose his right to forbid entry to an outsider, even one putatively licensed by another co-tenant, simply because he is not standing sentry over the property at the moment of trespass. If that veto is effective when voiced *after* the visitor has entered the property, see Tiffany & Jones, *supra*, §457, at 275, *a fortiori* it is effective when exercised preemptively. After all, no reasonable person would infer "authority in one cotenant to grant such a license in behalf of all," *ibid.*, where another co-tenant had previously and unequivocally forbidden entry in the presence of both the interloper and the inviting co-tenant. Cf. *Restatement (Second) of Agency* §158(b) & cmt. b (1958) (any authority, real or apparent, vanishes once it is expressly revoked).

Without a valid license, an entry upon another's property is trespass. See *Jardines*, 133 S. Ct. at 1415 ("'[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave.'" (quoting *Entick* v. *Carrington*, 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (K.B. 1765)). Thus, when the police receive one resident's clear command to stay out of his home; secure that objector's absence from the scene; and seek another tenant's permission to enter and search, they have committed the sort of common-law trespass against which, "at a minimum," the Fourth Amendment protects. *United States* v. *Jones*, 132 S. Ct. 945, 953 (2012); see *Jardines*, 133 S. Ct. at 1415 ("unlicensed physical intrusion" constitutes search under Fourth Amendment).

2. For more than four centuries, moreover, the common law has declared that one tenant may not act to the "prejudice" of his co-tenant's interests in the estate. See *Rothwell* v. *Dewees*, 67 U.S. 613, 619 (1862) ("it would be inequitable to permit one of [two tenants-in-common] to do any thing to the prejudice of the other"); *Tompkins* v. *Superior Court of City & Cnty. of S.F.*, 378 P.2d 113, 116 (Cal. 1963) ("Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estate"); A. Freeman, *Cotenancy and Partition* §174, at 235-236 (2d ed. 1886) ("Every act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his companions in estate will not bind them."); *Bartlet* v. *Harlow*, 12 Mass. 348, 352 (1815) ("[I]t is laid down as a general principle, that one joint-tenant cannot prejudice his companion in estate, or as to any matter of inheritance or freehold"); 2 W. Blackstone, *Commentaries on the Laws of England* 183 (1768) ("But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds"); *Rud* v. *Tooker*, 2 Coke 66a, 68b, 76 Eng. Rep. 567, 572 (K.B. 1601) ("[E]very act done by one joint-tenant in benefit of himself and his companion, is good * * * but one joint-tenant cannot prejudice his companion, as to any matter of inheritance or freehold").

The common law, for nearly as long, has forbidden cotenants from corrupting or destroying shared property. See, *e.g.*, 20 Am. Jur. (2d) *Cotenancy and Joint Ownership*, *supra*, §87 ("When one tenant in common destroys the subject of the tenancy, a trespass action may be instituted by the injured party"); *Young* v. *Ledford*, 37 So. 3d 832, 835 (Ala. Ct. App. 2009); *Cathcart* v. *Malone*, 229 S.W.2d 157, 158 (Tenn. Ct. App. 1950); *Sullivan* v.

Sherry, 111 Wis. 476 (1901) ("[I]f a cotenant * * * destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong wherever such a remedy would exist in the absence of the relationship between cotenants"); Freeman, *supra*, §251, at 331; *Symonds* v. *Harris*, 51 Me. 14, 19 (1862); *Mersereau* v. *Norton*, 15 Johns. 179 (N.Y. Sup. Ct. 1818); Blackstone, *supra*, at 183 ("[I]f any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other"); E. Coke, *Institutes of the Laws of England* 200-201 (1629) (explaining that "if two Tenants in Common bee of a Parke, and one destroyeth all the Deers, an Action of Trespass lieth"; likewise, "if two severall owners of houses have a river in common betweene them, if one of them corrupt the river, the other shall have an Action on the Case").

Those common-law principles reflect the larger social understanding that co-tenants are expected (indeed, required) to respect each other's property and privacy interests. That precludes deliberate disregard of a cotenant's express and pending objection, grounded in *a constitutional right*, to an otherwise impermissible warrantless search. The objecting co-tenant's right to exclude—that "most essential" property right, *Dolan*, 512 U.S. at 384, and one justifying legitimate expectations of privacy, *Rakas*, 439 U.S. at 149—is immediately and irreparably harmed if his co-tenant invites the police to search his possessions inside the home nonetheless. Once the right to be free of a search is infringed, it is destroyed forever. See *Covino* v. *Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992). To allow a consent search over an existing objection would all but obliterate an objecting co-tenant's essential right to exclude.

Four decades before this Court decided *Randolph*, the California Supreme Court reached precisely that conclusion, holding that police cannot rely on one co-tenant's consent to search over another's objection. In *Tompkins*, the police gained consent from one co-tenant to search an apartment he shared with Tompkins. 378 P.2d at 115. But when the police arrived at the apartment, key in hand, Tompkins refused to allow them in, slamming the door in an officer's face. The officer then kicked in the door and entered the apartment. *Ibid.* Citing the common law rule against prejudice between co-tenants, Justice Traynor rejected the State's argument that the first co-tenant could grant the police power to kick in the door over Tompkins's objection. *Id.* at 116. Rather, "[j]oint occupancy of property, particularly residential property, obviously demands reasonable restrictions on the right of each joint occupant either by himself or through another to exercise full control over the property at all times regardless of the wishes of another joint occupant present on the premises." *Ibid.* "[A] joint occupant's right of privacy in his home is not completely at the mercy of another with whom he shares legal possession." *Ibid.*

As *Tompkins* explained, any power by one co-tenant to allow a search over another co-tenant's objection must be subject to "reasonable restrictions." 378 P.2d at 116. This Court has recognized that it is reasonable for one co-tenant to have authority to make choices for other co-tenants who are absent or asleep. See *Matlock*, 415 U.S. at 170-171. The police thus may presume, absent contrary indication, that a co-tenant on the property impliedly speaks for all. But it is just as surely *un*reasonable for one co-tenant to allow a search where another co-tenant is present and objecting. *Randolph*, 547 U.S. at

120.[6] And nothing makes it more reasonable for one co-tenant to license the police to search over another's objection simply because the police have procured the objecting co-tenant's absence by arresting him on the heels of his refusal to permit entry. Rather, *Tompkins*, and the common law's broader rule against prejudice of a co-tenant's interests, confirm that co-tenants cannot prejudice each other's already-invoked exercise of their constitutional rights.

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[6] In *Matlock*, this Court stated that "[t]he authority which justifies the third-party consent does not rest upon the law of property," but rather on the "reasonable * * * recogni[tion]" that, in ordinary co-tenancy arrangements, the co-tenants "have assumed the risk that one of their number might permit the common area to be searched." 415 U.S. at 171 n.7. To avoid unreasonable burdens for law enforcement, the police are generally "entitled to rely" on that assumption, without first "eliminat[ing] the possibility of atypical arrangements, in the absence of reason to doubt that the regular scheme was in place." *Randolph*, 547 U.S. at 111-112 (discussing *Matlock*). But where a resident makes clear that he in fact does *not* acquiesce in his co-occupant's admittance of outsiders—here, shouting at them to stay out as they stood at the threshold—that explicit notice renders any police reliance on "the regular scheme" flatly unreasonable. *Id.* at 112. A co-occupant's "common authority" to consent to a search of shared premises is "limit[ed]" by "specialized tenancy arrangements *apparent to the police*." *Id.* at 110 (citing *Chapman* v. *United States*, 365 U.S. 610 (1961)) (emphasis added). Moreover, to the extent this Court has suggested that "[t]he common authority that counts under the Fourth Amendment may * * * be broader than the rights accorded by property law," *ibid.* (citing *Illinois* v. *Rodriguez*, 497 U.S. 177, 181-182 (1990)), that view is at odds with the Court's more recent recognition that an expectations-based Fourth Amendment standard should be "'*added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment * * * ." *Jardines*, 133 S. Ct. at 1417 (quoting *Jones*, 132 S. Ct. at 952).

II. THERE IS NO LEGITIMATE LAW ENFORCEMENT NEED TO CIRCUMVENT *RANDOLPH* BY ARRESTING AN OBJECTING OCCUPANT ON HIS DOORSTEP AND SEEKING CONSENT FROM OTHER OCCUPANTS

In evaluating whether the Fourth Amendment's "bar to unreasonable searches" has been violated, this Court also balances "competing individual and governmental interests." *Randolph*, 547 U.S. at 115 (citing *Camara* v. *Mun. Court of City & Cnty. of S.F.*, 387 U.S. 523, 536-537 (1967)). Commonsense social expectations, individual autonomy, and respect for the rule of law all weigh against allowing the police to enter a private home by forcibly removing an objecting resident and seeking consent to search from another occupant. On the other side of the ledger stands the governmental interest in investigating and halting criminal activity. But holding police to the warrant requirement in cases like this one threatens no legitimate law enforcement function. Where there is probable cause to arrest an objecting inhabitant, there often will be probable cause to search as well. Adhering to the warrant requirement would mean only that the police must endure the ordinary inconvenience involved in obtaining a warrant. And the law amply accommodates any other putative law enforcement need.

A. No Legitimate Law Enforcement Need Supports Reliance On Disputed Consent To Search An Objecting Individual's Home

The Fourth Amendment provides an obvious and time-honored means for police to enter a private residence over a citizen's objection: If officers have probable cause to search a home, they may—and should—seek a warrant. Indeed, "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreason-

able." *Payton*, 445 U.S. at 586 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-478 (1971)). "A warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Lo-Ji Sales* v. *New York*, 442 U.S. 319, 326 (1979) (quotation marks and citation omitted).

Adhering to the warrant requirement represents no impediment to legitimate law enforcement activity. Where the police have probable cause to arrest an individual in his home, the necessary cause to support a search warrant rarely will be absent. "Clearly, the police often have probable cause to search when they have probable cause to arrest." T. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment*, 48 Vill. L. Rev. 129, 178 n.276 (2003). To be sure, the standard for arrest and for search are not identical: Probable cause to believe an individual has committed a crime, and probable cause to believe *the home to be searched will contain evidence* of that crime, are not one and the same. 2 W. LaFave, *Search and Seizure* §3.1(b) (5th ed. 2011). But where, as here, a suspect is arrested at or near his residence, it will often "be permissible to infer that the instrumentalities and fruits of that crime are presently in that person's residence." *Ibid.*[7]

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[7] See, *e.g.*, *United States* v. *Tate*, 586 F.3d 936, 942-943 (11th Cir. 2009) (upholding finding of probable cause to search residence based on same information used to justify arrest); *United States* v. *Hobbs*, 509 F.3d 353, 362 (7th Cir. 2007) (probable cause existed for issuance of warrant to search defendant's house where he was caught carrying contraband immediately upon leaving his house); *United States* v. *Jones*, 159 F.3d 969, 974-975 (6th Cir. 1998) (search warrant for drug dealer's house valid where drug sales observed on "the premises rather than inside the house"); *United States* v. *Singleton*, 125

The law amply addresses law enforcement's other needs. If immediate action is necessary to preserve evidence, the exigent circumstances doctrine allows police to prevent its destruction. *Randolph*, 547 U.S. at 116 n.6 (citing *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966)).[8] Police in hot pursuit of a fleeing suspect may follow him into a home without a warrant. *Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 298 (1967). And officers do not need a warrant to intervene on behalf of an injured resident or to protect her from imminent injury. *Brigham City* v. *Stewart*, 547 U.S. 398, 403 (2006). That law enforcement prerogative extends to suspected cases of domestic violence:

F.3d 1097, 1102-1103 (7th Cir. 1997) (probable cause existed where two controlled drug sales occurred "in the vicinity of the" house ultimately searched); *Holmes* v. *State*, 796 A.2d 90, 98 (Md. 2002) (upholding search warrant for petitioner's home where officer arrested petitioner for drug possession a block away); see also *United States* v. *Williams*, 544 F.3d 683, 688 (6th Cir. 2008) (noting "other circuits which have held, in cases involving a variety of suspected crimes, that an issuing judge may infer that a criminal suspect keeps the 'instrumentalities and fruits' of his crime in his residence"); *United States* v. *Laury*, 985 F.2d 1293, 1314 (5th Cir. 1993) (upholding warrant for search of bank robbery defendant's home based on testimony that those "who commit bank robberies tend to keep evidence and instrumentalities of their robberies in their personal possession, as well as their homes"); *People* v. *Carrington*, 211 P.3d 617, 635 (Cal. 2009) ("When property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant's home."); *State* v. *Gathercole*, 553 N.W.2d 569, 574 (Iowa 1996) (declaring that "it is reasonable to infer that stolen property would be found at a defendant's residence").

[8] Rather than invade the home of a person they believe might destroy evidence, the police may briefly detain that person outside the home for the time it takes to obtain a warrant. *Illinois* v. *McArthur*, 531 U.S. 326, 328 (2001).

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

Randolph, 547 U.S. at 118. Once lawfully inside, moreover, the police may lawfully seize evidence in plain view without a warrant. *Texas* v. *Brown*, 460 U.S. 730, 737-739 (1983) (plurality opinion). That evidence, in turn, may supply probable cause for a warrant authorizing a more thorough search.

The doctrines of exigent circumstances, hot pursuit, and plain view amply meet the legitimate needs of law enforcement. Those finely tuned and time-honored doctrines properly accommodate law enforcement interests in maintaining public safety and order, on the one hand, and the right of private citizens to be free of unreasonable government intrusion into the sanctity of their private spaces, on the other.

B. The Warrant Requirement Imposes No Unreasonable Burden

Requiring officers to obtain a warrant in these circumstances is not an unreasonable burden. As NACDL members understand, "the overwhelming majority of warrant applications submitted to judges are approved." M. Hirsch, Fourth Amendment Forum, Featured Column, 30 Champion 50, 51 (Apr. 2006); see also R. Van Duizend *et al.*, *The Search Warrant Process: Preconcep-*

tions, Perceptions, Practices 27 (Nat'l Ctr. for State Courts 1985) ("*NCSC Study*") ("[T]he rate of outright rejection [of warrant applications] is extremely low. Most of the police officers interviewed could not remember having a search warrant application turned down.").

Any administrative burden involved in obtaining a warrant likewise offers little reason to abrogate the warrant requirement. "[T]he inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate," this Court observed long ago, "are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement" of obtaining a warrant. *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

Legislative initiatives and technological innovation have rendered that statement all the more true today. Since the advent of telephonic search warrants in the 1970s, police officers have been able to obtain search warrants from the field and in far less time than the roughly two hours that elapsed between petitioner's arrest and Ms. Rojas's execution of the consent form here. For example, as early as 1973, one district attorney's office in California estimated that "95 percent of telephonic warrants take less than 45 minutes." *People* v. *Blackwell*, 195 Cal. Rptr. 298, 302 n.2 (Ct. App. 1983); cf. *NCSC Study*, *supra*, at 4, 26 & tbl.7 (average length of review of warrant applications in a major Southern city was two minutes and forty-eight seconds). And States have continued to streamline warrant procedures apace with developments in technology, enabling police, prosecutors, and judges to navigate the entire process in cyberspace using tools such as mobile phones, e-mail, and video conferencing. See *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1561-1562 (2013).

The California statute authorizing electronic warrants—which the officers here never utilized—spells out a typical process:

- An officer or other affiant testifying in support of the warrant application takes an oath during a telephone conversation with a magistrate, Cal. Penal Code § 1526(b)(2)(A);
- The affiant affixes a digital signature to her affidavit and e-mails it to the magistrate, *ibid.*;
- The magistrate confirms receipt of the affidavit and supporting materials, verifying their contents and the digital signature, *id.* § 1526(b)(2)(B);
- If the magistrate decides to issue the warrant, she e-signs the warrant, notes the date and time of issuance on the warrant, and indicates that the oath was administered orally, *id.* § 1526(b)(2)(C); and finally,
- The magistrate e-mails the approved warrant back to the affiant, who is then authorized to write "duplicate original" on the warrant and execute it, *id.* § 1526(b)(2)(D).

See generally B.E. Witkin *et al.*, *California Criminal Law, Illegally Obtained Evidence* § 126, at 898-899 (4th ed. 2012). One California county has not only adopted e-signature technology for executing warrants, but has also issued judges iPads for after-hours review and sign-off of warrant applications. See S. Rich, *Search Warrants with E-Signatures Come to California*, Government Technology (Apr. 6, 2012), http://www.govtech.com/public-safety/Search-Warrants-With-E-Signatures-Come-to-California.html. And California hardly stands alone: Thirty-six States have authorized the use of telephone,

radio, e-mail, and other telecommunications technologies to obtain warrants remotely. See *McNeely*, 133 S. Ct. at 1562 n.4 (listing statutes of 35 States authorizing electronic warrant procedures at time of decision); 2013 Fla. Laws, ch. 247, §2 (amending Florida law to allow electronic warrant applications and electronic signatures as of July 1, 2013). The Federal Rules of Criminal Procedure similarly endorse the use of "telephone or other reliable electronic means" to apply for and issue search warrants. Fed. R. Crim. P. 4.1, 41.

C. The Balance Of Competing Interests Strongly Favors Adhering To The Warrant Requirement

For the reasons given above, adhering to the warrant requirement imposes no impediment to legitimate law enforcement interests. By contrast, warrantless searches of the home, based on a co-occupant's putative consent after police have arrested an objecting resident, seriously intrude upon individual privacy interests. The sanctity of the home ceases to be protected by the intervention of a neutral and detached magistrate. And privacy and dignity interests that property law has long protected, by precluding co-tenants from allowing invasions by outsiders over another resident's objection, lose all protection whenever the invading outsiders are government agents with the power to arrest.

More fundamentally, the tactic used here undermines the notions of civic responsibility and mutual respect that undergird our society. As explained above, consent searches are permissible because they respect both the value of mutual agreement and the citizen's sovereignty over himself, his home, and the possessions he keeps there. But allowing the police to arrest objecting residents and then seek consent from a co-tenant undermines respect for law enforcement; it instead teaches

citizens that their wishes, and their privacy, will be respected only if the police find that convenient. And, as the facts of this case illustrate, it undermines the voluntariness of consent generally: The objector's arrest graphically illustrates for all present that exercising one's rights may be costly indeed. "The warrant requirement * * * is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge*, 403 U.S. at 481. And "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* v. *Arizona*, 437 U.S. 385, 393 (1978). Allowing warrantless police intrusion here would not advance law enforcement interests one iota, while the interests of personal privacy and security in the home would be gravely damaged. The balance here should favor the warrant requirement.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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