No. 17-7046

In The
Supreme Court of the United States

CHENEQUA AUSTIN,
ERIC JERMAINE SPIVEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RESTORE THE FOURTH, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether police may use intentional deception to gain consent to search an individual's home, without obtaining a search warrant based on probable cause issued by a neutral magistrate as required by the Fourth Amendment.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2,[1] Pacific Legal Foundation (PLF), and Restore the Fourth, Inc. (Restore the Fourth), submit this brief amicus curiae respectfully urging the Court to grant certiorari in the instant case.

PLF was founded in 1973 and is recognized as the most experienced nonprofit legal foundation of its kind, and PLF has participated in numerous cases before this Court both as counsel for parties and as *amicus curiae*. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts, and represent the views of thousands of supporters nationwide who believe in constitutionally limited government, individual rights, and the rule of law. PLF attorneys have participated in numerous criminal cases in this Court, including *Skilling v. United States*, 561 U.S. 358 (2010), *Hanousek v. United States*, 528 U.S. 1102 (2000), and *Unser v. United States*, 528 U.S. 809

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Amici Curiae have also given notice to all counsel of record for all parties of its intention to file an amicus curiae brief at least 10 days prior to the due date for the amici curiae brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

(1999), and major property rights cases, including *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013), and *Sackett v. E.P.A.*, 566 U.S. 120 (2012). Because of its history and experience on these issues, PLF believes that its perspective will aid this Court in considering the petition for certiorari.

Restore the Fourth is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right. Restore the Fourth advances these principles by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

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[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc., in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc., in Support of Petitioner, *Byrd v. United States*, No. 16-1371 (U.S. filed Nov. 16, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc., in Support of Petitioner, *Carpenter v. United States*, No. 16-402 (U.S. filed Aug. 14, 2017).

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The essence of Fourth Amendment violations is not the "breaking of [] doors" or "the rummaging of [] drawers," but the "invasion of [the] indefeasible right of personal security, personal liberty, and private property." *Boyd v. United States*, 116 U.S. 616, 630 (1886). The invasion of private homes by British agents under the so-called "writs of assistance" provided one of the major bases for the American Revolution. *Id.* at 625. Instead of "plac[ing] the liberty of every man in the hands of every petty officer," *James Otis: Against Writs of Assistance*, National Humanities Institute,[3] the Founders provided specific protection for the sanctity of the home into our Fourth Amendment. *See* U.S. Const. amend. IV. *See also Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").[4] But under the Eleventh Circuit's "deception-exception" standard below, government agents are granted the same generalized search power the Founders sought to prevent. Therefore, this case represents an important federal question regarding the proper scope of the Fourth Amendment.

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[3] http://nhinet.org/ccs/docs/writs.htm.

[4] The Third Amendment, which prohibits the quartering of troops in private homes during peacetime, and allows it only during times of war as prescribed by law, is also directed to protecting the sanctity of private homes. *See* U.S. Const. amend. III.

The special relationship between the protections of the Fourth Amendment, private property, and the home has been explicitly recognized by this Court in recent years. As noted in *United States v. Jones*, 565 U.S. 400, 405 (2012), "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures." Specifically, this Court has recognized the category of special protection for private homes. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). The Eleventh Circuit's holding below directly flouts this judicially recognized protection by making government access to private property and homes contingent on an agent's ability to craft a sufficiently deceptive falsehood. Pet. App. at 12a. "Whether officers "deliberately lied" "does not matter" because the "only relevant state of mind" for voluntariness "is that of [the suspect] himself." *Id.* A standard allowing government agents to lie their way into any private home at will stands in direct conflict with the property rights-based Fourth Amendment jurisprudence of this Court.

Finally, there are the practical effects of the Eleventh Circuit's ruling that make this issue one of national importance. Given the wide proliferation of so-called "administrative searches," which often imperil Fourth Amendment guarantees, *see, e.g.*, *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015), the potential for abuse under the Eleventh Circuit's holding below is staggering. Municipalities already prone to skirting the limits of the Fourth Amendment,

see id., will only be encouraged to continue or expand this bad behavior under the Eleventh Circuit's holding. Under that standard, the deception of private citizens by government agents is encouraged, even when such deception pushes the boundaries of their legal authority. Pet'rs' App. at 35a (Martin, J., dissenting). Rather than preserve the intended protection for private property under the Fourth Amendment, or the narrowly drawn exceptions crafted by this Court, the Eleventh Circuit's new deception-exception encourages government agents to ignore the rights of Americans by conducting warrantless administrative searches of their homes at will. The Eleventh Circuit has decided an important federal question for which this Court should exercise its supervisory authority.

REASONS FOR GRANTING THE PETITION

I
THE HISTORY AND INTENT BEHIND THE FOURTH AMENDMENT ACCORD SPECIAL PROTECTION FOR PRIVATE HOMES

Under the Eleventh Circuit's holding below, government agents are given the same generalized search power as those granted by the British writs of assistance, as long as they craft a convincing enough deception. Therefore, this case represents an important federal question regarding the scope of the Fourth Amendment over which this Court should exercise its supervisory power.

The arbitrary search of private colonial homes by British agents was one of the disputes at the heart of the conflict over American independence. The so-called "writs of assistance," bestowed by the British government, purported to grant the holder the general power to enter private homes at will to search for evidence of illegal activity. *Boyd*, 116 U.S. at 625. These writs did not require the holders to specify where they desired to search or for what they were searching. *Id.* The writs of assistance affronted the well-established understanding of property rights under the British common law. "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose," declared Sir Edward Coke. *Semayne's Case* All ER Rep 62 (K.B.) (1604). "In all cases when the King is a party, the sheriff may break the party's house . . . . But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors." *Id.* The obvious contradiction between this common law principle and the operation of the writs of assistance did not go unnoticed by the Founders.

In designing our Republic, the Founders specifically rejected the British government's practice of unreasonable searches granted by general writs of assistance. In particular, James Otis vehemently opposed the writs of assistance, arguing against their constitutionality under British law. Otis declared that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle." Otis, *supra* at note 3. Otis's argument that the writs of assistance "place[] the liberty of every man in the hands of every petty

officer," *id.*, greatly influenced the other Founders, including future president John Adams. *See, e.g.*, *Boyd*, 116 U.S. at 625.

The Eleventh Circuit's holding in this case, which bestows upon law enforcement officials the general power to enter private homes at will when they deliberately deceive the homeowner to obtain consent, *see* Pet. App. at 12a, reeks of the extraconstitutional British writs of assistance. Just as with the writs, the Eleventh Circuit holding grants any officer or government agent carte blanche to lie their way through a private homeowner's door. Thus any "petty officer" who wishes to usurp the constitutional rights of innocent Americans, who are "quiet" and "well-guarded" in their homes, is empowered to do so. Otis, *supra* at note 3.

Under the Eleventh Circuit's holding, *see* Pet. App. at 12a ("The subjective motivation of the officers is irrelevant."), government agents can enter into private homes without "signify[ing] the cause" of their coming, or honestly "request[ing] to open doors." *Semayne's Case* All ER Rep 62 (K.B.) (1604) (establishing bedrock common law standard of "reasonable" searches by government agents). The Eleventh Circuit's decision thus grants government agents the very generalized search power over which the Founders fought a war of independence.

For many anti-federalists demanding the inclusion of a bill of rights as a condition of ratification, the issue of unreasonable searches of private homes was the *central issue* for which they demanded additional protection. *See generally* Joseph

J. Stengel, *The Background of the Fourth Amendment to The Constitution of the United States, Part Two*, 4 U. Rich. L. Rev. 60 (1969). "[T]he argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government." *Boyd*, 116 U.S. at 625. Concerns over the potential power of the new federal government to violate the sanctity of the home was uniform across the former colonies. *See* Stengel, U. Rich. L. Rev. at 66-71. Delegates from the Pennsylvania convention specifically cited the lack of protection for their property from unreasonable searches as sufficient reason to oppose the newly proposed Constitution. *Id.* at 66. In Maryland, dissenters declared that protection for "our dwelling houses, those castles considered so sacred by the English law," was "indispensable" to their potential support. *Id.* at 67. Writing under the pseudonym Columbian Patriot, one commenter on the draft Constitution wrote:

> I cannot pass over in silence the insecurity with which we are left with in regards to warrants unsupported by evidence . . . . a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult and seize at pleasure.

Michael Maharrey, *Fourth Amendment: The History Behind "Unreasonable"*, Tenth Amendment Center.[5]

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[5] http://tenthamendmentcenter.com/2014/09/25/fourth-amendment-history-behind-unreasonable/.

After the founders ratified the Constitution, James Madison directed his attention to the requested bill of rights. On June 8, 1789, Madison rose during the first session of the first United States Congress and offered several draft amendments, one of which specifically prohibited the powers exercised under the British writs of assistance. *See Amendments Offered in Congress by James Madison June 8, 1789*, Constitution Society.[6] After much debate, and several rounds of committee review, the ten amendments now known as the Bill of Rights were presented to the states for ratification. Stengel, U. Rich. L. Rev. at 71-74. The ratified Fourth Amendment, which, like its draft predecessor, provides *specific* protection for the home, reads in part "[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures . . . shall not be violated . . . ." U.S. Const. amend. IV (emphasis added).

The uniform support with which the former colonies demanded specific protections for private homes mirrors the uniform potential for abuse under the Eleventh Circuit's holding in this case. Under this standard, innocent members of the public are left insecure, as the "arbitrary power" of the state is constrained only by the ability of any "petty [] officer" to invent a convincing enough deception to gain entry. Otis, *supra* at note 3. Our homes are laid open by the Eleventh Circuit's holding to precisely the type of government invasion that the anti-federalists successfully fought so vehemently to prevent. "It must

[6] http://www.constitution.org/bor/amd_jmad.htm.

never be forgotten . . . that the liberties of the people are not so safe under the gracious manner of government as by the limitation of power." Richard Henry Lee, Letter to Patrick Henry (May 28, 1789), *in* 2 *The Letters of Richard Henry Lee*, 487 (James C. Ballagh, ed. 1914). By relying upon the "gracious manner" of government agents to control themselves, *see id.*, the Eleventh Circuit discards one of the central issues that sparked the fires of American independence. In doing so, it imperils the very purpose for which the Fourth Amendment was originally enacted: Providing protection for the home from invasion by government agents.

II
PROPERTY RIGHTS ARE SPECIFICALLY PROTECTED FROM GOVERNMENT INVASION UNDER THE FOURTH AMENDMENT

Under the Eleventh Circuit's holding below, government agents are directly empowered to violate the property rights of Americans in contravention of this Court's precedent. Certiorari should be granted because this standard stands in direct conflict with the property rights-based Fourth Amendment jurisprudence of this Court.

Long before this Court articulated the modern privacy-based approach to unreasonable searches and seizures, *see Katz v. United States*, 389 U.S. 347 (1967), it recognized the original grounding of the Fourth Amendment in property rights. In *Boyd v. United States*, the Court noted that the Fourth Amendment was intended to protect against invasions

of "the sanctity of a man's home" 116 U.S. at 630. Relying upon the British case of *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), a "case [the Court has] described as . . . .'the true and ultimate expression of constitutional law' with regard to search and seizure," *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989), *Boyd* held that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and *private property* . . . " 116 U.S. at 630 (emphasis added). Although there was a short period of time in which this Court disregarded this property rights approach to the Fourth Amendment, *see e.g.*, *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited."), these cases represent an aberration that this Court subsequently rejected.

This historically faithful shift began with *United States v. Jones*, 565 U.S. 400 (2012), where this Court held that the attachment of a Global–Positioning–System tracking device to a vehicle by government agents, and the use of that device to monitor the vehicle occupant's subsequent movements, constituted a search under the Fourth Amendment. *Id.* at 413. Of particular applicability to this case, the Court did not base its approach in the right of privacy as articulated in *Katz*. Instead, this Court based its analysis squarely upon property rights. *Jones*, 565 U.S. at 405. "The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the

right of the people to be secure against unreasonable searches and seizures." *Id.*

Noting that until the latter half of the 20th century this Court based its Fourth Amendment jurisprudence exclusively on property rights, the *Jones* Court acknowledged that the *Katz* test is correctly applied to factual situations implicating privacy, like the transmission of electronic signals sans physical contact. *Id.* at 411. But when it comes to the questions of unreasonable searches or seizures, this Court's baseline analysis is grounded in property rights, which provide the minimum degree of protection under the Fourth Amendment. *Id.*

The Eleventh Circuit decision also conflicts with the mode of analysis in *Florida v. Jardines*. In *Jardines*, this Court held that a police officer's use of a drug-sniffing dog on the front porch of a home was a trespassory invasion of the home's curtilage that constituted a search under the Fourth Amendment. 569 U.S. at 11. Again, the majority's rationale was based exclusively in property rights. *Id*. The Court notes:

> The *Katz* reasonable-expectations test "has been added to, not substituted for," the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.

Id. (citing *Jones*, 565 U.S. at 409).

For a majority of this Court, an officer physically violating real property boundaries triggered the protection of the Fourth Amendment. *Id*. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 6. As noted by Justice Scalia: "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Id.* at 11.

The Eleventh Circuit's deception-exception stands in direct conflict with this Court's property rights based jurisprudence. In the context of a property rights analysis under the Fourth Amendment, whether officers "*deliberately* lied" is irrelevant. *See* Pet. App. at 12a (emphasis added). If and when government agents breach the physical boundaries of private property, this Court's property-based Fourth Amendment analysis is triggered. The facts of this case go well beyond affixing a GPS tracking device to a vehicle or intruding upon a home's curtilage. This case concerns government agents physically invading a private home through the use of deception for the purposes of conducting a warrantless search for evidence to be used against the occupants. Pet'rs' App. at 2a-5a.

Under this Court's precedent on this question, *see Jones*, 565 U.S. at 405, government agents cannot simply violate property rights in pursuit of possibly inculpatory evidence. Protection of private property provides a minimum degree of protection under the

Fourth Amendment, *Id.* at 411, and there is a reason why specific protection is provided for "houses." *Id.* at 405. As the "first among equals," the home has been singled out by this Court as worthy of special protection from precisely the type of government invasion at issue in this case. *See id.* at 411. Keeping easy cases easy means law enforcement cannot violate the real property boundaries protected by the Fourth Amendment via resort to subterfuge. *See id.*

III
THIS CASE REPRESENTS AN IMPORTANT FEDERAL QUESTION REGARDING THE CONSTITUTIONAL LIMITS GOVERNING ADMINISTRATIVE SEARCHES

Under the Eleventh Circuit's holding below, municipalities already prone to skirting the limits of the Fourth Amendment, *see, e.g.*, *Patel*, 135 S. Ct. at 2443, will only be encouraged to continue or expand this bad behavior. This case represents an important federal question regarding the scope of administrative power over which this Court should exercise its supervisory power.

One of the most pervasive modern threats to individual liberty comes not in the form of police beating down doors, but in the form of the "administrative searches." Troublingly, in an era in which government agencies are increasingly utilizing administrative searches, the legal rules governing those searches remain "notoriously unclear." Eve Brensike Primus, *Disentangling Administrative Searches*, 111 Colum. L. Rev. 254, 257 (2011). "[S]cholars and courts find it difficult to even define

what an administrative search is, let alone to explain what test governs the validity of such a search." *Id.*

Most often seen in the context of business inspections, sobriety checkpoints, or screenings at international borders or airports, municipalities have in recent years attempted to extend the scope of warrantless administrative searches to private homes. This alarming trend, purportedly to promote public health and safety, has widespread potential for the abuse of Fourth Amendment rights. "[A]dministrative searches [of private homes by code inspectors] are significant intrusions upon the interests protected by the Fourth Amendment" which "lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 534 (1967). The Eleventh Circuit's standard below, which encourages government agents to avoid the necessity of seeking warrants to enter private homes, will only make an already constitutionally perilous situation worse.

Consider the Residential Rental Enhancement Program promulgated by the City of Highland, California. *See generally* Complaint, *Trautwein v. City of Highland*, Cal., No. 5:16-cv-01491 (C.D. Cal. filed July 8, 2016).[7] This municipal program required an inspection of all residential rental properties within the city limits prior to securing a rental license. *Id.* at 3. These warrantless inspections included seventy separate items in and around the properties,

[7] https://pacificlegal.org/wp-content/uploads/ 2016/07/ COMPLAINT.pdf.

including everything from contrasting color address numbers to dishwashers and bathroom exhaust fans. *Id.* Karl Trautwein, who owns a rental property in Highland, refused the City's attempts to conduct a warrantless search of the home. *Id.* The city responded with threats of additional fees and administrative citations. *Id.*

Rather than allow the City to violate his Fourth Amendment rights, Mr. Trautwein filed a lawsuit, challenging the warrantless administrative inspections under the Fourth Amendment. As a result of Mr. Trautwein's suit, Highland ultimately rescinded its unconstitutional Residential Rental Enhancement Program. Sandra Emerson, *Highland rental property owner dismisses lawsuit, city changes inspection policy*, Redlands Daily Facts (June 7, 2017).[8] In other words, careful attention to the Fourth Amendment thwarted a local government's effort to demand the right to search private property without a warrant. If that same local government could circumvent the Fourth Amendment through deception, as it is empowered to do under the Eleventh Circuit's holding at issue in this case, then it would not bother to demand that landlords waive their Fourth Amendment rights: government agents could just knock on the door, make up a reason to enter, and then conduct precisely the type of warrantless search that the Fourth Amendment prohibits.

Another example of the constitutional mischief resulting from attempted warrantless administrative

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[8] http://www.redlandsdailyfacts.com/2017/06/03/highland-rental-property-owner-dismisses-lawsuit-city-changes-inspection-policy/.

searches of private homes is the currently pending civil action challenging Santa Barbara's home sales ordinances. Petition for Writ of Mandate and Complaint, *Santa Barbara Association of Realtors v. City of Santa Barbara*, No. 17CV04720 (Santa Barbara Cty. Super. Ct. filed Oct. 19, 2017).[9] These ordinances require people who wish to sell their homes to allow city inspectors access to the inside and outside of the house, as well as the yard and accessory structures prior to approving a sale. Santa Barbara Mun. Code § 28.87.220. Despite efforts to work with the city to end these unconstitutional inspections, which can impact the sale price of homes, the Santa Barbara Association of Realtors filed a lawsuit challenging the ordinances under the Fourth Amendment.

The Eleventh Circuit's holding in this case will only exacerbate recent similar attempts to circumvent the requirement*s* of the Fourth Amendment by extending warrantless administrative searches to private homes. Consider the myriad possibilities. What if a city outlaws room sharing services like Airbnb, and wants to crack down on possible offenders within the city's jurisdiction? *See e.g.*, Associated Press, *Southern Nevada officials coming down on Airbnb, HomeAway*, Las Vegas Sun (May 28, 2017).[10] Under the Eleventh Circuit's standard, government agents can enter the homes of offenders and innocents alike, so long as they can craft a convincing enough deception. What about a local family who enjoys

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[9] https://pacificlegal.org/wp-content/uploads/2017/10/Santa-Barbara-Petition-Complaint.pdf.

[10] https://lasvegassun.com/news/2017/may/28/southern-nevada-officials-coming-down-on-airbnb-ho/.

gathering around the family's backyard fire pit during winter? *See e.g.*, *Quick Guide to the Fire Prevention Code*, Arlington Virginia Fire Department.[11] What stops a code inspector from posing as an employee of the electric company as the pretext for gaining access to the family's home? What if a municipality simply wants access to private property for a generalized search to enforce a preferred local policy? *See e.g.*, City of Rochester, NY, *Code Inspection and Enforcement*, (showing "neighborhood survey" a basis for code inspections).[12] Under the Eleventh Circuit's holding, what is to stop government agents from crafting any possible lie as pretext for conducting warrantless searches of private property and homes?

The Eleventh Circuit's holding also creates more problems than it solves for law enforcement, and hence for the communities law enforcement serves. The United States Department of Justice has noted that "[m]utual trust between the police and the community is essential for effective policing." *See Principles of Good Policing: Avoiding Violence Between Police and Citizens*, U.S. Dep't of Justice.[13] Allowing law enforcement to lie their way into homes erodes the public trust between citizen and state that the Justice Department recognizes as "essential." *See id.* Ultimately, "community members' willingness to trust the police depends on whether they believe that police actions reflect community values and

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[11] https://fire.arlingtonva.us/fire-code-information/open-burning-warming-fires-grilling/.

[12] http://www.cityofrochester.gov/article.aspx?id=8589936012 (visited Jan. 25, 2018).

[13] https://www.justice.gov/archive/crs/pubs/principlesofgood policingfinal092003.htm#91.

incorporate the principles of procedural justice and legitimacy." *Why Police-Community Relationships Are Important*, U.S. Dep't of Justice.[14] The Eleventh Circuit's decision below does not further that cause, and it violates the Constitution, as well. Or as Judge Martin put it below in her thoughtful dissent in this case: "[T]he Majority opinion undermines the public's trust in the police as an institution together with the central protections of the Fourth Amendment." Pet. App. at 35a (Martin, J., dissenting). Surely, courts should not undermine the trust placed by the public in both law enforcement officers and the plain meaning of the Fourth Amendment to our Constitution.

CONCLUSION

At the birth of our Republic, James Madison observed that "there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations." *See* James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military, June 16, 1788*, *in* 1 History of the Virginia Federal Convention of 1788, 130 (H.B. Grigsby ed., 1890). The Eleventh Circuit's holding encourages precisely the type of "gradual and silent encroachment" that the Founders sought to prevent in carefully crafting our Fourth Amendment.

This Court, "an impenetrable bulwark against every assumption of power," James Madison, *Speech Before the First Session of Congress*, 1 Annals of Cong.

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[14] https://www.justice.gov/crs/file/836486/download at 1.

457 (Joseph Gales ed., 1834), which is "entrusted with the primary responsibility" of protecting individual rights, Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 571 (1998) (quoting The Federalist No. 78, at 441 (Alexander Hamilton) (Isaac Kramnick ed., 1987)), should exercise its supervisory power to settle the important federal questions and conflicts of precedent implicated by the Eleventh Circuit in this case.

The petition for a writ of certiorari should be granted.

DATED: February, 2018.

Respectfully submitted,

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