No. 10-388

IN THE

Supreme Court of the United States

ROBERT AND MICHELLE HUBER,

Petitioners,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

REPLY BRIEF

HOWARD P. DAVIS
Counsel of Record
THE LAW OFFICE OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737
hdavis@envirolawyer.net

HOWARD P. DAVIS
ANNE M. RONAN
ERIC M. GRILLÉ
THE LAW OFFICE OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737

Attorneys for Petitioner

234706

Blank Page

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Page

STATUTES

LEGAL ARGUMENT

The New Jersey Department of Environmental Protection's ("NJDEP's") attempt to reimagine the federal issue presented, and its other arguments and suggestions, should not persuade the Court to forego review of this matter. In fact, none of NJDEP's propositions withstand scrutiny.

1. The Conservation Easement Did Not Influence the Warrantless Search or the Holding at Issue.

NJDEP primarily accuses the Hubers of wrongfully failing to inform this Court about a conservation easement created when NJDEP made a deal with the original developer of their property. (Brief in Opposition ("Opposition") 1.) But the holding below that upheld Inspector Nystrom's warrantless search was based entirely on NJDEP's authority under New Jersey's Freshwater Wetlands Protection Act (the "FWPA"). Specifically, the New Jersey court stated that "Nystrom had *statutory* authority to enter the property and perform his inspection." (*See* Pet. App. 23a). Accordingly, the conservation easement that NJDEP raises in its Opposition is not relevant to the federal issue presented.

Beyond this, the record shows beyond any doubt that the search had nothing to do with any conservation easement and that Inspector Nystrom was interested only in violations of the FWPA. In fact, NJDEP plainly admits that "Inspector Nystrom, the NJDEP representative who conducted the first inspection of the property on July 3, 2002, testified during a hearing in the New Jersey Office of Administrative Law that he

went to the Hubers' property to verify the presence or absence of wetlands there ...." (*See* Opposition 6 (citing Huber Hr'g Tr. 55, 100, Feb. 20, 2008)). Indeed, on July 3, 2002, Inspector Nystrom did not even know about any conservation easement. (*See, e.g.,* Huber Hr'g Tr. 67 at 18-21, Feb. 20, 2008) ("I had no knowledge of who owned the property or anything about the property other than I was to go up there and take soil borings. I had not researched this site.") He testified that it was not until a telephone conversation subsequent to his search, on July 8, 2002 that Mr. Huber "told [him] that ... his deed had certain property restrictions regarding the freshwater wetlands." (Huber Hr'g Tr. 56 – 22 to 25, Feb. 20, 2008).

Thus, on July 3, 2002, Nystrom was inspecting only the location and condition of wetlands, pursuant to NJDEP's interpretation of its authority under the FWPA. (*See* Huber Hr'g Tr. 55-56, Feb. 20, 2008 ("I had no knowledge of what was out there other than that we had a complaint and that I had to do the wetland borings.")). The fact that his search and soil borings may have been "within the area" subjected to a conservation easement had nothing to do with his search. He did not know or care about it. (*See* Huber Hr'g Tr. 55-19 to 21, Feb. 20, 2008 ("I didn't know about the deck or appurtenant structures. My job that day was to verify the presence or absence of wetlands.")).

Only after Mr. Nystrom's unwarranted search, in the course of subsequent searches and enforcement proceedings resulting from it, did another NJDEP official familiar with the history of the Property raise the issue of the "conservation easement" as a basis to

insist, *inter alia*, that the Hubers take apart their patio, retaining wall and back deck, and return the lawn to wetlands. (*See* Opposition 8).

The disputes in this matter relating to the conservation easement involved its validity and interpretation and who could enforce it. These were state law questions, not relevant to this Court. Specifically, the New Jersey court did not accept NJDEP's assertion that it had an access easement as well as a conservation easement.

2. No Special Need Justified Entry without a Warrant.

As noted in the Petition, the "special public needs" test allows a warrantless search only when the government proves that (1) urgent "special public needs" make such a search necessary, and (2) the special needs outweigh the infringement upon private rights caused by the search. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (allowing a warrantless search of a probationer's apartment upon information that it contained a gun); *see also United States v. Carter*, 360 F.3d 1235, 1241 (10th Cir. 2004) ("The government bears the burden of establishing exigency. In our assessment of whether the burden is satisfied, we are guided by the realities of the situation presented by the record. We should evaluate the circumstances as they would have appeared to prudent, cautious and trained officers.") (quoting *United States v. Rhiger*, 315 F.3d 1283, 1288 (10th Cir. 2003)).

The fact that NJDEP can identify an admittedly valid public purpose behind the search does not satisfy the "special needs" test. As this Court explained in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), "[t]he question is not ... whether these inspections may be made, but whether they may be made without a warrant." 387 U.S. at 533. Accordingly, in *Camara*, although the City of San Francisco had a legitimate need to inspect apartments for housing code violations, its search of an apartment was invalid because it did not show why it needed to avoid a warrant:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *See Schmerber v. State of California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 1835-1836, 16 L.Ed2d 908. It has nowhere been urged that fire, health and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.

387 U.S. at 533.

Similarly, there was no special need in this case for NJDEP to conduct its inspection without a warrant.

Indeed, NJDEP has never contended that Inspector Nystrom's search had to be conducted right away, nor offered any other justification for its failure to get a warrant, even after the Hubers turned away its first inspector, other than its reliance on the broadly-worded terms of the New Jersey Statutes sections 13:9B-21(m) and 13:1D-9(d). In fact, the record shows that NJDEP's warrantless procedure herein was driven by mere convenience. As Nystrom himself testified, he went at a time that was convenient for him and his office, on his way back from another assignment. (Huber Hr'g Tr. 102-15 to 17, Feb. 20, 2008) ("I was told to go and stop by on my way back because I was doing some field work up in Sussex and stop by."). He was in no rush and NJDEP has never even suggested that the evidence he sought might have become unavailable if an administrative warrant had been obtained. Wetlands, after all, are not a fast moving target.

3. Consent and Suppression were Timely Raised.

NJDEP suggests that Petitioners did not raise their lack of consent and need for suppression fully enough before the ALJ, and that their lack of consent is not supported by a sufficient record. (*See* Opposition 26-27). But, even though Mr. Huber was pro se at the time, the issue of consent to the search was raised by both sides before the ALJ, who cut off all questioning about it as follows:

> Q. Mr. Nystrom, under the Freshwater Wetlands Protection Act, is it required that indeed the inspector ask permission to access the site?
>
> JUDGE MASIN: It's not a issue in this case, Counsel. I understand there's a question about it, but there's no issue in this case with regard to that.
>
> THE WITNESS: Actually, it's not under the Freshwater Wetlands Protection Act.
>
> JUDGE MASIN: It's not an issue in this case. Let's move on.

(Huber Hr'g Tr. 108-24 to 109-10, Feb. 20, 2008).

Petitioners have argued ever since that their consent was necessary for a warrantless search to be legal under the Fourth Amendment, that they did not consent to Inspector Nystrom's search and that the fruits of his search are tainted and should be suppressed. The New Jersey court heard all of these arguments, noted that "that there was a factual dispute on this issue," decided that consent was unnecessary as a matter of law, and refused to suppress Nystrom's evidence. (Pet. App. 23a). Thus, the consent and suppression issue was preserved for this Court.

Beyond that, it is impossible to conclude on this record that Petitioners gave effective consent to Inspector Nystrom's search. *See generally Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir.

2008) (noting that "the government may not show consent to enter from the defendant's failure to object to the entry"). Nystrom himself testified that he went to the property anticipating trouble because Mr. Huber already had forcefully refused to consent to a search and thus ejected NJDEP's first inspector. (*See* Huber Hr'g Tr. 60-18 to 21, Feb.20, 2008) ("the person that preceded me was intimidated by him and was told – apparently had the door slammed in her face, and I was told to go."); (*see also* Huber Hr'g Tr. 61-5 to 8, Feb. 20, 2008 ("I was only advised that the previous person... had been intimidated and would not enter the property.")). Despite this, Inspector Nystrom was ready and willing to make a stab at it because, as he testified in response to a question from Mr. Huber, "I can enter[] your property regardless of whether you were there or not...." (Huber Hr'g Tr. 61-15 to 17, Feb. 20, 2008).

4. The Search Occurred in the Curtilage, not Open Fields.

As discussed in the Petition, the Fourth Amendment affords protection against warrantless searches in the cultivated outdoor areas adjacent to a house where the occupants generally engage in domestic activities with expectations of privacy similar to those that they have inside. As this Court explained in a case distinguishing curtilage from open fields:

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746

> (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.

Oliver v. United States, 466 U.S. 170, 180 (1984); *see also id.* at 178 (noting the legitimate demand for privacy for "the area immediately surrounding the home"); *see also Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986) ("The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.").

Thus, a family backyard is protected by the Fourth Amendment. *See, e.g., Bleavins v. Bartels*, 422 F.3d 445, 452 (7th Cir. 2005) ("Areas that are 'intimately connected with ... the activities 'of the home include, for example, backyards") (citing *United States v. French*, 291 F.3d 945, 953 (7th Cir. 2002); *United States v. Hedrick*, 922 F.2d 396, 399 (7th Cir. 1991) (noting that this Court's cases "have recognized that the yard of a residential home is within the curtilage of the house"); and *Carter*, 360 F.3d at 1241 (accepting the proposition that "the backyard should likewise be treated as a home because it is within the curtilage of the residence").

NJDEP has not contended that the search herein was outside the curtilage of Petitioners' property. Instead, it ignores the law extending Fourth Amendment protection to the curtilage, and cites a case involving open fields, *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). That case is inapt primarily because it did not involve a residence. In fact, it did not even involve a search conducted by an inspector intruding on commercial curtilage. As this Court observed, there was no showing that the smokestack inspector in that case was on the portion of "the premises from which the public was excluded." *See id.* at 865. In this regard, the law pertaining to "open fields," is inapplicable here, where the search occurred in the close, cultivated backyard of a suburban home, squarely within the residential curtilage. *See Oliver*, 466 U.S. at 178 (distinguishing "open fields" from curtilage based on "reasonable expectations of privacy").

In this regard, "[a] warrantless search of a home's curtilage implicates the "very core" of the fourth Amendment and presumptively is unreasonable." *Bleavins*, 422 F.3d at 451 (citing, *inter alia*, *Payton v. New York*, 445 U.S. 573, 585-86 (1980)); *see also California v. Ciraolo*, 476 U.S. 207, 221 (1986) (noting with apparent approval that "[t]he lower federal courts have agreed that the curtilage is 'an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling.'"). Fences and posting are factors in cases involving open fields rather than backyards.

NJDEP also seems to be conjuring some version of the "plain view" exception, which can save a warrantless search if an official has observed evidence in a private place, but only if the official makes the observation from a location where he is legally entitled to be. *See, e.g., Washington v. Chrisman*, 455 U.S. 1, 8 (1982) (applying the principle that if an enforcement official is not in a public place, the plain view exception applies only if the officer has obtained "lawful access to an individual's area of privacy"). But here, Nystrom was trespassing.

5. Suppression is the Appropriate, Indeed the Only, Remedy.

The exclusionary rule is designed to prevent future offenses by government officials against rights of American citizens. *See, e.g., United States v. Calandra*, 414 U.S. 338, 347-48 (1974). "The rule is calculated to prevent, not to repair. Its purpose is to deter, to compel respect for the constitutional guaranty in the only effectively available way by removing the incentive to disregard it." *United States v. Janis*, 428 U.S. 433, 443 n.12 (1976).

NJDEP needs the disincentive of the exclusionary rule. Its policy of trespassing onto residential property whenever it chooses calls for a remedy to make future searches like the one herein less fruitful. Otherwise it can be expected to continue to flout the fundamental privacy rights of residential property holders.

NJDEP has not "pointed to any authority in our Fourth Amendment jurisprudence suggesting that the warrant requirement applies with any less force in the

administrative context." *See Lopez-Rodriguez*, 536 F.3d at 1019 (citing *Camara*, 387 U.S. at 534, and applying the exclusionary rule in an administrative proceeding to suppress evidence obtained in the course of a nonconsensual, warrantless search of a residence). None of the cases that NJDEP cites demonstrate that the exclusionary rule would be an inappropriate remedy here. *Immigration and Naturalization Serv. v. Lopez-Mendoza (INS)*, 468 U.S. 1032, 1034, 1051 (1984), held only that the rule "does not generally apply" in the civil deportation hearing of an illegal alien (not an American citizen) "where the sole issues are identity and alienage." *See Lopez-Rodriguez*, 536 F.3d at 1016. Strikingly, the Ninth Circuit has interpreted *INS* specifically to allow application of the exclusionary rule where evidence has been obtained in a warrantless, nonconsensual search of a residence, even in deportation proceedings. *See Lopez-Rodriguez*, 536 F.3d at 1016. The Ninth Circuit explained that the warrantless entry into a residence without consent, in the absence of exigent circumstances, constitutes just the kind of egregious violation anticipated by *INS*, and that it calls for application of the exclusionary rule. *See Lopez-Rodriguez*, 536 F.3d at 1018.

NJDEP also cites *United States v. Janis*, 428 U.S. 433 (1976), which involved no brazen trespass, and held only that in a federal tax proceeding initiated by a party seeking a refund, that the evidence obtained by a state criminal law enforcement in good faith reliance on a warrant that later turned out to be defective would not be suppressed.

The remaining two cases that NJDEP cites both turned on the Court's skepticism of the deterrent value of suppression in certain distinct contexts where the costs of applying it were apt to be high. *Pennsylvania Board of Prob. & Parole v. Scott*, 524 U.S. 357 (1998), turned on the Court's balancing of the unusually small benefit it anticipated from applying the rule in parole revocation proceedings (because parole officers would not likely be influenced by it) with the serious detriment to the judicial system it would likely cause, in light of how "[t]he costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future criminal offenses than are average citizens." 524 U.S. at 365. And in *Calandra*, the rule was held inapplicable in grand jury proceedings because it would cause substantial disruption to that fundamental governmental function, but offer almost no deterrent value, inasmuch as "the incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." 414 U.S. at 351.

CONCLUSION

NJDEP seems to have no sense that even though it may be empowered by broad statutory language, the Fourth Amendment nevertheless restricts its right to perpetrate physical intrusions onto private residential property. The record and arguments herein reveal the misguided underpinnings of NJDEP's current policies

and highlight the urgent need for the Court's guidance and a corrective remedy to ensure the renewed respect of environmental inspectors for the fundamental privacy to which people in their homes are entitled. As discussed and supported more fully in the Petition submitted herein, the issues presented threaten people at home in all the States, not just New Jersey.

Respectfully submitted,

HOWARD P. DAVIS
Counsel of Record
THE LAW OFFICE
OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737
hdavis@envirolawyer.net

HOWARD P. DAVIS
ANNE M. RONAN
ERIC M. GRILLÉ
THE LAW OFFICE
OF HOWARD DAVIS, P.C.
180 Sylvan Ave, Second Floor
Englewood Cliffs, N.J. 07632
(201) 541-9737

Attorneys for Petitioner

Blank Page