No. 04-1067

IN THE

Supreme Court of the United States

STATE OF GEORGIA,
Petitioner,
v.
SCOTT FITZ RANDOLPH,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

PAMELA HARRIS
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1150 18th St. NW, Ste. 950
Washington DC 20036
(202) 872-8600

JEFFREY A. LAMKEN
Counsel of Record
HEATHER S. ALLEN
KEVIN T. JACOBS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for
National Association of Criminal Defense Lawyers

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

BLANK PAGE

QUESTION PRESENTED

Whether the police may search a home based on the putative consent of one occupant when another present occupant of the home expressly objects to the search.

BLANK PAGE

TABLE OF CONTENTS

TABLE OF CONTENTS–Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BLANK PAGE

IN THE

Supreme Court of the United States

No. 04-1067

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

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 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 35,000 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 enter the home of a potential criminal defendant without a warrant where he is present and objecting, simply because another occupant of the home—his spouse—purports to consent to the search. 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 effort to exclude others from the most sensitive of places, the home. NACDL has appeared as *amicus curiae* in numerous Fourth Amendment cases in this Court. See, *e.g.*, *Muehler* v. *Mena*, 125 S.Ct. 1465 (2005); *Denvenpeck* v. *Alford*, 125 S.Ct. 588 (2004); *United States* v. *Drayton*, 536 U.S. 194 (2002); *United States* v. *Knights*, 534 U.S. 112 (2001); *Kyllo* v. *United States*, 533 U.S. 27 (2001).[1]

STATEMENT OF THE CASE

1. Before May of 2001, respondent Scott Fitz Randolph and his wife lived in a house they rented from respondent's father in Americus, Georgia. 10/3/02 Tr. at 30, 33. In late May of 2001, the couple separated. Mrs. Randolph took the couple's son and most of her clothing and went to stay with her parents in Canada. Respondent remained in the marital home. *Id.* at 23; Pet. App. 7.

---

[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

On or about July 4, 2001, Mrs. Randolph returned to the home with their child. Pet. App. 7. She informed respondent that she intended to collect more of her belongings and return to Canada. 10/3/02 Tr. at 24.

On the morning of July 6, 2001, respondent awoke to find Mrs. Randolph highly intoxicated. 10/3/02 Tr. at 24-26. The couple argued, and Mrs. Randolph said she was going to collect her things and leave the house. *Id.* at 27. Respondent took their son to the house of a family friend. *Id.* at 27-28. While respondent was gone, Mrs. Randolph called the local police department. When the police arrived, Mrs. Randolph complained that respondent had taken their child away. She also claimed that respondent's cocaine use was causing the couple financial problems. Pet. App. 7. During that same conversation, Mrs. Randolph revealed to the police that she and respondent were having marital problems, that she had separated from him, and that she had recently left the home for over a month to stay with her family in Canada. 10/3/02 Tr. at 14-15.

When respondent arrived at his home, he found his wife there along with the police. He told the police where he had taken the child. He had been concerned, he explained, that Mrs. Randolph would again take their son out of the country. Pet. App. 7-8. After retrieving the child, one of the officers told respondent about Mrs. Randolph's allegations of cocaine use. *Id.* at 8.

The officer asked respondent for permission to search the house. Respondent unequivocally said "no." 10/3/02 Tr. at 8; Pet. App. 8. The officer then turned to Mrs. Randolph and asked for her consent. Mrs. Randolph agreed. Over respondent's objection, Mrs. Randolph then, in the officer's words, "showed [him] a bedroom upstairs in the back corner that was reported to be Mr. Randolph's." 10/3/02 Tr. at 8. Peering in the doorway, the officer observed "a piece of cut straw on top of a jar."

Ibid. Upon closer examination, the officer thought he saw white residue on the straw, which led him to believe the straw was used to ingest cocaine. *Ibid.*

The officer left the house to retrieve an evidence bag and to contact the district attorney. The district attorney told the officer to stop the search and obtain a warrant. 10/3/02 Tr. at 9; Pet. App. 8. The officer returned to the home, at which point Mrs. Randolph said she was withdrawing her consent to the search. The officer collected the straw and white residue and went to the police station with respondent and Mrs. Randolph. Pet. App. 8. The officer then obtained a search warrant for the home. During the ensuing search, the police seized numerous drug-related items. *Ibid.*

On November 21, 2001, an indictment was filed against respondent for possession of cocaine. J.A. 1. On January 17, 2002, respondent filed a motion to suppress all evidence seized from his home. The Superior Court denied the motion, holding that Mrs. Randolph was "still in possession of common authority to grant consent for police to search the marital home." J.A. 23.

2. The Georgia Court of Appeals granted respondent's application for interlocutory appeal and reversed. Pet. App. 7-47. The court held that it is "inherently reasonable that police honor a present occupant's express objection to a search of his dwelling, shared or otherwise." *Id.* at 10. "If 'common authority' is the basis for allowing one co-occupant to consent to a search on behalf of all occupants," the court explained, "it seems reasonable that 'common authority' should permit a co-occupant to exercise privacy rights on behalf of all occupants." *Ibid.* That result was "particularly reasonable" in cases involving marital disputes, the court added. "Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility." *Ibid.*

The court of appeals acknowledged that, in *United States* v. *Matlock*, 415 U.S. 164 (1974), this Court had held that one cotenant could consent to a search of the dwelling he shared with others. Pet. App. 8-9. But the court of appeals held that *Matlock* was "factually and legally distinguishable" because the nonconsenting tenant in that case was not present and objecting to the search. Here, respondent was "not only present, but he affirmatively exercised his Fourth Amendment right to be free from police intrusion by refusing to consent to the search of his house." *Id.* at 12.

3. The Supreme Court of Georgia affirmed. Pet. App. 1-6. The court assumed that it was "faced with a situation in which two persons have equal use and control of the premises to be searched." *Id.* at 1. Under those circumstances, the court held, "the consent to * * * a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." *Ibid.*

Like the court of appeals, the Georgia Supreme Court distinguished *Matlock*. The Georgia Supreme Court pointed out that, in *Matlock*, the defendant challenging the search had not been present on the scene when the police sought consent from a cotenant. "[T]he risk assumed by joint occupancy," the Georgia Supreme Court stated, is "merely an inability to control access to the premises during one's absence." Pet. App. 3 (internal citations omitted). Quoting the Supreme Court of Washington, the Georgia Supreme Court concluded that, "should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exalts expediency over an individual's Fourth Amendment guaranties." *Ibid.* (quoting *State* v. *Leach*, 113 Wash. 2d 735, 744 (1989)).

Three Justices dissented. In their view, respondent had "assumed the risk that because of his diminished expectation of privacy he had in the home he shared with his wife, she would expose their common private area" to a search. Pet. App. 6 (internal citations omitted).

SUMMARY OF ARGUMENT

The Fourth Amendment does not permit the police to enter a home and conduct a warrantless search, without exigent circumstances, in direct defiance of a present and objecting occupant who expressly refuses to consent to the search.

A. The expectation of privacy is at its apogee when a citizen is in his home and, in particular, the marital home. That expectation is reflected in the most fundamental of all property rights—the right to exclude others.

B. When a present occupant asserts his right to exclude police officers from his home, the government cannot overcome this assertion by relying on another occupant's purported consent. The shared social understandings that supported the Court's holding in *United States* v. *Matlock*, 415 U.S. 164 (1964), preclude that result. The social and legal understandings shared by members of our society do allow one occupant to invite a third party into his home in the absence of objecting cotenants. The holding in *Matlock* reflects those understandings. But it is similarly understood that strangers may not enter the home based on the putative consent of one occupant when another is present and objects to the entry. No person on the doorstep of the home, invited to enter by one inhabitant but confronted with vociferous objection from another, would think it permissible to brush the objecting occupant aside and enter nonetheless. The same rule should apply to the police.

To the extent relevant, that rule finds expression in principles of property law. While one tenant may, absent

objection, invite outsiders onto land, he may not do so when that interferes with the rights and quiet enjoyment of other tenants, such as where they are present and object to the intrusion. None of the cases cited by petitioner and its *amici* license a stranger standing at the threshold of a home to push his way inside past a present and objecting occupant at the invitation of another—much less push his way past the objecting tenant into the objector's bedroom.

The prohibition on entry over a tenant's objection serves important societal interests. The contrary rule would increase the likelihood of violent confrontations and expose the objecting occupant to potential tort liability. It would, moreover, encourage the police to create or exacerbate marital discord by setting one spouse against the other, a result that is in serious tension with the sanctity and respect our society accords the marital relationship.

Allowing the police to disregard the express wishes of an individual from whom they have sought consent, moreover, is inconsistent with basic principles of self-determination and the rule of law. This Court has explained that the citizen's decision to consent to a search is entitled to dignity and respect. By the same token, the decision not to consent is entitled to equal dignity and respect. When the police ignore a citizen's wishes after having purported to seek consent, they send a message of disrespect for individual constitutional choice.

C. The law enforcement need in this context is particularly slight. Where there is probable cause, the police can get a warrant. This Court, moreover, has recognized that the police may enter a home over a citizen's wishes without a warrant when there are exigent circumstances, and that the police may take reasonable measures to prevent the destruction of evidence, if they have sufficient reason to believe such destruction is

imminent, while officers obtain a warrant. Consequently, the only circumstance under which the police would "need" to rely on the rule advanced by petitioner is when there is no probable cause to believe a crime has been committed, no exigency exists, and there is no reason to fear the imminent destruction of evidence. But that is precisely the circumstance in which the law enforcement interest in entering the home is at its nadir. In such a case, it is unjustifiable and unreasonable to sacrifice an individual's right to privacy (and society's corresponding interests in preventing violent confrontation) to law enforcement expediency.

D. Finally, the record evidence in this case indicates that the occupant who purported to give consent—respondent's wife, Mrs. Randolph—had an interest in and relationship to the home (and the bedroom in particular) that was inferior to respondent's. Indeed, she had all but abandoned the home a month earlier, separating from respondent. In general, the consent of one with a subordinate interest in property cannot override the express wishes of a present occupant with a superior interest. Moreover, the record reflects that the bedroom at issue was known to the police as "Mr. Randolph's bedroom," not the couple's bedroom. Under this Court's precedents, one tenant cannot consent to the search of an area reserved for *another's* use and over which she does not share common authority and control.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PERMIT GOVERNMENT AGENTS TO PRESS THEIR WAY INTO PRIVATE HOMES AND BEDROOMS, PAST A PRESENT AND OBJECTING OCCUPANT, WITHOUT A WARRANT OR EXIGENCY

This case concerns whether the police must respect a citizen's decision to exercise his right to exclude them from the most private of locations—his home and, in particular, his bedroom. When the police asked respondent for consent to search his home and bedroom, respondent unequivocally refused, denying the police permission to enter without a warrant. The police did not respond by seeking a warrant or asserting exigent circumstances. Nor, however, did they respect respondent's decision to exercise his right to refuse admission to the police. Instead, they sought to circumvent respondent's choice by asking for and obtaining consent from respondent's wife (from whom respondent was separated). They did so even though respondent was present and expressly objecting to entry. They did so even though respondent's wife's connection to the home had become attenuated. She and respondent had separated; she had abandoned the marital home and relocated to Canada a month before; and she had returned for only a few days to collect more of her belongings. Yet, based on her putative consent, the police entered respondent's home and bedroom over his protest.

The police effort to bypass a present citizen's express and lawful effort to assert the privacy and sanctity of his home is inconsistent with the Fourth Amendment's irreducible requirement that searches be "reasonable." No ordinary citizen at the threshold of another's home or bedroom would ever claim the right—or believe that he is privileged—to push his way inside, past a present and

objecting occupant, based on the putative consent of another. To the contrary, the "understandings that are recognized and permitted by society," as well as those reflected in "concepts of real or personal property law," *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143-44 (1978)), strictly prohibit entry under such circumstances. That prohibition and the important societal interests it protects apply with no less force when the person seeking entry is no ordinary stranger but the government.

The police refusal to accept respondent's decision to deny consent, moreover, is inconsistent with the principles of individual responsibility and self-determination that undergird the concept of consent generally. As this Court has observed:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It 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.

United States v. *Drayton*, 536 U.S. 194, 207 (2002).

In a society based on law, the decision not to consent, and words like "no" and "do not," are likewise entitled to a weight and dignity of their own. Police officers "act in full accordance with the law" when they ask for consent. But they undermine the rule of law, they denigrate the principle of self-determination, and they send the message that individual constitutional choice is a charade when, having been advised of the citizen's wishes, they proceed to ignore them without resort to the legal procedures (*e.g.*, a warrant) that ordinarily serve as a bulwark of individual liberty. That result and the con-

comitant message of disrespect for individual constitutional choice should not be endorsed.

A. The Right To Exclude And Corresponding Privacy Interests Are At Their Apogee In The Marital Home

Whether a warrantless search offends the Fourth Amendment depends first on "whether a person has a 'constitutionally protected reasonable expectation of privacy'" in the location at issue. *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Even where a defendant has a "subjective" expectation of "privacy in the place searched," that expectation must be "reasonable," *i.e.*, "one that has a 'source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Carter*, 525 U.S. at 88 (quoting *Rakas*, 439 U.S. at 143-44).

Nowhere are expectations of privacy more likely to be reasonable—and more closely guarded by custom and law—than in the home, particularly where a citizen expressly objects to the intrusion on "the sanctity of [his] home and the privacies of life." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). "[A] special benefit of the privacy all citizens enjoy within their own walls * * * is an ability to avoid intrusions." *Frisby* v. *Schultz*, 487 U.S. 474, 484-85 (1988). "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970).

The special solicitude the law affords the privacy and security of the home reflects both principles of private property and the home's important function in our society. One of the keystones of private property is the right to exclude others. "[T]he owner's right to exclude

others from entering and using her property [is] perhaps the most fundamental of all property interests," *Lingle* v. *Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082 (2005)—"'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) (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)). Indeed, "physical entry of the home" is the "chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States Dist. Court for E.D. Mich.*, 407 U.S. 297, 313 (1972). The right to exclude, moreover, is the primary characteristic that sets private property apart from the commons. The right to invite entry is shared by both the property owner standing on his private land and the common citizen standing on public land. But the right to exclude others is unique to the owner of private property.

The home, moreover, has long served as a unique refuge from the insecurity and public scrutiny of the commons. "The axiom that a man's home is his castle * * * has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition." *Carter*, 525 U.S. at 100 (Kennedy, J., concurring) (citation omitted). It is not only a place to sleep and be "at our most vulnerable"; it is also a place to entertain visitors and host overnight guests, who "seek[] shelter in another's home precisely because it provides [them] with privacy." *Minnesota* v. *Olson*, 495 U.S. 91, 99 (1990).

The special status of the home is of particular importance when the government seeks to intrude on the privacy of a marital household. Just as the walls of the home shield individual private matters from outside intrusion, so too they provide a bulwark against intrusion on the intimacies and confidences of marital life. The

importance of barring intrusion on those interests is repeatedly reflected in law. For example, even setting aside the Framing-era rule that one spouse may never testify against the other as to any matter, it is now well-settled that one spouse may not testify as to confidential marital communications if the other spouse objects. See 3 Joseph M. McLaughlin, *et al.*, *Weinstein's Federal Evidence* § 505.09, at 505-15 (2d ed. 2005); *e.g.*, *United States* v. *Wood*, 924 F.2d 399, 401-02 (1st Cir. 1991).[2] The intimacy of the marital household and bedroom must be accorded similar solicitude when threatened with physical and not mere testimonial invasion. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

B. The Police May Not Invade The Home Based On The Putative Consent Of A Co-Occupant Over The Express Objection Of The Other, Present, Co-Occupant

Neither petitioner nor its *amici* dispute that respondent enjoyed a reasonable expectation of privacy—a

---

[2] For at least 150 years after the Constitution's framing, this Court followed the "general rule that neither a husband nor wife can be witness for or against the other," *i.e.*, spouses were held incompetent to testify against one another even if no marital communications would be disclosed. *Stein* v. *Bowman*, 38 U.S. (1 Pet.) 209, 210 (1839). In *Hawkins* v. *United States*, 358 U.S. 74, 77-78 (1958), the Court rejected the notion of competency as anachronistic and instead relied on a privilege doctrine, holding that either spouse may object and thereby foreclose the testimony of the other. Most recently, in *Trammel* v. *United States*, 445 U.S. 40, 53 (1980), the Court concluded that mutual consent is no longer required and that, except for marital communications, a spouse may voluntarily testify against the other spouse, but cannot be compelled to do so.

legitimate and socially recognized expectation—in his own home. Nor does anyone claim that respondent himself "waived" or otherwise "consented" to an intrusion on his Fourth Amendment rights or interests. The only question is whether the consent of a third person—respondent's wife—is sufficient to overcome his rights despite his presence and continued objection to physical entry into his home and bedroom. Custom, the law, and the societal interests they reflect all demonstrate that the answer is "no."

1. *Shared Social Understandings Support* Matlock*'s Conclusion That One Occupant May Allow Entry In The Other's Absence*

This Court has already concluded that one cotenant may, in the other's *absence*, consent to a search of the premises. As this Court explained in *United States* v. *Matlock*, 415 U.S. 164, 170 (1974), "the consent of one who possesses common authority over premises or effects is valid as against the *absent* nonconsenting person with whom that authority is shared." That rule reflects social custom, common experience, and (to the extent relevant) principles of property law.

a. As a matter of custom and experience, members of our society generally understand that an invitation from one cotenant to enter the premises is valid and effective notwithstanding the absence or silence of other cotenants. No one invited to enter a home by one of its occupants would think twice about entering without separate or express consent from the other occupants. The social guest invited by one spouse to come inside for a cup of tea; the business visitor invited to pitch his wares; the teenager invited inside by his highschool classmate. Each of these individuals would understand that—absent some contrary indication—an invitation

from one of the home's inhabitants is no less valid than an invitation from all.

b. That understanding finds expression in principles of real property law as well. As a general matter, cotenants may bring guests onto the premises (at least absent objection from, or interference with the quiet enjoyment of, other tenants). The law properly assumes that, if one tenant issues an invitation, his cotenants have no objection. See pp. 23-24, *infra*; cf. *United States* v. *Stone*, 471 F.2d 170, 177 (7th Cir. 1972) (Swygert, J., dissenting) ("Basic to the third party consent rationale is the premise that the absent party might, were he present, consent to the search, in which event no constitutional rights would be violated."). In that sense, the ordinary cotenancy relationship includes permission to bring others into the abode. Contrast *Stoner* v. *California*, 376 U.S. 483, 489 (1964) (while hotel guest impliedly consents to entry by "maids, janitors, and repairmen" in "the performance of their duties," that consent does not extend to the night clerk or the police).

As a result, one who shares his home with others, gives them "joint access or control for most purposes," and leaves them in sole possession unattended, "assume[s] the risk that one of their number might permit the common area to be searched" in his absence. *Matlock*, 415 U.S. at 172 n.7. In the context of chattels, for example, this Court has concluded that a defendant who not only allowed his cousin to use his duffel bag, but also left the bag at his cousin's house, "must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). That conclusion is fully consistent with the understandings that members of society share when multiple individuals inhabit a single home.

2. *Shared Social Understandings Preclude Extending* Matlock *To Permit Entry Despite Objection By A Present Occupant*

The social understandings and legal rules that support the result in *Matlock*, however, point in precisely the opposite direction in this case. As a matter of social custom and shared understanding, no person on the doorstep of the home, invited to enter by one inhabitant but confronted with objection from another, would think it permissible to brush the objecting occupant aside and enter nonetheless. Whether the potential visitor appears for social or business purposes, the social custom is clear—the objection of one cotenant renders the invitation of the other ineffective. That is particularly true when the invitee stands not on the threshold of the home but on the threshold of a private bedroom.

Consistent with that understanding, concurrent ownership or possession also creates a concurrent right to exclude.[3] One cotenant has no right to exclude the other cotenants—each has an equal right to full use and enjoyment of the premises. But no cotenant may use the property to interfere with the quiet enjoyment of the others either. 7 *Powell on Real Property* § 50.03[1] (Michael Allen 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

---

[3] 7 *Powell on Real Property* § 50.06[1] ("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"); *id.* § 52.03[4] ("Each tenant by the entirety is entitled to * * * protect it against outsiders * * * ."); 4 *Thompson on Real Property* § 31.07(d) (David A. 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.").

the other cotenants."). That limit on each tenant's use forecloses tenants from bringing unwanted visitors onto the property when objecting cotenants are present. As one treatise observes:

> 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 Herbert Thorndike Tiffany & Basil Jones, *The Law of Real Property* § 457, at 274-75 (3d ed. 1939) (emphasis added); see also Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 63 (1974-75) ("[O]rdinarily, persons with equal 'rights' in a place would accommodate each other by not admitting persons over another's objection while he was present.").

Early cases reflect the same principle—even when dealing with contexts other than the home. In *Richey* v. *Brown*, 58 Mich. 435, 435 (1885), for example, a mother, son, and daughter owned and resided on a farm as tenants in common. The defendant, a resident of a neighboring farm, sought consent from the son to enter onto the land and cut timber, without seeking permission from the mother or daughter. *Id.* at 436. As soon as the mother and daughter learned of the defendant's doings on the premises, the mother notified the defendant to "keep off the land." *Ibid.* Responding to a trespass

action, the defendant argued that he had received a license from the son. The court held that, without valid authority from the mother and sister, the son could not "give a valid assent to the entry of the defendant upon the premises for any such unlawful purpose." *Ibid.* See also *Moore* v. *Moore*, 34 P. 90, 92 (Cal. 1893) (affirming that one tenant-in-common's "bare license" to "enter, occupy and cultivate" the land is not a defense to a suit for ejectment, as "'no action of a portion of several tenants in common can impair the right of their cotenants'" (quoting *Mahoney* v. *Van Winkle*, 21 Cal. 552, 553 (1863))).

Those cases, which deal with land, should make cases like this one, which concern entry into the *home* over the objection of a present cotenant, an *a fortiori* conclusion. Just as one tenant cannot license strangers to enter and use land to the detriment of the right of quiet enjoyment of his cotenants, one tenant cannot license guests to enter and destroy his cotenants' quiet enjoyment of the home over their objection. As explained below, that is particularly true in the context of marital tenancies. See pp. 21-22, *infra*.

3. *The Rule Against Entry Over The Objection Of A Present Occupant Serves Important Societal Interests*

The rule that a stranger cannot enter a home over the objection of a present occupant serves numerous and important social values.

First is keeping the peace. Where there is a disagreement among cotenants about whether to permit a licensee to enter, the risk of violence is greatly diminished if the status quo is maintained with the putative licensee outside the home. As a Florida court observed, "such a rule is more likely to promote peace and tranquility. When one of two joint occupants consents to a search while the other is actively objecting, the

possibility of an untoward confrontation cannot be overlooked." *Lawton* v. *State*, 320 So. 2d 463, 465 (Fla. Dist. Ct. App. 1975). Faced with the potential for violent confrontation, social custom and the law adhere to the same principle: Where a co-equal inhabitant objects to entry, entry is generally proscribed.

Second, the entry of strangers into the home creates the potential for liability resulting from accidents or dangerous conditions in the home. The risk of liability is greater when the entrant is a licensee or invitee rather than a trespasser. See W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 58, at 393 (5th ed. 1984). Each cotenant who is present may be exposed to liability because of accidents on the property. As a result, each must be permitted to limit his liability by barring the entry of strangers.

Third, the principle of self-determination and adherence to the rule of law require the police to respect individual choice. Just like anyone else in our society, the police may seek voluntary consent to enter private property. Under our system of government, the decision whether to exclude—like many important and personal decisions—is generally placed in the hands of the individual rather than the government. When officers seek consent to enter, that reinforces the sovereignty of the individual over his personal property and private affairs. See Erik Luna, *Sovereignty and Suspicion*, 48 Duke L.J. 789, 841 (1999). It sends an appropriate message that, out of respect for individual sovereignty and choice, the police no less than anyone else may seek consent and arrive at an understanding that gives them license to enter private premises. See *Drayton*, 536 U.S. at 207.

Conversely, the police must respect the wishes of the individual even if, contrary to their desires, the individual withholds consent. (That excepts, of course, the consti-

tutionally provided alternative of seeking a warrant on probable cause.) For the police openly to circumvent an individual's express decision to refuse consent, without resort to the legal process of seeking a warrant, undermines the sovereignty of the individual over his property and the principle of individual choice. Moreover, it sends precisely the wrong message—that individual constitutional choice will be respected only when it suits the government's purposes.

Fourth, and finally, there are important social interests that arise where one deals with the *marital* household. (We set aside for the moment the various indications in the record that respondent's wife, by virtue of separating from respondent and relocating a thousand miles away in Canada, had abandoned her status as co-equal tenant and assumed the status of overnight guest—indications that, if considered by this Court, would compel affirmance. See pp. 28-30, *infra*.) As explained in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984): "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." This same interest in the highly private and sensitive marital relationship is also reflected in common-law principles, such as the privilege afforded confidential marital communications. See pp. 12-13, *supra*. In that context, neither spouse may testify to private communications over the other's objection. The same rule should apply here. If one spouse objects to the other's proposed intrusion into marital privacy, that objection should be sustained. Failure to object, of course, can result in forfeiture of the right, as in *Matlock* itself. But where the objection is made, it must be respected.

Property law, to the extent relevant, also reflects the special nature of the marital relationship. At common law, there were three predominant structures of concurrent ownership: tenancy in common, joint tenancy, and tenancy by the entirety. Tenancy in common, the most common form of concurrent ownership today, is characterized by separate fractional ownership by each tenant. *United States* v. *Craft*, 535 U.S. 274, 279-80 (2002). There are no restrictions on who may enter into a tenancy in common, and tenants in common may unilaterally alienate their own shares or place encumbrances upon those shares. *Ibid.* A joint tenancy is similar in many respects: There are no restrictions on who may enter into a joint tenancy, and each joint tenant enjoys certain rights in the property, including the right to exclude. *Ibid.* Unlike a tenancy in common, however, each joint tenant possesses the entire estate, rather than a fractional share, and a joint tenant also has a right of automatic inheritance known as "survivorship." *Ibid.* In order for one joint tenant to alienate his interest in the tenancy, the tenancy must be converted to a tenancy in common, though most States facilitate such alienation.

Tenancy by the entirety, in contrast, is a "unique sort of concurrent ownership that can only exist between married persons." *Craft*, 535 U.S. at 280-81 (citing 4 G. Thompson, *Real Property* § 33.02 (D. Thomas ed. 1994)). One of the chief characteristics of a tenancy by the entirety is that it cannot be severed unilaterally; nor can a tenant's interests be conveyed, leased, or transferred unilaterally. Instead, transfer typically requires the consent of *both* spouses or the ending of marriage in divorce. *Id* at 281. The ability of tenants by the entirety to introduce strangers to the household by alienating their interests is therefore more limited than in other contexts. Tenants in common can sell their interest and thereby inject strangers into the property unilaterally;

tenants by the entirety may not. 7 *Powell on Real Property* §§ 50.06[4], 52.03[4]. Following those same principles, many States also hold that neither spouse may encumber the marital property through separate debts. *Id.* § 52.03[3]; *e.g.*, *Beal Bank, SSB* v. *Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001) ("[W]hen property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse.").

Addressing the "typical" modern tenancy by the entirety, this Court has concluded that it accords each spouse an *individual* right to exclude. *Craft*, 535 U.S. at 282-83. Indeed, the Court relied on that as a basis for determining that the husband had a sufficient interest in an entireties property for it to be subject to a tax lien. *Id.* at 283 ("In determining whether respondent's husband possessed 'property' or 'rights to property' within the meaning of 26 U.S.C. § 6321, we look to the *individual rights* created by * * * state law rules. According to Michigan law, respondent's husband had * * * the following rights with respect to the entireties property: * * * the right to exclude third parties from it * * * .") (emphasis added). Advocating the same position, the United States observed that "[e]ach spouse has *separate rights* in the present use of the property," U.S. Br. at 13, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) (emphasis added), and characterized the "right of *each spouse* 'to exclude others' from property held in a tenancy by the entirety" as "'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" *id.* at 14 (quoting *Dolan*, 512 U.S. at 384) (emphasis added).

This Court, of course, has rejected the view that the boundaries of lawful police conduct should be set by

reference to hoary rules of real property. *Matlock*, 415 U.S. at 172 n.7. One could hardly expect an officer on the scene to make fine distinctions among tenants in common, joint tenants, and tenants by the entirety. But constitutional limits on police invasions into personal privacy are informed by the understandings society shares and respects as legitimate, and property law often reflects those principles. Here, there can be little dispute that a stranger at the door is not licensed to push his way into the house past an objecting cotenant, much less press his way into the marital bedroom past an objecting spouse, merely because another purports to consent. The same rule should apply to the police.

4. *The Property Cases Cited By Petitioner And Its* Amici *Do Not Support A Contrary Rule*

Respondent and its *amici* cannot seriously contest the social custom and shared understanding described above. Nowhere do they identify a social understanding that strangers may push their way into the marital abode past a present and objecting spouse at the putative invitation of the other. Perhaps recognizing that defect, the United States argues (in a footnote) that real property principles in fact privilege individual cotenants to insert strangers into the household over the objection of present and objecting cotenants. U.S. Br. at 16 n.4.

The argument is not well founded. The cases and cited authorities stand for a much more limited (and less controversial) proposition. First, for the most part, they address the situation where one "tenant in common" invites a guest or business visitor onto the property with the acquiescence of or in the absence of another tenant. See *Granger* v. *Postal Tele. Co.*, 50 S.E. 193 (S.C. 1905) (where one tenant in common granted permission to defendant company to construct and maintain telegraph lines on the property with the knowledge and consent of

the plaintiff cotenant, there is no trespass); *Dinsmore* v. *Renfroe*, 225 P. 886 (Cal. Ct. App. 1924) (plaintiffs, tenants in common, not present and objecting to the entry of a stranger). Those cases may recognize the ability of cotenants to authorize entry despite "non-consenting cotenants," 86 C.J.S., Tenancy in Common § 135, at 391 (1997), but even that rule is far from uniformly accepted, *ibid.* ("some authority" holds that "a tenant in common cannot license a third person to enter * * * as against the rights of non-assenting cotenants"); pp. 16-17, *supra*. In any event, those authorities merely address "nonconsenting tenants," *i.e.*, cases where the consent of another cotenant was not obtained before entry. They do not address cases where, as here, the other cotenant is present and expressly *objects* to entry because it will interfere with his quiet enjoyment. The rule for express objections is very different: A license to enter is "valid only until one of the cotenants expresses his dissent." 2 Tiffany & Jones, *supra*, § 457, at 275.

Other cases support the corresponding rule that, once an invitee has entered with valid permission, he cannot be converted into a trespasser and forcibly ousted by a late-arriving cotenant. See *Causee* v. *Anders*, 20 N.C. 388 (1839); *Buchanan* v. *Jencks*, 96 A. 307 (R.I. 1916); see also 86 C.J.S., *supra*, at 391. That too is consistent with social understandings and the dominant societal interest in maintaining the peace. One who enters a home with consent surely does not do so with the expectation that he will be assaulted (as in *Causee*) if another tenant arrives later and objects to the invitation. Nor does one who enters under license expect to become the defendant in a trespass action for damages merely because late-arriving tenants disagree with the first tenant's decision to admit him (as in *Jencks*).

But that hardly suggests that an invitee can enter into the home in the first place when another cotenant is

present and objecting to entry. None of the cases or treatises cited by the United States articulate *that* rule; they at best address the circumstance of a non-assenting tenant who raises objections after the fact. Where a cotenant is present and objects to entry, the cases generally favor—consistent with the strong interest in avoiding violent confrontation—preserving the status quo and disallowing self-help to alter the situation. When a cotenant is present and objecting, the visitor is not permitted to push his way inside past the objector, since such entry may create confrontation. Conversely, when the visitor has already entered the premises, his "license" may be withdrawn, but the dissenting cotenant cannot engage in self-help to eject the visitor forcibly, as that too could create the potential for undesirable confrontation.

Finally, the cases cited by the United States all involve tenants in common, not marital cotenants, and most involve entry onto land rather than into the home. Where the occupants are involved in the more intimate marital relationship, the law is more protective of their privacy and interests in the home. See pp. 21-23, *supra*. It is, moreover, inconsistent with the respect society accords the marital relationship for police to create or exploit fissures in the marital bond by pitting spouses against each other, seeking one spouse's consent to overturn the other's refusal. This Court ought not adopt a rule that encourages such tactics.

C. The Law Enforcement Interest Is Dwarfed By The Corresponding Intrusion On Privacy, Safety, And Other Societal Values

There can be no dispute that consent searches, as a general matter, serve important law enforcement interests. But that interest is certainly not so great that it counsels in favor of extending the doctrine to validate searches where the police ask the defendant for consent

and consent is withheld. Indeed, extending the concept of consent that far would aid law enforcement only in those cases where the interest in intruding on personal privacy is particularly slight—where there is no probable cause to suspect a crime and no exigency.

Where the police have a genuine need to enter the home against the citizen's wishes, the system established by the Framers, as well as this Court's cases, provide a mechanism to accommodate that need. Where the officers have probable cause, they may seek a warrant and enter the home. Indeed, when it comes to entering the home, there is a strong presumption in favor of requiring officers to obtain a warrant issued on probable cause by a neutral, detached judicial officer. *Payton* v. *New York*, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-78 (1971))). Where there are exigent circumstances such as hot pursuit, the police may dispense with the warrant requirement and pursue the fleeing suspect into the home. *Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 298 (1967). And where the police fear that an individual—tipped off to their presence by the request for consent or some other event—may destroy evidence while they obtain a warrant, the police may briefly detain that individual outside the home to prevent such destruction while the warrant is being obtained. *Illinois* v. *McArthur*, 531 U.S. 326, 333 (2001).

For that reason, petitioner (Br. at 17) errs in asserting that the rule set forth by the Supreme Court of Georgia would "thwart the ability of law enforcement officials to locate and seize evidence of a crime before evidence is destroyed." This Court's decisions already address that circumstance. Where there is sufficient reason to believe

contraband is present, the officers can obtain a warrant. And where there is sufficient reason to fear the evidence's destruction before a warrant can be obtained, as in *McArthur*, *supra*, the police may act reasonably to prevent the destruction.

Indeed, there appears to be only one circumstance in which this Court's cases would frustrate entry—where the police cannot obtain a warrant issued on probable cause and they lack sufficient grounds to seek warrantless entry by reason of exigent circumstance. But in that circumstance—where the police do not have sufficient grounds for believing that a crime is being committed, and no exigency exists—the law enforcement interest in entering the home is virtually nonexistent. The police may have a sufficient interest to ask for consent to search. But they do not have a sufficient interest to warrant disregarding the citizen's decision to refuse that consent. That is particularly true where, as here, the police seek to enter the most private of locations, the home (and within it the bedroom). The sanctity of the home protected by the Fourth Amendment, the dominion our society affords citizens over their property, and the principle of self-determination implicit in the concept of consent should not be sacrificed for what amounts to the scantest of law enforcement needs.

It therefore comes as no surprise that the leading legal commentators have almost uniformly reached the same conclusion as the Supreme Court of Georgia in this case. "When two or more persons have equal use of a place in which both are present, the consent of one does not normally eliminate the need for the consent of the other(s) before a search is made." Weinreb, 42 U. Chi. L. Rev. at 63; 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d), at 159 (4th ed. 2004) (Requiring the consent of both occupants has "somewhat greater appeal" because "the risk assumed by joint occupancy is merely an

inability to control access to the premises during one's absence."); see also 4 *Thompson on Real Property* § 31.07(d), at 51 (David A. Thomas, ed., 2004) ("The consent [of one joint tenant to a police search] is generally not valid to permit a search if another joint tenant, present at the same time, objects."). That conclusion is mandated by the social understandings that society accepts as legitimate. It is reflected in principles of real property law. It is supported by basic principles of self-determination. And it is compelled by any sensible balancing between individual liberty and law enforcement need.

D. The Record Indicates That Mrs. Randolph's Connection To The Property Was Insufficient To Elevate Her Decision Over Respondent's

Finally, petitioner overlooks two other factors rendering the search unreasonable in this case: Mrs. Randoph's attenuated relationship to the home, and evidence that—whatever Mrs. Randolph's relationship to the home generally—the bedroom searched was not an area under her common control.

1. While the Georgia Supreme Court resolved this case under the assumption that Mrs. Randolph and her husband had equal rights and control over the home, Pet. App. 1, the record indicates that such was not the case—and that the police knew that. As explained above, Mrs. Randolph had separated from her husband and moved hundreds of miles away, with her son and many of her belongings, about a month before the search took place. She had, moreover, recently returned for only a couple days for the apparently limited purpose of collecting additional belongings. See pp. 2-3, *supra*. Given her separation from her husband, her abandonment of the home, and the limited purpose of her return, Mrs. Randolph was more akin to an overnight guest than a co-

equal tenant, and her interest in the property was therefore inferior to that of the home's principal occupant, respondent.

It is well established that the consent of a mere visitor is ineffective over the objection of the home's primary occupant. As a leading treatise explains, objection by a present person with a superior interest trumps a consent given by a person with an inferior interest. See 4 LaFave, *supra*, § 8.3(d), at 160 ("[A]n objection by the person with the superior interest would prevail over a consent given by a person with a lesser interest.") (citing cases); *Lucero* v. *Donovan*, 354 F.2d 16, 20-21 (9th Cir. 1966) (holding that police search was unlawful where a "welcome visitor" consented to a warrantless search over a resident's protest and demand for a warrant). Here, the police knew facts that, at the very least, cast doubt on the extent of Mrs. Randolph's interest in the property. 10/2/03 Tr. at 14-15.

This case, in any event, is utterly unlike *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). The police here did not merely make a mistake of fact regarding whether someone was a cotenant (much less a mistake based on misrepresentations by the person purporting to give consent). Instead, the police willfully chose to ignore respondent's express and unequivocal decision to refuse consent and to seek consent from another person instead. Because the Fourth Amendment proscribes that effort to bypass respondent's decision, because it offends the social understandings we all share, and because it undermines important social values (including respect for individual sovereignty and maintaining the domestic peace), that tactic cannot be upheld.

2. Petitioner's position is defective for a second reason. It is well established that a third party cannot validly consent to the search of an area over which he has no common control, even if that area is within shared

premises. 4 LaFave, *supra*, § 8.3(e), at 167. In *Matlock*, for example, this Court focused on whether the occupant's "relationship to the east bedroom" was sufficient to afford him authority to give valid consent to a search of that room. 415 U.S. at 167. The question thus was not whether the occupant had control over the entire house in general, but whether there was "common authority," "mutual use," or "joint access or control" over the specific location in question. *Id.* at 171 & n.7. Here, the record evidence indicates that the bedroom where the police found the straw and white residue was known to the officer as "Mr. Randolph's bedroom," not the couple's bedroom. Because it has not been established that Mrs. Randolph had common control over the bedroom, her consent cannot validate the search.

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted.

PAMELA HARRIS
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1150 18th St. NW, Ste. 950
Washington DC 20036
(202) 872-8600

JEFFREY A. LAMKEN
Counsel of Record
HEATHER S. ALLEN
KEVIN T. JACOBS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for
National Association of Criminal Defense Lawyers

SEPTEMBER 1, 2005