**STATE OF WISCONSIN**

**SUPREME COURT**

**Case No. 2015AP1523**

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VINCENT MILEWSKI and MORGANNE MacDONALD,

Plaintiffs-Appellants-Petitioners,

v.

TOWN OF DOVER; BOARD OF REVIEW FOR THE TOWN OF DOVER; and GARDINER APPRAISAL SERVICE, LLC, as Assessor for the TOWN OF DOVER,

Defendants-Respondents-Respondents.

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# NONPARTY BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS-PETITIONERS' PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT II

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*_Pro hac vice_ admission pending.

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## INTEREST OF NONPARTY

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is protecting private property rights, both because control over one's property is a tenet of personal liberty and because property rights are inextricably linked to other civil rights. For this reason, IJ litigates cases defending property rights and files amicus briefs in cases implicating these rights. *See, e.g.*, *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (amicus). In particular, IJ works to protect private homes from nonconsensual government inspections. IJ is interested in this case because the Court of Appeals' decision gravely jeopardizes the Fourth Amendment rights of all Wisconsin homeowners.

## INTRODUCTION

The Court of Appeals' decision threatens one of the Fourth Amendment's most basic protections: The government cannot punish an individual for exercising her Fourth Amendment rights.

Petitioners exercised their Fourth Amendment rights by refusing to allow a government-hired inspector to enter their home to conduct a tax assessment without a warrant. But now, because they exercised that right, Wis. Stat. § 70.47(7)(aa) and Wis. Stat. § 74.37(4)(a) bar them from ever challenging the resulting assessment. As such, this consequence penalizes them for exercising their Fourth Amendment rights and itself violates the Fourth Amendment.

Wis. Stat. § 809.62(1r) sets forth the criteria this Court considers for granting review. Relevant to this case, the Court may grant review if (1) a real and significant question of federal or state constitutional law is presented; (2) a decision by this Court will help develop, clarify or harmonize the law, or the question presented is a novel one, the resolution of which will have statewide impact, or the question presented is not factual in nature but rather a question of law that is likely to recur unless resolved by the Court; or (3) the Court of Appeals' decision conflicts with controlling opinions of the U.S. Supreme Court, this Court or other Court of Appeals' decisions.

This case satisfies this Court's criteria for granting certiorari review. First, this case presents real and significant questions of constitutional law regarding the Fourth Amendment rights afforded

to homeowners when the government seeks to enter their homes to conduct tax assessments. Second, a decision by this Court in this case will help develop, clarify and harmonize the jurisprudence of administrative inspections with the treatment of tax-related inspections of the home. The U.S. Supreme Court has repeatedly required warrants in the context of routine, administrative inspections, regardless of the type of inspection at issue or the government's reason for conducting the search. The question of whether the Fourth Amendment applies to homeowners who oppose warrantless tax inspections is a novel question that needs to be resolved in this case. Further, this question is likely to recur if left unresolved because Wis. Stat. § 70.47(7)(aa) and Wis. Stat. § 74.37(4)(a) apply to homeowners across the state. Finally, the Court of Appeals' decision conflicts with controlling decisions of the U.S. Supreme Court. Time and time again, the U.S. Supreme Court has found that the Fourth Amendment applies to regulatory inspections and protects individuals who exercise their Fourth Amendment rights from being punished for exercising those rights.

Below IJ explains how this case satisfies each of these criteria and urges this Court to grant review to resolve these very important constitutional questions.

## ARGUMENT

### I. This Case Presents Real and Significant Questions of Constitutional Law.

This case presents two very important constitutional questions. First, this case presents the question of whether the Fourth Amendment protects Petitioners' right to demand a warrant before the government may enter their home to conduct a tax assessment. Second, this case presents the question of whether the Fourth Amendment prohibits the state from penalizing Petitioners for exercising that right.

The Court of Appeals found that the Fourth Amendment does not protect these rights because inspections to conduct tax assessments are (1) not Fourth Amendment searches and (2) even if they are searches, are reasonable and do not violate the Fourth Amendment. The Court of Appeals then held that Wis. Stat. § 70.47(7)(aa) and Wis. Stat. § 74.37(4)(a) did not punish Petitioners for exercising their Fourth Amendment rights because they had no Fourth Amendment right to exercise.

The Court of Appeals' decision contravenes the history of the Fourth Amendment and well-settled case law establishing Fourth Amendment protections for routine, administrative inspections. Below IJ first explains how this case implicates a core Fourth Amendment right and why this Court should grant review to resolve the important constitutional questions this case presents.

**a. These questions of constitutional law are real and significant because they implicate a core Fourth Amendment right.**

The right to refuse a warrantless administrative inspection is a core Fourth Amendment right. Indeed, the Fourth Amendment was adopted to protect against the exact type of regulatory search Respondents sought in this case.

The Court of Appeals' decision overlooks the history of the Fourth Amendment. History plays an integral role in understanding the Fourth Amendment. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 346 n.14 (2001); Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* 16 (2d ed. 2014). And history reveals that the Fourth Amendment was adopted to put an end to the Crown's use of "writs of assistance." *Payton v. New York*, 445 U.S. 573, 583 n.21 (1979) (citing *Boyd v. United States*, 116 U.S.

616, 625 (1886)). These writs enabled suspicionless searches of the colonists' homes, giving British officers "blanket authority to search where they pleased for goods imported in violation of British tax laws." *Id.*

Like the search in this case, these searches were regulatory, revenue-seeking searches of the home, primarily searching for untaxed goods. *Id*. These reviled searches were one of the driving forces behind the American Revolution itself and the adoption of the Fourth Amendment. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 54, 624-48 (Dec. 1999).

The Fourth Amendment secured critical protection against these types of searches in America's early days and remains a vital source of protection against these searches today. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 311, 324-25 (1978) (relying in part on the Fourth Amendment's history to hold that OSHA violated the Fourth Amendment insofar as it purported to authorize warrantless administrative searches of business premises). The government's viewing of a home's interior to assess taxes evokes the same privacy concerns that inspired the Amendment's adoption centuries ago and

plainly implicates the Fourth Amendment. This history should guide the resolution of these important constitutional questions.

**b. This Court should determine whether the Fourth Amendment applies to an inspection to conduct a tax assessment.**

The Court of Appeals' decision did not contemplate the history of the Fourth Amendment. Instead, it considered just two cases in arriving at its decision. First it considered *Wyman v. James*, 400 U.S. 309 (1971), a case involving home visits for welfare benefits. *Wyman* held that the Fourth Amendment did not protect a welfare recipient's right to demand a warrant when a government case worker sought to conduct a home visit for the purpose of administering welfare benefits. *Id.* at 318. The second case the Court of Appeals considered was *Camara v. Municipal Court of San Francisco*, a case involving a tenant's right to refuse a warrantless administrative inspection of his rental home. 387 U.S. 523, 540 (1967). In *Camara* the Supreme Court found that the Fourth Amendment protected a tenant's right to demand a warrant before the government could conduct a routine, administrative inspection of the tenant's home *and* protected the tenant from being punished for demanding that warrant. *Id.* at 534, 540.

After considering these two cases, the Court of Appeals found the tax inspection at issue to be analogous to the home visit in *Wyman*. Relying on *Wyman*, it concluded that a tax inspection was not a search, and even if it was, it was reasonable under *Wyman* and did not violate the Fourth Amendment.

This Court should now decide whether *Wyman* or *Camara* applies to interior inspections of the home to conduct tax assessments. The Court of Appeals' reliance on *Wyman* is misplaced. *Wyman* is distinguishable because it involved an inspection for a government benefit, where the beneficiary was in a contractual relationship with the government: in order to receive the benefit she was required to allow the inspection. Unlike the home visit in *Wyman*, a tax assessment is not a government benefit; it is an obligation. It is not optional, and a homeowner cannot decline to pay taxes without penalty.

The Court of Appeals also considered an analogy used in *Wyman* involving tax deductions. In *Wyman*, the Supreme Court compared the home visit to the IRS's routine audit of an income tax return for proof of a deduction, which the Supreme Court stated would not be a Fourth Amendment search because the taxpayer

would have the full right to refuse. *Wyman*, 400 U.S. at 324. But a tax deduction is not a tax assessment. There is no right to refuse a tax obligation. This example too involves an optional government benefit and is inapplicable.

Finally, even if this Court finds that the inspection in this case mirrors the home visit in *Wyman*, the factors that the Supreme Court relied on to determine the reasonableness of the search in *Wyman* demonstrate why this Court should find that the Fourth Amendment applies to this case. The Supreme Court considered several factors in determining the reasonableness of the search including (1) the fact that the recipient was receiving a government benefit; (2) the public interest in the protection and aid of the welfare recipient's child; (3) fulfilling the public trust by assuring that the intended recipients were actually benefiting from the aid; (4) the emphasis the regulatory scheme placed on close contact with recipients; (5) the emphasis the scheme placed on privacy; and (6) the fact that the home visit was conducted by a social worker concerned with the welfare of the family. *Wyman*, 400 U.S. at 318-324.

These very factors that made the search in *Wyman* reasonable make the search in this case unreasonable. As discussed above, Petitioners are not receiving a government benefit. The government therefore has no interest in assuring the intended beneficiary is receiving the benefit. There is also no emphasis on privacy in statutes that authorize these inspections. Rather, this scheme allows inspectors to enter every room of the home and to look at anything in the home to conduct the assessment. Finally, the inspectors are not conducting the assessment out of concern for the taxpayer's welfare.

This Court should grant review to resolve this important question of whether *Camara* or *Wyman* applies and conclude that the inspection here is more like the inspection in *Camara* and is entitled to the Fourth Amendment's protections.

**c. *Camara* should guide the Court's analysis in this case.**

The search in this case is comparable to a search to conduct a routine, administrative inspection. *Camara*, therefore, should guide the Court in resolving the questions presented in this case. In *Camara*, the City of San Francisco arrested and convicted a tenant who refused the city's warrantless inspection of his home. The

inspector was looking for violations of the city's housing code but any discovered violations would incriminate the landlord—not the tenant. *Camara*, 387 U.S. at 526. Thus, the search was not investigatory in nature. The tenant nonetheless demanded a warrant before the government entered his home, and the city convicted the tenant for refusing the inspection. *Id.* at 540. The Supreme Court first held that the tenant had a Fourth Amendment right to demand the government get a warrant before entering his home. *Id.* at 534, 540. The Court then held the conviction violated the Fourth Amendment because it penalized him for exercising his Fourth Amendment rights. *Id*. Importantly, the Court reasoned the tenant was entitled "to verify the need for, or the appropriate limits of the inspection" without risking penalties. *Id.* Like the tenant in *Camara*, Petitioners should receive this same protection under the Fourth Amendment.

## II. This Court Should Harmonize the Supreme Court's Administrative-inspections Jurisprudence with the Treatment of Tax-related Inspections of the Home.

The Court of Appeals' decision shows a strong need for this Court to develop, clarify and harmonize the Supreme Court's jurisprudence of administrative inspections with the treatment of

administrative inspections for tax-related purposes. This need is even greater here because the Court of Appeals' decision puts the Fourth Amendment rights of Wisconsin homeowners in jeopardy.

**a. Applying *Camara* to this case will help develop, clarify and harmonize the law.**

This Court should find that *Camara* controls in this case or harmonize the law and explain why it does not. Starting with *Camara*, the Supreme Court has long recognized that the Fourth Amendment protects the right to demand a warrant in the context of administrative inspections and prohibits the government from punishing individuals for exercising their Fourth Amendment rights. The Court of Appeals' decision is incongruent with this jurisprudence.

This Court should harmonize the treatment of tax-related inspections with *Camara* and two additional Supreme Court cases involving routine, regulatory inspections: *See v. City of Seattle*, 387 U.S. 541, 546 (1967), and *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). This Court should also harmonize the law with other areas of Wisconsin law that protect landlords and tenants from administrative inspections of rental properties.

In addition to *Camara*, *See v. City of Seattle* extended *Camara*'s protection to a commercial warehouse owner who refused a warrantless fire inspection of his warehouse. *See*, 387 U.S. at 546. And like *Camara*, *See* also held that the Fourth Amendment protected the owner from being penalized for insisting the government obtain a warrant to enter his business. *Id.*

The Supreme Court again relied on its holding in *Camara* in *City of Los Angeles v. Patel*, 135 S. Ct. at 2452-53. This case involved the ability of hotel operators to demand a warrant before the city could search their hotel registries. *Id.* The law at issue penalized hotel operators for not allowing the search. The Supreme Court protected their ability to oppose a warrantless inspection, even though the city's desire to search the hotel's registry had nothing to do with enforcing criminal laws against hotel operators and was rather designed to "deter[] criminals from operating on the hotels' premises." *Id.* at 2452. The Court nevertheless found the city's ordinance violated the Fourth Amendment because a hotel operator could "only refuse to comply with an officer's demand to turn over the registry at his or her own peril." *Id.* at 2452-53. The Court explained that business owners could not be put to that kind of

choice under the Fourth Amendment without "an opportunity to obtain precompliance review before a neutral decision maker." *Id.*

This Court should find that *Camara*, *See*, and *Patel* control in this case or explain and harmonize why tax inspections fall outside the Fourth Amendment.

In addition to this case law, other areas of Wisconsin law have already recognized the rights of landlords and tenants to be free from invasive administrative inspections of their properties. Indeed, just this year, the Wisconsin State Assembly passed a law prohibiting cities from enacting ordinances that require rental properties to be inspected without a complaint or a special warrant. 2015 Wis. Act 176, Wis. Assemb. Reg. Sess. 2015-2016 (enacted Feb. 29, 2016) (codified as Wis. Stat. § 66.0104(2)(e)). If this Court allows the Court of Appeals' decision to stand, Wisconsin homeowners will actually be left with fewer rights in their homes than landlords and tenants.

It cannot be the case that Wisconsin homeowners receive less protection in their homes than landlords, tenants, business owners and hotel operators. This Court should grant review to harmonize the law and protect Petitioners' Fourth Amendment rights.

**b. The questions presented are novel and likely to recur unless resolved by this Court, and the resolution will have statewide impact.**

This case presents novel questions of law that require the straight application of Fourth Amendment jurisprudence involving administrative inspections. There is very little precedent on whether a tax inspection constitutes a search under the Fourth Amendment. Further, where this issue has been addressed, the court has found that the Fourth Amendment applies to these searches. *See, e.g., Jacobowitz v. Bd. of Assessors for Town of Cornwall*, 121 A.D.3d 294, 301-302 (N.Y. App. Div. 2d Dept. 2014) (entry into home for tax assessment is a Fourth Amendment search and requires a warrant). This is a question that needs to be resolved in Wisconsin. Otherwise, the Court of Appeals' decision will continue to jeopardize homeowners' rights across the state.

## III. The Court of Appeals' Decision Conflicts with Controlling Opinions of the United States Supreme Court.

As discussed above in Part II.a., because this case involves routine, administrative inspections, *Camara*, *See*, and *Patel* control, and the Court of Appeals' decision directly conflicts with these opinions. This Court should grant review to resolve this conflict.

## CONCLUSION

The Fourth Amendment has long protected the right to demand a warrant when the government knocks at one's door. This is especially true when the government seeks to conduct a regulatory, revenue-seeking search of the home, the same type of searches that spurred the Fourth Amendment's adoption. This Court should grant review to decide whether this type of search will receive the same Fourth Amendment protections today as other administrative searches under federal law, to develop, clarify and harmonize the law in this area and to correct the Court of Appeals' decision that conflicts with clear Supreme Court precedent.

Respectfully submitted,

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## CERTIFICATION OF BRIEF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 2,958 words.

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## CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that, upon the Court's acceptance of the paper original of this brief, I will submit an electronic version of this brief, which complies with the requirements of Sec. 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served on all parties with the paper copies of this brief filed with the Court.

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of the Nonparty Brief of Institute for Justice in Support of Plaintiffs-Appellants-Petitioners' Petition for Review of a Decision of the Court of Appeals District II were served via U.S. Priority Mail, postage prepaid, on the 13th day of June, 2016 to counsel of record at their respective addresses as follows:

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