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VIA ELECTRONIC FILING
Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: State v. Andrew Fede A-53-17 (079997)
App. Div. Docket No. A-1296-15

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal submission from *amici curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ) and the New Jersey Office of the Public Defender (OPD) in the above-captioned matter.

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PRELIMINARY STATEMENT

Our federal and state constitutions allow New Jerseyans to say to police who knock on their door, “get a warrant.” While police may nevertheless enter in limited circumstances without a warrant, even sometimes by force, there is no obligation on a resident to consent to their entrance or otherwise take affirmative steps to assist them. Yet three courts in the present case have found that Defendant’s refusal to consent to a warrantless police search of his home amounts to obstruction of the administration of law. Those findings are mistaken as a matter of law and create dangerous policy. This Court should reverse the lower courts and make clear that New Jerseyans may deny consent to search – both in word and deed - without fear of repercussion.

Defendant was criminally charged not for taking steps to obstruct the police but for failing to help the police more than he did. When police knocked, he opened his front door but left the chain lock engaged. Officers pleaded with him for half an hour to consent to their entry, before breaking the chain with a baton, entering his home, and finding no victim in distress or any evidence of criminal activity. Still, he was arrested for obstruction for refusing to unlock the chain.

Defendant’s failure to consent to the police entry, without more, is not obstruction. The plain language of the statute requires some affirmative physical act, such that Defendant’s

omission in refusing to unlock the chain is insufficient; at most, he maintained the status quo of a partially opened door. (Point I, A). Defendant's insistence that the police get a warrant is constitutionally protected, whether or not the police could claim a well-established exception to the warrant requirement and enter anyway. An opposite rule would vitiate the voluntariness requirement that this Court has affirmed time and again in its consent search jurisprudence. Allowing a conviction for denial of consent would render absurd the critical requirement that the State must show a person knew he had a right to refuse. (Point I, B). Finally, that the police may have been legitimately performing an emergency aid function does not change the analysis. The emergency aid doctrine does not impose a duty on Defendant to consent to a search or otherwise welcome police into his home. Neither does it allow officers to deputize residents or passers-by to assist the police in their functions; the emergency aid doctrine carries with it no requirement of Good Samaritans. (Point I, C).

Defendant's conviction imposes a criminal penalty for the invocation of his rights under the Fourth Amendment and Article I, Paragraph 7. Criminalizing the failure to consent to a search, or more broadly the failure to waive constitutional rights, sets a dangerous precedent and propels the constitutional jurisprudence onto a slippery slope. It also undermines the foundation of *State v. Domicz*, in which this Court reasoned that a person in his home

would feel free to deny police consent to search without fear of repercussion. Defendant's conviction belies that sense of freedom and demands this Court's correction. (Point II).

With this case, the Court has the opportunity to reaffirm that New Jerseyans have the right to refuse consent to search and to assert their constitutional rights. Where Defendant has done nothing more than demand a warrant, his conviction for obstruction must be reversed as a matter of constitutional urgency.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Amici adopt the facts and procedural history contained in Defendant-Appellant's Supplemental Brief to this Court. For the sake of clarity, *amici* recount the following facts, as found by the Superior Court, Law Division and upon which the Appellate Division relied. *See* Da 3-15 (attaching the September 21, 2015 decision of Judge Frances McGrogan, J.S.C. on the municipal appeal of *State v. Andrew Fede*).[1]

On the evening of March 16, 2015, Cliffside Park Police responded to a 9-1-1 call reporting a domestic dispute in a neighboring apartment. When the officers knocked on Defendant's

[1] Db refers to Defendant-Appellant's Supplemental Brief to this Court; Da refers to the appendix to that brief. Because the Appellate Division invoked *Rule* 2:11-3(e)(2) and affirmed "substantially for the reasons stated in Judge McGrogan's written decision[,]" *amici* reference the Law Division opinion in this brief. *State Fede,* No. A-1296-15, 2017 N.J. Super. Unpub. LEXIS 1688, at *4 (App. Div. 2017).

door, he opened it a few inches “in his usual manner with the chain engaged.” Da 4, 8. Through the open door, an officer explained that they were investigating a report of a domestic dispute and asked Defendant to consent to their entry. Defendant responded that a warrantless entry into his home violated his constitutional rights and refused to give consent. For a period of half an hour, the officers continued to seek Defendant’s consent to enter, and Defendant continued to refuse consent. Da 5, 6. He acknowledged he had a female roommate but said she was not at home and denied police’s request to enter to look for her. During the encounter, Defendant became angry, called the police department headquarters, and began to film the officers on his iPhone. *Id.* However, the record does not indicate that his uncooperativeness manifested as physical action or anything more than verbal statements. He simply told police that he did not want to unlock the chain for them and that if they entered his home without a warrant, he would sue them. Da 6.

After a half hour of seeking Defendant’s consent to enter, an officer used his baton to break the chain lock and enter the apartment. A subsequent search revealed no woman present, nor any contraband, drugs, or other evidence of criminal activity. Defendant was nevertheless arrested and charged with obstruction of the administration of law for refusing to grant the police entry. Da 7. At trial, Defendant’s roommate testified that she was

in North Carolina on the date of his arrest. *Id.* Defendant also testified. Da 7-8. On cross-examination, the prosecution asked Defendant, "What were your concerns? Why didn't you want the police to come into your apartment to confirm that no one was in need of aid?" Defendant responded that he thought officers had to get a warrant to enter. He also testified that he had moved to Harlem after the incident because he was "really scared of the Cliffside Park Police." Da 8.

The municipal court found Defendant guilty of obstruction of the administration of law under *N.J.S.A.* 2C:29-1(a). Reviewing *de novo*, the Superior Court, Law Division upheld his conviction, and the Superior Court, Appellate Division affirmed, relying on *Rule* 2:11-3(e)(2), which applies when "some or all of the arguments made are without sufficient merit to warrant discussion in a written opinion." *R.* 2:11-3(e)(2); *State v. Fede*, No. A-1296-15, 2017 N.J. Super. Unpub. LEXIS 1688, at *4 (App. Div. 2017). Defendant sought certification from this Court *pro se*, and the Court granted certification and assigned counsel to Defendant. The ACLU-NJ and OPD filed a Motion for Leave to Appear as *Amici Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. FAILURE TO CONSENT TO A WARRANTLESS POLICE ENTRY, WITHOUT MORE, CANNOT CONSTITUTE OBSTRUCTION.

Three courts have found Defendant committed obstruction when he refused to consent to a warrantless search of his home. Each of those courts mistook the law, because Defendant's conviction is for nothing more than failing to welcome the police inside.

The record shows that Defendant's only physical act was to open his door with the chain lock engaged, and then to refuse to open it any further. He did not block or otherwise prevent the police's entrance into his home, even when they broke the chain after failing to secure his consent. If anything, Defendant made their entry easier by opening the door part way; at worst, he did nothing more than maintain the status quo with the chain lock engaged. Because the law clearly supports a person's right to insist upon a warrant, whether or not police may legitimately enter under the emergency aid doctrine, Defendant's conviction impermissibly criminalizes the invocation of his Fourth Amendment and Article I, Paragraph 7 rights.[2]

A. Obstruction Cannot Be Based Upon Maintenance of the Status Quo.

Amici agree with Defendant that the lower courts in this case "confused the creation of an obstacle with the failure to remove

[2] For purposes of this brief, *amici* assume *arguendo* that the police entry was proper under the emergency aid doctrine.

an obstacle that preexisted the police encounter." Db 8. Where Defendant did nothing to make it harder for the police to carry out their emergency aid function, there is simply no predicate act for an obstruction conviction under *N.J.S.A.* 2C:29-1(a).[3] As Judge McGrogan noted, a "necessary element of the offense requires the defendant to have affirmatively taken some action to physically interfere, or place an obstacle, to prevent the police from performing their official function." Da 10.

Whether or not Defendant's purpose was to obstruct or simply to demand a warrant, he took no affirmative act to make it more difficult for the police to enter his home to pursue their emergency aid function. There is nothing in the record to suggest he physically blocked the police's entry or that they could not have maneuvered past him, as they eventually did after breaking the chain.[4] The State has presented no evidence that he prevented the officers from breaking the chain lock from the beginning.[5]

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[3] A person commits obstruction when he "purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act." *N.J.S.A.* 2C:29-1(a).

[4] Although it would not amount to obstruction without some physical interference, there is not even any indication that he purposefully misled or delayed the officers through the thirty-minute dialogue they engaged him in, in which they attempted to secure consent.

[5] Judge McGrogan remarked that Defendant's claim that "the police could have broken down the door without any discussion with the defendant" is "seemingly criticizing the police for their

If anything, by opening the door Defendant made it easier, not harder, for the police to enter than if he had taken no action at all. Had Defendant not responded when the police knocked – whether because he was in the shower, because he did not want to help the police, or for any other reason – one cannot reasonably claim his failure to unlock the door would have amounted to obstruction, even if it meant the police had to break down the door. Similarly, Defendant's maintenance of the status quo by leaving the chain engaged cannot amount to obstruction, when the chain (and entire door) would have remained locked had he not responded to their knocking at all.

Judge McGrogan found that Defendant "was being uncooperative the entire time, hostile, angry, and didn't want to unlock the door." Da 14. This behavior likewise does not constitute obstruction: the law imposes no requirement of good etiquette or hospitality upon civilians who encounter police at their doorstep. This case is not similar to *State v. Reece*, citation to which was the only addition the Appellate Division made to Judge McGrogan's legal analysis. *Fede,* 2017 N.J. Super. Unpub. LEXIS 1688, at *4.

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restraint." Da 12-13. Although one could argue that the thirty-minute discussion, and the officers' insistence on obtaining consent, might suggest there was no real emergency, that argument is not essential here. Instead, the fact that the police could have broken down the door without any discussion – and without the consent to search that the discussion sought to obtain – shows simply that consent was not necessary and therefore that Defendant's refusal to give it in no way obstructed their response.

In *Reece,* the defendant's hostility culminated in physical interference with the police's emergency aid function. There, police also responded to a 9-1-1 call and the defendant also opened the door and refused consent to search his home. However, after his verbal denials, Mr. Reece slammed the door closed in the officers' faces and attempted to lock it behind him. The Court found this affirmative act to be dispositive: defendant could be guilty of obstruction because he "hampered their entry by slamming the door[.]" 222 N.J. 154, 172 (2015). But whereas Mr. Reece's action made it more difficult for police to perform their function after he opened the door, Mr. Fede's *omission* at most simply maintained the status quo of a partially opened door. Unlike *Reece*, this case therefore lacks the *actus reus* required for an obstruction conviction under *N.J.S.A.* 2C:29-1(a).

Simply put, the statute requires "*affirmative interference* with governmental functions." *N.J.S.A.* 2C:29-1(a) (emphasis added). Defendant in the present case took no affirmative steps to interfere with police entry or create obstacles; he simply refused to take action to facilitate police entry into his home. Inaction is fundamentally different from affirmative interference, both actually and jurisprudentially. Judge McGrogan (and the Appellate Division citing her) thus clearly erred as a matter of law in holding that "defendant prevented the officers from entering his apartment by purposefully refusing to unchain his door, thereby

creating an obstacle, which prevented the police from performing their official function [in violation of N.J.S.A. 2C:29-1(a)].” *Fede*, 2017 N.J. Super. Unpub. LEXIS 1688, at *3 (emphasis added). Mere inaction and refusal to remove already-existing normal barriers to entry does not “create” an obstacle and cannot support a conviction under the statute.

B. The Law Allows New Jerseyans to Insist Upon a Warrant.

Defendant here refused to open the door because police lacked a warrant. Da 5, 8. Defendant’s insistence upon a warrant is protected by the Fourth Amendment and Article I, Paragraph 7. It is axiomatic that a warrantless search is *per se* unreasonable unless it falls within one of the few well-established exceptions to the warrant requirement. *State v. Cooke*, 163 N.J. 657, 664 (2000). Indeed, the very notion of consent as one of those exceptions presumes that an individual may instead insist upon a warrant, whether or not police can claim another well-established exception and search regardless.

An opposite proposition would render meaningless the requirement that consent be voluntary. This Court has recognized that consent is not truly voluntary unless the individual knows she has the right to refuse. *State v. Johnson*, 68 N.J. 349, 353-54 (1975). Defendant’s refusal of consent here is therefore a concomitant right explicitly protected by this Court’s search and seizure jurisprudence. *See State v. Domicz*, 188 N.J. 285, 307

(2006) (noting that New Jersey is one of a small minority of jurisdictions that requires the State to prove knowledge of the right to refuse as a precondition of a valid consent search).

In *State v. Heine*, the Appellate Division relied on a Ninth Circuit opinion that is instructive here, noting: "We adhere to the sentiments that an individual 'is not required to surrender [her] Fourth Amendment protection on the say so of the [inspector]. The Amendment gives [her] a constitutional right to refuse to consent. . . .[Her] asserting it cannot be a crime.'" 424 N.J. Super. 48, 64 (App. Div. 2012) (quoting *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978)) (alterations in *Heine*). The *Prescott* court further explained:

> [When] the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused.
>
> [*Prescott*, 581 F.2d at 1350-51.]

State v. Frankel reiterates the same proposition. Instead, Judge McGrogan relied on *Frankel* to uphold Defendant's conviction, because it authorizes police entry without a warrant to provide emergency aid. Da 14. That reliance was misplaced. First, *Frankel* dealt with the introduction of evidence found after a police

search, not the criminalization of the defendant's refusal to permit police entry. 179 N.J. 586, 612 (2004). Further, *Frankel* ultimately confirmed the right to demand a warrant and refuse a consent search, regardless of whether the emergency aid doctrine ultimately permits police to enter and search.

In *Frankel*, police responded to a 9-1-1 call, and the defendant asked the officer if he had a search warrant. When the officer replied that he did not, the defendant denied consent. Officers subsequently entered the home anyway, and this Court upheld the entry under the emergency aid doctrine. But, significantly, the Court refused to give weight to the officer's testimony that a resident had never before denied him consent to search in response to a 9-1-1 call, or that the defendant in that case had said officers could not enter without a warrant. *Id*. at 610-11. This Court cautioned:

> A homeowner has a right under our federal and state constitutions to insist that a police officer obtain a warrant before entering and searching his house. The assertion of that constitutional right, which protects the most basic privacy interests of our citizenry, is not probative of wrongdoing and cannot be the justification for the warrantless entry into a home. While we in no way suggest that the public should not cooperate with the police, a person's assertion of a constitutional right should not be used to cast suspicion on him and serve as the excuse to diminish that right.
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> [*Id.* at 611 (citations omitted).]

That the police could have entered Defendant's home over his verbal objections, as they did in *Frankel*, pursuant to the emergency aid doctrine is beside the point. Our federal and state constitutions – and the requirement of voluntariness in the consent search doctrine – afford Defendant the right to insist upon a warrant.

C. The Emergency Aid Doctrine Does Not Require Residents to Consent to a Search, or Otherwise Take Affirmative Steps to Welcome the Police Inside Their Homes.

Judge McGrogan misstated the law in concluding, "Once the officers explained their purpose, defendant did have an obligation to allow the officers into his home without interference." Da 15; *Fede*, 2017 N.J. Super Unpub. LEXIS 1688, at *3 (quoting Judge McGrogan's written decision). While it is true that Defendant could not actively interfere with the officers' activities, he had no obligation to affirmatively allow them inside – in other words, to consent to their entry and remove normally-existing obstacles (such as a closed door or a lock) – once he learned they were pursuing an emergency aid function.

The emergency aid doctrine allows officers to enter a home just as they could if the resident were not present,[6] and under

[6] Under this exception to the warrant requirement, "the public safety official must have an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or prevent serious injury." *Frankel*, 179 N.J. at 600.

N.J.S.A. 2C:29-1(a), a resident may not physically prevent that entry. But nothing in the emergency aid doctrine requires passers-by to be Good Samaritans and proactively facilitate police entry. Certainly, the doctrine does not impose such a duty upon a resident whose "assistance" to the police may result in the revelation of private information or even, as in *Reece and Frankel* (but not this case), incriminating evidence. Although the emergency aid doctrine, like other forms of exigency, allows officers to dispose of a warrant, it does not empower them to deputize or commandeer residents to help them perform their law enforcement functions.

Of course, Judge McGrogan was correct that *Frankel* holds "[a] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person." Da 14 (quoting *Frankel*, 179 N.J. at 569). The question is not whether Defendant was correct as a matter of law that officers actually had to get a warrant; the emergency aid doctrine, if properly invoked here, answers that in the negative. But where Defendant's mistake of law manifests solely as a constitutionally protected denial of consent, the emergency aid doctrine imposes no duty upon him to unlock the chain or otherwise to cooperate with or assist law enforcement.

Other than consent, none of the other exceptions to the warrant requirement, in the context of a home or any other setting,

requires acquiescence by the person whose property is to be searched. For example, it would be absurd to claim that concerns about destruction of evidence – concerns which allow police to enter a home under the exigency exception – would require the very person who was about to destroy evidence to open the door to the police and invite them in. *See State v. Hutchins*, 116 N.J. 457, 464 (1989) (discussing destruction of evidence as an exigent circumstance). So too with emergency aid. Indeed, in affirming warrantless entries to prevent destruction of evidence, despite a lack of consent from the homeowner, the U.S. Supreme Court has explicitly clarified,

> When law enforcement officers who are not armed with a warrant knock on a door . . . the occupant has no obligation to open the door or to speak. . . . And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.
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> [*Kentucky v. King*, 563 U.S. 452, 469–70 (2011).]

Finally, *even if* there was a duty to open the door or otherwise assist officers, the plain language of *N.J.S.A.* 2C:29-1 makes clear that failure to perform a legal duty cannot constitute obstruction: "This section does not apply to failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions." *N.J.S.A.* 2C:29-1(a). This plain language

disposes of the issue. *DiProspero v. Penn*, 183 N.J. 477, 492 (2005). Defendant aptly summarizes the New Jersey cases applying this statutory provision in his Supplemental Brief to this Court. Db 7-11 & 8 n.3.

II. CRIMINALIZING FAILURE TO CONSENT TO A SEARCH, OR MORE BROADLY FAILURE TO WAIVE CONSTITUTIONAL RIGHTS, SETS A DANGEROUS PRECEDENT AND UNDERMINES THIS COURT'S REASONING IN *DOMICZ.*

Defendant's conviction for obstruction imposes a criminal penalty on the exercise of rights guaranteed by the Fourth Amendment and Article I, Paragraph 7. It is disturbing that three of our state courts concluded in this case that refusal to consent to a search and facilitate entry – whose constitutional protection this Court has affirmed time and again since *Johnson* – may amount to a criminal offense. Defendant has been adamant in his assertion of his right to demand a warrant, both in denying police entry in March 2015 and in pursuing three rounds of appeals in the years since, including to this Court *pro se*. Not all New Jerseyans may have the resources or the confidence to stand for their rights so insistently. If Defendant's conviction is upheld yet again, it will send a clear message that New Jerseyans invoke their constitutional rights at a hefty price. This Court has the opportunity to tell them otherwise.

In allowing Defendant's denial of consent to constitute obstruction, the lower courts ignored a long line of cases

admonishing the criminalization, or otherwise negative interpretation, of the exercise of constitutional rights. *See, e.g., State v. Rice*, 251 N.J. Super. 136, 143 (App. Div. 1991) (cautioning that "[t]he exercise of a constitutional right may not be the basis of an adverse inference."); *Frankel*, 179 N.J. at 610-11 (*supra* Point I, B). This Court has recognized this in the search and seizure context, noting that a person need not answer police questions and that such a refusal does not provide grounds for criminal suspicion, or otherwise elevate police's authority to search or seize. *State v. Maryland*, 167 N.J. 471, 483 (2001) (citing *Florida v. Royer*, 460 U.S. 491, 497-98 (1983)); *see also Heine*, 424 N.J. Super. at 64 (*supra* Point I, B).

Amici are aware of no other context in which this Court has criminalized the failure to waive a constitutional right. It seems extraordinary to imagine, for example, that a defendant could be criminally charged for failing to waive his right to remain silent under the Fifth Amendment or his right to a jury trial under the Sixth Amendment. It should be equally shocking to imagine it here, where Defendant failed to waive his Fourth Amendment right by providing consent to search. The lower courts' conclusions to the contrary propel the constitutional jurisprudence onto a slippery slope.

Finally, while *amici* respectfully disagreed with the holding in *State v. Domicz, amici* note that upholding Defendant's

conviction here would directly undermine the Court's reasoning in that case. The foundation of *Domicz* is that "a person secure in his own home" would feel free to deny consent to search, unburdened by the inherent coercion experienced by a person detained in an automobile. 188 N.J. at 306 (declining to extend *State v. Carty*, 170 N.J. 632 (2002), to the home). But if failure to consent to a search of a home has criminal repercussions, the Court should revisit its reassurance that "[t]he choices are not so stark for the person who, in the familiar surroundings of his home, can send the police away without fear of immediate repercussions." *Id.* If Defendant's conviction is upheld yet again, students of this Court's jurisprudence will be hard pressed to square *Domicz*'s rationale with the deeply coercive pressure that results from criminalizing failure to consent in this case.

On cross-examination, the prosecution asked Defendant, "What were your concerns? Why didn't you want the police to come into your apartment to confirm that no one was in need of aid?" Da 8. The Fourth Amendment and Article I, Paragraph 7 do not require Defendant to justify his denial of consent, or to allow police into his home to prove he had nothing to hide. Defendant's response on the stand, and his insistence over the course of three years of appeals, that he could refuse warrantless police entry is absolutely correct. This Court should ensure New Jerseyans are not

required to explain themselves – and are not arrested and prosecuted – when they say to the police "get a warrant."

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Appellate Division.

Respectfully submitted,

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