No. _____

In The
SUPREME COURT OF THE UNITED STATES

HEATHER M. DUNCAN,

*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Petition For A Writ Of Certiorari**
**To The Massachusetts Supreme Judicial Court**

# PETITION FOR A WRIT OF CERTIORARI

Travis J. Jacobs, Esq.
*Counsel of Record for Petitioner*
Eric J. Moreno, Esq.
The Jacobs Law, LLC
36 Bromfield Street, Suite 502
Boston, MA 02108
(800) 652-4783
TJacobs@TheJacobsLaw.com

*Counsel for Petitioner*

## QUESTION PRESENTED

Whether the emergency aid exception to the warrant requirement of the Fourth Amendment, articulated by this Court in *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), permits the warrantless entry onto and warrantless seizure of property in order to assist a nonhuman animal.

## PARTIES TO THE PROCEEDING

All the parties to the proceedings below are parties in this Court.

The petitioner is Heather M. Duncan.

The respondent is the Commonwealth of Massachusetts, represented by the Attorney General of Massachusetts.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED....i
PARTIES TO THE PROCEEDINGS....ii
TABLE OF CONTENTS....iii
TABLE OF AUTHORITIES....iv
OPINIONS BELOW....1
STATEMENT OF JURISDICTION....1
RELEVANT STATUTORY PROVISION....1
INTRODUCTION....1
STATEMENT OF THE CASE....2
REASONS FOR GRANTING THE WRIT....6

I. THE SUPREME JUDICIAL COURT'S EXPANSION OF THE EMERGENCY AID DOCTRINE BEYOND THAT CONTEMPLATED BY THIS COURT'S JURISPRUDENCE IMPERILS THE FOURTH AMENDMENT'S PROTECTION AGAINST UNREASONABLE GOVERNMENTAL INTRUSIONS....7
   a. This Court Has Never Given Non-Human Animals Such Broad Protection....8
   b. The Decision Disrupts the Delicate Balance Between the Countervailing Interests of Privacy Rights and Prevention of Cruelty to Animals....11

II. THE EMERGENCY AID DOCTRINE'S REASONABLENESS STANDARD CANNOT BE UNIFORMLY AND CONSISTENTLY APPLIED TO ANIMALS....16
   a. Reasonableness as it Relates to the Aid of Animals is Far Too Difficult to Define or Apply to an Objective Standard....16
   b. The Decision Conflicts with the Exigent Circumstances Exception to the Warrant Rule Because the Investigatory Purpose Cannot Be Separated From the Administered Aid....22

III. THE PRACTICAL EFFECT OF THE SUPREME JUDICIAL COURT'S DECISION WILL BE THE DEGRADATION OF PRIVACY RIGHTS WITHOUT SUFFICIENT JUSTIFICATION....25

CONCLUSION....28

## TABLE OF CONTENTS—Continued

### APPENDIX

Page

Massachusetts Supreme Judicial Court Opinion, (*Commonwealth v. Duncan*, 467 Mass. 746 (2014)), dated April 11, 2014 ..... App.0001

Findings of Fact and Report of Question of Law to the Appeal Court of the Lynn District Court, dated August 2, 2012 ..... App.0008

Order of the Supreme Judicial Court for the Commonwealth of Massachusetts scheduling oral arguments, dated October 18, 2013 ..... App.0022

Constitutional and Statutory Provisions and Rules of Court

- First Amendment to the U.S. Constitution ..... App.0024
- Fourth Amendment to the U.S. Constitution ..... App.0024
- 18.U.S.C. § 48 ..... App.0024
- M.G.L. c. 272, § 77 ..... App.0025
- Massachusetts Rules of Crim. Pro. 34 ..... App.0026

Petitioner's Motion to Suppress Physical Evidence and Statements and Information Obtained Pursuant to Illegal Police Actions, dated February 3, 2012 ..... App.0027

## TABLE OF AUTHORITIES

### CASES

*Boyd v. United States*, 116 U.S. 616 (1886) ---- 15
*Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) ---- passim
*Camara v. Municipal Court*, 387 U.S. 523 (1967) ---- 8
*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520 (1993) ---- 13, 14
*Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F.Supp. 45 (D. Mass. 1993) ---- 11
*Commonwealth v. Duncan*, 467 Mass. 746 (2014) ---- passim
*Davis v. State*, 907 N.E.2d 1043 (Ind.Ct.App. 2009) ---- 19
*DiCesare v. Stout*, 992 F.2d 1222 (10th Cir. Apr. 23, 1993) ---- 19
*Florida v. Jardines*, 133 S.Ct. 1409 (2013) ---- 8, 28
*Graham v. Connor*, 490 U.S. 386 (1989) ---- 17
*Groh v. Ramirez*, 540 U.S. 551 (2004) ---- 9
*Jones v. United States*, 357 U.S. 493 (1958) ---- 11
*Katz v. U.S.*, 389 U.S. 347 (1967) ---- 8, 15
*Ker v. California*, 374 U.S. 23 (1963) ---- 9, 25, 26
*Kirk v. Louisiana*, 536 U.S. 635 (2002) ---- 25
*Kyllo v. United States*, 533 U.S. 27 (2001) ---- 27, 28
*Massachusetts Society for Prevention of Cruelty to Animals v. Commissioner of Public Health*, 339 Mass. 216, 158 N.E.2d 487 (1959) ---- 11
*McDonald v. United States*, 335 U.S. 451 (1948) ---- 9
*Michigan v. Fisher*, 558 U.S. 45 (2009) ---- passim
*Mincey v. Arizona*, 437 U.S. 385 (1978) ---- 9, 11, 12
*New Jersey v. T.L.O.*, 469 U.S. 325 (1985) ---- 8
*Payton v. New York*, 445 U.S. 573 (1980) ---- 15, 26
*Roe v. Wade*, 410 U.S. 114 (1973) ---- 15
*Silverman v. United States*, 365 U.S. 505 (1961) ---- 8
*State v. Fessenden*, 258 Or.App. 639 (2013) ---- 19
*Suss v. American Soc'y for the Prevention of Cruelty to Animals*, 823 F.Supp. 181 (S.D.N.Y. 1993) ---- 19, 20
*Terry v. Ohio*, 392 U.S. 1 (1968) ---- 15
*U.S. v. Stevens*, 533 F.3d 218 (2008) ---- 14
*United States v Villamonte-Marquez*, 462 U.S. 579 (1983) ---- 12, 26
*United States v. Hernandez-Salazar*, 813 F.2d 1126 (11th Cir. 1987) ---- 23
*United States v. Santana*, 427 U.S. 38 (1976) ---- 9
*United States v. Stevens*, 559 U.S. 460 (2010) ---- 13, 14
*United States v. United States District Court*, 407 U.S. 297 (1972) ---- 16
*Wayne v. United States*, 318 F.2d 205, 212 (D.C.Cir. 1963) ---- 22
*Welsh v. Wisconsin*, 466 U.S. 740 (1984) ---- 8

## STATUTES AND REGULATIONS

18. U.S.C. § 48 ---------- 13, 14
28 U.S.C. § 1257(a) ---------- 1
M.G.L. c. 272, §77 ---------- 5

## OTHER AUTHORITIES

3 *W. Lafave, Search & Seizure* § 6.6(a) (5th Ed. 2012) ---------- 25
H.R.REP. NO. 106-397 ---------- 14

## CONSTITUTIONAL PROVISIONS

First Amendment to the U.S. Constitution ---------- passim
Fourth Amendment to the U.S. Constitution ---------- passim

Petitioner, Heather M. Duncan ("Petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court.

## OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (App. 0001) is published at *Commonwealth v. Duncan*, 467 Mass. 746 (2014). The district court's report of a question of law to the Massachusetts Supreme Judicial Court is unpublished and attached (App. 0008).

## JURISDICTION

The Massachusetts Supreme Judicial Court announced its decision on April 11, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).[1]

## RELEVANT STATUTORY PROVISION

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated..."

## INTRODUCTION

This petition for writ of certiorari is before this Honorable Court following the Massachusetts Supreme Judicial Court's decision on a question reported by the Lynn District Court: "Does the 'pure emergency' exception to the warrant requirement extend to animals?" (App. 0021). The

[1] Although the Supreme Judicial Court's disputed decision is not a "final judgment" as to the

Massachusetts Supreme Judicial Court answered the question in the affirmative and remanded the matter to Lynn District Court for proceedings consistent with the opinion. (App. 0006).

The District Court proceedings have been stayed, pending the outcome of this petition for writ of certiorari.

## STATEMENT OF THE CASE

Petitioner, her children, and, at times, her husband, Earl A. Duncan, were the sole occupants of an apartment in Lynn, Massachusetts that included the second and third floors of the multi-unit building. (App. 0003, 0010). The first floor was vacant at all relevant times hereto. (App. 0011). Petitioner and her husband had taken steps to increase the privacy of their home and property, erecting a six-foot tall privacy fence around the entire perimeter of the property, reinforced by tarps, plastic strips, and plywood. (App. 0003, 0011). Entry onto the property was secured by a padlocked gate in the fence. *Id.* In addition, there were signs posted on the fence and house warning others to keep out, beware of dogs, and to refrain from trespassing. *Id.*

On January 2, 2011, petitioner called the Lynn, Massachusetts Police Department to her home in order to serve a restraining order on her husband, Earl A. Duncan. (App. 0012). Petitioner had not been staying in the residence for approximately two weeks, as she was waiting for a restraining/vacate order to be served on her husband on her behalf. *Id.* She

had previously told her husband to remove his belonging, including his dogs. (App. 0012).

While at petitioner's home, Lynn Police Sergeant James Flynn noticed dogs in the front yard that "were in need of help". *Id.* at 0013. The officer asked petitioner if she would be taking care of the dogs, to which she replied that she would. *Id.* Sergeant Flynn testified at the suppression hearing that he did not closely inspect the dogs, but that "they were in bad shape." *Id.* No mention of the dogs was mentioned in the corresponding police report, nor was an animal control officer contacted. *Id.*

On January 8, 2011, police responded to petitioner's home at approximately 3:15 p.m. due to a report by a neighbor of two deceased dogs and a third emaciated dog on the property. *Id.* In the six days between the police visits, it had snowed intermittently and the weather was bleak, snowy, and freezing. *Id.* The reporting neighbor met the responding officers at petitioner's home. *Id.* at 0014. She told the officers that she had gone to petitioner's home to retrieve a borrowed item, but no one responded to her arrival, whereupon she saw what she knew to be the defendant's dogs – two were apparently deceased. *Id.*

The officers heard a dog "whimpering and very hoarsely and weakly barking as if it had almost lost its voice, noting that it sounded like an animal in distress." *Id.* To get a better view into the yard, the officers stepped on a snow bank several feet in height. *Id.* In the yard, the officers saw two

motionless dogs, partially inside and partially outside of a dog house, apparently frozen and leashed to the fence. (App. 0014). A third dog that was leashed to the fence, which was alive and barking, but emaciated. *Id.*

The padlocked gate prevented the officers from approaching the front door of the home to inquire about the dogs' condition. *Id.* at 0015. Instead, the officers attempted to alert occupants of the home by siren, air horn, and the emergency lights of their police cruiser, to no avail. *Id.* One officer also directed another officer at the station to use local water and sewer directories to try and reach the registered owner of the property. *Id.* All efforts were unsuccessful. *Id.* Pursuant to police protocol for handling animal emergencies, officers contacted the local fire department, who arrived to remove the padlock on the gate and enter the yard. *Id.* Upon warrantless entry into the yard, the police contacted animal control; an animal control officer subsequently arrived and took custody of the three dogs. *Id.* at 0016. An officer testified at the suppression hearing that responders did not leave the premises until 4:56 p.m., a period of approximately one hour and forty-five minutes had elapsed between the responding officers' arrival and the last officer's departure.[2] *Id.* During the full duration, the officer also testified that the live, but malnourished dog was also at the scene. *Id.*

On April 19, 2011, a complaint issued in Lynn [Massachusetts] District Court charging the petitioner, Heather M. Duncan, with three counts of

[2] It can also be argued that six-plus days had elapsed, if the "emergency" had begun when officers first noticed the dogs in "bad shape."

cruelty to animals by a custodian, pursuant to M.G.L. c. 272, §77. (App. 0003). On March 30, 2012, the District Court held an evidentiary hearing on the petitioner's motion to suppress observations by the police and a neighbor (as testified-to by the police) and physical evidence which gave rise to the charges. *Id.* Subsequent to the hearing, the motion judge allowed the motion to suppress in a margin endorsement, stating that, Massachusetts courts have not as yet applied the emergency exception to animals. (App. 0008). The judge also determined that police had probable cause to believe the crime of animal cruelty had been committed. (App. 0004). However, the judge reported the following question of law, pursuant to state law[3], to the Massachusetts Appeals Court: "Does the 'pure emergency' exception to the warrant requirement extend to animals?" *Id.* at 0021. The judge made no findings as to whether an emergency situation existed on the afternoon in question, concluding that the status of the emergency aid exception, related to animals, was unclear. Trial was continued pending resolution of the reported question. *Id.* at 0020 ("[i]nterlocutory review is preferable because the ruling appears to be dispositive of the underlying case").

The Supreme Judicial Court granted an application for direct appellate review and oral arguments were held on December 3, 2013. (App. 0022). On April 11, 2014, the Court answered the reported question in the affirmative, holding that the emergency aid exception to the Fourth Amendment's warrant requirement extends to police actions undertaken to render

[3] Mass. R. Crim. P. 34, as amended.

emergency assistance to animals. (App. 0006). The Court did not limit its decision to, nor distinguish between, particular types of nonhuman animals. The decision also lays out additional potential factors which courts may need to consider in determining whether the officer's actions were reasonable under the circumstances. *Id.* at 0005-0006.

## REASONS FOR GRANTING THE WRIT

This case fits the criteria for this Court's review, as the scope of the emergency aid exception to the Fourth Amendment's warrant requirement is a recurring and constitutionally significant issue. The Massachusetts Supreme Judicial Court's decision extends the emergency aid exception outlined in *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) and *Michigan v. Fisher*, 558 U.S. 45 (2009), to facts beyond those contemplated by this Court. This is an issue of first impression for this Court.

The Supreme Judicial Court's decision relies on Massachusetts statutes regulating cruelty to animals and on the fact that many jurisdictions across the country that have confronted this issue have found that public policy in the prevention of animal cruelty necessitates expanding the emergency aid doctrine to include the assistance of nonhuman animals. At this time, however, less than half of the states and the District of Columbia have extended the emergency aid exception to animals.

The question presented in this petition is whether the Massachusetts high court erred in expanding the emergency aid doctrine to include

assistance to nonhuman animals, thereby effectively giving any nonhuman animal[4] protection by diminishing an individual's privacy rights.

Petitioner argues that the Supreme Judicial Court's decision unjustifiably expands the emergency aid exception beyond the bounds set forth by this Court in *Brigham City* and *Fisher*; the reasonableness standard used for emergency aid cannot be uniformly and consistently applied to the assistance of non-human animals; and the decision allows law enforcement to side-step constitutionally protected rights to privacy within the home.

## I. THE SUPREME JUDICIAL COURT'S EXPANSION OF THE EMERGENCY AID DOCTRINE BEYOND THAT CONTEMPLATED BY THIS COURT'S JURISPRUDENCE IMPERILS THE FOURTH AMENDMENT'S PROTECTION AGAINST UNREASONABLE GOVERNMENTAL INTRUSIONS

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." *U.S. Const.* amend. IV. The Amendment's purpose "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). "At the Amendment's very core stands the right of a man to retreat into his own home and there be free from

[4] The Supreme Judicial Court's decision declined to limit the species of animal encompassed in the emergency aid doctrine. However, depending on the reasonableness of the intervention, such animals could conceivably include domesticated farm animals, traditional pets such as dogs, cats, rabbits, birds and fish, even exotic pets like boa constrictors, alligators, tigers, apes and all other manner of beast that may be lawfully (or unlawfully) possessed and contained on one's property, or which may enter on its own accord. This could conceivably include a wild coyote that enters a yard and attacks an animal, which would thereby justify police entry per the Supreme Judicial Court's ruling.

unreasonable governmental intrusions." *Florida v. Jardines*, 133 S.Ct. 1409, 1414 (2013) quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961). Additionally, this Court regards "the area immediately surrounding and associated with the home," generally referred to as the curtilage, "as part of the home itself for Fourth Amendment purposes," as this "area around the home is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened. *Id.* at 1414-1415 (internal citations omitted).

### a. This Court Has Never Given Non-Human Animals Such Broad Protection

"Over and again," this Court has observed that warrantless searches and seizures, "are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. U.S.*, 389 U.S. 347 (1967). Moreover, the government's "heavy burden" in such cases, *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984), is to show that, even within those few narrow exceptions, the warrantless search or warrantless seizure was "imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

The hallmark of the Fourth Amendment's warrant requirement is "reasonableness." *Brigham City*, 547 U.S. at 403 (internal citations omitted). Therefore, the presumption that searches and seizures in the home or curtilage are unreasonable may be overcome only in certain narrow circumstances. *Fisher*, 558 U.S. at 47. For example, law enforcement is

permitted to make warrantless entry onto private property in order to prevent the imminent destruction of evidence, *Ker v. California*, 374 U.S. 23, 40 (1963); to engage in 'hot pursuit' of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42, 43 (1976); or to fight a fire and thereafter investigate its cause, *Groh v. Ramirez*, 540 U.S. 551, 559 (2004).

Another exigency is "the need to assist persons who are seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 403. This "emergency aid exception" to the warrant requirement, thus depends on the objectively reasonable belief of the officer that "a **person** within [the home] is in need of immediate aid." *Fisher*, 558 U.S. at 47 (emphasis added) (internal quotations omitted). "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). The emergency exception, however, must only apply to a narrow class of circumstances. If not, police will be given license to intrude upon the sanctity of the home for any minor disturbance in which an animal could become injured.

In *Brigham City* and *Fisher*, this Court found entry into the home justified when law enforcement officers observed on-going physical altercations between individuals inside the home. In both cases, the officers' warrantless entries were justified in order to prevent potentially serious injuries to the **human** combatants inside. *See Brigham City*, 547 U.S. at 406

(officer's entry was objectively reasonable where they heard an altercation, observed one **individual** strike another in the face, for believing the injured adult might need help and the violence was just beginning); *Fisher*, 558 U.S. at 48 (entry found reasonable where officers, responding to disturbance call, observed signs of a **human** injury and saw violence occurring between **individuals** inside the home that included screaming and throwing things).

Unlike *Brigham City* or *Fisher*, the officers' warrantless entry onto petitioner's property in this case did not relate to ongoing violence directed at, or potential imminent harm to, any human being. Although animals may hold a special position within society, the fundamental constitutional rights of humans will always be paramount to the rights of animals. The Massachusetts Supreme Judicial Court does not, nor do other state courts, find support for extending the emergency aid exception to animals in the jurisprudence of this Court, because such support does not exist. The Massachusetts high court's decision greatly expands the emergency aid doctrine beyond the bounds that can be accurately predicted by permitting the warrantless entry of law enforcement to protect **nonhuman animal** life. This is an expansion unsupported by this Court's jurisprudence, which it has "jealously" guarded and "carefully drawn" the few exceptions to the Fourth Amendment's prohibition of warrantless entry. *Jones v. United States*, 357 U.S. 493, 499 (1958).

The Supreme Judicial Court quotes *Mincey* in its decision, which states "[t]he need to protect or preserve life or avoid injury is justification for what would be otherwise illegal absent an exigency or emergency," in finding that its decision comports with this Court's jurisprudence. *Duncan*, 467 Mass. at 749-50. But "life" in the context of constitutional protections has only ever related to **human** life. *See Brigham City*, 547 U.S. at 403 (exigency exists obviating warrant requirement when "the need to assist **persons** who are seriously injured" is present) (emphasis added). Animals possess no legal or constitutional rights of their own. *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F.Supp. 45, 49-50 (D. Mass. 1993); *Massachusetts Society for Prevention of Cruelty to Animals v. Commissioner of Public Health*, 339 Mass. 216, 158 N.E.2d 487, 495 (1959). There is no basis found in any of this Court's jurisprudence for extending "life" to include nonhuman animal life. There is no justification found in the language of the Fourth Amendment, or any other Amendment to the Constitution that could be read to recognize the rights of animals as being paramount to those of human beings. The Massachusetts Supreme Judicial Court's decision to extend the emergency aid exception to nonhuman animals is done only through the erosion of the closely guarded Fourth Amendment protections afforded only to humans.

b. **The Decision Disrupts the Delicate Balance Between the Countervailing Interests of Privacy Rights and Prevention of Cruelty To Animals**

In Fourth Amendment cases, the Court has balanced the intrusion of the individual's privacy interests protected by the Fourth Amendment against the governmental interest served by the intrusion. *United States v Villamonte-Marquez*, 462 U.S. 579 (1983) ("[t]hus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"). This balance is maintained through the Court's reliance on the reasonableness standard – a determination of the objective reasonableness of the officer's actions when considering the reasonableness of the officer's belief an emergency was occurring (or would imminently occur) and that the place entered was connected to the emergency. *See Mincey*, 437 U.S. at 392 ("[t]he exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable").

The Supreme Judicial Court's decision diminishes human privacy rights, protected by the Fourth Amendment, in order to protect nonhuman animals, who have no constitutional rights and do not enjoy the level of protection afforded to humans by the United States Constitution and this Court. While this Court has not addressed the issue of 'animal rights' in the context of the Fourth Amendment, cases dealing with First Amendment issues are instructive. For example, in *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, this Court suggested that the government interest in

the protection of animals, in the context of the Free Exercise Clause of the First Amendment is not compelling. 508 U.S. 520, 546-47 (1993) (**city ordinance outlawing animal sacrifices could not be upheld** based on the city's argument that the protection of animals was a compelling government interest, when balanced against religious freedom).

Similarly, in *United States v. Stevens*, this Court, faced with a challenge to a federal statute banning depictions of animal cruelty, 18. U.S.C. § 48, found that although the protection of children from abuse was a sufficiently compelling reason to classify child pornography as outside the protection of the First Amendment[5], **animals did not receive the same protection**. 559 U.S. 460, 470-71 (2010). The *Stevens* Court found that the welfare of children justified the free speech restriction on the creation and possession of child pornography, but invalidated a federal statute that criminalized the commercial creation, sale, or possession of depictions of animal cruelty.[6] *Id.* As the Third Circuit Court of Appeals stated in its opinion upheld by this Court, "**[n]o matter how appealing the cause of animal protection is to our sensibilities, we hesitate – in the First Amendment context – to elevate it to the status of *compelling* interest.**" *U.S. v. Stevens*, 533 F.3d 218, 226 (2008) (emphasis added). The Third Circuit also stated that the Supreme Court has stated, when

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[5] *See New York v. Ferber*, 458 U.S. 747, 763 (1982).

[6] 18 U.S.C. § 48, was enacted, in large part, to criminalize "crush videos." Depictions of women slowly torturing animals by crushing them to death with their bare feet or while wearing high heels. The cries and squeals of the animals, obviously suffering and in great pain, can also be heard. *Stevens*, 559 U.S. at 464-65.

explaining what constitutes a compelling interest in free speech cases, "**the interest has – without exception – related to the well-being of human beings, not animals.**" *Id.*

The Third Circuit also looked at the legislative history of 18 U.S.C. §48, which stated, that:

> [a]lthough the Supreme [C]ourt recognized the governmental interest in protecting animals from cruelty, as against the constitutional right of free exercise of religion[,] the governmental interest did not prevail. **Therefore, it seems that, on balance, animal rights do not supersede fundamental human rights.**

H.R.REP. NO. 106-397, at 11 (emphasis added).

Petitioner does not argue that no governmental interest exists in preventing the cruel punishment and unnecessary suffering of nonhuman animals. This interest, however, is superseded by the privacy interests of all citizens, whether they own a pet or not. Just as *Stevens* and *Lukumi* found that the protection of animals from extreme torture or ritualistic sacrifice were not compelling interests in the context of the First Amendment rights to free speech and the free exercise of religion, similarly here, a compelling interest cannot be found.

This Court has recognized that a right to privacy exists under the Constitution. *Roe v. Wade*, 410 U.S. 114, 152 (1973). More specifically, this Court has found the enumerated right to freedom from unreasonable searches and seizures under the Fourth Amendment, creates a fundamental

privacy right. *Id.* (finding privacy right in the Fourth and Fifth Amendments based on this Court's decisions in *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz*, 389 U.S. at 350; and *Boyd v. United States*, 116 U.S. 616 (1886)).

Where this Court has not found prevention of cruelty to animals to be sufficient justification to uphold laws that erode the First Amendment rights of humans, surely the Court must likewise find the reasoning of the Supreme Judicial Court lacking where it has the effect of eroding the fundamental right to privacy in one's own home. An "overriding respect for the sanctity of the home...has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). Nothing in this Court's jurisprudence suggests that a state court determination will stand where it diminishes an individual's privacy right against unreasonable government intrusions in favor of aiding animals.

The fact that the search and seizure at issue here was a home[7] where extensive steps were taken by the residents to protect their privacy from passersby, neighbors, and police (including installing six foot high privacy fencing, tarps, no trespassing signs (*See* App. 0003)), provides further justification to find that the Supreme Judicial Court's ruling is an erosion of closely guarded Fourth Amendment protections and rights to privacy. "It is a bedrock principle that the prophylaxis of the Fourth Amendment is at its zenith with respect to an individual's home." *Martins*, 413 F.3d at 146. "[P]hysical entry of the home is the chief evil against which the wording of

[7] Curtilage is included in the definition of a home. *See Jardines*, 133 S.Ct. at 1414.

the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

The Massachusetts high court's decision weakens privacy expectations in the home and carves out a broad exception to the standards this Court has set through numerous decisions considering exceptions to the warrant requirement. Therefore, this petition should be granted in order to review the Massachusetts Supreme Judicial Court's decision.

## II. THE EMERGENCY AID DOCTRINE'S REASONABLENESS STANDARD CANNOT BE UNIFORMLY AND CONSISTENTLY APPLIED TO ANIMALS

This Court has reinforced the notion that the emergency aid doctrine dictates that police are free to conduct warrantless entries when the officer reasonably believes there is an imminent threat of death or serious injury, which may befall a **person** within the home. *Brigham City*, 547 U.S. at 403; *Fisher*, 558 U.S. at 47. As stated above, this Court has not found that this rule extends to the protection of nonhuman animals. If it were to be extended, however, the Fourth Amendment's reasonableness inquiry, as applied to the emergency aid exception could not be applied in a consistent and predictable manner across endless species of nonhuman animals.

### a. Reasonableness as it Relates to the Aid of Animals is Far Too Difficult to Define or Apply to an Objective Standard

As stated above, "the ultimate touchstone of the Fourth Amendment is reasonableness." *Brigham City*, 547 U.S. at 403. The reasonableness of an officer's actions as it relates to aiding a potentially distressed nonhuman

animal, however, is incapable of an objective determination. Given that the standard is 'objective reasonableness,' the court making the determination must consider what a reasonable officer would do in the same situation. *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation"). While there are many factors present in this determination, there is an abundance of case law, fashioned from many years of Fourth Amendment jurisprudence related to the reasonableness of an officer's aid to humans. This is not the case when it comes to animal well-being.

Furthermore, when an officer possesses a belief that a human being is in immediate need of assistance, whether that belief was objectively reasonable is capable of a consistent and even-handed determination because the officer, being a human, can draw on his or her own human experience to determine the level of exigency involving the person in potential need of aid and whether or not intervention is necessary. The officer can place himself or herself in the potential victim's shoes and decide that if he or she were in the same position, he or she would need emergency assistance. In an evidence suppression hearing, such as the one from which this petition was born, the court's inquiry is relatively straightforward[8] - it simply must decide what a reasonable officer would do in the same situation. As human beings share a

[8] *See Fisher*, 558 U.S. at 48 ("straightforward application of the emergency aid exception" was all that was required to find the officer's actions reasonable").

common human existential experience, of living and breathing and being put in potentially dangerous situations, the courts are well versed to make such an inquiry. When it comes to nonhuman animals, on the other hand, the court nor the responding officer can relate to the animal's circumstances on a level sufficient for a court to determine if the actions were reasonable.

In its decision, the Massachusetts Supreme Judicial Court states that the emergency aid doctrine's "application to nonhuman animals does not expand the exception or alter the essential framework for determining when a warrantless police search of the home is permissible under it." *Duncan*, 467 Mass. at 754. However, the court then goes on to explain, unlike humans, animals require "additional considerations to be taken into account." *Id.* The Court then lists several factors considered by other courts including: whether the animal's condition was caused by human abuse or neglect, *Davis v. State*, 907 N.E.2d 1043, 1050 (Ind.Ct.App. 2009); the species of the animal in danger, *State v. Fessenden*, 258 Or.App. 639, 649, 310 P.3d 1163, review granted, 354 Or. 597, 318 P.3d 749 (2013); the nature of the privacy interest impacted, *DiCesare v. Stout*, 992 F.2d 1222, 1993 WL 137110 (10th Cir. Apr. 23, 1993); the extent of the intrusion and any damage caused and whether officers tried to obtain consent of the property owner prior to the warrantless entry, *Suss v. American Soc'y for the Prevention of Cruelty to Animals*, 823 F.Supp. 181, 187 (S.D.N.Y. 1993). The court then suggests a case-by-case

determination based upon the totality of the circumstances be employed in objective reasonableness inquiries. *Duncan*, 467 Mass. at 755.

The Supreme Judicial Court states that when an officer objectively believes that a human is injured or is in imminent danger or harm, "nothing further ordinarily is necessary to justify warrantless police entry" *Id.* at 754. Meanwhile, pursuant to the Supreme Judicial Court's ruling, a web of competing factors (which the court admits are not exhaustive) will be necessary when dealing with nonhuman animal aid. This acknowledgement by the court strongly suggests that no straightforward application to nonhuman animals of the emergency aid exception can be undertaken. This will result in confusion in the lower courts and a lack of uniformity in the administration of justice and abuse in inner cities and drug cases.

More specifically, the Massachusetts Supreme Judicial Court's lack of guidance on what species of nonhuman animal apply to the emergency aid exception leaves open the door for mass confusion within the courts as to what is a reasonable response. For example, many people would likely argue that breaking a window to gain entry in order to save the life of a dog is reasonable. But what about the life of a hamster? What if the exigency involved a valuable or rare bird? Or a snake? What if a wild fox attacked a family dog? People's opinions and beliefs on the value and worth of pets are as far ranging as are the variety of animals on this planet and reasonableness will be an impossible standard to meet.

In one situation, the United States District Court for the Southern District of New York found that it was unreasonable to demolish the exterior wall of a commercial building in order to attempt to save the life of a cat. *Suss*, 823 F.Supp. at 187. It would not be surprising for a cat owner to find the Southern District of New York's opinion to be offensive and highly unreasonable. Is the cat owner, then, unreasonable? Unlike humans, there is no social or cultural consensus as to the legal status and rights that animals should be afforded. However, by limiting the exception to certain classes of nonhuman animals, other difficulties arise, as they will be forced to make value judgments on which species or class of nonhuman animal should or should not be protected under the emergency aid exception. Such a framework would permit intrusion of human Fourth Amendment protections for one species or class of animal but not another. Would the beef, poultry, or pork industries be at risk, given that some keep pigs as pets, and for some cows have religious significance? The increasing popularity of urban farms, where city dwellers have begun keeping chicken coops on rooftops could also complicate the framework.

The Massachusetts Supreme Judicial Court argues that state law has informed its determination. It found a public policy in favor of protecting the lives of animals given the "focus on the prevention of both intentional and neglectful animal cruelty" found in state legislative enactments and the

policies therein.[9] *Duncan*, 467 Mass. at 751. The court looks to past Massachusetts cases in defining "cruelty" as "[s]evere pain inflicted upon an animal...without any justifiable cause." *Id.* at 751, n. 5 (internal quotations omitted). This definition, however, is problematic. An officer observing signs of such "cruelty", absent special training or expertise, is unable to comprehend the level of suffering involved and cannot fully empathize with something not of his own species. How can an officer be expected to determine in the instant in which he must act, whether a justifiable cause exists for breaching the sanctity of the home without examination of the animal's condition?

Similarly, many people hold the belief that hunting is cruel and unnecessarily inflicts suffering on animals, while many others have been raised in an environment where hunting is not merely a sport but a familial right of passage into adulthood. Animal rights activists argue against the manufacture and sale of animal skins, yet the U.S. fur industry experienced sales of approximately $1.27 billion in 2012. *FICA Facts*, Fur Information Council of America, http://www.fur.org/fica-facts/ (last visited July 9, 2014).

The decision leaves open far too many considerations and gives insufficient guidance for consistent determinations of what is objectively

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[9] The Supreme Judicial Court's rationale is interesting, given the fact that animals are still only valued as property in Massachusetts. *See Irwin v. Degtiarov*, 85 Mass.App.Ct. 234, 238 (where Massachusetts Appeals Court states that dogs, like other animals, are considered property, thus damages related to pain and suffering not recoverable). Therefore, the court's decision elevates, what the state considers "property" at the expense of humans' Fourth Amendment protections.

reasonable with respect to the expansion of the emergency aid exception to include nonhuman animals.

### b. The Decision Conflicts with the Exigent Circumstances Exception to the Warrant Rule Because the Investigatory Purpose Cannot Be Separated From the Administered Aid

In a typical emergency situation involving imminent serious harm to a human being, an officer alerted to the exigency generally has only one interest – to protect the person in danger or to administer life saving medical aid as quickly as possible. This Court has stated that a warrant is not required to break down the door to enter a burning home to rescue occupants, to prevent a shooting, or to bring emergency aid to a person. The reason is clear: "[p]eople could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process." *Wayne v. United States*, 318 F.2d 205, 212 (D.C.Cir.) cert. denied, 375 U.S. 860 (1963). It is the immediacy of the emergency which creates the impossibility of obtaining a warrant in order to enter the home. *United States v. Hernandez-Salazar*, 813 F.2d 1126, 1131 (11th Cir. 1987) (allowance for warrantless entry is based not upon "inconvenience", but rather, impossibility of obtaining warrant in time).

As the Supreme Judicial Court states in its decision, "although the broader 'exigent circumstances' exception generally requires a showing of probable cause, such a showing is not necessary in emergency aid situations, because the purpose of police entry is not to investigate criminal activity."

*Duncan*, 467 Mass. at 750. This logic, however, is flawed with respect to animal aid, due to the myriad factors an officer must deliberate in deciding whether or not to intervene (whether animal's condition caused by human abuse or neglect, the species of the animal, nature of privacy interest and extent of intrusion, and whether attempt to obtain consent was made before entry). In addition to these factors, the officer will be further required to consider many other factors before deciding whether aid would be useful or prudent.

In situations where human neglect has imperiled a nonhuman animal, for example by failing to provide shelter, food, or water[10], in addition to assessing the condition of the animal, an officer must consider whether food or water is present, whether it appears the animal is able to move on its own, whether the animal is capable of assisting itself, whether the officer will require additional assistance or will need specific expert help such as a veterinarian or animal control officer, whether the animal, because of its species or condition, poses a danger to anyone who ventures close to it or poses a danger if set free, and the particular type of assistance that would be most effective in assisting the animal. These considerations are required in order to ensure that the officer does more good than harm to the animal and should be taken in order to respect the constitutionally protected privacy of

[10] Petitioner was charged, pursuant to M.G.L. c. 272, § 77, which makes it a crime for a custodian to "unnecessarily fail to provide [an animal] with proper food, drink, shelter, sanitary environment, or protection from the weather."

the homeowner. In cases of neglect, in particular, entry onto the property once the officer is alerted to the danger will take extensive amounts of time to determine whether the animal is truly in need of assistance and the best course of action. The additional time obviates the exigency required to fall within the emergency aid exception.

In this case, the officers observed the dogs in "bad shape" six days prior. Then on the date of warrantless entry and seizure, the officers spent nearly two hours at the scene before the dogs were seized. (App. 0003). The officers did not immediately come to the animal's aid, but instead made several attempts to alert the homeowner and any occupants of the home. They then called the local fire department to break the padlock on the gate and summoned an animal control officer to actually seize the animals. Such deliberative steps, while prudent, suggest that an emergency requiring immediate action was not present. Instead the officers' forced entry was more closely related to an entry for investigative purposes, which under these facts is not an objectively reasonable intrusion upon petitioner's heavily maintained privacy in her home. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) ("police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home").[11]

The fact is, in this situation, the officers' investigatory purpose cannot be decoupled from the reasonableness of the entry where the recipient of the

[11] Petitioner recognizes that a split exists in the Federal Circuits of Appeal as to whether the emergency aid exception requires something approaching probable cause or a lower standard of proof. *See* 3 *W. Lafave, Search & Seizure* § 6.6(a) (5th Ed. 2012).

alleged aid is also the only evidence of the alleged criminal wrongdoing. This Court's treatment of warrantless entries has never allowed for a purely investigatory warrantless entry, without more. *See e.g. Ker v. California*, 374 U.S. at 40 (officers may make entry into a home without a warrant when it is reasonable to assume that evidence of a crime will likely be destroyed imminently). It defies common sense to ignore the officer's subjective intent, when the officer's conduct hinges so much on the investigative practices the officer employs prior to entering the property. This is especially true in light of the fact that the nonhuman animal will be the only evidence of the crime charged.

The Massachusetts Supreme Judicial Court's decision does serious violence to the Fourth Amendment's "ultimate touchstone" – reasonableness, *Brigham City*, 547 U.S. at 403, by injecting confusion and doubt into what is already a complex area of law. This Court should grant this petition to eliminate the inconsistent treatment of the fundamental right to privacy within one's own home.

## III. THE PRACTICAL EFFECT OF THE SUPREME JUDICIAL COURT'S DECISION WILL BE THE DEGRADATION OF PRIVACY RIGHTS WITHOUT SUFFICIENT JUSTIFICATION

This Court has held that the states are free to create workable rules governing searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement", so long as those rules "do not violate the constitutional proscription of unreasonable searches and

seizures..." *Ker v. State of California*, 374 U.S. at 34 (internal quotations omitted). These rules, however, do not permit the state to give license to officers to abuse their roles as peace officers. *United States v Villamonte-Marquez*, 462 U.S. at 588 (stating that permissibility of a particular police practice is judged by balancing its intrusion on the individual's Fourth Amendment interests versus its promotion of legitimate governmental interests). The Massachusetts Supreme Judicial Court's ruling, however, gives an opportunistic and disreputable officer license to claim the protection of animals as pretext to intrude into the home.

Although its decision stresses that the reasonableness requirement sufficiently limits the emergency aid exception from broad expansion, the Massachusetts Supreme Judicial Court's decision has done just the opposite. Now, an officer intent on gaining access into an individual's home will have legal cover to breach the "firm line at the entrance to the house," *Payton*, 445 U.S., at 590, "a line that must be not only firm but also bright." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Furthermore, given the large number of U.S. residents that have household pets[12], and wild animals who can wander onto private property, the potential for abuse is vast.

[12] According to the American Veterinary Medical Association, as of 2012, 36.5% of U.S. households, totaling approximately 43 million households, own dogs, 30.4% or 36 million households own cats, while 3.1% (3.6 million) of households own birds and 1.5% (1.7 million) of households own horses. *U.S. Pet Ownership Statistics*, American Veterinary Medical Association U.S. Pet Ownership Demographics Sourcebook, https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx (last visited July 9, 2014).

The threat of abuse lies in the fact that when dealing with animal emergencies, the officer looking for entry into an unoccupied dwelling may claim that he heard what sounded like the death throes of a family pet. In human emergency situations, the source of the noise will often be able to testify as to the reasonableness and veracity of the officer's assumption. Even in situations where the officer forces entry into an unoccupied home to save property there will be evidence, extrinsic to the officer's own report. For example, a situation where an officer forces entry to fight a fire.[13] Evidence corroborating justification for the warrantless entry will be present, including, for example, smoke, fire, and water damage. With animals, of course, the family dog is unable to attest to the officer's conduct or its own allegedly distressed bark. It will generally only be the officer's word, which must be taken as true, absent other evidence. Thus, in many situations, an otherwise illegal search will be transformed, through the post hoc statements of an officer who may assert he believed that an animal was in danger, without corroboration from other evidence.

Such a result flies in the face of the very foundation on which the Fourth Amendment stands. "At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusions." *Jardines*, 133 S.Ct. at 1414.

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[13] *See Groh v. Ramirez*, 540 U.S. at 559.

## CONCLUSION

The result of the Massachusetts Supreme Judicial Court's decision is the erosion of this Court's principle that the home is "where privacy expectations are most heightened." *Kyllo*, 533 U.S. at 33. The expansion of the emergency aid exception to include nonhuman animals weakens the privacy expectations in the home below any level articulated by this Court, and erodes the closely guarded Fourth Amendment protections against unreasonable searches and seizures. Such an expansion makes it impossible for the courts to uniformly and fairly enforce the standards on which the Fourth Amendment is based, and it unjustifiably opens the door to the threat of widespread abuse by law enforcement. This Court should grant this petition to reaffirm the sanctity of the home, which it has repeatedly and vigorously protected in its Fourth Amendment Jurisprudence.

Respectfully submitted.

Travis J. Jacobs, Esq.
*Counsel of Record for Petitioner*
Eric J. Moreno, Esq.*
The Jacobs Law, LLC
36 Bromfield Street, Suite 502
Boston, MA 02108
(800) 652-4783
TJacobs@TheJacobsLaw.com

* *Admitted to practice in the Commonwealth of Massachusetts. Supervision by Counsel of Record who is a member of the Bar of this Court.*

JULY 2014

## APPENDIX


Page

Massachusetts Supreme Judicial Court Opinion, (*Commonwealth v. Duncan*, 467 Mass. 746 (2014)), dated April 11, 2014 ..... App.0001

Findings of Fact and Report of Question of Law to the Appeal Court of the Lynn District Court, dated August 2, 2012 ..... App.0008

Order of the Supreme Judicial Court for the Commonwealth of Massachusetts scheduling oral arguments, dated October 18, 2013 ..... App.0022

Constitutional and Statutory Provisions and Rules of Court

- First Amendment to the U.S. Constitution ..... App.0024
- Fourth Amendment to the U.S. Constitution ..... App.0024
- 18.U.S.C. § 48 ..... App.0024
- M.G.L. c. 272, § 77 ..... App.0025
- Massachusetts Rules of Crim. Pro. 34 ..... App.0026

Petitioner's Motion to Suppress Physical Evidence and Statements and Information Obtained Pursuant to Illegal Police Actions, dated February 3, 2012 ..... App.0027

467 Mass. 746
Supreme Judicial Court of Massachusetts, Essex.

COMMONWEALTH
v.
Heather M. DUNCAN.

SJC–11373. | Submitted Dec. 3, 2013. | Decided April 11, 2014.

**Synopsis**

**Background:** Defendant was charged with animal cruelty. The District Court Department, Lynn Division, Essex County, Ellen Flatley, J., granted motion to suppress evidence, and subsequently reported a question of law to the Appeals Court.

**[Holding:]** On direct appellate review, the Supreme Judicial Court, Lenk, J., held that emergency aid exception to constitutional warrant requirement extends to police action undertaken to render emergency assistance to animals.

Question answered; remanded.

West Headnotes (9)

[1] **Searches and Seizures**
Persons, Places and Things Protected

The right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy, and it was just this sort of intrusion that the federal and state constitutional prohibitions on unreasonable searches and seizures were designed to circumscribe by the general requirement of a judicial determination of probable cause. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[2] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

The emergency aid doctrine comprises one entry in that narrow category of cases where an exception to the constitutional search warrant requirement is justified. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[3] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

The emergency aid doctrine, as an exception to the constitutional search warrant requirement, permits the police to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be someone inside who is injured or in imminent danger of physical harm. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[4] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Under the emergency aid doctrine, as an exception to the constitutional search warrant requirement, scenarios in which entry into a home to help someone who is injured or in imminent danger of physical harm present one type of "exigent circumstance" that obviates the need for a warrant, in part because it would be impracticable to obtain a warrant under the circumstances. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[5] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Under the emergency aid doctrine, as an exception to the constitutional search warrant requirement, the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an

exigency or emergency. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[6] **Searches and Seizures**
Presence of probable cause

Although the broader "exigent circumstances" exception to the constitution search warrant requirement generally requires a showing of probable cause, such a showing is not necessary in emergency aid situations, because the purpose of police entry is not to investigate criminal activity. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[7] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Under the emergency aid doctrine, as an exception to the constitutional search warrant requirement, a warrantless entry must meet two strict requirements; first, there must be objectively reasonable grounds to believe that an emergency exists, and second, the conduct of the police following the entry must be reasonable under the circumstances. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[8] **Animals**
Searches, seizures, inspections and forfeitures

Emergency aid doctrine, as an exception to the constitutional search warrant requirement, extends to permit the police in certain circumstances to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be an animal inside who is injured or in imminent danger of physical harm; permitting warrantless searches to protect nonhuman animal life fits coherently within the existing emergency aid exception intended to facilitate official response to an immediate need for assistance for the protection of life or property, vindicates the legislative framework for preventing cruelty to animals, and enables trained personnel, such as police or animal control officers, to respond to animal emergencies. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

[9] **Searches and Seizures**
Necessity of and preference for warrant, and exceptions in general

The scope and nature of a public interest, as a consideration in determining the boundaries of the judicially established exceptions to the warrant requirement, can be discerned from legislative enactments and the policies reflected in them. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

Cases that cite this headnote

**Attorneys and Law Firms**

****470** Paul C. Wagoner, Assistant District Attorney, for the Commonwealth.

Travis J. Jacobs, Boston, for the defendant.

The following submitted briefs for amici curiae:

Virginia F. Coleman for Animal Legal Defense Fund & others.

Michael W. Morrissey, District Attorney, & Tracey A. Cusick, Assistant District Attorney, for the Attorney General & others.

John M. Collins for Massachusetts Chiefs of Police Association, Inc.

Carolyn C. Van Tine for Animal Control Officers Association of Massachusetts.

Kate M. Fitzpatrick, of New York; Jonathan R. Lovvorn, Kimberly D. Ockene, & Aaron D. Green, of the District of Columbia; Elise VanKavage, of Utah; & Michael G. Bongiorno for Humane Society of the United States & another.

Stacy Wolf & Jennifer H. Chin for American Society for the Prevention of Cruelty to Animals.

Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.

**Opinion**

LENK, J.

*747 This case presents the question whether the emergency aid exception to the warrant requirement of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights extends to police action undertaken to render emergency assistance to animals. [1]

**471 After receiving a telephone call from the defendant's neighbor, police entered the defendant's front yard without a warrant and seized three dogs that had been left outside in severely inclement winter weather. Two of the dogs appeared to be dead, and one was extremely emaciated. The defendant was charged with three counts of animal cruelty under G.L. c. 272, § 77. A District Court judge granted the defendant's motion to suppress evidence obtained as a result of the warrantless search but subsequently reported a question of law, pursuant to Mass. R.Crim. P. 34, as amended 442 Mass. 1501 (2004): "Does the 'pure emergency' exception to the warrant requirement extend to animals?"

The question is one of first impression for this court. In agreement with a number of courts in other jurisdictions that have considered the issue, we conclude that, in appropriate circumstances, animals, like humans, should be afforded the protection of the emergency aid exception. We therefore answer the reported question in the affirmative.

1. *Factual background and prior proceedings.* We summarize the facts found by the motion judge. On January 2, 2011, the defendant called police to her home to serve a restraining order on her husband. The home was surrounded by a six-foot tall *748 privacy fence, reinforced by tarps, plastic strips, and plywood. Entry to the property was secured by a padlocked gate in the fence.

While at the defendant's home, police officers noticed dogs in the front yard that were "in bad shape" and "in need of help." Officers asked the defendant to whom the dogs belonged and whether they were being cared for. The defendant responded that the dogs belonged to "the Duncan[s]" and that she was taking care of them. The officers did not follow up on the state of the dogs at that point, nor did they call an animal control officer to the residence.

On January 8, 2011, the defendant's neighbor telephoned police to report two deceased dogs on the defendant's property and a third "emaciated" dog. In the intervening six days, it had snowed intermittently; the weather on that day was "bleak, snowy, and freezing." The defendant's neighbor greeted police when they arrived at the defendant's home at approximately 3:15 P.M. The neighbor informed the officers that she had gone to the defendant's home to retrieve a borrowed snow shovel; no one responded to her arrival, but she heard a dog barking and looked through or over the privacy fence and saw what she knew to be the defendant's dogs. Two apparently were deceased.

The officers heard a dog "whimpering and very hoarsely and weakly barking as if it had almost lost its voice, noting that it sounded like an animal in distress." In order to get a better view into the yard, they stepped on a nearby snowbank that was several feet in height. Inside the yard, they saw two motionless dogs, apparently frozen and leashed to the fence, partially inside and partially outside a doghouse. A third dog, alive but emaciated, was leashed to the fence and barking. The officers did not see any food or water laid out for the dogs.

Due to the padlocked gate, police were unable to access the front door of the house. Instead, they engaged the siren, emergency lights, and air horn of their **472 police cruiser to alert the residents of their presence, to no avail. One officer also directed another at the police station to use the local water and sewer directory to reach the registered owner of the property. These efforts were unsuccessful. Pursuant to police protocol for handling *749 animal-related emergencies, officers then contacted the fire department to remove the padlock on the gate and enter the yard. After police gained entry to the yard, they contacted animal control; an animal control officer arrived and took custody of the three dogs. All of the responders cleared the premises by 4:56 P.M.

On April 19, 2011, a complaint issued in the District Court charging the defendant with three counts of animal cruelty pursuant to G.L. c. 272, § 77. The defendant subsequently filed a motion to suppress observations by police and physical evidence that gave rise to the charges. After an evidentiary hearing, the judge allowed the motion, ruling that "[o]ur courts have not as yet applied the emergency

exception to animals."[2] The judge determined also that police had probable cause to believe that the crime of animal cruelty had been committed. However, the judge reported the following question of law, pursuant to Mass. R.Crim. P. 34, as amended, 442 Mass. 1501 (2004): "Does the 'pure emergency' exception to the warrant requirement extend to animals?" Trial was continued pending resolution of the reported question.

[1] [2] [3] [4] [5] 2. *Discussion*. a. *Emergency aid exception to the warrant requirement*. "The right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy. It was just this sort of intrusion that the Fourth Amendment [to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights] [were] designed to circumscribe by the general requirement of a judicial determination of probable cause." *Commonwealth v. Peters*, 453 Mass. 818, 819, 905 N.E.2d 1111 (2009), quoting *Commonwealth v. DeJesus*, 439 Mass. 616, 619, 790 N.E.2d 231 (2003). The emergency aid doctrine comprises one entry in that "narrow category" of cases where an exception to the warrant requirement is justified. *Commonwealth v. Young*, 382 Mass. 448, 456, 416 N.E.2d 944 (1981), *S.C.* 399 Mass. 527, 505 N.E.2d 186 (1987). This exception "permits the police to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be someone inside who is injured or in *750 imminent danger of physical harm."[3] *Commonwealth v. Peters*, *supra* at 819, 905 N.E.2d 1111, and cases cited. Such scenarios present one type of "exigent circumstance" that obviates the need for a warrant, see **473 *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), in part because it would be impracticable to obtain a warrant under the circumstances. See *Commonwealth v. Forde*, 367 Mass. 798, 800–801, 329 N.E.2d 717 (1975). In addition, "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Commonwealth v. Snell*, 428 Mass. 766, 774, 705 N.E.2d 236, cert. denied, 527 U.S. 1010, 119 S.Ct. 2351, 144 L.Ed.2d 247 (1999), quoting *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

[6] [7] Although the broader "exigent circumstances" exception generally requires a showing of probable cause, such a showing is not necessary in emergency aid situations, because the purpose of police entry is not to investigate criminal activity.[4] See *Commonwealth v. Entwistle*, 463 Mass. 205, 214–215, 973 N.E.2d 115 (2012), cert. denied, — U.S. —, 133 S.Ct. 945, 184 L.Ed.2d 736 (2013); J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law §§ 14–1[a], 14–1[c][3][vi] (2012–2013). Instead, a warrantless entry "must meet two strict requirements. First, there must be objectively reasonable grounds to believe that an emergency exists.... Second, the conduct of the police following the entry must be reasonable under the circumstances...." (Citations omitted.) *Commonwealth v. Peters*, *supra* at 823, 905 N.E.2d 1111. *751 Where these two conditions have been satisfied, warrantless entry into a home is permissible.

[8] b. *Warrantless searches or seizures to protect nonhuman animal life*. We turn to the question whether warrantless searches of a home are permissible where they are intended to render emergency assistance to protect nonhuman animal life. Stated differently, the question is whether the public interest underlying the emergency aid exception, in facilitating immediate first aid response to those in danger of harm or physical injury, applies with equal force to animals.

[9] The scope and nature of any such public interest can be discerned from "legislative enactments and the policies reflected in them," which are "relevant as we consider the boundaries of the judicially established exceptions to the warrant requirement." *State v. Fessenden*, 258 Or.App. 639, 648–649, 310 P.3d 1163, review granted, 354 Or. 597, 318 P.3d 749 (2013). Our statutes evince a focus on the prevention of both intentional and neglectful animal cruelty.[5] See, e.g., G.L. c. 272, § 77. In addition to outlawing intentional acts of cruelty against animals, such as torture, mutilation, and overworking, G.L. c. 272, § 77, makes it a crime for the custodian of an animal to "unnecessarily fail[ ] to provide it with proper food, drink, shelter, sanitary environment, or protection from the weather." In a 2012 enactment, An Act Further Regulating Municipal Animal Control, St. 2012, c. 193(act), the Legislature **474 took steps to protect dogs in particular, by prescribing the duration and conditions under which they may be restrained outside. See G.L. c. 140, § 174E (requiring, inter alia, that dogs confined outside be provided with clean water and appropriate shelter).

A web of other statutes also regulates human interaction with animals, for example, by prohibiting certain means of putting animals to death; imposing restrictions on railroad corporations that transport animals; and restricting the use of animals in scientific experimentation. See G.L. c. 272, §§ 80E, 80G, *752 81. As part of the 2012 act, the Legislature authorized judges to consider the welfare of household pets

when issuing protective orders; judges "may make a finding, based upon the totality of the circumstances, as to whether there exists an imminent threat of bodily injury to" a pet, and shall notify law enforcement officials if such a finding is made. G.L. c. 209A, § 11. This public policy promoting the humane treatment of animals, as reflected in the statutes of the Commonwealth, "is a basic source of law when no previous decision or rule of law is applicable." *Commonwealth v. Yee*, 361 Mass. 533, 538, 281 N.E.2d 248 (1972).

In light of the public policy in favor of minimizing animal suffering in a wide variety of contexts, permitting warrantless searches to protect nonhuman animal life fits coherently within the existing emergency aid exception to the warrant requirement, intended to facilitate official response to an "immediate need for assistance for the protection of *life* or property" (emphasis supplied). *Commonwealth v. Snell*, *supra* at 774, 705 N.E.2d 236, quoting *Commonwealth v. Bates*, 28 Mass.App.Ct. 217, 219, 548 N.E.2d 889 (1990). It is therefore reasonable "to render aid to relatively vulnerable and helpless animals when faced with people willing or even anxious to mistreat them." *State v. Bauer*, 127 Wis.2d 401, 409, 379 N.W.2d 895 (Ct.App.1985). See *Commonwealth v. Entwistle*, *supra* at 213, 973 N.E.2d 115, quoting *Commonwealth v. Townsend*, 453 Mass. 413, 425, 902 N.E.2d 388 (2009) ("the 'ultimate touchstone' of both the Fourth Amendment and art. 14 is reasonableness").

In addition to promoting life-saving measures, the ability to render such assistance vindicates the legislative framework for preventing cruelty to animals, particularly the provision regulating the conditions under which dogs may be kept outside. See G.L. c. 140, § 174E. Indeed, it would be illogical and inconsistent to permit the prosecution of dog owners for exposing their dogs to conditions that "could injure or kill [them]" in ill-equipped yards, G.L. c. 140, § 174E (*f*) (1), only after the harm to animal life has taken place, while hindering the ability of police proactively to prevent such injury. Furthermore, the inclusion of animals within the ambit of the emergency aid exception enables trained personnel, such as police or animal control officers, to respond to animal emergencies, rather than lay people. In the absence of such trained professionals rendering ***753** care and assistance, untrained citizens may attempt to intervene, potentially causing further harm to the animal, to themselves, or to other members of the community, should an injured animal end up loose on public streets.

We therefore conclude that our prior formulations of the emergency aid exception encompass warrantless searches to protect nonhuman animal life. Thus, under both the Fourth Amendment and art. 14, the exception permits the police in certain circumstances "to enter a home without a warrant when they have an objectively reasonable basis to believe that ****475** there may be [an animal] inside who is injured or in imminent danger of physical harm."[6] *Commonwealth v. Peters*, *supra* at 819, 905 N.E.2d 1111. Accordingly, we answer the reported question in the affirmative.[7]

This conclusion accords with that of courts in other jurisdictions that have considered the issue, including the highest courts of the District of Columbia and Montana, which have held that "needless suffering and death" of animals is an "exigent circumstance[ ] justifying the warrantless search for and rescue of the animals." *State v. Stone*, 321 Mont. 489, 498, 92 P.3d 1178 (2004). Accord *Tuck v. United States*, 477 A.2d 1115, 1120 (D.C.1984). See also *State v. Goulet*, 21 A.3d 302, 311–315 (R.I.2011) (affirming denial of motion to suppress where entry permissibly aimed to preserve life of dog that homeowner threatened to shoot); *Hegarty v. Addison County Humane Soc'y*, 176 Vt. 405, 410, 848 A.2d 1139 (2004), citing *Siebert v. Severino*, 256 F.3d 648, 657 (7th Cir.2001) ("Exigent circumstances are a well-established exception to the warrant requirement, ... even in cases involving the seizure of animals"). Acknowledging that "[s]tandards of decency have evolved," *People v. Chung*, 185 Cal.App.4th 247, 258 n. 4, 110 Cal.Rptr.3d 253 (2010), quoting *Graham v. Florida*, 560 U.S. 48, 85, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Stevens, J., concurring), these courts have recognized ***754** a public interest "in the preservation of life in general and in the prevention of cruelty to animals in particular." *Tuck v. United States*, *supra* at 1120.

The emergency aid doctrine remains a narrow exception to the warrant requirement. Its application to nonhuman animals does not expand the exception or alter the essential framework for determining when a warrantless police search of the home is permissible under it. As in instances involving humans, there must be objectively reasonable grounds to believe that an emergency exists, and police conduct following entry must be reasonable under the circumstances. See *Commonwealth v. Peters*, *supra* at 823, 905 N.E.2d 1111. However, when the exception applies to nonhuman animals, there are additional considerations to be taken into account. When there is an objectively reasonable belief that an emergency exists involving human life, i.e., that a person "is injured or in imminent danger of physical harm," *id.* at 819, 905 N.E.2d

1111, nothing further ordinarily is necessary to justify a warrantless police entry. In contrast, where nonhuman animal life is similarly imperiled, other factors appropriately enter the calculus in determining whether such entry is justified.

One such factor that other courts have looked to is whether the animal's condition was caused by human abuse or neglect. See *Davis v. State*, 907 N.E.2d 1043, 1050 (Ind.Ct.App.2009) ("circumstances of animal cruelty [by humans] may create exigent circumstances to permit a warrantless search of the curtilage"). As against the countervailing norm of privacy within ****476** one's home, there is an especially strong societal interest, suggested by the legislative enactments discussed *supra*, in avoiding injury to animals inflicted by humans; a concern with preventing harm to animals, no matter what the source, does not find the same support. Although true emergencies that do not arise as a result of any human action may befall animals, the threshold for police entry in such situations will be considerably higher.

Other considerations that courts have weighed include the species of the animal in need, *State v. Fessenden*, 258 Or.App. 639, 649, 310 P.3d 1163, review granted, 354 Or. 597, 318 P.3d 749 (2013); the nature of the privacy interest at issue, *DiCesare v. Stout*, U.S.Ct.App., No. 92–7116, 1993 WL 137110 (10th Cir. Apr. 23, 1993); whether any efforts were ***755** made to obtain the consent of the property owner prior to making entry onto the property, *Suss v. American Soc'y for the Prevention of Cruelty to Animals*, 823 F.Supp. 181, 187 (S.D.N.Y.1993); and the extent of the intrusion, including any damage done to the property. *Id.* (warrantless action to save cat unreasonable where, inter alia, exterior building wall was demolished). Inevitably, of course, there will be countless and varied iterations of emergency aid scenarios involving animals, and these factors do not purport to be exhaustive. The reasonableness of the search must be determined on a case-by-case basis upon consideration of the totality of the circumstances.

3. *Conclusion.* For the reasons stated, we answer the reported question in the affirmative. The matter is remanded to the District Court for further proceedings consistent with this opinion.

*So ordered.*

**Parallel Citations**

7 N.E.3d 469

Footnotes

1 We acknowledge the amicus briefs on behalf of the Commonwealth from the Attorney General and the District Attorneys for the Norfolk, Berkshire, Bristol, Hampden, Middle, Northern, Northwestern, Plymouth, and Suffolk Districts; Massachusetts Chiefs of Police Association, Inc.; Animal Control Officers Association of Massachusetts; Animal Legal Defense Fund, Animal Rescue League of Boston, National District Attorneys Association, and Association of Prosecuting Attorneys; Humane Society of the United States and Best Friends Animal Society; and American Society for the Prevention of Cruelty to Animals.

2 Concluding that the status of the emergency aid exception as applied to animals was unclear, the judge made no express finding regarding whether an emergency situation did, in fact, exist on the afternoon in question.

3 Although the emergency aid exception to the warrant requirement is "closely related" to the so-called community caretaking exception, *Commonwealth v. Knowles*, 451 Mass. 91, 96, 883 N.E.2d 941 (2008), the latter has been applied almost exclusively in situations involving searches or seizures of automobiles. See, e.g., *Commonwealth v. Mateo–German*, 453 Mass. 838, 842–843, 906 N.E.2d 970 (2009) (police officer acted pursuant to community caretaking function when he checked on vehicle that had abruptly slowed down on highway and had run out of gasoline); *Commonwealth v. Evans*, 436 Mass. 369, 373, 764 N.E.2d 841 (2002) ("The trooper, as part of his community caretaking responsibilities, appropriately decided to check the status of the vehicle" that was idling in breakdown lane).

4 Exceptions involving other types of exigent circumstances are similarly inapplicable here. For example, this case does not involve the possibility of the imminent destruction of evidence. Cf. *Commonwealth v. Ortiz*, 435 Mass. 569, 574, 760 N.E.2d 282 (2002) ("circumstances justified the warrantless entry and search under the destruction of evidence exigency" where unruly crowd threatened to rush crime scene and undermine its integrity).

5 "Cruelty in this context is '[s]evere pain inflicted upon an animal ... without any justifiable cause.' " *Commonwealth v. Zalesky*, 74 Mass.App.Ct. 908, 909, 906 N.E.2d 349 (2009), quoting *Commonwealth v. Lufkin*, 89 Mass. 579, 7 Allen 579, 581 (1863). It excludes activities involving the killing of an animal for legally sanctioned purposes, such as hunting and food production. See, e.g., G.L. c. 94, §§ 119–125; G.L. c. 131, § 5.

6 Where an animal's condition has been inflicted lawfully, see note 5, *supra*, the emergency aid exception will not apply. Cf. *State v. Fessenden*, 258 Or.App. 639, 649, 310 P.3d 1163, review granted, 354 Or. 597, 318 P.3d 749 (2013).

7 In one rendering, the motion judge had phrased the reported question as "whether the situation presented to the police on January 8th was a 'pure emergency' and, if so, whether an emergency exception to the warrant requirement should be recognized for the protection of animals." We answer only the reported question of law, not the question of fact. See *Commonwealth v. Bankert*, 67 Mass.App.Ct. 118, 120, 852 N.E.2d 132 (2006), citing *Commonwealth v. Giang*, 402 Mass. 604, 608, 524 N.E.2d 383 (1988).

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

LYNN DISTRICT COURT
No. 1113CR1868

COMMONWEALTH

AUG 28 2012

v.

HEATHER M. DUNCAN

FINDINGS OF FACT AND REPORT OF QUESTION OF LAW TO THE APPEALS COURT

## Introduction

This case presents an important, doubtful, and time-sensitive question of public concern regarding whether the "pure emergency" exception to the warrant requirement extends to animals. The question is worthy of report to the Appeals Court pursuant to Mass. R. Crim. P. 34. Although other jurisdictions have extended the exception to animals, no clear guidance exists in Massachusetts appellate case law. Commonwealth v. Hurd, 51 Mass. App. Ct. 12, 18 (2001) ("Even were we to assume, without deciding, that the emergency principle does extend to animals . . . no such exception [was] applied" because no exigent circumstances permitted a warrantless search).

## Background

I. Procedural Posture

On April 19, 2011, a complaint issued in this Court charging the defendant, Heather M. Duncan, for three counts of cruelty to animals (by custodian) (G.L. c. 272, § 77). On March 30, 2012, at the evidentiary hearing on the defendant's motion to suppress observations by the police and a neighbor (as testified-to by the police) and physical evidence that gave rise to the charges, the matter was taken under advisement (Flatley, J.).[1,2] On April 27, 2012, this Court allowed the motion to suppress in a margin endorsement, explaining, "Our courts have not as yet applied the emergency exception to the warrant requirement to animals. Com v. Hurd, 51 Mass. App. 12[;] cf. Com. v. Ericson (sic), 74 Mass. App. 172,[3] entry permissible where it was feared that a human may be in danger inside."

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[1] The recording of the suppression hearing is referred to as "(_:_:_)," denoting the recording time-stamp containing testimony that supports the finding.

[2] At the hearing, the defendant conceded so much of the motion as sought to suppress her statements and their voluntariness (12:31:30; 3:05:40).

[3] Commonwealth v. Erickson, 74 Mass. App. Ct. 172, f.a.r. denied, 454 Mass. 1105 (2009), cert. denied, 130 S. Ct. 1151 (2010).

II. Findings of Fact

At the hearing on the suppression motion, this Court heard testimony from 1) Lynn Police Department Sergeant James Flynn[4], 2) Lynn Police Department Officer Andrew Beaver[5], and 3) the defendant. In addition, the parties introduced photographs and a chalk depicting the defendant's property and surrounding area as exhibits. From the credible, consistent testimony and the other evidence, this Court finds the following facts.

A. The defendant's residence

The defendant, her children, and, at times, her husband, Earl A. Duncan, were the sole occupants of 11 Albany Street, Apt. 2; the apartment includes the second and third floors of the multi-unit building and the first floor was vacant (2:34:55; 2:52:20; 2:52:50). They have been tenants there since October 1, 2005 (2:52:20; 2:55:50; 2:56:38; 2:59:38).

The lot that adjoins the defendant's property to the left had a private parking lot; no public property adjoined the defendant's property (3:01:40; 3:02:38; 3:08:38;

[4] Sgt. Flynn has twenty years of law enforcement experience. In his role as Central Lynn sector sergeant, he oversees route cars in the city, and reviews the work performed by officers on patrol (R. 12:40:15; 12:41:10).

[5] Oficer Beaver has six years of law enforcement experience. He is a night-shift patrolman (R. 2:32:57).

3:09:50). This lot was apparently vacant and accessible, at all relevant points (2:16:05; 3:01:58).

For their part, the Duncans took steps to increase the privacy of their yard and property (2:56:50). For instance, they installed privacy fencing at the perimeter of the entire property, including a padlocked gate which precluded both driveway access from Albany Street and front door access to the home (12:44:25; 12:44:46; 12:49:45; 2:13:30; 2:35:00; 2:40:40; 3:02:55; 3:07:08). The privacy fencing stood approximately six feet tall, and almost completely obstructed views through it by use of plastic strips, tarps, and plywood reinforcements (12:48:15; 2:13:48; 2:15:00; 2:29:35; 3:10:15). In addition, chain link "tops" were constructed above the privacy fencing (2:57:00; 3:10:20). The defendant installed the padlock, to which only she, her landlord, and a neighbor had a key (2:53:10). The padlock's purpose was to protect the privacy and safety of herself, her children, and her dogs (2:53:50). In addition, the Duncans posted signs on the fence and house warning others, including police, to keep out, to beware of the dogs, and to refrain from trespassing (2:13:58; 2:15:35; 2:57:55; 2:59:38).

In the front yard, within the home's curtilage, two doghouses were located along the fence running parallel to

Albany Street, and a third doghouse sat at a 90-degree angle, perpendicular to that fence, abutting the fence at the left of the property (2:16:35; 2:21:15; 2:46:00; 3:00:45). The entrance to each doghouse faced the yard (2:21:15; 2:45:30). From the vantage point of Albany Street, the doghouses were in the yard's left corner, behind the fence (2:16:35; 2:16:58; 2:45:30).

B. The first observation of the dogs by police

On January 2, 2011, the defendant used her cell phone to call the Lynn Police Department from just outside her yard (3:04:45). She had not slept at her home for approximately two weeks because she was waiting for a restraining/vacate order to be served on her husband on her behalf; she had apparently previously told him to remove his belongings, including the dogs (12:42:00; 2:54:00; 2:54:40; 3:04:45; 3:07:40).

Sergeant Flynn and other officers responded to the call and met the defendant to serve the order on her husband (12:41:30; 12:42:19; 3:04:45). The defendant used her key to enter the padlocked gate and when Mr. Duncan did not answer the front door, she gave the officers permission to force entry into the home (12:42:20; 12:52:50; 2:27:38; 3:06:35). The officers checked the home to ensure Mr. Duncan was not present (12:42:35). At that time, Sgt.

Flynn noticed dogs in the yard that he described as emaciated and in need of help; when he asked the defendant whose they were, she told him they were the Duncans' dogs (12:43:42; 12:42:45; 3:05:07). According to Sgt. Flynn, the dogs "appeared to be in some type of harm; they didn't appear to be healthy, so I asked her if she was going to be taking care of the dogs and she told me that she was" (12:43:30). He did not closely inspect the dogs, but noted that they were in bad shape (12:52:28). In his capacity as officer-in-charge, and because the officers had forced entry into the home, he asked the responding officer to write a report (12:50:35; 12:53:45). That report did not mention the dogs and no animal control officer was contacted (12:51:30; 12:53:50; 12:54:40).

C. The observation and seizure of two deceased dogs and one live dog by the police

Six days later, on January 8, 2011, Ofc. Beaver and another officer responded to the defendant's home at approximately 3:15 p.m. due to a report of two deceased dogs and a third emaciated dog on the property (2:33:15; 2:48:40). It had been snowing off and on the previous week such that the ground was covered in snow, and the weather was bleak, snowy, and freezing (12:47:34; 12:48:00; 2:15:40; 2:19:55; 2:35:40; 2:39:35; 3:10:50).

The caller, Tracy Mondello, was present when the officers arrived and she identified herself as the defendant's friend; she said she had gone to the home to retrieve a borrowed snow shovel (2:34:00; 2:36:30). When no one responded and she heard a dog barking, she looked through or over the privacy fence (2:36:30; 2:43:05). In the yard, she saw what she knew to be the defendant's dogs -- two were apparently deceased (2:36:30). As she related this information to the officers, she seemed concerned for the safety of the third, live dog (2:36:50).

Officer Beaver heard a dog whimpering and very hoarsely and weakly barking as if it had almost lost its voice, noting that it sounded like an animal in distress (12:48:50; 2:34:40; 2:42:30). While the privacy fence allowed them a limited view of the yard from Albany Street, the officers also stepped onto a snowbank approximately three to four feet high in the adjoining parking lot that abutted the fence on the left side of the yard to look over the fence (12:46:58; 12:48:30; 2:16:20; 2:29:10; 2:34:20; 2:44:20). The officers saw two motionless dogs that appeared frozen, leashed to the fence, and partially in and outside of their respective doghouses (12:48:10; 2:31:05; 2:35:30; 2:35:58; 2:46:30; 2:48:30). A third, live dog was leashed, emaciated, and barking (2:35:30; 2:39:25;

2:40:30). Officer Beaver detected no odor, explaining that the weather was freezing (2:47:15). He could not discern whether water or food was present (12:48:15; 2:36:10).

The padlocked gate prevented the officers from knocking on the front door to inquire about the dogs' condition (12:49:38). Instead, the officers tried to alert the occupant of the home by siren, air horn, and emergency lights on the police cruiser to no avail (2:37:15; 2:40:40). In addition, Sgt. Flynn directed an officer at the station to use the local water and sewer directory in an effort to reach the registered owner of the property; this effort was also unsuccessful (12:49:09). At some point, Sgt. Flynn told Ofc. Beaver that he had previously been to the property with the defendant, and that she told him she would take care of the dogs (2:29:55).

Pursuant to a police protocol for handling animal emergencies, Sgt. Flynn authorized the officers to contact the Lynn Fire Department to remove the padlock and enter the yard (12:46:28; 12:49:15; 2:40:50; 2:50:50). The Fire Department used bolt cutters to remove the lock (2:23:50; 2:41:20). Officer Beaver contacted the sergeant and fire department because two dogs were dead, the weather was extremely inclement, and the third dog was near death, emaciated, and in distress (2:41:30). To Sgt. Flynn, the

live dog "didn't sound healthy, and it sounded like it needed our help"; it appeared to be "an exigent circumstance" requiring the breaking of the padlock (12:49:00; 2:30:30).

Sergeant Flynn, Ofc. Beaver, and another officer entered the yard, walked down the driveway approximately thirty feet, and saw the dogs in the yard to the left (2:24:22; 2:40:50). They were authorized to contact an Animal Control Officer (12:50:10; 2:50:50). Two of the dogs were deceased and the third, live dog was extremely emaciated, its ribs were visible, and it was cold and in need of help (12:50:10; 2:25:35, 2:50:25). It was aggressive and scared before the police entered, and once they entered, it became gun-shy and retreated into its doghouse (2:50:25). The Animal Control Officer took custody of the three dogs and the officers cleared the area at approximately 4:56 p.m. (12:50:15; 2:27:10; 2:42:00; 2:48:40; 2:50:50).

The limited observations of the yard through the fence and the sound of a dog in distress were plain view observations made from a place in which the police had a right to be, namely, Albany Street.[6] The confirmatory

[6] Based on the evidence presented at the hearing, the police had probable cause to believe that the crime of

observations from the snowbank in the adjoining parking lot also constituted plain view observations not implicating Fourth Amendment or art. 14 rights. The defendant had no standing to object to the mounting of a snowbank on the property of the adjoining property owner.

## Discussion

The "pure emergency" exception to the warrant requirement applies when

> "The purpose of the police entry is not to gather evidence of criminal activity but rather, because of an emergency, to respond to an immediate need for assistance for the protection of life or property. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'"

Commonwealth v. Snell, 428 Mass. 766, 776 n. 7 (1999) (citation omitted). This case involves no reasonable belief of imminent loss of human life, although the defendant's property (the dogs) was in need of protection.

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animal cruelty had been committed. Arguably, the police may well have had probable cause on January 2, 2011 when Sgt. Flynn first observed the dogs in bad condition, noting that one of them "may" have been dead already. See M.G.L. c. 272 s 81. s 83. It is regrettable that Animal Control was not alerted and that the police did nothing for six days. The police inaction on January 2nd was based on the representation by the defendant that she would take care of the dogs. Nevertheless, the situation on January 8, 2012 appeared graver. The question raised in this report is whether the situation presented to the police on January 8th was a "pure emergency" and, if so, whether an emergency exception to the warrant requirement should be recognized for the protection of animals.

Nevertheless, this case differs from Erickson, where warrantless entry of the defendant's apartment was justified under the emergency exception due to the officer's reasonable belief that a human tenant could have been deceased, dying, or injured inside the apartment. 74 Mass. App. Ct. at 175.

In 2001, the Appeals Court acknowledged that other jurisdictions have included animals within the emergency exception. Hurd, 51 Mass. App. Ct. at 18 & n. 2. In the decade since then, the number of jurisdictions extending the exception has increased. See 3 LaFave, Search & Seizure § 6.6(b), n. 60, at 470 (4th ed. 2004) (collecting cases);[7] see also J.A. Grasso & C.M. McEvoy, Suppression

[7] Warrantless entry to protect property, i.e., animals, from an occupant has been justified under the Fourth Amendment and, in some cases, as a matter of policy. Siebert v. Severino, 256 F.3d 648, 657 (7th Cir. 2001) ("Exigent circumstances may justify a warrantless seizure of animals"); Tuck v. United States, 477 A.2d 1115, 1120 (D.C. Cir. 1984) (warrantless search of pet shop justified where "exigency . . . involved the protection of animal life"); Suss v. American Soc. for the Prevention of Cruelty to Animals, 823 F. Supp. 181, 187 (S.D.N.Y. 1993) ("[r]eal immediacy may allow emergency entries to preserve animal life that is threatened because of cruelty"); People v. Chung, 185 Cal. App. 4th 247, 260 (2010), rev. dismissed, cause remanded, 250 P.3d 179 (2011) (exigent circumstances existed allowing officers to enter defendant's condominium, without warrant and despite defendant's refusal of consent, in order to check on welfare of live dog officers reasonably believed to be in distress within); State v. DeMarco, 124 Conn. App. 438, 450-51 (2010) ("We need not answer the question [of whether emergency doctrine extends

Matters Under Massachusetts Law § 14-1[c][3][vi] at 14-15 (2009-2010) ("Although some other jurisdictions have extended the emergency principle to animals, Massachusetts has not yet decided the point."). The issue is squarely presented in this case. Contrast Commonwealth v. Erickson, 64 Mass. App. Ct. 1106 (2005) (Rule 1:28 decision) (Court considered a search, pursuant to a warrant, for the seizure and protection of live and deceased animals).

The question presented by this suppression motion is so important and doubtful as to require the decision of the Appeals Court. Because a decision by this Court prior to report under Rule 34 is advisable, the suppression motion

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to situations in which animals are perceived by the police to be in immediate danger] in this case, however, because the court did not find that the police acted on the belief that the dogs were in peril; nor did the court base its decision on any threat to the well-being of the dogs."), rev. allowed, 300 Conn. 902 (decision pending); People v. Thornton, 286 Ill. App. 3d, 624, 630 (1997) (totality of circumstances justified warrantless entry to rescue dog); State v. Stone, 321 Mont. 489, 496, 498 (2004) ("With the knowledge that a neighborhood boy who had previously worked for Stone had seen dead and dying rabbits on Stone's property," warrantless search there "was justified given the unrefuted imminent threat to the lives and well-being of the animals"); Hegarty v. Addison Co. Humane Soc'y, 176 Vt. 405, 409 (2004) (warrantless entry and seizure of horse Paka lawful where humane officer "reasonably believed that Paka's health was in jeopardy and that immediate action was required to protect her"); State v. Bauer, 127 Wis.2d 401, 409 (1985) (upon determination that horse on defendant's farm had died of starvation, search of barn for other horses justified under "state policy to render aid to relatively vulnerable and helpless animals when faced with people willing or even anxious to mistreat them").

was allowed based on existing case law. Interlocutory review is preferable because the ruling appears to be dispositive of the underlying case.

## The Reported Question

This Court, therefore, reports the following question to the Appeals Court pursuant to Rule 34:

Does the "pure emergency" exception to the warrant requirement extend to animals?

As the aggrieved party, the Commonwealth is designated as the appellant.

Ellen Flatley
Associate Justice
of the District Court

Dated: August 2, 2012

**Supreme Judicial Court for the Commonwealth of Massachusetts**
**John Adams Courthouse**
**One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724**
**Telephone 617-557-1020, Fax 617-557-1145**

Travis J. Jacobs, Esquire
101 Tremont Street
Suite 712
Boston, MA 02108

RE: No. SJC-11373

**COMMONWEALTH**
**vs.**
**HEATHER M. DUNCAN**

O R D E R

It is hereby Ordered that oral argument in this case be held on December 3, 2013, at 9:00 a.m. in the **John Adams Courthouse, Courtroom 1, 2nd Floor, One Pemberton Square, Boston, Massachusetts.**

ENTERED: October 18, 2013 By the Court,

Jane Kenworthy Lewis, Acting Clerk

Counsel should refer to MRAP Rule 22 regarding time allotment for arguments. There will be no rescheduling of the argument unless by order of the Court upon a written motion detailing extreme circumstances. Should counsel not appear, the case will be deemed submitted on brief.

IF THIS CASE HAS RECEIVED AN ORDER PLACING IT ON A RESERVE LIST FOR THE PRIOR MONTH, THIS ORDER DOES NOT RELIEVE THE CASE OF RESERVE STATUS.
**PLEASE PROMPTLY ACKNOWLEDGE RECEIPT OF THIS ORDER BY RETURN MAIL OR FAX (617-557-1145) AND CONFIRM WHETHER NAMED COUNSEL WILL OR WILL NOT PRESENT ORAL ARGUMENT. INDICATE DIVISION OF TIME AND ORDER OF ARGUMENT AS APPROPRIATE .**

Be advised that arguments are public proceedings; in addition, arguments are broadcast on the internet and are archived for public viewing.

To: Paul Wagoner, A.D.A.
Travis J. Jacobs, Esquire
Virginia F. Coleman, Esquire
Tracey A. Cusick, A.D.A.
Martha Coakley, Attorney General
David F. Capeless, District Attorney
C. Samuel Sutter, District Attorney
Mark G. Mastroianni, District Attorney
Joseph D. Early, Jr., District Attorney
Marian T. Ryan, District Attorney

David E. Sullivan, District Attorney
Timothy J. Cruz, District Attorney
Daniel Conley, District Attorney
John M. Collins, Esquire
Carolyn Van Tine, Esquire
Michael G. Bongiorno, Esquire
Kate M. Fitzpatrick, Esquire
Jonathan R. Lovvorn, Esquire
Elise VanKavage, Esquire

## CONSTITUTIONAL PROVISIONS

### The First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### The Fourth Amendment to the U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## FEDERAL LAW

### 18 U.S.C. § 48.
### Animal Crush Videos

**(a) Definition.**--In this section the term "animal crush video" means any photograph, motion-picture film, video or digital recording, or electronic image that--

**(1)** depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242); and

**(2)** is obscene.

**(b) Prohibitions.–**

**(1) Creation of animal crush videos.**--It shall be unlawful for any person to knowingly create an animal crush video, if--

**(A)** the person intends or has reason to know that the animal crush video will be distributed in, or using a means or facility of, interstate or foreign commerce; or

**(B)** the animal crush video is distributed in, or using a means or facility of, interstate or foreign commerce.

**(2) Distribution of animal crush videos.**--It shall be unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an

animal crush video in, or using a means or facility of, interstate or foreign commerce.

**(c) Extraterritorial application.**--Subsection (b) shall apply to the knowing sale, marketing, advertising, exchange, distribution, or creation of an animal crush video outside of the United States, if--

**(1)** the person engaging in such conduct intends or has reason to know that the animal crush video will be transported into the United States or its territories or possessions; or

**(2)** the animal crush video is transported into the United States or its territories or possessions.

**(d) Penalty.**--Any person who violates subsection (b) shall be fined under this title, imprisoned for not more than 7 years, or both.

**(e) Exceptions.–**

**(1) In general.**--This section shall not apply with regard to any visual depiction of--

**(A)** customary and normal veterinary or agricultural husbandry practices;

**(B)** the slaughter of animals for food; or

**(C)** hunting, trapping, or fishing.

**(2) Good-faith distribution.**--This section shall not apply to the good-faith distribution of an animal crush video to--

**(A)** a law enforcement agency; or

**(B)** a third party for the sole purpose of analysis to determine if referral to a law enforcement agency is appropriate.

**(f) No preemption.**--Nothing in this section shall be construed to preempt the law of any State or local subdivision thereof to protect animals.

## MASSACHUSETTS GENERAL LAWS

### c. 272, § 77.
### Cruelty to animals; prohibition from work involving contract with animals.

Whoever overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates or kills an animal, or causes or procures an animal to be overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated or killed; and whoever uses in a cruel or inhuman manner in a race, game, or contest, or in training therefor, as lure or bait a live animal, except an animal if used as lure or bait in fishing; and whoever, having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary cruelty upon it, or unnecessarily fails to provide it with proper food, drink, shelter, sanitary environment, or

protection from the weather, and whoever, as owner, possessor, or person having the charge or custody of an animal, cruelly drives or works it when unfit for labor, or willfully abandons it, or carries it or causes it to be carried in or upon a vehicle, or otherwise, in an unnecessarily cruel or inhuman manner or in a way and manner which might endanger the animal carried thereon, or knowingly and willfully authorizes or permits it to be subjected to unnecessary torture, suffering or cruelty of any kind shall be punished by imprisonment in the state prison for not more than 5 years or imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than $2,500, or by both such fine and imprisonment.

In addition to any other penalty provided by law, upon conviction for any violation of this section or of sections seventy-seven A, seventy-eight, seventy-eight A, seventy-nine A, seventy-nine B, eighty A, eighty B, eighty C, eighty D, eighty F, eighty-six, eighty-six A, eighty-six B or ninety-four the defendant shall forfeit to the custody of any society, incorporated under the laws of the commonwealth for the prevention of cruelty to animals or for the care and protection of homeless or suffering animals, the animal whose treatment was the basis of such conviction.

A person convicted of a crime of cruelty to an animal shall be prohibited from working in any capacity that requires such person to be in contact with an animal, including a commercial boarding or training establishment, shelter, animal control facility, pet shop, grooming facility, commercial breeder service, veterinary hospital or clinic or animal welfare society or other nonprofit organization incorporated for the purpose of providing for and promoting the welfare, protection and humane treatment of animals.

## COURT RULES

### Massachusetts Rules of Criminal Procedure 34: Report

If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

COMMONWEALTH OF MASSACHUSETTS

LYNN DISTRICT COURT
DOCKET NUMBER 1113CR1868

COMMONWEALTH

V

HEATHER DUNCAN

MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS AND INFORMATION OBTAINED PURSUANT TO ILLEGAL POLICE ACTIONS

The defendant requests that the Court suppress all evidence obtained during the illegal entry and search of 11 Albany Street, Lynn, Massachusetts and statements made by Ms. Duncan in response to police questioning, while she was illegally detained.

On January 8 2010, without a warrant or legal cause, members of the Lynn Police Department and agents from other police agencies cut a padlock and entered the premises at 11 Albany Street. On other occasions Ms Duncan was detained and interviewed and not given her Miranda warnings. Statements by Ms. Duncan were not voluntarily given

Wherefore, the defendant states the evidence was obtained in violation of her rights as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and Articles Twelve and Fourteen of the Massachusetts Declaration of Rights and M.G.L. c.276, s.1.

Respectfully submitted

February 3, 2012

By her attorney,

Christopher Burke
BBO# 064757
45 Franklin Street
Lynn, MA 01902

FILED
LYNN DISTRICT COURT
2012 FEB -3 A 10:05

4/27/12 After hearing, Allowed
Our courts have not as yet applied the emergency exception to the warrant requirement to animals.
Com v. Hurd, 51 Mass App 12
cf Com v. Ericson, 74 Mass. App. 172, entry permissible where it was feared that a human may be in danger inside.
Gratley, J



APR. 30. 2012 3:06PM JON BLODGETT NO. 9963 P. 2

No. _____

**In The**
**SUPREME COURT OF THE UNITED STATES**

HEATHER M. DUNCAN,

*Petitioner*,

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent*.

**On Petition For A Writ Of Certiorari**
**To The Massachusetts Supreme Judicial Court**

## CERTIFICATE OF SERVICE

I, Travis J. Jacobs, Esq., a member of the bar of this Court, certify that on July 10, 2014, a copy of the Petition for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis (with attached affidavit) in the above-entitled case, and a copy of this Certificate, were mailed first-class, postage prepaid, to: Paul C. Wagoner, Assistant District Attorney, Ten Federal Street, Salem, Massachusetts 01970. I further certify all parties required to be served have been served.

Travis J. Jacobs, Esq.
*Counsel of Record for Petitioner*
The Jacobs Law, LLC
36 Bromfield Street, Suite 502
Boston, MA 02108
(800) 652-4783
TJacobs@TheJacobsLaw.com

No. _____

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COMMONWEALTH OF MASSACHUSETTS,

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**On Petition For A Writ Of Certiorari**
**To The Massachusetts Supreme Judicial Court**

**CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS**

I Travis J. Jacobs, Esq., counsel for the petitioner and member of the Bar of this Court, certify that the Petition for Writ of Certiorari in the above-entitled case contains 7,084 words, excluding the parts of the Petition that are exempted under Rule 33.1(d).

July 10, 2014

Travis J. Jacobs, Esq.
*Counsel of Record for Petitioner*
The Jacobs Law, LLC
36 Bromfield Street, Suite 502
Boston, MA 02108
(800) 652-4783
TJacobs@TheJacobsLaw.com