2d Civil No. B297096
LASC Case No. BS170967

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 1

FRANCISCO MARTINEZ,
Petitioner and Appellant,

v.

CITY OF LOS ANGELES DEPARTMENT OF ANIMAL SERVICES et al.,
Respondents.

On Appeal from Los Angeles Superior Court,
Hon. Mary Strobel, Judge Presiding

APPLICATION BY THE CENTER FOR ANIMAL LITIGATION, INC. TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208(e)(2), *amicus curiae* The Center for Animal Litigation, Inc., while not a party but to the best of its knowledge, is not aware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the issue of disqualification under Canon 3E of the Code of Judicial Ethics.

Dated: April 23, 2020

Thompson Gould Page
Appellate counsel for *amicus curiae*
The Center for Animal Litigation, Inc.

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPPEAL, SECOND DISTRICT, DIVISION ONE:

Pursuant to Rule 8.200(c) of the California Rules of Court, *amicus curiae* The Center for Animal Litigation, Inc. ("Center") hereby applies for permission to file its proposed amicus curiae brief in support of appellant Francisco Martinez.[1]

I. The Amicus Curiae

Laws affecting companion animals and their owners, by and large, were written in the early to mid-1900's. The status of "pets" has since grown immensely, but the laws regarding them throughout the country remain vastly the same. They have not kept pace with people's burgeoning sensitivity toward the animals they share their lives with. As a result, companion animal owners are often denied basic rights and protections, those they would expect concerning such cherished property, especially when the permanent destruction of these animals is at stake.

The founders established the not-for-profit *Center for Animal Litigation* to support and bring legal challenges to address this predicament, and over the past nine years have done so in twenty states, including before the Maine and Nevada Supreme Courts, various state appellate courts and in nine federal district courts. The Center applies established principles of property, trust, constitutional and other legal jurisprudence to not only save these animals' lives, but in so doing to incrementally advance the

[1] Quinnipiac University School of Law students Emily C. Barigye and Julie P. Jaquays contributed significantly to the research, drafting and editing of this brief. Co-founder of the Center for Animal Litigation, Attorney Richard B. Rosenthal, provided immeasurable theory development and guidance.

recognition and expansion of fundamental rights for companion animals and their owners. It does this mostly through dangerous dog proceedings such as the instant matter before the Court, in this rapidly changing legal paradigm.

The Center's objectives are foremost to protect the interests of these animals, who are often facing death. Secondarily, the Center's purpose is to advance the rights of animals through the development of laws and doctrines which will provide them with their own unique status within and beyond the well-settled doctrines of property law.

The Center provides a centralized source of resources, litigation strategy management and educational assistance to expand the quantity and quality of representation by attorneys engaged in these matters. The Center also provides minimal funding for the out-of-pocket expenses of attorneys who take on these matters on a pro bono basis.

II. Interest of the Amicus Curiae

As noted above, the Amicus Curiae's interest in the present matter arises from its mission to establish and develop fundamental rights not fully afforded dogs and their owners, such as the protections concerning trespass, and by rational extension, provocation, which are clearly established in Los Angeles County Ordinance § 10.37.170(A). The issue of whether a dog was provoked or not as a defense to a dangerous dog determination is common, bordering on standard, in local and state laws throughout the country, including the Los Angeles Municipal Code § 53.34.4. The municipal ordinance includes a provision that the "presence or absence of any provocation for the bite, attack or injury" shall be considered in determining whether a dog is to be deemed dangerous, and thus subject to government destruction. Nothing can be more basic to the rights of a dog than the right to its own existence.

However, the legal concepts of provocation and to a large extent trespass, while prevalent in the current laws on dangerous dogs at issue and throughout California, lack the support of a clear and meaningful jurisprudence to establish a reasonable standard for interpreting and enforcing these statutory components. In addition, the fundamental premise that provocation must be determined from the perspective of the dog and the reasonableness of its response, and not from the victim's perspective, has not been substantiated in the laws of this state. Without this, arbitrary and conclusory determinations on whether and how a dog's bite was provoked or not, exist and will continue to place such animals at fatal risk. Thus, the development of a rule of general applicability regarding what constitutes adequate provocation in these matters is also a paramount interest of the Amicus Curiae.

III. The Brief's Assistance to the Court

The proposed amicus curiae brief will assist the Court in deciding the instant matter by providing relevant caselaw and perspectives for review and guidance from other jurisdictions which have adopted rules of general applicability regarding what constitutes adequate provocation. The Court should consider the need for appropriate and necessary standards supporting such rules in order to establish a clear understanding of the law to benefit the dog and non-dog owning constituents of California, as well as the dogs themselves.

Given the importance of these issues, the Center respectfully submits herewith its Amicus Curiae brief for this Honorable Court's consideration

Dated: April 23, 2020

Thompson Gould Page
Appellate counsel for *amicus curiae*
The Center for Animal Litigation, Inc.

Amicus Curiae hereby certifies under the provisions of California Rules of Court, Rule 8.200(c)(3)(A), that no party or counsel for any party authored the proposed brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. Amicus Curiae further certifies under Rule 8.200(c)(3)(B), that no person or entity other than amicus curiae or its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

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I. Introduction

"Just as beauty lies in the eyes of the beholder, perception of harm also lies in the eyes of the beholder."

> V.K. Kool, *Psychology of Nonviolence and* Aggression (November 7, 2007).

Petitioner's two dogs bit and injured a stranger employed by the U.S. Census who came onto their owner's pedestrian gate-locked and fenced property. The dogs were subsequently determined to be dangerous and ordered to be killed, despite a relevant county ordinance the Superior Court erroneously declined to apply, which provides a defense to such determinations if the injured person was a willful trespasser onto the dog owner's property.

Los Angeles County Ordinance § 10.37.170(A) expressly provides such an applicable exception to the dangerous dog determinations issued in the instant matter pursuant to Los Angeles Municipal Code § 53.34.4. It provides a consistent and rational finding, when coupled with the Los Angeles municipal dangerous dog ordinance, with the more developed jurisprudence throughout the country regarding the elements of provocation and trespass as provocation in determining whether dogs are to be deemed dangerous and subject to destruction.

Specifically, such jurisprudence establishes that whether the defense of provocation exists must be determined from the perspective of the dog and the reasonableness of its response. This rule of general applicability regarding what constitutes adequate provocation, and therefore whether a dog is properly declared dangerous, should be adopted by the Court to give consistency and clarity to the law.

II. Los Angeles County Ordinance § 10.37.170(A), which should have been given effect because it is applicable and does not conflict with Los Angeles Municipal Code § 53.34.4, bars the Superior Court's dangerous dog determinations because Chin willfully trespassed onto Mr. Martinez's property.

The Superior Court improperly declared Mr. Martinez's dogs, Sophy and Nana, dangerous animals pursuant to Los Angeles Municipal Code ("Municipal Code") § 53.34.4. Los Angeles County Ordinance ("County Ordinance") § 10.37.170 should have also been given effect because the county ordinance is applicable and is not in conflict with the city ordinance. *See Cty of Los Angeles by Gish v. Eikenberry*, 131 Cal. 461, 465 (1901). Had the exception provided under County Ordinance § 10.37.170(A) been appropriately applied, Sophy and Nana could not have been declared dangerous by virtue of Chin's willful trespass, tortious conduct which precludes a dangerous dog determination. *See* Los Angeles, California, County Ordinance § 10.37.170(A). Accordingly, the Amicus Curiae respectfully asks this court to recognize the relevancy of County Ordinance § 10.37.170(A), and, upon applying that ordinance, to determine that Chin's willful trespass barred the Superior Court from declaring Sophy and Nana dangerous dogs.

b. The trespass exception under Los Angeles County Ordinance § 10.37.170(A) is applicable and is not in conflict with Los Angeles Municipal Code § 53.34.4.

The Superior Court erred in failing to give effect to County Ordinance § 10.37.170(A). Although the present dangerous dog determinations were made based on the factors listed under Municipal Code § 53.34.4(c), the Superior Court should have looked to the county ordinance because it is applicable and does not conflict with the city law. *See* Clerk's Transcript ("CT") 1:217-1:218.

"The [California] constitution . . . authorized the creation of . . . municipalities within the boundaries of the several counties, and has given to such municipalities the same power of legislation upon these enumerated subjects as is conferred upon the counties themselves; and the power thus conferred by the constitution is to be construed, if possible, in such a way as to give full effect to its exercise by *each of the designated bodies.*" *Eikenberry*, 131 Cal. at 465 (citation omitted) (emphasis added). A county may promulgate and enforce local, police, sanitary, and other regulations so long as the county ordinance does not conflict with city law. *See, e.g., Great Western Shows v. Cty of Los Angeles*, 27 Cal. 4th 853, 858 (2002) (county may regulate the sale of firearms on its property located in a city when the county ordinance is not in conflict with the city ordinance). If a conflict exists between a county and city ordinance, the city ordinance within its jurisdiction is controlling. *Id.* at 465. There can be no conflict, however, where it is reasonably feasible to comply with both the county and city ordinances. *See City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743 (2013) (defining what constitutes a conflict in the context of state preemption). When ordinances do not conflict, "[e]very intendment is to be indulged in favor of [the] validity [of each], and all doubts resolved in a way to uphold the lawmaking power . . . ." *See Eikenberry*, 131 Cal. at 466-67 (quoting *Ex parte Haskell*, 112 Cal. 416, 416 (1896)).

Both a county and city ordinance must be given effect when no conflict is posed by the levying of a separate tax, in differing amounts, by each governmental entity on the same "retail liquor establishment." *See Eikenberry*, 131 Cal. at 464, 465-66. In *County of Los Angeles by Gish v. Eikenberry*, the County Government Act of 1893 was challenged as unconstitutional because it allowed the county to transcend its limited jurisdiction over unincorporated areas of the county "to license all kinds of

business for the purpose of regulation and revenue in incorporated cities . . . ." *Id.* at 464. Based on its prior case law, the California Supreme Court reasoned that the double tax imposed on liquor businesses at the county and city levels did not give rise to a conflict. *Id.* at 465-66 (citing *In re Lawrence*, 69 Cal. 608 (1886); *Ex parte Mansfield*, 106 Cal. 400 (1895)). The *Eikenberry* court, heeding California's constitutional mandate "to give full effect" to the regulations enacted by both county and city legislatures when no conflict exists, held that the defendant was lawfully subject to Los Angeles county and city taxes. *See Eikenberry*, 131 Cal. at 465-66.

i. County Ordinance § 10.37.170(A) is applicable because its willful trespass exception fits within the pertinent factors listed under Municipal Code § 53.34.4(c).

The exception under County Ordinance § 10.37.170(A) should have governed the instant case, together with Municipal Code § 53.34.4(c), because the County Ordinance is applicable. County Ordinance § 10.04.070 defines the jurisdictional confines of Title 10: "Title 10 of the Los Angeles County Code is enforced in all unincorporated areas of the County of Los Angeles. Title 10, or portions of Title 10, will be enforced in contract cities as applicable." Los Angeles, California, County Ordinance § 10.04.070. The applicability of Title 10 thus does not center on whether the Petitioner is challenging actions taken by the County Animal Control Department as Judge Strobel of the Superior Court suggested, but rather whether Mr. Martinez is potentially subject to that Title, or portions therein, as a resident of the City of Los Angeles. *See id.*; CT 1:220. The Amicus does not dispute that Mr. Martinez resides within the incorporated limits of the City of Los Angeles. The City of Los Angeles is a contract city,[2] however, and as such,

[2] *Member Cities*, CALIFORNIA CONTRACT CITIES ASSOCIATION, https://www.contractcities.org/about/member-cities/ (last visited Apr. 20, 2020).

Title 10, or portions of Title 10, may have legal force when applicable. The Amicus urges this court to recognize the applicability of County Ordinance § 10.37.170(A) to the instant case, which provides that a dog may not be declared potentially dangerous if "the injury or damage is sustained by a person who, at the time the injury was sustained, was committing a willful trespass . . . upon the premises occupied by the owner . . . of the dog . . . ." Los Angeles, California, County Ordinance § 10.37.170(A). The Superior Court looked only to Municipal Code § 53.34.4(c), which offers no exceptions to a dangerous dog declaration, instead listing a number of factors that a court must consider when determining whether or not a dog is dangerous, one of which requires courts to evaluate evidence of "[t]he presence or absence of any provocation for the bite, attack or injury."[3] *See*

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[3] To determine whether or not a dog is dangerous, L.A. Municipal Code requires courts to evaluate evidence of:

> 1. Any previous history of the dog or other animal attacking, biting or causing injury to a human being or other animal; 2. The nature and extent of injuries inflicted and the number of victims involved; 3. The place where the bite, attack or injury occurred; 4. The presence or absence of any provocation for the bite, attack or injury; 5. The extent to which property has been damaged or destroyed; 6. Whether the dog or other animal exhibits any characteristics of being trained for fighting or attack or other evidence to show such training or fighting; 7. Whether the dog or other animal exhibits characteristics of aggressive or unpredictable temperament or behavior in the presence of human beings or dogs or other animals; 8. Whether the dog or other animal can be effectively trained or retrained to change its temperament or behavior; 9. The manner in which the dog or other animal has been maintained by its owner or custodian; 10. Any other relevant evidence concerning the maintenance of the dog or other animal; 11. Any other relevant evidence regarding the ability of the owner or custodian, or the Department, to protect the public safety in the future if the dog or other animal is permitted to remain in the City.

Los Angeles, California, Municipal Code § 53.34.4(c).

CT 1:211, 1:216-1:217. County Ordinance § 10.37.170(A) is applicable to the instant case because, as Part II of this Amicus Brief contends, Chin's willful trespass onto Mr. Martinez's property constituted provocation; therefore, County Ordinance § 10.37.170(A)'s willful trespass exception fits within Municipal Code § 53.34.4(c)'s requirement that evidence of provocation be examined. *See* Appellant's Motion to Augment the Record ("MTA"), Exhibit F: 129-130.

ii. The Superior Court should have given effect to County Ordinance § 10.37.170(A) because its willful trespass exception is not in conflict with the factors listed under Municipal Code § 53.34.4(c).

County Ordinance § 10.37.170(A) should have been given effect because it does not conflict with Municipal Code § 53.34.4(c). In *Eikenberry*, absent prior case law permitting double taxation on liquor businesses, it would appear the county and city ordinances were in conflict because of their overlap – that is, both ordinances regulated the same activity. *See Eikenberry*, 131 Cal. at 465. In the instant case, the want of prior case law speaking to a lack of conflict between County Ordinance § 10.37.170(A) and Municipal Code § 53.34.4(c) is immaterial because the ordinances do not substantively overlap. *See* Los Angeles, California, County Ordinance § 10.37.170(A); Los Angeles, California, Municipal Code § 53.34.4(c). In other words, it is possible for a court to enforce both ordinances in the instant case; a court can consider evidence relating to the factors listed under Municipal Code § 53.34.4(c), while refusing to declare a dog potentially dangerous when the person injured committed a willful trespass as provided under County Ordinance § 10.37.170(A). *See id.*; Los Angeles, California, County Ordinance § 10.37.170(A). Therefore, the Superior Court should have examined whether or not Chin committed a willful trespass before declaring Mr. Martinez's dogs dangerous animals.

c. Mr. Martinez's dogs should not have been deemed dangerous animals because Chin's entry onto his property constituted a willful trespass under County Ordinance §10.37.170(A).

Chin's conduct in entering Mr. Martinez's property constituted a willful trespass within the meaning of County Ordinance § 10.37.170(A) because Chin was neither an invitee nor a licensee, and even if Chin had an implied license, that implied license was revoked based on her unreasonable entry. *See* MTA Exhibit F:129-130.

A dog within the jurisdiction of Los Angeles County may not be declared potentially dangerous if the injured person willfully trespassed onto the dog owner's property. Los Angeles, California, County Ordinance § 10.37.170(A). Trespass, an "'unauthorized entry' onto the land of another," is considered to be an intentional tort notwithstanding the actor's motivation; the actor's intent need only to have been to enter the property in question. *Hollywood v. Superior Court*, 99 Cal. App. 4th 1244, 1252 (2002); *Miller v. Nat'l Broad. Co.*, 187 Cal. App. 3d 1463, 1480 (1986). One's status as an express or implied invitee or licensee, however, prohibits a finding of willful trespass. *See Stroop v. Day*, 896 P.2d 439, 442-43 (1995). "A duty or authority imposed or created by legislative enactment carries with it [an express or implied license] to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise . . . ." Restatement (Second) of Torts § 211 (1965).[4] Even if an actor has an implied license to enter the property of

[4] *See* Restatement (Second) of Torts § 211 cmt. c (1965) (The privilege of entry to perform a duty may be explicit, "as where an employee of a public utility is in terms authorized to enter upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain," or may "arise by implication," such as "where a city official is by statute charged with the duty of preparing a map of the

another, that implied license may be revoked under certain circumstances. *See, e.g., People v. Camacho*, 23 Cal. 4th 824, 828 (2000) (fences, gates, or shrubbery indicate that entry is forbidden and thus may be sufficient to revoke an implied license).

i. Chin committed a willful trespass because she was neither an invitee nor a licensee when she entered Mr. Martinez's property.

A person may be deemed a willful trespasser if he or she was neither an invitee nor a licensee. *See Stroop*, 896 P.2d at 442-43. In *Stroop*, Stroop had approached Day's fenced backyard to discuss a suspicious vehicle that Stroop had observed near Day's house on the night of a recent robbery. *Id.* at 440. Stroop "leaned on the fence, rested his arms on the top horizontal cross-board and extended his hands and forearms into the Days' property." *Id.* Day's dog proceeded to "[run] at [Stroop] in an aggressive manner." *Id.* Stroop again leaned against Day's fence, "placing his hands and forearms into [Day's] property." *Id.* The dog then jumped up and bit Stroop on the right hand. *Id.* In finding that there was no trespass, the court upheld a jury instruction which advised:

> One who enters upon the premises of another at the express or implied invitation of the owner of the premises is called in law an invitee. An invitation is implied where there is some common interest or mutual advantage gained by the property owner as a result of the individual's presence . . . . One who enters upon the premises of another for his own purpose, but with the permission or sufferance of the owner, is called in law a licensee. A license is implied where the object or purpose of the individual's presence upon the property is at the pleasure, convenience or benefit of the individual.

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city, an entry upon land for the purpose of making surveys necessary to the preparation of the map may be privileged, although not specifically provided for in the statute.").

Id. at 442-43 (citing *State ex. rel. Burlington Northern, Inc. v. District Court*, 159 Mont. 295 (1972)).

Stroop v. Day is clearly distinguishable from the instant case. The *Stroop* court found that Stroop was not a trespasser because the facts could only support a finding that the he was either an implied invitee or licensee. *Stroop*, 896 P.2d at 442. Stroop can be construed to have been an implied invitee because there was "some common interest or mutual advantage gained by [Day]" by Stroop's presence: to learn of a suspicious vehicle that Stroop had spotted near Day's home on the evening of a recent robbery. *See id.* at 443. Additionally, Stroop could be interpreted to have been a licensee because his entry may have been for his "pleasure, convenience or benefit": to inform Day of the suspicious vehicle that he had seen near Day's house. *See id.* In contrast, Chin was neither an invitee nor a licensee. There was no "common interest or mutual advantage gained by the property owner" as a result of Chin's presence – Chin entered Mr. Martinez's property solely to carry out her employment obligations. *See* CT 1:211. Furthermore, Mr. Martinez did not give express or implied permission to Chin to enter his property. *See id.* In fact, Mr. Martinez's locked pedestrian gate and closed driveway gate clearly indicated that the public was not permitted to come onto his property. *See* MTA Exhibit F:129-130. Therefore, because Chin cannot fit *Stroop*'s definitions of an invitee or licensee, Chin committed a willful trespass. *See Stroop*, 896 P.2d at 442-43.

ii. Even if Chin's duty as a census taker gave her an implied license to enter Mr. Martinez's property, Chin's decision to enter despite the fact that Mr. Martinez's pedestrian gate was locked and driveway gate was closed revoked that implied license.

Indicia of a property owner's desire to prevent the public from coming onto his or her property may revoke an implied license arising from a duty imposed by legislation to enter the property of another. *See*

Burkholder v. Superior Court, 96 Cal. App. 3d 421, 424 (1979). In *Burkholder v. Superior Court*, several police officers, ignoring "no trespass" signs and unlocking or circumventing locked gates, entered the property of the petitioner. *Id.* at 424. The court explained that, employing the test of reasonableness based on the totality of the circumstances, the police officers' entry was "openly restricted by posted signs along, and locked gates across, the rural access road signifying an intention to deny access to the public in general, including government agents." *Id.* at 427-28. Thus, the court held that the police officers violated the petitioner's Fourth Amendment privacy interest "against arbitrary intrusion by the police," *Berger v. New York*, 388 U.S. 41, 53 (1967), because the police officers' unreasonable entry revoked their implied licenses to lawfully enter the petitioner's property. *Burkholder*, 96 Cal. App. 3d at 427, 429.

Assuming that Chin had an implied license to enter Mr. Martinez's property in her official capacity as a census taker for the United States Census Bureau,[5] the unreasonableness of her entry revoked that implied license; therefore, Chin's conduct constituted a willful trespass under County Ordinance § 10.37.170(A).[6] Just as the Fourth Amendment analysis

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[5] "Whether the circumstances are such in a particular case as to give rise to [an] implied license is a question to be decided upon the facts; however, [w]here it is claimed that no such license has been extended, and but one inference can be reasonably drawn from the circumstances, and that showing the person to be a trespasser, the question becomes one of law." *Smithwick v. Pac. E.R. Co.*, 206 Cal. 291, 301 (1929).

[6] This Amicus Brief assumes that Chin had an implied license, although no such determination has been made on the present facts nor as a matter of law, to show that such an implied license would not change the conclusion that Chin willfully trespassed onto Mr. Martinez's property. *See Smithwick*, 206 Cal. at 301. This assumption is based on the United States Constitution's provision for the national Census:

> [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be

hinges on the reasonableness of the police officer's actions, *see id.* at 427-28, County Ordinance § 10.37.170(A) requires that the reasonableness of Chin's entry be assessed in light of the attendant circumstances. *See* Restatement (Second) of Torts § 211, Illus. h (1965). A "no trespass" sign itself, without a locked or closed gate, is not enough to revoke a police officer's implied license; thus, the key determinant as to whether an implied license is to be revoked is the presence of a locked or closed gate. *See, e.g., United States v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982) ("The presence of 'no trespassing' signs in this country without a locked or closed gate makes the entry along the driveway . . . not a trespass . . . ."); *State v. Koenig*, 148 A.3d 977, 984 (Vt. 2016) ("[A] fence and a closed gate . . . may be sufficient to revoke the implied license to enter the curtilage of a residence . . . ."). Similar to the presence of the two locked gates in *Burkholder*, 96 Cal. App. 3d at 424, Mr. Martinez's pedestrian gate was locked and driveway gate was shut at the time of Chin's entry. *See* MTA Exhibit F:129-130. The video that Judge Strobel of the Superior Court reviewed shows that Chin initially attempted to enter the curtilage of Mr. Martinez's home through his pedestrian gate but realized the gate was locked. *See id.*; *see also* CT 1:218-1:219. Like the police officers in *Burkholder* who gained entry onto inaccessible private property by unlocking or bypassing locked gates, Chin proceeded to forcefully pry open Mr. Martinez's closed, and visibly heavy, driveway gate. *See* MTA Exhibit F:129-130. Chin's entry

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> determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. CONST. art. 1, § 2, cl. 3.

onto Mr. Martinez's property was unreasonable because an objectively reasonable person, upon realizing that a gate intended for pedestrians was locked, would not attempt to force open a heavy, closed gate unquestionably *meant only for vehicles*. *See id.* Instead, a reasonable person, upon realizing that a pedestrian gate was locked and finding no other means of entry intended for pedestrians, would have decided not to enter that private property. *See id.* Thus, based on the totality of the circumstances, Chin's entry was "openly restricted" by a locked pedestrian gate and a closed, difficult to open driveway gate plainly meant only for vehicles, which indicated Mr. Martinez's intention to "deny access to the public in general, including [census takers like Chin]." *See id.*; *Burkholder*, 96 Cal. App. 3d at 427-28. Accordingly, like the police officers in *Burkholder*, Chin's unreasonable entry onto Mr. Martinez's property effectively revoked her presumptive implied license. *See id.* at 429; MTA Exhibit F:129-130.

Therefore, the Amicus Curiae respectfully requests this court reverse the Superior Court's finding that Chin did not willfully trespass due to the absence of visible dog warning signs on Mr. Martinez's property and because she had entered through an unlocked driveway gate. *See* CT 1:220. The Superior Court erroneously relied on the presence or absence of dog warning signs to render its decision, while the central consideration should have been the presence or absence of locked *or closed* gates. The Superior Court's decision fails to acknowledge that Mr. Martinez's pedestrian gate had been locked, and that his driveway gate, although not locked, was clearly shut and thus adequately conveyed Mr. Martinez's intention to keep the public, including government actors, off of his property. *See* MTA Exhibit F:129-130. Accordingly, Sophy and Nana should not have been declared dangerous pursuant to County Ordinance § 10.37.170(A)'s willful trespass exception.

III. Trespass Constitutes Provocation

The lower court erred in finding no provocation. Relevant caselaw on provocation in other jurisdictions establishes a standard of review that necessitates the court evaluate the reasonableness of the dog's response to the actions in question and consider whether the actions would be provocative from the viewpoint of the dog. Considering Chin's willful trespass upon Mr. Martinez's property at a time when he was away from his home and his dogs' protective instincts were therefore heightened, the dogs' response to Chin's entry onto the gated property was reasonable, because such actions would be provocative to a normal dog. *See* MTA Exhibit F:129-130, at 0:02 -1:05. However, the lower court neither considered Chin's actions as a trespass, nor her actions as provoking Martinez's dogs. *See* Clerk's Tr. vol. 1, 219; Clerk's Tr. vol. 1, 217.

While California courts have not ruled on the issue, courts in other jurisdictions have held that trespass constitutes provocation of a dog. *See, e.g., Aegis Sec. Ins. Co. v. Pa. Ins. Dep't*, 798 A.2d 330, 332-34 (Pa. Cmwlth 2002) (finding that visitors who ignored "No Trespassing" and "Beware of Dog" signs provoked dogs into attacking); *Dorman v. Carlson*, 106 Conn. 200, 203, 137 A. 749, 750 (1927) (determining that when someone injured by a dog provoked the dog through a trespass or other tort, there could be no recovery). Another jurisdiction has also ruled extensively on the appropriate standard that should be utilized to determine if provocation exists. *See Kirkham v. Will,* 311 Ill. App. 3d 787, 791, 724 N.E.2d 1062,1065 (2000) (conducting an in-depth review of Illinois caselaw and synthesizing a rule that "the reasonableness of the dog's response to the action in question [should determine] whether provocation exists").

Even for a jurisdiction which has not yet acknowledged that trespass constitutes provocation, the *Kirkham* rule supports such a finding. This logical standard should serve as a model for California courts. The Amicus Curiae requests that the court recognize and apply the "reasonable dog" standard created under *Kirkham v. Will*, 311 Ill. App. 3d 787, 724 N.E.2d 1062 (2000) and hold that Chin's willful trespass onto Mr. Martinez's property was provocative to the dogs.

a. California courts have offered no rule of general applicability defining what it means for a dog to be provoked.

California courts have not defined what it means for a dog to be provoked, thereby failing to provide a rule of general applicability. Instead, California courts have often merely concluded either that the dog was or was not provoked.[7]

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[7] See, e.g., *Roos v. Loeser*, 41 Cal. App. 782, 783 (1919) ("without provocation and while the plaintiff's dog was proceeding peaceably along the public street, . . . [an] Airedale attacked it from behind"); *Boggiano v. City & Cty. of San Fransisco*, 2012 Cal. Super. LEXIS 3779, at *7 (2012) ("the dog Juice did not provoke the dog Dandelion prior to the July 6, 2012 attack"); *Boggiano v. Animal Care & Control*, 2011 Cal. Super. LEXIS 4635, at *7 (2011) ("evidence supports the conclusion that Dandelion meets the definition of a 'vicious and dangerous dog,' which is 'any dog that when unprovoked inflicts bites or attacks a human being or domestic animal either on public or private property.'"); *Hicks v. Sullivan*, 122 Cal. App. 635, 636 (1932) ("The dog, without provocation, came barking and lunging at her."); *Chandler v. Vaccaro*, 167 Cal. App. 2d 786, 789 (1959) ("The Vaccaro dogs suddenly became vicious . . . [t]here was no provocation. Dogs, like humans, are unpredictable. Either, for no apparent reason, may suddenly go berserk."); *Zuniga v. County of San Mateo Dep't of Health Servs.*, 218 Cal. App. 3d 1521, 1535 (1990) ("evidence is . . . sufficient to support . . . the finding that these animals are "dangerous" within the meaning of the ordinance . . . due to their demonstrated behavior of attacking without provocation") (citation omitted).

Smythe v. Schacht, 93 Cal. App. 2d 315 (1949), does offer some examples of what constitutes provocation of a dog. In *Smythe*, a dog wrapped his mouth around the front of a minor child's face while the child played with the dog. *Id.* at 318. The court reasoned that the dog bite statute did not render void basic tort law affirmative defenses, such as assumption of risk or willfully inviting injury. *Id.* at 321. The court held that, despite the fact that the dog bite statute is not founded on negligence liability, "good morals and sound reasoning dictate that if a person lawfully upon the portion of another's property where the biting occurred should kick, tease, or otherwise provoke the dog, the law should and would recognize the defense that the injured person by his conduct invited injury and therefore, assumed the risk thereof." *Id.* at 321-22. Therefore, *Smythe* illustrates that certain behaviors, such as kicking and teasing, are considered adequate provocation. *See id.* It is Amicus Curiae's position that the "otherwise provoke the dog" element noted immediately above by the *Smythe* court also encompasses a willful trespass onto the property of the dog's owner.

The court in *Ellsworth v. Elite Dry Cleaners, Dyers & Laundry, Inc.*, 127 Cal. App. 2d 479, 484 (1954), citing to *Smyth*, offered further examples of provocation or lack thereof. The appellate court determined the lower court properly held the plaintiff did not provoke the attack because the plaintiff frequently petted the dog; the dog "always responded in a friendly fashion"; the plaintiff was "standing in the doorway through which she entered on the morning in question"; the plaintiff "reached down to pet . . . [the dog] with her right hand as she went through; that . . . [the dog] then jumped at her and bit her; and . . . [the plaintiff] had not been warned previously not to pet him." *Ellsworth*, 127 Cal. App. at 484.

Burden v. Globerson, 252 Cal. App. 2d 468 (1967), provides the same examples found in *Smythe*. *See Globerson*, 252 Cal. App. at 471; *see also Smythe,* 93 Cal. App. at 321-22. In *Globerson,* the plaintiff was bitten

and seriously injured by the defendant's dog. 252 Cal. App. at 468. The plaintiff visited the plaintiff's business approximately five times per week for three years. *Id.* at 469. Almost every time the plaintiff visited, he would leave a pint of milk for the dog and often poured it into the dog's bowl. *Id.* Although the defendant had told the plaintiff that the dog was a watchdog, the defendant repeatedly allowed the plaintiff to interact with the dog for several years, and the dog had never previously barked or growled at the defendant. *Id.* The court articulated that "there was no contributory negligence or assumption of risk under the circumstances." *Id.* at 471. The plaintiff "did not enter an area where the dog was barking or growling or showing any animosity toward him" and "did not tease, kick, or otherwise provoke the dog nor . . . by any other conduct, invite the injury or assume the risk." *Id.* Therefore, the *Globerson* court defers to the *Smythe* court's identification of behaviors that constitute adequate provocation of a dog, namely, teasing and kicking. *See id.*; *see also Smythe,* 93 Cal. App. at 321-22.

Though California caselaw does provide some examples of what constitutes adequate provocation of a dog, California caselaw fails to provide a rule of general applicability regarding what constitutes adequate provocation. Instead, California courts have either made conclusory statements that a dog was or was not provoked without any further explanation, or have only provided some concrete examples in the context of specific cases. However, California courts have not limited provocation to only the examples discussed in those cases.

Further, the examples discussed in the cases where the California courts comment on provocation are not applicable to the instant action. The *Smythe* court discussed provocation in the form of physical abuse and teasing. The *Ellsworth* court discussed provocation only in relation to a plaintiff who had a preexisting relationship with the dog. Likewise, the

Globerson court discussed provocation where the plaintiff had a preexisting relationship with both the defendant and his dog. In the instant action, the person bitten by Mr. Martinez's dogs, Chin, was a stranger to both Mr. Martinez and his dogs, and there is no assertion by any party that Chin physically abused or teased the dogs. *See* Clerk's Tr. vol. 1, 107 (recording Chin's testimony that she does not know the residents of the Martinez household). Accordingly, caselaw from other jurisdictions should be reviewed and further relied on as persuasive authority on the issue of provocation.

b. Other jurisdictions have ruled that trespass constitutes provocation.

The Commonwealth Court of Pennsylvania found in *Aegis* that a dog was provoked when a visitor "passed a 'No Trespassing' sign, appeared to [the dog] to be someone who did not belong, and made what [the dog] interpreted as a threatening gesture." 798 A.2d at 334. The facts of the case reflect that the homeowner's property was bordered in the back by woods and a creek, with a "No Trespassing" sign posted in the rear of the property. *Id.* at 331. The homeowner's dog, Heidi, frequently observed the defendant's son and other neighborhood children cross the creek to enter the property. *Id.* However, the dog was accustomed to seeing strangers, not these children which it knew, enter the property from the front of the house. *Id.* On the day of the bite, a state trooper crossed the creek and climbed two embankments to enter the rear of the defendant's property. *Id.* The trooper had been to the property previously but always entered from the driveway. *Id.* Heidi had never bothered the trooper previously, but when she saw him enter the rear of the property, she moved from the porch and headed in his direction, prompting him to waive a leather portfolio at her. *Id.* She reacted by tearing through his pants and biting his thigh. *Id.*

The underlying issue at hand in *Aegis* was a disputed Insurance Commissioner's determination that the homeowner's insurance policy was unfairly cancelled, and that the homeowner's ownership of Heidi resulted in no substantial increase in hazard. *Id.* at 332. The court discussed another similar insurance case where a visitor ignored a "Beware of Dog" sign on an entry gate. *Id.* at 332. In that case, no substantial increase in hazard was found because "the [dog was] determined to have been provoked into attacking." *Id.* at 333.

Further, in a Connecticut Supreme Court Case deciding liability for injuries caused by a dog, the court held there was no liability "when the person injured by the dog had provoked the dog by conduct which he either knew or ought to have known would be 'calculated to rouse a dog to defensive action by the use of its natural weapons of defense.'" *Dorman* 106 Conn. at 202 (citing *Kelley v. Killourey*, 81 Conn. 320, 70 A. 1031 (1908)). Subsequent to *Kelley*, the Connecticut state legislature enacted a statutory exception where an owner or keeper bore no liability for injuries from a dog which another person sustained while committing a trespass. *Dorman*, 106 Conn. at 200. The *Dorman* court held that "[t]he trespasses and torts which the framers of this exception had in mind were those which were committed upon the person or property of the owner . . . and which the dog, with his characteristic loyalty, would instinctively defend and protect . . ." *Id.* at 203.[8]

In a 2004 case where a trespassing neighbor was bitten by a dog kept behind a gated fence, the Louisiana Supreme Court found that the dog did not pose an unreasonable risk of harm to the trespasser. *See Pepper*

[8] The court further found that "[w]hether the injury caused by the dog occurred in private grounds or on the public highway is not the determining factor of liability, but whether it was inflicted upon one at the time he was committing a trespass or tort." *Dorman* 106 Conn. at 203.

v. Triplet, 864 So. 2d 181 (La. 2004). In *Pepper*, the plaintiff neighbor unlocked the gate to the dog owner's fence and entered the owner's backyard in order to retrieve a ball. *Id.* at 185. The gate was secured by a metal pipe, which the neighbor shoved out of place to allow the gate to open. *Id.* Importantly, the neighbor had never before been given permission to enter the owner's yard. *Id.* at 185. When the ball had previously been tossed into the owner's yard, a member of the plaintiff's family would knock on the owner's front door, and the owner or his wife would retrieve the ball. *Id.*

When the plaintiff entered the backyard on the day of the bite, he reached for the ball, and the dog bit him on the hand and stomach. *Id.* His injuries required hospital treatment. *Id.* In determining that the dog did not pose an unreasonable risk of harm to the plaintiff, the court considered the facts that the dog was secured in its owner's backyard, behind a fence with a closed gate. *Id.* at 197. The court noted that ". . . a neighbor has no right to enter another's yard without express or tacit consent, and a fence indicates a desire to be free from intrusion, with the presence of a dog emphasizing that desire." *Id.* at 197. The court further found:

> Under the facts of [the] case, until the plaintiff intentionally and knowingly entered the defendant's backyard without authority, the defendant's dog did not present an unreasonable risk of harm to the plaintiff or the public. Securing dogs in his or her yard is what is expected of a dog owner -- it protects the dogs and it protects the innocent public.

Id. The court emphasized that the case was not "a case of a dog running down the street unfettered to prey upon the public. The owner secured the dog against contact with outsiders by enclosing the dog within the fence . . ." *Id.* at 197-98. The same scenario exists in the instant case, where the Petitioner secured his two dogs behind secured fencing.

The court found the dog "posed no unreasonable risk of harm" while secured in the backyard. *Id.* at 198. "Secured, the dog also was not subject to provocation. Secured, the dog was able to guard and protect his master's home with no undue risk of harm to the innocent public. By breaching the security that the dog's owner had created, the plaintiff negated that security."[9]

In the instant action, the facts of the case bear similarity to the facts in *Aegis.* While Mr. Martinez's dogs may have been accustomed to Mr. Martinez and his family and guests entering the property, the dogs were likely unaccustomed to seeing strangers enter the property through the driveway gate or otherwise. As noted above, the *Aegis* court found that a dog was provoked when a visitor "passed a 'No Trespassing' sign, appeared to [the dog] to be someone who did not belong, and made what [the dog] interpreted as a threatening gesture." 798 A.2d at 334. Whether trespass signs were prominently placed on Mr. Martinez's property was disputed by the parties, with the lower court ultimately finding that no dog warning signs were visible in the video of the incident. *See* Clerk's Tr. vol. 1, 219. However, Chin arguably appeared to Mr. Martinez's dogs to be someone who did not belong. She was a stranger who had entered their territory. Further, her prolonged attempt to make entrance to the property, first through the locked pedestrian gate followed by her ultimate entry through the heavy and substantial driveway gate, was likely interpreted by the dogs as a threatening gesture. *See* MTA Exhibit F:129-130, at 0:02 - 1:05.

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[9] The court ultimately held that "[a]fter balancing the various claims and interests, weighing the risk to the public and the gravity of harm, and considering individual and societal rights and obligations . . . under the facts of this case, the dog did not pose an unreasonable risk of harm." *Pepper,* 864 So. 2d at 198.

The facts of this case also align with the scenario described in *Dorman,* where the Connecticut Supreme Court held the owner of a dog provoked by a trespasser would not be liable for the trespasser's injuries caused by the dog. 106 Conn. at 202. The court noted that trespass upon the property of the owner was an act that a dog, "with his characteristic loyalty, would instinctively defend and protect [against]. . ." *Id.* at 203. Chin was injured by the Petitioner's dogs while she was trespassing; the evidence shows the dogs only approached Chin after she trespassed onto the property and rang the doorbell multiple times. *See* [video at 1:14 to 1:54]. It was natural for Mr. Martinez's loyal dogs to defend against her entry onto the property.

In the instant action, the facts of the case also bear greatest similarity to the facts of *Pepper*. The plaintiff in *Pepper* unlocked the dog owner's gated fence in order to access the backyard and retrieve a ball. 864 So. 2d at 185. The plaintiff knew he did not have permission to enter the yard. *Id.* In finding that the dog posed no unreasonable risk of harm, the court emphasized that "a fence indicates a desire to be free from intrusion," "a fence acts to secure a dog against contact with outsiders," "[s]ecuring dogs in his or her yard is what is expected of a dog owner," and "[s]ecured, the dog [was not] subject to provocation . . . [and] was able to guard and protect his master's home with no undue risk of harm to the innocent public." *Id.* at 197-98. These same findings bear true in Mr. Martinez's situation. The gated fence indicated his desire to be free from intruders, and it also acted to secure outsiders from any risk of harm from the dogs who were simply guarding their master's home. By ignoring the locked pedestrian gate and trespassing onto Mr. Martinez's property, Chin "[breached] the security that the [dogs'] owner had created" and provoked the dogs' response. *See id.* at 198.

c. Other jurisdictions have created extensive rules of general applicability answering the question of what constitutes provocation; their analysis offers the most reliable and thorough standard for California courts to follow.

The aforementioned cases help establish the logical conclusion that trespass constitutes provocation. The standards adhered to in other jurisdictions also lead to an inference that trespass constitutes provocation. The California cases discussing provocation fail to define what exactly constitutes provocation. Neither do any applicable California statutes establish what exactly constitutes provocation. Thus, it is essential that the court consider caselaw from other jurisdictions in determining the scope and applicability of provocation.

i. California courts should apply the *Kirkham* standard, which requires that provocation or lack thereof be established by reviewing the reasonableness of the dog's response to the action(s) in question and considering whether the action(s) would be provocative *to the* dog.

The Illinois Appellate Court discussed provocation in *Kirkham,* 311 Ill. App. 3d at 791. *Kirkham* establishes the Illinois courts' adoption of a rule of general applicability, specifically that "it is not the view of the person provoking the dog that must be considered, but rather it is the reasonableness of the dog's response to the action in question that actually determines whether provocation exists." *Id.*

The plaintiff in *Kirkham* came onto the defendants' property in order to pick up some asparagus from the defendants' neighbor. 311 Ill. App. 3d at 789. The homes shared a driveway. *Id.* The plaintiff was walking up the driveway on the defendants' property, towards the neighbor's home, when the defendants' dog attacked the plaintiff. *Id.* There was no evidence of a notice or warning to stay off the defendants' property, and there was no evidence that the plaintiff committed an unlawful act upon the property or

caused damage to the property. *Id.* at 790. The plaintiff also claimed that she had visited the neighbor's home in the past and used the same driveway; the defendants had observed her doing so and had never objected. *Id.* at 789. The court ultimately upheld a verdict in favor of the defendant. *Id.* at 788, 796.

In establishing Illinois's rule of general applicability, the *Kirkham* court reviewed substantial prior caselaw. In *Nelson v. Lewis*, 36 Ill. App. 3d 130, 344 N.E.2d 268, 270 (1976), provocation "was considered from the perspective of the 'normal' dog, since it does not matter whether the acts that caused the provocation were unintentional or intentional." *Kirkham,* 311 Ill. App. 3d at 791.[10]

The *Kirkham* court also looked to *Stehl v. Dose*, 83 Ill. App. 3d 440, 403 N.E.2d 1301 (1980), where the court found that "the question of what conduct constitutes provocation is primarily a question of whether the plaintiff's actions would be provocative *to the dog*." *Kirkham*, 311 Ill. App. 3d at 792 (emphasis in original) (citing *Stehl*, 83 Ill. App. 3d at 443).[11]

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[10] In *Nelson*, a 2-year-old child stepped on the dog's tail, and the dog scratched the child's eye in response. *Kirkham,* 311 Ill. App. 3d at 791. "The court defined provocation as 'an act or process of provoking, stimulation, or incitement.'" *Id.* The court found that there was no "vicious attack that was out of proportion to the unintentional acts involved and that provocation existed." *Id.* The court also found that "an unintentional act can constitute provocation" within the meaning of the Illinois statute. *Id.* (citing *Nelson*, 344 N.E.2d at 270-71).

[11] The plaintiff had entered the defendant's property with permission to pick up a German Shepard located there. *Kirkham*, 311 Ill. App. 3d at 792. After the man petted and fed the dog, the German Shepherd attacked when the man turned his back to the dog. The court further found that the fact that the plaintiff had permission from the owner to approach the dog "was [not] a matter bearing on the issue of provocation." *Id.* (citing *Stehl*, 83 Ill. App. 3d at 443). Provocation could exist even where the plaintiff had permission to approach the dog.

The court also reviewed *Smith v. Pitchford*, 219 Ill. App. 3d 152, 579 N.E.2d 24 (1991), finding that "mere presence on private property does not constitute provocation . . ." *Kirkham*, 311 Ill. App. 3d at 793. The *Smith* court further found that "[p]rovocation cannot be said to exist within the meaning of [the Illinois statute] where such unintentional stimuli as greeting or petting a dog result in the dog attacking the plaintiff viciously and the attack is out of all proportion to the unintentional acts involved." *Kirkham*, 311 Ill. App. 3d at 793 (quoting *Smith*, 219 Ill. App. 3d at 154, 579 N.E.2d at 26). However, the *Smith* court established a "reasonable dog" standard where the court looks at whether a particular action would provoke a normal dog. *Id.*

In *VonBehren v. Bradley*, 266 Ill. App. 3d 446, 640 N.E.2d 664 (1994), a toddler repeatedly hit a dog and pulled the dog's tail and ears in order to get a bird out of the dog's mouth. The court held that the child's actions constituted provocation and indicated that "provocation is measured solely from the perspective of the animal." *Kirkham*, 311 Ill. App. 3d at 793 (citing *VonBehren*, 266 Ill. App. 3d at 450, 640 N.E.2d at 667). The *VonBehren* court also clarified that provocation differs from mere negligence, stating, "Provocation instigates or initiates the acts resulting in harm; in contrast, contributory negligence, by its terms, combines with the actionable negligence of defendant." *VonBehren* 266 Ill. App. 3d at 450, 640 N.E.2d at 667.

In summary, prior to *Kirkham,* Illinois courts "focused on provocation from the perspective of the animal . . . [determining] how an average dog, neither unusually aggressive nor unusually docile, would react to an alleged act of provocation." *Kirkham*, 311 Ill. App. 3d at 793. The jury instruction adopted by the *Kirkham* court defines provocation as "any action or activity, whether intentional or unintentional, which would be

reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence." *Id.* at 794.[12]

The Illinois Appellate Court's extensive analysis of prior caselaw led to a well-defined "reasonable dog" standard for determining whether provocation exists. The standard is applicable to the facts of the instant case and should be adopted by this Court.

Application of the *Kirkham* "reasonable dog" standard supports a finding that trespass constitutes provocation in the instant action. "The courts have consistently pointed out that it is not the view of the person provoking the dog that must be considered, but rather it is the reasonableness of the dog's response to the action in question that actually determines whether provocation exists." *Id.* at 791. While the *Kirkham* court found that "[m]ere presence on private property does not constitute provocation," the court also emphasized that potential provocation must be evaluated from the perspective of the animal, thus adhering to the reasonable dog standard. *Kirkham*, 311 Ill. App. 3d at 793, 794. Therefore, if Chin were present on the property as an invited guest in the company of Mr. Martinez, the dogs' response might be categorized as unreasonable. Dogs typically react differently to trespassers and individuals who enter a property through unusual ways than they do to individuals they are accustomed to seeing. *See Aegis,* 798 A.2d at 334. However, as a trespasser, Chin's presence on the property was reasonably responded to under the dogs' protective and guarding instincts. *See id.; Dorman*, 106 Conn. at 203.

While the *Kirkham* standard is applicable to the instant action, the facts of the two cases are different. In *Kirkham*, there was no fence or

[12] The Illinois Appellate Court again ruled in 2019 that provocation is measured from the perspective of the animal. *See Lymberis v. Wu* No. 1-18-1251, 2019 IL App (1st) 181251-U (Ill. App. Ct. May 9, 2019).

noticeable boundary line indicating that the plaintiff should keep out. She was engaging in an activity – walking up a shared driveway – that she had repeatedly engaged in previously, and she claimed she was never asked to stay off the defendants' property, *See Kirkham*, 311 Ill. App. 3d at 789-90. In the instant action, Chin crossed a noticeable fence indicating that she should keep out, she was a stranger who had never visited the property before, and the presence of the locked pedestrian gate should have indicated to her that she was being asked to stay off of Mr. Martinez's property. *See* MTA Exhibit F:129-130, at 0:02-1:05; Clerk's Tr. vol. 1, 107. However, the *Kirkham* court still upheld a verdict for the defendant. *See Kirkham*, 311 Ill. App. 3d at 788, 796. If the facts of *Kirkham* supported a verdict of no liability pursuant to the reasonable dog standard, the facts of the instant action surely support a finding of provocation pursuant to that same standard.

Measuring her actions "solely from the perspective of the animal," Chin's trespass onto Martinez's property constituted provocation. *See Kirkham*, 311 Ill. App. 3d at 793 (citing *VonBehren*, 266 Ill. App. 3d at 450, 640 N.E.2d at 667). Chin's "entry onto the property constituted provocation because it [instigated] the acts resulting in harm." *See VonBehren* 266 Ill. App. 3d at 450. A normal dog would see trespass, whether intentional or unintentional, as provocative conduct. *See Kirkham,* 311 Ill. App. 3d at 791, 792, 793 (discussing the holdings in *Nelson v. Lewis*, 36 Ill. App. 3d 130; *Stehl*, 83 Ill. App. 3d at 443; *Smith*, 219 Ill. App. 3d).[13]

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[13] It is also notable that trespass constitutes provocation in criminal cases ruling on human reaction. In *McConnell v. Hatton*, 2016 U.S. Dist. LEXIS 168644, *43 (E.D. Cal. 2016), the federal district court discussed a jury instruction that "any act or series of acts 'over a short or long period of time,' can amount to legally adequate provocation if it 'would have caused a person of average disposition to act rashly and without due deliberation,

ii. Decisions in other jurisdictions, both pre-*Kirkham* and post-*Kirkham*, adhere to the "reasonable dog" standard set forth in *Kirkham*.

Pennsylvania courts have ruled extensively on whether or not specific factual situations constitute provocation. The Pennsylvania Commonwealth court found there was no provocation where the victim stopped in the street to talk to a neighbor and then continued walking, whereupon a dog approached, growled, lunged, bit, and knocked victim to the ground. *See Commonwealth v. Baldwin*, 767 A.2d 644, 645-46 (Pa. Cmwlth. 2001). Likewise, the Commonwealth court found no provocation where the victim was a neighbor who, while observing the defendant's dogs fighting, called out to see if the defendant needed help and was subsequently attacked and bitten when one of the dogs ran onto her property. *See Commonwealth v. Seyler*, 929 A.2d 262, 264, 266 (Pa. Cmwlth. 2007). The Pennsylvania Supreme Court found no provocation where a dog lunged at a child who was eating a piece of chicken, biting the child's face and neck. *See Eritano v. Commonwealth*, 547 Pa. 372, 374, 378 (1997). However, as discussed previously herein, the Commonwealth court did find provocation in *Aegis*, where a visitor "passed a 'No Trespassing' sign, appeared to [the dog] to be someone who did not belong, and made what [the dog] interpreted as a threatening gesture." 798 A.2d at 334.

The Michigan Appellate Court in *Bradacs v. Jiacobone*, 244 Mich. App. 263, 276 625 N.W.2d 108, 115 (2001) closely followed the Kirkham court, finding that when a jurisdiction holds that unintentional acts can

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that is, from passion rather than from judgment.'" The court found that the jury should have understood from the instruction that trespass could amount to provocation. *Id.* Considering the *McConnell* court's acknowledgement that trespass could amount to provocation for a human, trespass could certainly amount to provocation more often for an animal, especially a dog commonly understood to operate under more base impulses and reactions than human beings.

constitute provocation, to support a finding of provocation, the animal's response must be proportional to the victim's action. The court also indicated that evidence of a "quick or threatening [gesture]" would weigh towards provocation. *Id.* at 275.

In *Stroop v. Day*, 271 Mont. 314, 896 P.2d 439, 442 (1995), the Montana Supreme Court held that the plaintiff's damages claim was not barred due to provocation after the plaintiff was bitten by the defendant's dog while the men were having a conversation across the defendant's fence. *Id.* at 440. As they talked, the plaintiff leaned against the fence and extended his arms and hands into the defendant's property several times, ultimately resulting in the dog jumping up and biting the plaintiff's right hand. *Id.*

In determining whether provocation existed, the court found that "provocation should not be required to rise to the level of intentional torture to be a valid defense." *Id.* at 441. However, the court also found the plaintiff's extension of his arms into the property was not provocation, as the plaintiff did not make any "quick or threatening gestures." *Id.* at 442.

Additionally, the Ohio Court of Appeals found provocation where a woman heard two neighborhood dogs fighting and attempted to separate them by hitting them and pulling at their collars, leading to the woman being severely bitten. *See Pflaum v. Summit Cty. Animal Control*, 92 N.E.3d 132, 134 (Ohio Ct. App. 2017). The court emphasized that it was not the victim's "noble intentions" or "malicious intent" that mattered, but instead whether the victim's actions could be considered tormenting the dog. *Id.* at 136. There was "no evidence to suggest that [the dog] would have bitten [the victim] if she had not struck the dog and pulled on its collar." *Id.* Thus, the appellate court rejected the trial court's conclusion that the dog bit without provocation. *Id.*

The New York Appellate Division held there was provocation where a leashed dog escaped and attacked another dog but was ultimately injured itself; the court found that when the second dog was "[a]ttacked by another dog with his owner at close range, [the dog's] protective and defensive instincts were entirely understandable, even expected." *See Matter of People of the State of N.Y. v. Shanks*, 962 N.Y.S.2d 742, 745, 105 A.D.3d 1103, 1105 (N.Y. App. Div. 2013).

The decisions in the Pennsylvania courts indicate adherence to a "reasonable dog" standard such as the one found in *Kirkham*. A normal dog would not attack in reaction to someone walking in the street, calling out to a neighbor, or simply eating a piece of chicken. *See Baldwin*, 767 A.2d at 645-46; *Seyler*, 929 A.2d at 264, 266; *Eritano*, 547 Pa. at 374, 378. However, a normal dog might attack in reaction to a trespasser who appeared to be someone who did not belong. *See Aegis,* 798 A.2d at 334.

Further, the instant action is highly distinguishable from the *Stroop* case described above. The *Stroop* court found there was no provocation when the plaintiff extended his arms and hands into the defendant's property. *See Stroop,* 896 P.2d at 442. However, extending one's hands across a fence while talking to your neighbor on the other side of the fence is very different from entering a closed gate, approaching a door, and waiting while ringing the doorbell. *See* MTA Exhibit F:129-130. In *Stroop*, the defendant's dog bit the plaintiff while the defendant was engaged in a conversation with the plaintiff. *Stroop,* 896 P.2d at 440. However, in the instant case, the defendant's dogs bit the plaintiff after the plaintiff entered the defendant's property while the defendant was away from his home. *See* MTA Exhibit F:129-130. The *Stroop* court, similarly to the *Bradacs* court, found that "quick or threatening gestures" can constitute provocation. *Id.* at 442; *see also Bradacs*, 244 Mich. App. at 275. Chin's entry into the gated property and her close approach to the front door arguably constituted a

"threatening gesture" in the eyes of the dogs. *See* MTA Exhibit F:129-130, at 0:02-1:05.

It is undisputed that Chin's intent to enter the property was not malicious. However, her noble intention to carry out her census duties did not negate Mr. Martinez's right to privacy and security of his property. The dogs were understandably and reasonably provoked by Chin's trespass. Their protective and defensive instincts resulted in actions that any normal dog might take under the circumstances. Thus, under *Kirkham's* "reasonable dog" standard, there was provocation. The lower court erred in finding no provocation, and this court must therefore reverse, thus establishing a rule of general applicability regarding what constitutes adequate provocation and therefore whether a dog is properly declared dangerous under the law.

Dated: April 23, 2020

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Appellate counsel for *amicus curiae*
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this amicus curiae brief contains 11,329 words. In making this certification, I have relied on the word count of the Microsoft Word computer program used to prepare this brief.

Dated: April 23, 2020

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   APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF; [PROPOSED] ORDER

   a. [x] **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

         (a) [ ] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

         (b) [x] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

      (2) Date mailed: April 23, 2020

      (3) The envelope was or envelopes were addressed as follows:

         (a) Person served:
            (i) Name: Jonathan H. Eisenman, Deputy City Attorney
            (ii) Address:
            200 North Main Street, CHE 7th Floor
            Los Angeles, CA 90012

         (b) Person served:
            (i) Name: The Honorable Mary H. Strobel, Judge
            (ii) Address:
            Department 82
            Los Angeles Superior Court, Stanley Mosk Courthouse
            111 North Hill Street, Los Angeles, CA 90012

         (c) Person served:
            (i) Name:
            (ii) Address:

         [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

      (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state): Hartford, Connecticut

Form Approved for Optional Use
Judicial Council of California
APP-009 [Rev. January 1, 2017]

Case Name: Francisco Martinez v. Los Angeles Department of Animal Services, et al.	Court of Appeal Case Number: B297096R
	Superior Court Case Number: BS170967

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April 23, 2020

Thompson Gould Page
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: Francisco Martinez v. Los Angeles Department of Animal Services, et al. Court of Appeal Case Number: B297096R Superior Court Case Number: BS170967	

1. At the time of service I was at least 18 years of age.
2. a. My ☐ residence ☒ business address is *(specify)*:
   1 Linden Place, Suite 108, Hartford, CT 06106-1748
   b. My electronic service address is *(specify)*: thom@tpagelaw.com
3. I electronically served the following documents *(exact titles)*:
   APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF; [PROPOSED] ORDER
4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: Jonathan H. Eisenman, Deputy City Attorney
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   City of Los Angeles Department of Animal Services
   City of Los Angeles
   b. Electronic service address of person served: Jonathan.Eisenman@lacity.org
   c. On *(date)*: April 23, 2020
   ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April 23, 2020

Thompson Gould Page
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Court of Appeal)

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