No. 04-9728

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

CARTER G. PHILLIPS*
JEFFREY T. GREEN
THOMAS A. BURNS
DEVON A. CORNEAL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

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* Counsel of Record

QUESTION PRESENTED

Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts, including many cases involving the Fourth Amendment. See *Illinois* v. *Caballes*, 125 S. Ct. 834 (2005); *Thornton* v. *United States*, 541 U.S. 615 (2004); *Kyllo* v. *United States*, 533 U.S. 27 (2001); *Bond* v. *United States*, 529 U.S. 334 (2000).

SUMMARY OF THE ARGUMENT

This case presents the question whether the Fourth Amendment permits law enforcement officers to conduct warrantless, suspicionless searches of parolees at any time and at any place, regardless of the privacy interests of others nearby, solely because that person has the status of a parolee.

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Respondent State of California has taken a crabbed and ahistorical view of Fourth Amendment protections that would grant unfettered discretion to officers to conduct searches of the persons, homes and effects of parolees and their families. According to California, the Fourth Amendment's "reasonableness" requirement is fully consistent with a policy that gives police officers unchecked authority to "search first, and ask questions later."

California's peculiar understanding of what constitutes a "reasonable" exercise of authority by an officer conflicts with the practices of many of its sister States, which provide some meaning to the reasonableness requirement by demanding that searches of parolees be based at least upon an articulable suspicion. California's position also conflicts with numerous decisions of both State and federal courts. As many of these courts have recognized, parolees may have a diminished expectation of privacy in light of the State's legitimate interests in the protection of citizens and the deterrence of further crime. But parolees live among us in our communities as part of their rehabilitation, and the State's general interests cannot justify a unique grant of authority that is anathema to a free society.

NACDL's mission is to defend those accused of crime and to ensure that constitutional protections in the criminal justice system are strictly construed and honored. NACDL and its members are familiar with the practices in all 50 States and the District of Columbia with respect to parole and probation. From this unique perspective, NACDL seeks to call the Court's attention to three issues of significant importance: first, the degree to which California's proposed practice is at variance with that of other jurisdictions; second, the absence of any justification for California's position; and third, the need for a reasonable suspicion standard as the only sensible check on police powers in this context.

ARGUMENT

I. CALIFORNIA'S STANDARD DEPARTS FROM THE PRACTICES OF ITS SISTER STATES.

No other State has adopted California's practice of allowing any officer to conduct a suspicionless search of the person, home or effects of any parolee at any time and for any reason, excepting only searches somehow deemed to be "arbitrary, capricious or harassing." Instead, most States impose an express "reasonable suspicion" standard. Even the courts of the one State (North Dakota) that has concurred with California that a broad "reasonableness" standard applies have nonetheless taken pains to point out that reasonable suspicion existed for the challenged searches in any event. And no State has upheld the type of random, intrusive search that occurred in this instance upon a sidewalk while Petitioner was walking with his companion and her child.

A. Parole Conditions Generally.

In the United States, parole is a well-established penological tool used to rehabilitate and reintegrate offenders into society. See *Morrissey* v. *Brewer*, 408 U.S. 471, 477-78 (1972) (discussing the purpose of parole); Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 Crime & Just. 479, 487-92 (1999). To achieve these goals, States have enacted regulatory frameworks governing parole, which, in part, permit parole boards to impose broad conditions of release upon parolees.[2] The conditions imposed are often

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[2] *See* Ala. Code § 15-22-29; Alaska Stat. § 33.16.150; Ariz. Rev. Stat. Ann. § 31-411; Ark. Code Ann. § 16-206; Cal. Penal Code § 3053; Colo. Rev. Stat. § 17-2-201; Conn. Gen. Stat. § 54-124a; Del. Code Ann. tit. 11, § 4321; D.C. Code § 1986-14; Fla. Stat. § 947.18; Ga. Code Ann. § 42-9-42, -44; Haw. Rev. Stat. § 353-66; Idaho Code Ann. § 20-228; 730 Ill. Comp. Stat. 5/3-3-7; Ind. Code § 11-13-3-4; Iowa Code § 45.2(906); Kan. Stat. Ann. § 22-3717; Ky. Rev. Stat. Ann. § 439.340; La. Rev. Stat. Ann. § 15:574.4; 03-208-001 Me. Code R.; Md. Code Regs. 12.08.01.21; 120 Mass. Code Regs. 300.07; Mich. Comp. Laws § 791.236; Minn. R.

similar from State to State. Thus, significant deviations—such as the one at issue here—raise sensible concerns about improper State infringement upon parolees' constitutional rights.

California's general approach to parole and to parole boards is similar to that in other States. California maintains extensive supervisory powers over parolees and retains the right to revoke parole if the conditions imposed are violated. See Cal. Penal Code § 3056 ("Prisoners on parole shall remain under the legal custody of the department [of corrections] and shall be subject at any time to be taken back within the inclosure of the prison."). Like other States, California gives broad discretion to its parole board by providing that "[t]he Board of Prison Terms upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper." *Id.* § 3053(a).

Generally, parole boards have the authority to apply a set of universal, mandatory release conditions, in addition to any special restrictions tailored to an individual parolee's particular circumstances.[3] Among these restrictions are so-called "search conditions." Most such conditions require a parolee to submit to searches of his person, his property, or

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2940.2000; Miss. Code Ann. § 47-7-17; Mo. Rev. Stat. § 217.690; Mont. Admin. R. 20.7.1101; Neb. Rev. Stat. § 83-1,116; Nev. Rev. Stat. § 213.12175; N.H. Rev. Stat. Ann. § 651-A:4; N.J. Admin. Code § 10A:71-6.4; N.M. Stat. § 31-21-10; N.Y. Penal Law § 70.40; N.C. Gen. Stat. § 15A-1374; N.D. Cent. Code § 12-59-07; Ohio Rev. Code Ann. § 753.10; Okla. Stat. tit. 57, § 332.8; Or. Rev. Stat. § 144.270; 61 Pa. Cons. Stat. § 331.23; R.I. Gen. Laws § 13-8-16; S.C. Code Ann. § 24-21-660; S.D. Codified Laws § 24-15A-24; Tenn. Code Ann. § 40-28-117; Tex. Gov't Code Ann. § 508.221; Utah Code Ann. § 77-27-10; Vt. Stat. Ann. tit. 18, § 502b; Va. Code Ann. § 53.1-157; Wash. Rev. Code § 72.04A.070; W. Va. Code § 62-12-17; Wisc. Stat. § 304.06; Wyo. Stat. Ann. § 7-13-402.

[3] The conditions imposed are then set forth in parole forms, the specific content of which varies from state to state and from parolee to parolee. Amicus App. 1a-10a.

both, either without a warrant or expressly upon reasonable suspicion.[4] California's "Notice and Conditions of Parole," for example, informs parolees that "You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer." Amicus App. 1a; see also Cal. Code Regs. tit. 15, § 2511(b). However, the California Penal Code also provides that parolees must agree to warrantless searches "with or without cause." Cal. Penal Code § 3067(a)

B. California's Suspicionless Searches.

Based upon this statutory and regulatory framework, California courts have permitted suspicionless searches of parolees. *People* v. *Reyes*, 968 P.2d 445, 450 (Cal. 1998) (allowing police and parole officers to search parolees without individualized suspicion so long as the search is not "arbitrary, capricious or harassing"). In so doing, California goes against the "the vast majority of jurisdictions that have considered this issue," and which have held that warrantless searches are only permissible when supported by reasonable suspicion. *Reyes*, 968 P.2d at 453 (Kennard, J., dissenting); see also *State ex rel. Corgan* v. *King*, 868 P.2d 743, 746 (Okla. Crim. App. 1994) (noting that the "majority of states that have addressed this issue agree that probable cause is not necessary to justify a warrantless search of a parolee's home,"

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[4] In broad overview, these restrictions fall into one of four categories. First, some parole forms do not contain an explicit search condition, but do contain a catch-all provision allowing imposition of "special conditions" at the court/officer's discretion. Amicus App. 3a, 10a. Second, other forms contain a blanket search condition that does not identify under what terms a search may be conducted. *Id.* at 4a, 7a. Third, still other States require parolees to submit to warrantless searches. *Id.* at 1a, 8a. Fourth and finally, several States require parolees to submit to searches only where the searching officer has reasonable suspicion of a parole violation. *Id.* at 5a, 9a.

but that they do "requir[e] reasonable grounds to exist in order for a warrantless search to be valid").[5]

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[5] The weight of authority on this issue clearly and consistently forbids suspicionless searches of parolees. *See Moreno* v. *Baca*, 400 F.3d 1152, 1163 (9th Cir. 2005); *United States* v. *Williams*, 417 F.3d 373, 376 n.2 (3d Cir. 2005) (interpreting Pennsylvania's parole condition permitting warrantless searches "'to include an implicit requirement that any search be based on reasonable suspicion'") (quoting *United States* v. *Baker*, 221 F.3d 438, 448 (3d Cir. 2000)); *United States* v. *Payne*, 181 F.3d 781, 787 (6th Cir. 1999) (requiring that a parole search be supported by at least reasonable suspicion); *United States* v. *Lewis*, 71 F.3d 358, 361-62 (10th Cir. 1995); *United States* v. *Bennett*, 2005 WL 2709572, at *4 (W.D.N.Y. Oct. 21, 2005) (finding that the New York State Division of Parole Policy & Procedure Manual requires reasonable suspicion for parolee searches); *United States* v. *Crew*, 345 F. Supp. 2d 1264, 1266 (D. Utah 2004); *Riley* v. *Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003); *State* v. *West*, 517 N.W.2d 482, 484 n.2 (Wis. 1994) (noting that although Wisconsin parolees are subject to warrantless searches, those searches are proper if an officer has "reasonable grounds to believe that the client" is in possession of contraband); *Pena* v. *State*, 792 P.2d 1352, 1357-58 (Wyo. 1990); *State* v. *Ashley*, 459 N.W.2d 828, 830 (S.D. 1990) (stating that although parolees are subject to a warrantless search condition, the condition limited searches to those supported by "reasonable cause . . . ascertained by a parole agent"); *Allan* v. *State*, 746 P.2d 138, 140 (Nev. 1987) (per curiam) (ruling that a parole search must be founded on reasonable belief that "a violation of a parole agreement has occurred"); *State* v. *Bonner*, 811 So. 2d 1151, 1153-54 (La. Ct. App. 2002); *State* v. *Massey*, 913 P.2d 424, 425 (Wash. Ct. App. 1996); *People* v. *Woods*, 535 N.W. 2d 259, 261-62 (Mich. Ct. App. 1995); *King*, 868 P.2d at 745, 746 (ruling that although Oklahoma subjects parolees to searches "'at any time or place,'" state regulations require "reasonable grounds to believe that the offender is keeping contraband" before conducting a search); *People* v. *Slusher*, 844 P.2d 1222, 1225 (Colo. Ct. App. 1992) (stating that a parole search must be predicated on "reasonable grounds to believe that a parole violation has occurred"). *But see Owens* v. *Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982) (permitting probation searches without individualized suspicion); *Reyes*, 968 P.2d at 451.

Given that some jurisdictions make no distinction between parolees and probationers for Fourth Amendment purposes, cases involving probation searches are relevant here. *See, e.g.*, *Williams*, 417 F.3d at 376 n.1 (stating "'there is no constitutional difference between probation and

Even in the rare instance where a court has upheld suspicionless searches as theoretically permissible, the court was at pains to point out that the search was, in fact, supported by reasonable suspicion. See *State* v. *Smith*, 589 N.W.2d 546, 549-50 (N.D. 1999) (holding that probationary searches need not be based on reasonable suspicion, but then finding that "the reasonable suspicion standard was met here"). The need for a court to bolster its decision with alternative findings on reasonable suspicion strongly suggests that the core holding offering no limitation at all on officer discretion is constitutionally infirm.[6]

This Court has consistently demanded cognizable and meaningful levels of suspicion when granting limited exceptions to the warrant requirement. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 18 (1968) (permitting warrantless pat-down

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parole for purposes of the [F]ourth [A]mendment'") (quoting *United States* v. *Hill*, 967 F.2d 902, 909 (3d Cir. 1992)). As such, probation cases requiring reasonable suspicion help inform the analysis in this case. *United States* v. *Giannetta*, 909 F.2d 571, 576 (1st Cir. 1990) (upholding a probation search "so long as the decision to search was in fact narrowly and properly made on the basis of reasonable suspicion"); *United States* v. *Scott*, 678 F.2d 32, 35 (5th Cir. 1982); *United States* v. *Bradley*, 571 F.2d 787, 790 n.4 (4th Cir. 1978); *People* v. *Lampitok*, 798 N.E.2d 91, 106 (Ill. 2003); *State* v. *Fields*, 686 P.2d 1379, 1390 (Haw. 1984) (requiring, where a probation condition forced probationers to submit to warrantless searches, that those searches be "justified by a reasonable suspicion supportable by specific and articulable facts").

[6] Indeed, North Dakota law appears unsettled on this point. *Compare State* v. *Maurstad*, 647 N.W.2d 688, 696 (N.D. 2002) (declining to "apply our prior case law holding reasonable suspicion or probable cause is unnecessary for a probationary search to be valid," because such searches are valid whenever "a probationary search authorized by a condition of probation is supported by reasonable suspicion"), *with State* v. *Perbix*, 331 N.W. 2d 14, 21-22 (N.D. 1983) (permitting warrantless searches of probationers without individualized suspicion so long as the searches are reasonable), *overruled in irrelevant part by State* v. *Maurstad*, 647 N.W.2d 688 (N.D. 2002). As will be discussed below, the justification for such suspicionless searches is grossly overbroad.

searches for officer safety only where supported by reasonable suspicion); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 347 (1985) (permitting warrant-less searches with less than probable cause only where the state has a special need); *Carroll* v. *United States*, 267 U.S. 132, 160 (1925) (permitting warrantless searches of moving vehicles only where the search is supported by probable cause); see also *Moreno* v. *Baca*, 400 F.3d 1152, 1163 n.7 (9th Cir. 2005) (noting that "'special needs'" cases permitting warrantless searches with less than probable cause "have required individualized suspicion in order to conduct targeted searches of individuals"); *United States* v. *Crew*, 345 F. Supp. 2d 1264, 1266 (D. Utah 2004) (holding that parole searches were a "special need[]" and could be conducted without a warrant, but only if those searches were based on reasonable suspicion). Thus, "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Any "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy'" is protected by more than an officer's discretion. *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654-55 (1979)). California's suspicionless parole searches do not provide those "other safeguards."

In its *Reyes* decision (followed in the decision at issue here), the California Supreme Court sought to provide some minimal protection to parolees, in the form of a prohibition on searches of parolees that are "arbitrary, capricious or harassing." *Reyes*, 968 P.2d at 450; *People* v. *Samson*, 2004 WL 2307111, at *2-*3 (Cal. Ct. App. Oct. 14, 2004). This standard, however, collapses into a nullity for two reasons. First, this prohibition is easily avoided by a simple claim—as was made here—that the officer conducted the search as part

of his or her more general duties of protecting public safety. J.A. 38. So long as an officer can provide a "rehabilitative, reformative, or legitimate law enforcement purpose[]" for the search, the courts will uphold it. *Reyes*, 968 P.2d at 450. As Petitioner notes, this standard "does not significantly limit the discretion of law enforcement officers to search parolees." Pet. Br. 22. Indeed, no California court has ever excluded the fruit of such searches because they were arbitrary, capricious or harassing. *Id.* Second, the standard is patently meaningless if the facts as stated here satisfy it. Here, the search conducted is the definition of arbitrary—Officer Rohleder admitted that he does not does not "go after [every parolee] all the time" and offered no explanation for the search other than that Petitioner was a parolee. J.A. 38-39. A standard that ratifies searches based upon nothing more than an officer's peculiar schedule and whim cannot reasonably be described as anything other than arbitrary. On its own terms, then, California's attempt to satisfy some Fourth Amendment concerns fails entirely.[7]

By rejecting this reasonable suspicion standard, California has veered from the body of case law in the State and federal courts that recognizes that, despite their lessened expectations of privacy, parolees are still entitled to Fourth Amendment protection and should not be subjected to suspicionless searches at the whim of any law enforcement officer. Given the importance of Fourth Amendment protections and the weight of authority opposing California's decision to relax those protections, it is particularly important that this Court invalidate suspicionless searches of parolees and reject California's practice.

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[7] Any additional protection that California might argue it has provided by requiring that suspicionless searches be "reasonable" is illusory. By defining reasonableness as being that which is not "arbitrary, capricious or harassing," but failing to give real meaning to those terms, California has eviscerated the protections of the Fourth Amendment for parolees.

II. CALIFORNIA'S COURTS HAVE FAILED TO OFFER A SATISFACTORY JUSTIFICATION FOR ITS PAROLE SEARCH DOCTRINE BECAUSE ONE DOES NOT EXIST.

Warrantless, suspicionless, discretionary parole searches are not justified by reference to California's interests in deterring crime and protecting the public. Neither are such searches justified by parolees' express or implied consent or constructive custody.

A. California's Interests In Deterring Crime And Protecting The Public Do Not Justify Warrantless, Suspicionless, Discretionary Searches Of Parolees.

In *Reyes*, the Supreme Court of California recognized that parole plays a critical correctional purpose; specifically, it is "granted for the specific purpose of monitoring [a parolee's] transition from inmate to free citizen." 968 P.2d at 450. Accordingly, the conditional freedom of parole serves the dual purpose of rehabilitating convicts and protecting the public from future crimes. *Id.* Indeed, California "has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public." *Id.* Considering California's interests in rehabilitation and protection, the *Reyes* court concluded "the purpose of the search condition is to deter the commission of crimes and to protect the public." *Id.* at 451. As such, "the importance of the latter interest justifies the imposition of a warrantless search condition." *Id.* at 450. That was because deterrence and protection are "enhanced by the potential for random searches." *Id.* at 451.

To be sure, a regime of "random searches" of parolees might "deter the commission of crimes" and "protect the public," but that argument proves far too much. Such an argument might also justify random searches of dwellings in high crime areas or random searches of corporate boardrooms whenever earnings are restated. An appeal to such general

interests sweeps so broadly as to justify random, suspicionless searches in nearly any cognizable context or community where crime has previously occurred. California steadfastly refuses to recognize that these are the very same arguments used to justify a police state. See *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."). Persons living in a free society enjoy robust privacy interests that are protected both by *ex ante* procedures (valid warrants, probable cause requirements) as well as *post hoc* remedial measures (exclusionary remedies, limited civil actions). These protections necessarily clash with the interests of public safety and even deterrence. Accordingly, the question is not whether a regime of suspicionless, nonconsensual searches would promote deterrence and protection—as surely it must; instead, the question is whether such a regime is consonant both with the status of parolees and the origins and purpose of Fourth Amendment protections.

B. The Status Of Parolees.

California's unique posture with respect to its parole search doctrine is at odds with its own case law recognizing that parolee status does not extinguish all Fourth Amendment rights. In particular, California courts have explicitly rejected the express consent, constructive custody, and act-of-grace theories. *Reyes*, 968 P.2d at 448 (rejecting express consent theory); *People* v. *Burgener*, 714 P.2d 1251, 1266-67 (Cal. 1986) (declining to justify suspicionless search by relying on custody theory to analogize parolees to incarcerated prisoners), *overruled on other grounds by People* v. *Reyes*, 968 P.2d 445 (Cal. 1998); *People* v. *Edwards*, 557 P.2d 995, 999 (Cal. 1976) (recognizing that the act-of-grace theory is now defunct). This Court should likewise reject each theory as invalid.

1. Consent.

Compulsory parole conditions cannot serve as consent to engage in otherwise unreasonable searches. Fourth Amendment rights (like other constitutional rights) may be waived, and a search rendered permissible where an individual gives knowing, intelligent, and voluntary consent. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (holding that "a search conducted pursuant to a valid consent is constitutionally permissible"); see also *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968) (explaining that consent is not "freely and voluntarily given" without showing "more than acquiescence to a claim of lawful authority"). But California's parole form waivers are not voluntary, and thus cannot be the basis of a "consent" search.

California's regulatory framework expressly states that parole conditions cannot be construed as a contract between parolees and the State. Cal. Code Regs. tit. 15, § 2512(a) ("The parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions."). That is because prisoners have no choice in the matter: in California, parole is mandatory. *Reyes*, 968 P.2d at 448. In other words, *every* prisoner in California becomes a parolee upon release from incarceration; there is no other way in which a prisoner can leave prison. Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.*; see also *Burgener*, 714 P.2d at 1266 n.12 (explaining "the parolee's acceptance of parole under the determinate sentencing law is in no sense pursuant to a voluntary agreement by which he has waived his right to privacy in exchange for release on parole").

Scholarly authority accords with California law in its criticism of the contractual waiver theory. Professor Wayne LaFave contends that the "notion that these waivers are unquestionably voluntary" is "a remarkable one to say the least." 5 Wayne R. LaFave, *Search and Seizure: A Treatise*

on the Fourth Amendment § 10.10(b), at 440-41 (4th ed. 2004). Even with respect to probation, Professor LaFave argues that "to speak of consent … is to resort to a 'manifest fiction,' for 'the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse, and the waiver cannot be said to be voluntary in any generally-accepted sense of the term.'" *Id.* (footnote omitted). In this case, of course, the prisoner has *no* "option to refuse," genuine or otherwise, given that California has made parole mandatory – with the result that it is impossible to "speak of consent" in any meaningful way.

The constitutional peril that would attend a rule of law that treated mandatory parole conditions as contractual waivers is both obvious and ominous. Under that theory, a State could attach any requirement it wished to mandatory parole, and thus to all citizens who had at one time been incarcerated. All such citizens, in other words, "could be forced to waive all constitutional rights, including the right to due process in revocation proceedings, or even the right to trial on any new offense allegedly committed during the parole period." *United States* v. *Crawford*, 323 F.3d 700, 718 (9th Cir.), *vacated*, 343 F.3d 961 (9th Cir. 2003), *reaching same result on other grounds*, 372 F.3d 1048 (9th Cir. 2004) (en banc). California has pointed to nothing that would justify such an anomalous and extraordinary result.

2. Parolees Are Not Prisoners.

With respect to the Fourth Amendment, parolees should not be equated with prisoners. Parolees are unlike prisoners, who do not have any Fourth Amendment rights. *Hudson* v. *Palmer*, 468 U.S. 517, 525-26 (1984). Instead of leading highly compartmentalized and rigorously structured lives, parolees' daily affairs more closely resemble those of ordinary free citizens. Even though this Court has held that parolees have *diminished* Fourth Amendment rights, *Morrissey*, 408 U.S. at 480 (stating that parolees are deprived of the "absolute liberty to which every citizen is entitled," and

can claim only "the conditional liberty properly dependent on observance of special parole restrictions"), that is a far cry from holding their Fourth Amendment rights are *extinguished* altogether.

This Court has unequivocally rejected the proposition that the limited Fourth Amendment rights of parolees can be equated to those extinguished rights of prisoners. Whereas in the prison context, this Court found that the Fourth Amendment simply "does not apply within the confines of the prison cell," *Hudson*, 468 U.S. at 525-26, the Court has long observed in the parole context that, "[t]hough the State properly subjects [a parolee] to many restrictions not applicable to other citizens, *his condition is very different from that of confinement in a prison*," *Morrissey*, 408 U.S. at 482 (emphasis added). Consistent with *Hudson*'s analysis, California has also rejected the constructive custody theory. *Burgener*, 714 P.2d at 1266-67.

Scholars universally criticize the notion that parolees can be equated with prisoners with respect to their Fourth Amendment rights. As an initial matter, the first "difficulty with the constructive custody concept is that it is more a conclusion than a theory, and thus can be employed to justify virtually any search of a parolee." 5 LaFave, *supra*, § 10.10(a), at 435-36. Professor Welsh White has criticized the custody theory's premise of equating parolees to prisoners, and suggested a more appropriate legal lens would be the "unconstitutional conditions doctrine." Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167, 178-81 (1969). As a factual matter, parolees bear very little similarity to prisoners.[8] While the circumstances of prison necessitate

[8] The differences between parolees and prisoners include the following: The parolee is not incarcerated; he is not subjected to a prison regimen, to the rigors of prison life and the unavoidable company of sociopaths. He does not live in a society whose violent, though

"severe deprivation of [F]ourth [A]mendment rights" because, absent frequent suspicionless searches, "the possibility of riots or attempts to escape might be substantially increased," *id.* at 180, parolees obviously do not live in those same circumstances. Accordingly, Professor White concludes "one cannot blithely maintain that for Fourth Amendment purposes, the two groups of citizens may be treated the same." *Id.*

In short, there is no factual or theoretical basis for treating parolees like prisoners for Fourth Amendment purposes, or for using a comparison between the two groups to validate suspicionless searches of parolees.

3. The Act-Of-Grace Theory.

Finally, the act-of-grace theory does not justify completely depriving parolees of their Fourth Amendment rights. This theory is a corollary to the contractual waiver theory. Whereas the contractual waiver approach might be described as a kind of *express* waiver, the act-of-grace theory "might be described as contemplating an *implied* waiver of Fourth Amendment rights arising from acceptance of the 'privilege' of probation or parole." 5 LaFave, *supra*, § 10.10(b), at 438 (emphasis added).

> usually repressed, mores necessitate iron bars and the close watch of armed guards. Routine searches are necessary in prison to prevent dangerous riots and internal violence. . .. A parolee, however, lives in a different environment, one where such problems are absent and searches and seizures are intrusive. The parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them. His parole represents supervision, rather than repression; and his parole officer is, ideally, an advisor, rather than an armed watchman. If the parole officer is to be the parolee's personal prison guard, it is only because the court decides that he is, and such a decision stands on extraordinarily shaky ground.

William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 Stan. L. Rev. 129, 133 (1969) (footnote omitted).

This Court, however, has already discredited the act-of-grace theory. Compare *Escoe* v. *Zerbst*, 295 U.S. 490, 492-93 (1935) (stating "[p]robation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose"), with *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (finding that "a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, that probation is an 'act of grace'") (citation omitted). The Court has explained that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Morrissey*, 408 U.S. at 482. The Supreme Court of California has reached the same result. *Edwards*, 557 P.2d at 999 (recognizing that "the traditional view that a grant of probation is a privileged act of grace or clemency has been discredited in favor of the modern view that such a grant would be deemed an alternative form of punishment in those cases when it can be used as a correctional tool"). As such, any reliance on the "act of grace" doctrine to justify suspicionless searches is improper.

C. General Warrants Rejected.

California's parole search doctrine confers a general warrant upon officers to search the persons, homes and effects of parolees, subject only to a non-harassment condition. The Fourth Amendment embodies the Framers' hostility to precisely such grants of authority to officers. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999) (explaining that the "delegation of discretionary authority to ordinary, 'petty,' or 'subordinate' officers was anathema to framing-era lawyers")[9]. The Framers' particular concern with the

[9] A general warrant was "a framing-era term for an unparticularized warrant (for example, ordering a search of 'suspected places'), which was

substance of general warrants was much the same as expressed here—the perceived need to limit the broad discretion of officers to conduct intrusive searches of homes and to thereby disrupt the privacy of the residents and the community's sense of ordered liberty. See William J. Cuddihy, *The Fourth Amendment: Origins and original meaning, 602-1791*, at 237 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services) ("[G]eneral searches and warrants … furnished an infinite power of surveillance to searchers that exposed every Englishman's dwelling to perpetual, capricious intrusion.").

As here, the general warrant required no showing of cause and delineated no specific boundaries. Davies, *supra*, at 558. It conferred upon common officers essentially unlimited power to search and arrest at their discretion. The Framers found this nearly unmitigated authority especially pernicious given their general distrust of the judgment of common officers. As a result, the search restrictions that ultimately became the Fourth Amendment were a central feature of the compromise between the Federalists and the Anti-federalists that made way for the new federal charter. See generally Davies, *supra*, at 609-11; see also Cuddihy, *supra*, at 1365-79. So strong was the acclamation for such a provision that it was already a feature of many State constitutions at the time the Framers drafted our Constitution. See Cuddihy, *supra*, at 1233-54, 1298-341, 1347-51 (discussing search and seizure in state constitutions). Accordingly, any conferral of the type of authority represented by California's parole search doctrine warrants careful scrutiny against a backdrop of well over 200 years of unmitigated hostility to such power.

California's effort to justify its radical approach on the broad ground of deterrence and public safety likewise

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also commonly applied to a warrant lacking a complaint under oath or an adequate showing of cause." Davies, *supra* at 558.

represents a departure from the Framers' express intent to strictly limit "unreasonable search and seizures." While the Framers held a great distrust for the common officer, they were unconcerned with passing a congressional standard to regulate the warrantless officer as "they did not perceive ordinary officers as possessing any significant discretionary authority … to initiate arrests or searches." Davies, *supra* at 578. Warrants, and not officers, were the main source of search and arrest authority. Framing-era common law gave no more arrest authority to common officers than it did to the general public, which mandated that a warrantless arrest could be justified only by "felony in fact," and nothing so loose as a general standard of "reasonableness." *Id.*

Given the limited power of the warrantless officer, the Framers intended to "control the officer by controlling the warrant," and had little reason to believe that the probable cause requirement would not effectuate such control. *Id.* at 552. California, however, not only hands back to the officer the very sort of general warrant the Framers despised, but also does so on a ground entirely foreign to them; namely, the notion that an officer's warrantless search or seizure can, without more, be construed as "reasonable" under the Fourth Amendment. Far from "controlling the warrant," California seeks to guarantee "reasonableness through reliance upon the good will of officers, a "deference" that is decidedly "at odds with the central purpose of the Fourth Amendment, which is distrust of discretionary police power." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 248 (1993).

D. The Rights Of Others.

California's parole search doctrine contravenes not only the history of the Fourth Amendment and our nation's long-held hostility to the concept of general warrants, but also the privacy rights and liberty interests of others who may be impacted by the exercise of such broad authority. The breadth of authority that California confers upon its officers

to search the persons, homes and effects of state parolees necessarily threatens the interests of those who are not parolees and who are imbued by the Constitution with a full panoply of rights.

The search here is a case in point. Officer Rohleder stopped Petitioner on the street during an outing with his companion and her infant child, who was in a stroller at the time. While not technically a stop of these other two persons, it was a stop in effect. This Court has given careful consideration to the rights of others in such a context and certainly, where such a stop is predicated upon probable cause or reasonable suspicion, those rights must necessarily yield to public safety concerns. See *Maryland* v. *Wilson*, 519 U.S. 408, 413-15 (1997).

Here, however, California's rule makes manifest the inevitable phenomena of stops and searches that are not predicated on any specific justification. The co-residents of a parolee, for example, are subject to a search of their homes and effects at any time and for any reason short of harassment. To be sure, it may be said that such "third-parties" can avoid this vulnerability by avoiding a parolee altogether. But this is to impose upon those third-parties an "implied consent" theory that, as described above, is roundly and sensibly rejected by many courts, even California's, for parolees themselves. Further, it contradicts the rehabilitative purposes of parole to suggest that law-abiding citizens and family-members should avoid parolees. And, finally, it defies reality to suggest that the families and friends of parolees have a real choice in the matter when parolees, like Petitioner, attempt to resume their lives in the community and their role in the family unit. Neither the communities in which parolees live, nor their families should be put to such a Hobson's choice.

III. THE REASONABLE SUSPICION STANDARD IS THE LEAST RESTRICTIVE MEANS TO PROTECT THE FOURTH AMENDMENT INTERESTS AT ISSUE.

In allowing parole searches so long as they are not arbitrary, harassing, or capricious, the Supreme Court of California has become unmoored from the Fourth Amendment foundation of its parole system. Its approach is both unique and reactionary. It is unique because the overwhelming majority of States require, at a minimum, reasonable suspicion for parole searches. And it is reactionary because it is, in essence, an attempt to return to the general warrant days for which the Fourth Amendment was initially drafted.

Indeed, California's approach turns well-established Fourth Amendment law on its head. It makes no sense to allow suspicionless searches, on the one hand, and then to add a caveat that such searches may not be arbitrary or capricious. All of modern Fourth Amendment law is premised on the understanding that in the law enforcement context, the best and only way to ensure that a search *is not* arbitrary or capricious, or driven by some impermissible motive, is to insist that it *is* based on some articulable suspicion of wrongdoing. See *United States* v. *Knights*, 534 U.S. 112, 121 (2001) ("The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable."); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Horton* v. *California*, 496 U.S. 128, 138 (1990) (explaining "evenhanded law enforcement is best achieved by the application of objective standards of conduct"); *Terry*, 392 U.S. at 15 ("[C]ourts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches

upon personal security without the objective evidentiary justification which the Constitution requires."). For all practical purposes, the "reasonable suspicion" requirement is the logical converse of arbitrary, capricious and harassing searches. To avoid the latter, we require the former.

For the reasons discussed above, California's novel experiment in Fourth Amendment law—cutting loose the prohibition on arbitrary, capricious and harassing law-enforcement searches from the reasonable suspicion requirement—has obvious flaws, and is bound to be entirely ineffective. That should come as no surprise. If there were a way to ensure that wholly unconstrained law-enforcement discretion would not be used in arbitrary or capricious ways, or to target racial or other minorities, then there would have been no need for the reasonable suspicion standard in the first place.

The reasonable suspicion standard therefore represents the least restrictive means to accomplish California's monitoring and public safety goals while adequately protecting acknowledged privacy interests. That standard affords officers tremendous flexibility—allowing them to act on mere suspicions that need only be articulable and not wholly irrational. Practically speaking, no standard is less restrictive and yet short of full officer discretion. California's proposed standard does not functionally limit officer discretion in any meaningful way and cannot, in any event, be applied in any sort of "bright-line" manner. Whether any particular action is "arbitrary, capricious or harassing" is patently subjective and difficult to assess fairly in any context, much less by officers who are executing their duties in the street. California's deviation from the reasonable suspicion standard must therefore be rejected in favor of the more prevalent and sound "reasonable suspicion" standard.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal of California should be reversed.

Respectfully submitted,

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

CARTER G. PHILLIPS*
JEFFREY T. GREEN
THOMAS A. BURNS
DEVON A. CORNEAL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

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* Counsel of Record