04-9728

IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Special Needs Doctrine Does Not Apply To A Parole Search Conducted For General Criminal Law Enforcement 5

A. The Special Needs Doctrine Is A Narrow Exception To Fourth Amendment Warrant And Probable-Cause Requirements 7

B. The Suspicionless Search Of A Parolee By A Police Officer Engaged In Ordinary Law Enforement Is Not A Special Need 13

II. The Fourth Amendment Requires Individualized Reasonable Suspicion For Discretionary Searches Of Particular Parolees 20

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 21, 23

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) ..... *passim*

Camara v. Mun. Court,
387 U.S. 523 (1967) 8,10,21,25

Carroll v. United States,
267 U.S. 132 (1925) 19

Chandler v. Miller, 520 U.S. 305 (1997) 10

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) ..... *passim*

Delaware v. Prouse, 440 U.S. 648 (1979) ..... *passim*

Ferguson v. City of Charleston,
532 U.S. 67 (2001) ..... *passim*

Griffin v. Wisconsin, 483 U.S. 868 (1987) ..... *passim*

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 25

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 11, 14, 21, 24

Michigan v. Tyler, 436 U.S. 499 (1978) 10

Minnesota v. Dickerson, 508 U.S. 366 (1993) 5

Morrissey v. Brewer, 408 U.S. 471 (1972) 6, 7

Nat'l Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) ..... *passim*

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... *passim*

New York v. Burger, 482 U.S. 691 (1987) 10

O'Connor v. Ortega, 480 U.S. 709 (1987) ..... *passim*

Pa. Bd. of Probation & Parole v. Scott,
524 U.S. 357 (1998) 17

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) ..... *passim*

Terry v. Ohio, 392 U.S. 1 (1968) 5

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 20, 21, 23

United States v. Knights, 534 U.S. 112 (2001)..... *passim*

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) ..... *passim*

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 8, 11, 20, 22

Whren v. United States, 517 U.S. 806 (1996) 10

Regulations

49 C.F.R. § 219.201(a)(1)-(3) (1987) 22

Other Authorities

William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1501-02, 1507-08 (1990) (unpublished Ph.D. Dissertation, Claremont Graduate School) 8

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the protection of Fourth Amendment rights has been a central concern of the ACLU, which has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. Of particular note, the ACLU has served as direct counsel in several of the cases delineating the scope of the "special needs" exception to the usual Fourth Amendment standards, including *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Because this case addresses an important Fourth Amendment question, its proper resolution and the proper application of the special needs doctrine are matters of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

On September 6, 2002, San Bruno police officer Alex Rohleder was driving his patrol vehicle when he happened upon Petitioner Donald Curtis Samson, Petitioner's friend Deborah Watson, and Watson's three-year-old son Jefferson as they

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[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici*, their members or counsel, made any monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court.

walked down the street. Joint Appendix 10, 31, 53 (henceforth "J.A."). Officer Rohleder recognized Petitioner from a prior contact. J.A. 32, 35. Officer Rohleder knew that Petitioner was on parole and believed that he "might have a parolee at large warrant." J.A. 32. He frisked Petitioner for weapons and found none. J.A. 55. Officer Rohleder asked Petitioner if he had an outstanding warrant, and Petitioner stated that he had already resolved the warrant and that "he was in good standing with his parole agent." J.A. 32. Officer Rohleder called the matter in and confirmed that this was correct. J.A. 33. Nevertheless, he searched Petitioner a second time more thoroughly. J.A. 33, 38. Officer Rohleder searched Petitioner solely because he was on parole. J.A. 10, 38. Officer Rohleder admitted that he had no other reason to search Petitioner, who posed no threat to officer safety. J.A. 40.

When asked whether he searches all parolees with whom he makes contact, Officer Rohleder testified: "It depends." J.A. 39. He explained: "[i]f I drive by one and I already dealt with him earlier in the day or have dealt with him, I just drive by. I have other work to do. I don't go after everybody all the time." *Id.* During his search of Petitioner, Officer Rohleder discovered a cigarette pack containing a "plastic baggy" of methamphetamine. J.A. 33. He then arrested Petitioner. J.A. 11.

Petitioner was on parole on the day Officer Rohleder searched and arrested him. J.A. 47. His notice of conditions of parole stated: "You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 48.

SUMMARY OF ARGUMENT

Rather than repeat arguments made elsewhere, this brief focuses on the history of the special needs exception to ordinary

Fourth Amendment rules and the reasons this exception does not apply to the suspicionless and discretionary search of parolees by law enforcement officers. *Amici* agree with Petitioner that the search in this case cannot be upheld if traditional Fourth Amendment rules are applied, but do not directly address that issue in this brief.

Under the Fourth Amendment, a search generally is reasonable only if it is supported by some level of individualized suspicion, usually requiring probable cause and a warrant. Special needs justifying departure from the normal warrant and probable-cause requirements arise only in exceptional circumstances that extend "beyond the normal need for law enforcement" and that "make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citation and quotation marks omitted). Those circumstances do not exist here. Pursuant to California's standard parole search condition permitting suspicionless law enforcement searches, Officer Rohleder searched Petitioner solely because he was a parolee. As an ordinary police officer conducting an ordinary search, Officer Rohleder should be held to ordinary Fourth Amendment standards.

This Court's decisions in *Edmond*, *Griffin*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *United States v. Knights*, 534 U.S. 112 (2001), make clear that the line separating special needs searches from regular Fourth Amendment searches lies in the programmatic purpose and character of the search. If the search is conducted for a general law enforcement purpose, then it must satisfy the traditional balancing test in order to be constitutional. The special needs exception only includes those searches conducted for administrative or non-prosecutorial purposes. In that limited context, this Court has allowed an exception to the probable-cause and warrant requirement based on its view that the probable-cause standard "is peculiarly related to criminal investigations," *Earls*, 536 U.S. at 828 (citation and internal quotation marks omitted).

Thus, in *Griffin,* this Court described the supervisory search of a probationer as a special need. This Court did not hold that every search of a probationer – or, in this case, a parolee – qualified under the special needs doctrine. Any ambiguity in that regard was resolved in *Knights,* where this Court applied traditional Fourth Amendment rules in reviewing a police officer's search of a probationer for law enforcement purposes. Officer Rohleder's search of Petitioner was not a supervisory search; it was a law enforcement search. *Ferguson, Edmond, Griffin,* and *Knights* together command that a police officer's search of a parolee for law enforcement purposes does not fall within the special needs exception and must be examined under the usual Fourth Amendment balancing test.

Even assuming *arguendo* that parolee searches are considered a special need, the search here violated the Fourth Amendment because it was based on a complete absence of suspicion. This Court has held, in an unbroken line of precedent, that a completely suspicionless search cannot rest on the discretion of an individual officer; the search must be even-handed and programmatic. Accordingly, officers have only two choices: they may single out particular individuals for a search if they have individualized reasonable suspicion, or they may search individuals without reasonable suspicion, but only if the search policy is applied uniformly. The California parole search condition contains no standards to limit discretion; its permissive language expressly contemplates searches at any time, for any purpose, with or without cause. Unsurprisingly, then, Officer Rohleder neither applied the search policy even-handedly nor had reasonable suspicion to search Petitioner – instead, he searched Petitioner for no better reason than that he could. This Court should not break from its long line of precedent by upholding a general search based on nothing but a police officer's whim.

ARGUMENT

I. The Special Needs Doctrine Does Not Apply To A Parole Search Conducted For General Criminal Law Enforcement

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend IV. A police officer's command to stop and produce for inspection a privately held, concealed package, the officer's inspection of the interior of the package, and the decision to take custody of the contents of that package as evidence in support of a criminal charge constitute, collectively, both a search and a seizure. *See generally Terry v. Ohio*, 392 U.S. 1 (1968); *Minnesota v. Dickerson*, 508 U.S. 366 (1993). The general rule requires that to be reasonable, and thus constitutional, a search must be based on individualized suspicion of wrongdoing. This Court has recognized a limited exception to that rule, however, for searches based on "special needs, beyond the normal need for law enforcement, mak[ing] the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873 (citation and internal quotation marks omitted); *see also Ferguson*, 532 U.S. at 74 n.7; *Edmond*, 531 U.S. at 37.

In *Griffin*, this Court found that "[s]upervision . . . is a 'special need' of the State," 483 U.S. at 875, "justify[ing] replacement of the standard of probable cause by reasonable grounds" when probation officials conduct searches to assess compliance with probation terms, *id.* at 876 (internal quotation marks omitted). In *Edmond* and *Ferguson*, by contrast, this Court rejected application of the special needs exception, where "the central and indispensable feature of the policy from its inception was the [involvement] of law enforcement," *Ferguson*, 532 U.S. at 80, and the pursuit of law enforcement ends. *See also Edmond*, 531 U.S. at 38, 41, 44. Most recently, in *Knights*, this Court upheld a search of a probationer by a police officer, not because the special needs exception applied,

but because the search was deemed reasonable based upon the existence of individualized suspicion that the probationer had committed a crime. *Knights*, 534 U.S. at 117-18, 121-22.

As explained below, the invocation of the special needs exception has always been premised upon a clear separation of the nature and programmatic purpose of a search from general law enforcement goals, requiring the government to justify a law enforcement search under ordinary Fourth Amendment rules of warrants, probable cause, and overall reasonableness. The status of the person being searched – in this case, a person on parole – may well have implications for that reasonableness analysis, but that status alone cannot convert an ordinary police search into a special need. To so find would make the special needs exception so broad as to swallow the rule of Fourth Amendment reasonableness, opening the door to standardless police searches of any member of a societal group having diminished or attenuated privacy expectations.[2] This Court's ruling in *Knights* declined to apply the special needs doctrine to a police officer's search of a California probationer, and the same framework must apply to the substantially similar search at issue in this case.[3]

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[2] As discussed in more detail below, many of this Court's special needs decisions involve groups of individuals who, like parolees in California, are subject to various forms of scrutiny. These groups include high school students, employees in regulated industries, and certain government employees. In none of these cases did this Court signal a willingness to allow police searches of anyone at any time, but rather constructed a careful balancing test, evaluating the precise governmental interest – an interest that was found, in each case, to exist apart from law enforcement.

[3] This case involves a parolee, whereas *Griffin* and *Knights* involved probationers, but probationers and parolees have been treated similarly under the Fourth Amendment. Probationers and parolees are alike in that they do not have "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer*, 408 U.S. 471, 480

A. The Special Needs Doctrine Is A Narrow Exception To Fourth Amendment Warrant And Probable-Cause Requirements

From its inception, "the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). The present case offers a remarkable parallel to this foundational "evil": an officer of the state invokes a general power to search individuals without any particularized suspicion toward the person being searched or even the belief that a crime has been committed. If a prototypical case for Fourth Amendment limitations exists, it is this law enforcement officer trolling for evidence of a crime, searching individuals who are suspected of no wrongdoing, in the hope that some evidence of criminality might be exposed.

Fourth Amendment analysis begins with the strong presumption that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37 (citation omitted). Exceptions to this fundamental rule are closely guarded, made in the "limited circumstances . . . where the program [i]s designed to serve special needs, beyond the normal need for law enforcement." *Id.* (citations and internal quotation marks omitted). A long and consistent pedigree attaches to the judicial insistence upon cabining the special needs doctrine, reaching only those searches made for some reason *other than law enforcement*. A finding that law enforcement concerns are

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(1972); *see also Griffin*, 483 U.S. at 874 (applying the conditional liberty concept to probationers). Since the search condition at issue in *Knights* is substantially the same as the search condition at issue here, the line drawn by *Griffin* and *Knights* between special needs cases and ordinary Fourth Amendment cases applies to parolees in the same way that it applies to probationers.

sufficiently absent to justify the special need exception turns on some combination of the nature of the search and the relationship between the government actor and the person being searched, leading to a circumscribed list of contexts in which the need for individualized suspicion is either lowered or eliminated.

1. Where a government search is based on legitimate regulatory or administrative concerns unrelated to criminal law enforcement, this Court has been willing to dispense with the traditional probable-cause and warrant requirements when it appears those requirements are either unnecessary or impractical. As this Court has explained, "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions" where the government is not seeking evidence of criminal activity but is instead seeking "to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (internal citations omitted).[4] For instance, in looking for faulty wiring in a building, the notion of individualized suspicion is of no relevance to a government inspector. *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967). The point of the inspection is building safety, not "discovery of evidence of crime." *Id.* In a similar vein, efforts to discover drug and

[4] The historical context for adopting the Fourth Amendment comports with the contemporary countenance of suspicionless searches for purely administrative purposes. Specifically, during the ratification era, a number of states permitted warrantless inspections of commercial enterprises pursuant to regulatory objectives, and federal law authorized limited warrantless commercial searches for tax collection and customs purposes. *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1501-02, 1507-08 (1990) (unpublished Ph.D. Dissertation, Claremont Graduate School), *cited in Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor J., dissenting) (describing Cuddihy's work as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken.").

alcohol use among employees grow from a desire to foster a safe workplace. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 628-29 (1989); *Von Raab*, 489 U.S. at 674; *see also Earls*, 536 U.S. at 836 (stating that "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.").

Under this Court's cases, the concepts of probable cause and reasonable suspicion have been deemed "rooted . . . in the criminal investigatory context," and the Court has therefore concluded that "it is difficult to give [those concepts] . . . much meaning" in the context of searches conducted for administrative or non-prosecutorial purposes, *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987). In contrast, a search conducted for law enforcement purposes can be expected, and should be required, to "generate articulable grounds for searching any particular person or place." *Von Raab*, 489 U.S. at 668.

2. The finding of a special need can turn, as well, upon the fact that the person performing a search has little or no connection to law enforcement, both demonstrating that the search does not serve law enforcement ends, but also recognizing the reality that most government employees are ill-equipped to assess the existence of probable cause. Railroad supervisors, for instance, "are not in the business of investigating violations of the criminal laws" and "otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Skinner*, 489 U.S. at 623. Similarly, this Court has found that "[i]mposing unwieldy warrant procedures . . . upon [government office] supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable." *O'Connor*, 480 U.S. at 722. On the same basis, this Court has seen fit to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause" when they suspect that a student has violated school rules. *T.L.O.*, 469 U.S. at 343.

Unlike railroad supervisors, office managers, and school teachers, police officers are trained to detect violations of the law: their central job responsibilities require the ability to recognize suspicious behavior and investigate potential crimes. Thus, it is not at all "difficult" to give "meaning" to the concept of probable cause in the context of a parolee search whose purpose is "criminal investigat[ion]." *O'Connor*, 480 U.S. at 723.

3. "While reasonableness under the Fourth Amendment is predominantly an objective inquiry," this Court's "special needs and administrative search cases demonstrate that purpose is often relevant" to the special needs analysis. *Edmond*, 531 U.S. at 47.[5] The finding of a special need apart from law enforcement has led this Court regularly to examine programmatic purposes and to specify the nature of the governmental interest.

In *Camara*, 387 U.S. at 535, the special need arose from the observation that "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." This Court recognized the special need of hospital officials in *O'Connor*, 480 U.S. at 721, "to enter the offices and desks of . . . employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner." Similarly,

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[5] The rule against inquiry into an officer's *subjective* reasons for conducting a particular search, as articulated in *Whren v. United States*, 517 U.S. 806 (1996), "does not preclude an inquiry into programmatic purpose" where "relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Edmond*, 531 U.S. at 45-46 (citing *Chandler v. Miller*, 520 U.S. 305 (1997); *Von Raab*; *New York v. Burger*, 482 U.S. 691 (1987); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Camara v. Mun. Court, 387 U.S. 523 (1967)*).

the need for swift and informal discipline in schools justified the finding of a special need in *T.L.O.*, 469 U.S. at 340.

In this Court's four cases upholding suspicionless drug testing, a special need arose from concerns about workplace or school safety, as opposed to general law enforcement. *See Earls*, 536 U.S. at 834 (school drug testing based on the governmental concern with "[t]he drug abuse problem among our Nation's youth"); *Vernonia*, 515 U.S. at 661-62 (same); *Von Raab*, 489 U.S. at 666 (purpose of drug testing Customs Service employees is "to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions"); *Skinner*, 489 U.S. at 631 (recognizing the "Government's goal of ensuring safety in rail transportation").

Significantly, each of these cases involved an announced policy authorizing designated government officials, who were not police officers, to conduct a limited search for specified reasons that were articulated in advance and unrelated to general law enforcement.[6] Whether the programmatic purpose was building safety, workplace efficiency, or school discipline, this Court was able, in each case, to identify and describe that purpose in terms clearly distinct from ordinary enforcement of criminal laws.

Accordingly, this Court has carefully noted the lack of a law enforcement purpose in cases approving a special need. The school district policy approved in *Earls* "[wa]s not in any way related to the conduct of criminal investigations." 536 U.S. at 829. *See also Vernonia*, 515 U.S. at 658 n.2 (suspicionless drug testing of student athletes is "*non*punitive" and distinct

[6] The need to articulate a government purpose unrelated to criminal law enforcement becomes even more important when the search is conducted by police officers normally charged with investigating crime. *Cf. Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (sobriety checkpoint program conducted by state police for purpose of highway safety, not general law enforcement).

from "evidentiary" searches); *Von Raab*, 489 U.S. at 666 ("It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent."); *Skinner*, 489 U.S. at 620-21 ("The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.") (citation and internal quotation marks omitted); *T.L.O.*, 469 U.S. at 341 n.7 (limiting its holding to "searches carried out by school authorities acting alone and on their own authority" and expressly withholding opinion on "the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies").

4. By contrast, this Court has found the special needs exception inapplicable when the purpose of a search or seizure is not "one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79. Significant for the analysis of the present case, this Court noted in *Ferguson* that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes," *id.* at 83 n.20, which is plainly what occurred here. "Without drawing the line at [searches] designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Edmond*, 531 U.S. at 42.

Since law enforcement officers developed and implemented the drug-testing policy in *Ferguson*, 532 U.S. at 82 ("throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy"), for law enforcement purposes, *id.* at 80 ("the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance

abuse treatment"), abandonment of Fourth Amendment requirements could not be justified through the special needs exception, *id.* at 84.

Likewise, because the Indianapolis Police Department created and operated the checkpoint program in *Edmond*, 531 U.S. at 34-36, and "the . . . program unquestionably ha[d] the primary purpose of interdicting illegal narcotics," *id.* at 40-41, such stops could "only be justified by some quantum of individualized suspicion," *id.* at 47. This Court emphasized that:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. . . . each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

Id. at 41-42.

B. The Suspicionless Search Of A Parolee By A Police Officer Engaged In Ordinary Law Enforcement Is Not A Special Need

Petitioner's suspicionless search by a police officer engaged in ordinary law enforcement cannot be justified as a special need under this Court's decisions. In *Griffin*, this Court held that supervision of probationers, when conducted by a

probation officer,[7] is a special need justifying departure from the usual probable-cause and warrant requirements. 483 U.S. at 873-75. As in its other special needs cases, this Court tethered its decision to the nature of the search, the relationship between the government actor and the person being searched, and the programmatic purpose of the search. *Id.* at 873-79.

In *Knights*, this Court reaffirmed the *Griffin* rule but declined to extend the special needs exception where a probationer was searched by an ordinary police officer for the purpose of gathering evidence in a criminal investigation. 534 U.S. at 117-18. The decision to apply ordinary Fourth Amendment standards (that is, the decision to forego invocation of the special needs exception) in *Knights* controls the analysis in the present case: the search and seizure of Petitioner Samson was of a similar nature, was performed by a comparable officer, and had an identical programmatic purpose, as explained in detail below.

1. In *Griffin*, this Court found a special need because every relevant characteristic of the probation regulation at issue in that case – the nature of the governmental interest, the relationship between the probation officer and the probationers, and the programmatic purpose of the search – centered on supervision of probationers. As this Court noted, the overall objectives of the probation system (and likewise, the parole system) are to rehabilitate probationers and protect the community. *Griffin*, 483 U.S. at 875. "These . . . goals require and justify the exercise of supervision to assure that the [probation] restrictions are in fact observed." *Id.* Like the checkpoint programs upheld in *Sitz* and *United States v.*

[7] Two probation officers conducted the search, but three police officers accompanied them. *Griffin*, 483 U.S. at 871. Since the police officers only assisted in what was otherwise a probation officer-led supervisory search, this Court characterized the search as "carried out entirely by the probation officers under the authority of Wisconsin's probation regulation." *Id.*

Martinez-Fuerte, 428 U.S. 543 (1976), the safety-related nature of the governmental interest is not criminal investigation – even though those who violate probation, like those who violate laws against drunk driving and smuggling of aliens, may ultimately be arrested and prosecuted. Supervision of probationers is thus a special need going "beyond the normal need for law enforcement." *Griffin*, 483 U.S. at 874.

Furthermore, as in *O'Connor* and *T.L.O.*, the "not, or at least not entirely, adversarial" relationship "between the object of the search and the decisionmaker" was an additional factor in this Court's finding of a special need in *Griffin*. *Id.* at 879. Although a probation officer has a stronger connection to law enforcement than hospital officials (in *O'Connor*) and teachers (in *T.L.O.*), "neither is he the police officer who normally conducts searches against the ordinary citizen." *Id.* at 876. Special needs permitting departure from the usual warrant and probable-cause requirements exist only where such requirements are "impracticable." *Id.* at 873, 876. According to this Court, the warrant requirement would "interfere" with the operation of the probation system because "a magistrate rather than the probation officer [becomes] the judge of how close a supervision the probationer requires," *id.* at 876, and the probable-cause requirement would disrupt the "ongoing supervisory relationship" between the probationer and his or her probation officer, *id.* at 879. Given the probation officer's unique relationship with the probationer, this Court concluded in *Griffin* that it would be "destructive of the whole object of the continuing probation relationship to insist upon" probable cause instead of reasonable grounds in this context. *Id.*

In determining that the programmatic purpose of the Wisconsin probation search regulation was supervisory and non-prosecutorial, this Court began with the language of the regulation itself, *id.* at 870-71, and the needs of "the probation agency," *id.* at 879, rather than the subjective purpose of the probation officers who searched Griffin's home. Since probation officers conducted the search of Griffin's home

pursuant to a regulation whose programmatic purpose was "beyond normal law enforcement," *id.* at 874, and the goal of the search was to assess whether Griffin violated his probation by possessing a firearm, *id.* at 871, 875, the search was sufficiently supervisory in nature to fall within the closely guarded category of special needs, *id.* at 874.

2. *Knights* answers the question left open by *Griffin*, making clear that a police officer's routine search of a probationer (or, by implication, a parolee) must be evaluated under the usual Fourth Amendment balancing test. In *Knights*, a detective investigating acts of vandalism searched Knights's home based on reasonable suspicion that he was involved in those crimes. 534 U.S. at 114-15. This Court stressed that *Griffin*'s "special needs holding made it unnecessary to consider whether warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment," *id.* at 117-18 (citation and internal quotation marks omitted), but declined to apply the special needs exception, deciding the case instead on the basis that a probationer search based on reasonable suspicion was valid under the Fourth Amendment, *id.* at 118. That *Griffin* involved a search "carried out entirely by . . . probation officers" for the purpose of supervising the probationer to ensure his compliance with the terms of his probation, *Griffin*, 483 U.S. at 871, whereas *Knights* involved a search carried out by a police officer for the purpose of investigating ordinary criminal activity, *Knights*, 534 U.S. at 115, proved to be the critical distinction that removed the probationer search from the special needs framework. The nature of the search (detecting crime), the identity of the government official (a police officer), and the lack of any programmatic purpose apart from criminal law enforcement placed *Knights* outside the long line of special needs cases. *See* discussion *supra* Section I.A.

3. *Griffin* and *Knights* are opposite sides of the same coin: searches conducted for supervisory purposes count as special needs justifying departure from Fourth Amendment

safeguards; conversely, searches conducted for general law enforcement purposes must satisfy the traditional balancing test.

The search of Petitioner Samson lacked the essential elements that led this Court in *Griffin* to invoke the special needs exception. Unlike the probation officer search in *Griffin*, a police officer on routine patrol searched Petitioner. Officer Rohleder knew that Petitioner was on parole (just as the police officer in *Knights* knew the probation status of Mr. Knights), but this mere knowledge did nothing to create a supervisory relationship and thus failed to place the police officer in a position to judge "how close a supervision," *Griffin*, 483 U.S. at 876, Petitioner required as a parolee. Unlike a supervising parole officer, Officer Rohleder did not "proceed on the basis of [his] entire experience" with Petitioner or "assess probabilities in the light of [his] knowledge of [Petitioner's] life, character, and circumstances." *Id.* at 879. He did not assess probabilities at all, because his sole reason for searching Petitioner was the fact that he was on parole. J.A. 10, 38. Officer Rohleder is precisely the ordinary police officer whom this Court has distinguished from parole agents conducting parole searches. *See Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 369 (1998) ("Parole agents, in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime; instead, their primary concern is whether their parolees should remain free on parole.") (internal citation and quotation marks omitted).

Just as this Court in *Griffin* thoroughly examined the nature of the Wisconsin probation system to ensure that it was truly supervisory and did not merely conclude from the fact that Griffin was a probationer that the search of his home was a special need, this Court should not conclude that Petitioner's mere status as a parolee converts every search into a special needs search.

4. The California parole search condition to which Petitioner was subject is substantially the same as the probation

search condition at issue in *Knights*.[8] Here, as in *Knights*, an ordinary police officer conducted the search as part of his daily routine of investigating and detecting crime.[9] The search condition does not require police officers to "have in mind the welfare of the [parolee]," or "[p]rovid[e] individualized counseling designed to foster growth and development of the client." *Griffin*, 483 U.S. at 876 (citation and quotation marks omitted). Just as this Court treated the search in *Knights* as being outside the special needs exception, the same analysis should apply here.

If a search condition that allows any peace officer to search a parolee at any time, with or without cause, is not for the purpose of general law enforcement, it is difficult to imagine what would be. Pursuant to this blank check, Officer Rohleder carried out the search not because he suspected Petitioner of any wrongdoing, either in terms of violating the terms of his parole or being guilty of any crime, but merely because he could. *See* J.A. 38. The Fourth Amendment was enacted precisely to protect against this kind of general search for evidence of a crime without any reason to believe that the individual is guilty of any wrongdoing. Just as this Court has

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[8] The search condition in *Knights* stated that Knights would "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." 534 U.S. at 114 (internal quotation marks omitted). The search condition at issue here states: "You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 4.

[9] The police officer in *Knights* had specific reason to believe that Knights was guilty of the particular crime, while the officer in the present case lacked even that level of suspicion. Officer Rohleder searched Petitioner because he "just happened to run across him," J.A. 34. As discussed *infra* at Section II, this search suffers the infirmity, not just of being for law enforcement purposes, but also of trolling broadly to try to *find* evidence of crime.

not "sanction[ed] stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime," *Edmond*, 531 U.S. at 44, it should not sanction a police officer's suspicionless search of a parolee simply to make sure that "he had nothing on him illegal," J.A. 44. No exigent circumstances accompanied the search in this case that would distinguish it "from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction." *Edmond*, 531 U.S. at 44; *see also Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

While the ultimate goal of the California search condition may be to facilitate the supervision and rehabilitation of parolees, the immediate programmatic purpose highlighted in this case is to allow general searches for evidence of wrongdoing – as shown by Officer Rohleder's investigatory search. This is a far cry from the Wisconsin probation search regulation this Court approved in *Griffin*, which specifically authorized supervisory searches carried out by probation officers. 483 U.S. at 870-71. "Because law enforcement involvement always serves some broader social purpose or objective," describing the purpose of a search at too high a level of generality would result in "virtually any nonconsensual suspicionless search [being] immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose." *Ferguson*, 532 U.S. at 84. This Court has been willing to relax the Fourth Amendment's warrant and probable-cause requirements only when the search is not part of a general enterprise of criminal investigation: "The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and

prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives." *Id.* at 88 (Kennedy, J., concurring). The Court should not change course now.

II. The Fourth Amendment Requires Individualized Reasonable Suspicion For Discretionary Searches Of Particular Parolees

Assuming *arguendo* that the present case were viewed as fitting within the special needs exception, the search would nonetheless be unreasonable because Officer Rohleder acted with unfettered discretion and in the absence of any individualized suspicion. While individualized suspicion may not be an "irreducible requirement" of the Fourth Amendment, *Earls*, 536 U.S. at 829 (quoting *Martinez-Fuerte*, 428 U.S. at 561), it is still the rule rather than the exception. This Court has never permitted a search focused on a single individual without at least reasonable suspicion, and a contrary holding that a police officer could single out a particular parolee on a discretionary, non-random basis for a suspicionless search would allow the exception to swallow the rule.[10]

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[10] This Court has reached a consistent result in every special needs case, permitting officer discretion for searches only upon some level of individualized suspicion. *Compare Griffin*, 483 U.S. at 872 (probation officers searched probationer's apartment with reasonable grounds to believe he violated his probation); *O'Connor*, 480 U.S. at 712-13 (hospital personnel searched doctor's office with suspicion to believe he improperly managed the hospital's residency program); *T.L.O.*, 469 U.S. at 329-30 (assistant vice principal searched student's purse with reasonable suspicion to believe it contained cigarettes); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (roving patrol stops must be based on reasonable suspicion of violation of license and registration laws); and *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (same for immigration violation), *with Vernonia*, 515 U.S. at 650 (no suspicion required for drug testing policy applied to all student athletes); *Earls*, 526 U.S. at 826 (same for extracurricular activity participants); *Skinner*, 489 U.S. at 608 (same for all covered employees specified by statute); *Von*

Under the California search condition, individual peace officers determine entirely for themselves if, when, where, and how they will search a particular parolee; "[t]his kind of standardless and unconstrained discretion is the evil this Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Prouse*, 440 U.S. at 661 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara*, 387 U.S. at 532-33). As this Court emphasized in striking down suspicionless stops performed at the discretion of individual officers, "the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government." *Brignoni-Ponce*, 422 U.S. at 822. This Court's steadfast concern with unlimited discretion manifests itself in the requirement that if an officer does not have individualized suspicion to search a particular person, he must search either everyone or no one in a given group.

The California search condition violates the rule against standardless discretion underlying this long line of cases: it provides neither an individualized suspicion requirement for searching specific parolees nor a uniform, non-discretionary manner of searching all parolees without suspicion. Officer Rohleder singled out Petitioner for a search not because of any suspicion of wrongdoing, but because he merely felt like searching him that day. What California permits is far beyond anything this Court has ever upheld, either as part of the special needs doctrine or otherwise.

1. Where this Court has upheld suspicionless searches based on special needs, government officers had little or no

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Raab, 489 U.S. at 660-61 (same for all employees in drug interdiction or firearm-carrying positions); *Martinez-Fuerte*, 428 U.S. at 559 (no suspicion required for seizures of motorists at fixed immigration checkpoints); and *Sitz*, 496 U.S. at 454 (same for fixed sobriety checkpoints).

discretion to pick and choose who to search. The student and employee drug testing cases illustrate this point quite well. In *Vernonia* and *Earls*, school officials subjected all students participating in athletics and extracurricular activities, respectively, to drug tests on a uniform basis. *Vernonia*, 515 U.S. at 650 (school tested all athletes at the beginning of their sport season and randomly tested ten percent of the athletes each week during the season); *Earls*, 526 U.S. at 826 (school tested all students engaging in extracurricular activities before participation and randomly during participation). In fact, the drug-testing policy in *Earls* specifically did not permit the school to single out individual students unless there was reasonable suspicion of drug use. *Earls*, 526 U.S. at 826. The California search condition gives a blank check to police officers to conduct searches at their will; this flies in the face of this Court's emphasis on the importance of minimizing the ability of officials to exercise discretion in an arbitrary manner. *See, e.g., Vernonia*, 515 U.S. at 663 (expressing concern over "the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students.").

Similarly, this Court upheld the drug-testing policies in *Skinner* and *Von Raab* in part because employers uniformly imposed drug tests on a certain defined group of employees, rather than imposing drug tests on an ad hoc basis. *Skinner*, 489 U.S. at 609, 633 (Federal Railroad Administration required railroads to drug test all employees involved in an accident); *Von Raab*, 489 U.S. at 660-61 (Customs Service drug tested all employees seeking to be placed in positions involving drug interdiction and carrying of firearms). In *Skinner*, one subpart of the Federal Railroad Administration regulations mandated testing for all covered employees under three circumstances: following a "major train accident," an "impact accident," and "[a]ny train incident that involves a fatality to any on-duty railroad employee." 489 U.S. at 609 (quoting 49 C.F.R. § 219.201(a)(1)-(3) (1987)). Unlike the California parole search condition, this subpart of the regulations contained little room

for the exercise of discretion. *Id.* at 609 n.2. Another subpart of the regulations permitted railroads to single out particular employees for drug testing, but only if a supervisor had reasonable suspicion that the employee's acts contributed to an accident or certain rule violations. *Id.* at 611. While this subpart of the regulations "confer[red] some discretion to choose those who may be required to submit to testing, [it] also impose[d] specific constraints on the exercise of that discretion." *Id.* at 622 n.6.

2. This Court has applied a similarly strict standard to motorist stops, allowing suspicionless searches and seizures only where officers faced constraints over their discretion in selecting whom they would stop. The contrast between this Court's analysis (and the results) in *Brignoni-Ponce*, 422 U.S. at 882-83, and *Martinez-Fuerte*, 428 U.S. at 559, is telling. Both cases concerned seizures of motorists in order to detect illegal immigration, a purpose sufficiently removed from ordinary law enforcement to permit seizures without probable cause or a warrant. *See Brignoni-Ponce*, 422 U.S. at 878-80; *Martinez-Fuerte*, 428 U.S. at 551-53. Yet, in the former, this Court was "unwilling to let the Border Patrol dispense entirely with the requirement that officers must have reasonable suspicion to justify roving-patrol stops," *Brignoni-Ponce*, 422 U.S. at 882, because "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference," *id.* at 883. *See also Almeida-Sanchez*, 413 U.S. at 268 (rejecting as unreasonable the Border Patrol's asserted "extravagant license to search" automobiles by roving patrol "without a warrant," "without probable cause to believe the cars contain aliens," and without consent). By contrast, this Court upheld fixed immigration checkpoints because "field officers may stop only those cars passing the checkpoint, [so] there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Martinez-Fuerte*, 428 U.S. at 559.

This Court applied the same reasoning in examining police stops removed from the border. In both *Sitz* and *Prouse*, the primary purpose for the stops was to ensure highway safety (apprehending drunk drivers and unlicensed drivers)—a purpose that was sufficiently divorced from the general interest in law enforcement. *See Sitz*, 496 U.S. at 451; *Prouse*, 440 U.S. at 658-59. Nevertheless, this Court struck down the roving patrols employed in *Prouse* because "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle to a seizure . . . at the unbridled discretion of law enforcement officials." 440 U.S. at 661. In *Sitz*, this Court upheld the fixed sobriety checkpoint program partly on the ground that "this case" does not involve "a challenge to random highway stops," as *Prouse* did. 496 U.S. at 454. Instead, the sobriety checkpoints were "selected pursuant to [established] guidelines, and uniformed police officers stop[ped] every approaching vehicle"; therefore, "the intrusion . . . [wa]s for constitutional purposes indistinguishable from the checkpoint stops . . . upheld in *Martinez-Fuerte*." *Id.* at 453.[11]

Like the patrolman in *Prouse* who "decided to pull [the motorist] off" the road merely because he "saw the car in the area and wasn't answering any complaints," 440 U.S. at 650-51 (internal quotation marks omitted), Officer Rohleder does not search all parolees "all the time," but only if he has no "other work to do" or has not already "dealt with" the parolee. J.A. 39. In other words, he searches parolees whenever he feels like it. This Court's reasoning in *Prouse* is highly applicable here:

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[11] Similarly, in *Edmond*, written directives instructed officers that they "must conduct each stop in the same manner" and gave them "no discretion to stop any vehicle out of sequence." 531 U.S. at 35. However, as discussed *supra* Section I.A, the primary law enforcement purpose of the *Edmond* checkpoints puts them outside the special needs exception.

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations – or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered – we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.

440 U.S. at 661.

3. The California search condition imposes no specific constraints on the exercise of an officer's discretion to search parolees. *Cf. Von Raab*, 489 U.S. at 667 (the Customs Service "does not make a discretionary determination to search based on a judgment that certain conditions are present"). Under the search condition, "[t]he process" for searching a parolee is not "automatic," like the process for drug testing a Customs Service employee "pursu[ing] a covered position." *Id.* A search is not "undertaken pursuant to previously specified 'neutral criteria.'" *Prouse*, 440 U.S. at 662 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978)). No regulations or standards curb the "discretion of the official in the field" to use the search condition as an excuse to search any particular parolee. *Camara*, 387 U.S. at 532. These searches are not "established" or carried out in a "regularized manner" that provides "visible evidence, reassuring to law-abiding [citizens], that the [searches] are duly authorized and believed to serve the public interest." *Martinez-Fuerte*, 428 U.S. at 559. Unlike the suspicionless searches and seizures approved in special needs and checkpoint cases, officers acting pursuant to the California search condition do not automatically search all parolees upon the occurrence of certain predetermined events (such as applying for a safety-sensitive employment position or joining an athletic team). These searches do not have to be conducted

in an even-handed manner – as Officer Rohleder's search of Petitioner certainly illustrates.

If there is one rule governing this Court's special needs jurisprudence, it is that government officers cannot have free reign to search whomever they choose, whenever they choose, for whatever reason they choose. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions . . . ." *Prouse*, 440 U.S. at 653-54 (citations and internal quotation marks omitted). California has only two options: either require individualized reasonable suspicion for the search of a particular parolee or search all parolees on a uniform and non-discretionary basis without suspicion. Since the California parole search condition falls into neither category, it is unconstitutional.

CONCLUSION

For the reasons stated, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted, [12]

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