No. 04-9728

In the Supreme Court of the United States

DONALD CURTIS SAMSON, PETITIONER

v.

STATE OF CALIFORNIA

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the suspicionless search of a parolee on a public street by a police officer pursuant to a state statute authorizing such a search violates the Fourth Amendment.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment prohibits the suspicionless search of a parolee pursuant to a state statute authorizing the search. The federal government prosecutes cases in which evidence has been obtained pursuant to state parole or probation searches. See *United States* v. *Knights*, 534 U.S. 112 (2001). Moreover, federal courts in some cases have imposed a similar search condition on federal prisoners serving a term of supervised release.[1] See, *e.g.*, *United*

[1] Parole was abolished in the federal system as of November 1, 1987, in favor of supervised release, which is overseen by the sentencing court rather than the United States Parole Commission. See *Johnson* v. *United States*, 529 U.S. 694, 696-697 (2000); Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, §§ 218(a)(5), 235(a)(1), 98

States v. *Monteiro*, 270 F.3d 465 (7th Cir. 2001). The United States has participated in other cases involving Fourth Amendment challenges to state parole and probation conditions, see *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357 (1998); *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987). The United States thus has a significant interest in the Court's disposition of this case.

STATEMENT

1. In September 2002, petitioner was on state parole in California, following a conviction for being a felon in possession of a firearm. J.A. 10, 47, 49. One of the mandatory conditions of his parole was that he agree to be subject to "search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067(a) (West 2000); J.A. 10 n.3, 47-48. Petitioner signed a form agreeing to this condition. J.A. 49.

On the afternoon of September 6, 2002, Officer Alex Rohleder of the San Bruno, California, Police Department, saw petitioner, accompanied by a woman and a

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Stat. 2027, 2031. Supervised release is imposed "as a part of the sentence" to follow imprisonment, with the length of the term varying depending on the severity of the offense (18 U.S.C. 3583(a) and (b)). Supervision is carried out by probation officers (18 U.S.C. 3601). Parole and supervised release are quite similar; as with parole, supervised release is intended to "improve the odds of a successful transition from the prison to liberty." *Johnson*, 529 U.S. at 708-709. The Parole Commission still exists by virtue of several statutory extensions, see United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. No. 109-76, § 2, 119 Stat. 2035, and United States probation officers supervise federal parolees under the authority of 18 U.S.C. 4203(b)(4).

small child, walking down the street. Officer Rohleder recognized petitioner from a prior contact and knew that he was on parole. Rohleder had heard from other officers that petitioner "might have a parolee at large warrant." J.A. 10. Rohleder parked his patrol car, approached petitioner and asked if he could speak with him. J.A. 10, 32.

Officer Rohleder asked petitioner if "he had a warrant at that time." J.A. 10. Petitioner replied that there had been a parole warrant for his arrest, but that he "had already taken care of it" and had been "released from custody." J.A. 10, 32, 36. Rohleder knew that when San Francisco police officers previously arrested petitioner for a domestic violence incident, petitioner had stated that the police "weren't going to take him back to prison." J.A. 10, 35, 39, 43-44. Rohleder learned by radioing his dispatcher that petitioner had finished serving a term for a prior parole violation, and that he was not subject to a parole warrant.[2] Rohleder decided to conduct a parole search of petitioner because it was a condition of parole. J.A. 10, 36-38. Rohleder explained: "I believe that being [a] parolee, that [petitioner] needs to make sure he's still obeying the laws. It's a privilege for him to be out here." J.A. 10, 38. Rohleder testified that he did not search parolees "all the time," but conducted parole searches on a "regular basis." J.A. 11, 39, 44. Rohleder intended to let petitioner go if he had nothing illegal on him. J.A. 11, 44. During the search,

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[2] At the suppression hearing, petitioner's parole agent testified that petitioner had been released in September 2001 after serving 10 months' imprisonment for a parole violation. J.A. 50-51. Further, on June 24, 2002, petitioner was arrested on a parole warrant, placed in custody, and released on August 28, 2002, less than two weeks before the challenged search. J.A. 51-52.

which Officer Rohleder conducted following a preliminary pat-down for weapons, J.A. 65, Rohleder found a cigarette box in petitioner's left breast pocket. Inside the box was a plastic baggie containing methamphetamine. J.A. 11, 33.

2. Petitioner was charged with possession of methamphetamine (Cal. Health & Safety Code § 11377(a) (West 1991)) and moved to suppress the evidence. The trial court denied the motion, finding that the search was authorized, "prudent," and neither arbitrary nor capricious. J.A. 63. Petitioner proceeded to trial and was convicted by a jury of the charge against him. J.A. 9. After finding that petitioner had a prior felony conviction (Cal. Penal Code § 1170.12(c)(1) (West 2004)) and had served prior prison terms (*id.* § 667.5(b) (West 1999)), the trial court sentenced petitioner to seven years of imprisonment. J.A. 7, 9.

3. The California Court of Appeals, relying on *People* v. *Reyes*, 968 P.2d 445 (Cal. 1998), cert. denied, 526 U.S. 1092 (1999), upheld the parole search. J.A. 9-14. In *Reyes*, the California Supreme Court rejected a challenge to the constitutionality of the State's parole search condition, holding that a parolee within the State is properly subject to suspicionless searches so long as they are not "arbitrary, capricious, or harassing." 968 P.2d at 450. The California Court of Appeals in this case found "nothing arbitrary or capricious in the search." J.A. 13. In particular, the court found that Officer Rohleder had not detained petitioner "indiscriminately or at his whim, but rather recognized him as a parolee, and thought he may be subject to an outstanding 'parolee at large warrant.'" J.A. 14 (quoting J.A. 32). The court further found that "[t]he lawful basis for the search did not dissipate when Rohleder learned that the

warrant was not active," because petitioner's parole status justified a search, as Rohleder testified, "to determine whether [petitioner], as a parolee, was 'still obeying the laws.'" *Ibid.* (quoting J.A. 38). The reasonableness of the search was additionally supported by "[t]he testimony by Officer Rohleder that he customarily searches identified parolees" because that practice "indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward [petitioner]." *Ibid.* Finally, the court found that the search "was not unreasonable in duration or the circumstances of its execution." *Ibid.*

4. The California Supreme Court denied petitioner's petition for review. J.A. 30.

SUMMARY OF ARGUMENT

The suspicionless search of petitioner in accordance with his statutorily mandated parole condition is constitutional under the special needs doctrine. Under that doctrine, special governmental interests "beyond the normal need for law enforcement" (*Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)) will justify searches conducted without a warrant or probable cause where the State's special needs outweigh the searched party's privacy interests.

In *Griffin*, this Court upheld the warrantless search of a probationer's home without probable cause because it was conducted pursuant to a state regulation designed to serve the special need of supervising probationers. The Court explained that the State's interest in rehabilitating probationers and in protecting the community from their commission of additional crimes justified relaxing the traditional warrant and probable cause re-

quirements with respect to a class of persons whose liberty is only "conditional." *Griffin*, 483 U.S. at 874-880.

California's operation of its parole system presents a special need no less than Wisconsin's operation of its probation system. Parolees present a serious threat to public safety. California's need to combat that threat and to ensure that parolees' behavior remains consistent with their conditions of parole outweighs the parolee's substantially diminished expectation of privacy. California's judgment that those twin goals are most effectively served by authorizing suspicionless searches is reasonable and entitled to deference. The California Supreme Court has addressed the concern that a suspicionless search condition affords police officers too much discretion by holding that a parolee retains Fourth Amendment protection against arbitrary, capricious, or harassing searches. The California legislature has reinforced that protection by forbidding searches conducted solely for purposes of harassment.

California's decision to enlist police officers in the administration of its parole regime does not remove this case from the special needs domain. *Griffin* made clear that the State's operation of its probation system is a special need notwithstanding that a principal goal of that system is to combat recidivism and notwithstanding the close nexus between probation officers and other law enforcement officers. The State's special need to supervise parolees is no less served by authorizing a police officer to search a parolee, so long as that search is conducted in accordance with the regulatory regime, as was the case here.

Even if this Court concludes that the special needs doctrine is inapplicable, the search is constitutional under the totality-of-the-circumstances test that this Court

applied in *United States* v. *Knights*, 534 U.S. 112 (2001). That test, like the special needs test, balances the individual's privacy interests against the government interests served by the search, but, of course, does not require that those government interests constitute a special need. That balancing comes out in the State's favor, just as it does under special needs, because a parolee's privacy interests are severely diminished and the State has an overwhelming interest in combating recidivism by parolees under its supervision.

ARGUMENT

A SUSPICIONLESS SEARCH OF A PAROLEE AUTHORIZED BY A PAROLE CONDITION MANDATED BY STATUTE COMPLIES WITH THE FOURTH AMENDMENT

The suspicionless search of petitioner conducted pursuant to a parole search condition mandated by statute did not violate the Fourth Amendment. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). See *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). In defining the contours of reasonableness under the Fourth Amendment, this Court has repeatedly said that "the specific content and incidents of this right must be shaped by the context in which it is asserted." *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)).

The relevant context here is that petitioner was on parole when Officer Rohleder conducted the search. In *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), this Court upheld, under the "special needs" doctrine, the

warrantless search of a probationer's home that was conducted pursuant to a Wisconsin regulation and supported by reasonable suspicion. And in *United States* v. *Knights*, 534 U.S. 112 (2001), this Court upheld, under the "totality of the circumstances," a warrantless search of a probationer's home that was conducted pursuant to a probation search condition and supported by reasonable suspicion.

Griffin and *Knights* both emphasized that probationers are categorically different from ordinary citizens for purposes of the Fourth Amendment because probationers have a diminished expectation of privacy (*Griffin*, 483 U.S. at 874; *Knights*, 534 U.S. at 119), and because they are "more likely than the ordinary citizen to violate the law." *Griffin*, 483 U.S. at 880; see *Knights*, 534 U.S. at 121. Both decisions also emphasized the importance of the State's need to combat recidivism. *Griffin*, 483 U.S. at 875, 876, 878, 880; *Knights*, 534 U.S. at 120-121. As explained below, the reasons this Court identified in *Griffin* and *Knights* for upholding the probation searches there support the conclusion that the search of petitioner, a parolee subject to a statutory search condition and protected against oppressive or harassing searches, was constitutional under either *Griffin*'s special needs rationale or *Knights*'s general totality-of-the-circumstances approach.

A. The Parole Search Of Petitioner Was Constitutional Under The Special Needs Doctrine

Under this Court's "special needs" doctrine, special governmental interests "beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873. In such cases, the Court "employ[s] a balancing test that

weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). Applying that test here, California's interests in ensuring that parolees honor the conditions that justified their conditional release and in combating parolee recidivism create a special need that justifies permitting police officers to conduct suspicionless searches of parolees pursuant to a search condition mandated by statute.

1. *The parolee's privacy interest is minimal*

A parolee does not enjoy "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 (1972); see *Griffin*, 483 U.S. at 874 (emphasizing conditional liberty of probationers). Indeed, "[p]arole is a 'variation on imprisonment of convicted criminals,' in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 365 (1998) (quoting *Morrissey*, 408 U.S. at 477). For that reason, the degree of privacy that a parolee may legitimately expect cannot be determined by reference to the privacy rights of the population at large. Rather, it must be judged by reference to the legally authorized treatment of convicted offenders and, more particularly, the character and purposes of parole.

Parole "significantly restrain[s] [a parolee's] liberty to do those things which in this country free men are entitled to do." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). As a legal matter, "[u]ntil discharged from pa-

role, [a prisoner] remains under the custody of the Department of Corrections." See Cal. Penal Code § 3056 (West 2000) ("Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison."). Consistent with the parolee's status as a convicted criminal whose release is conditional, California law imposes substantial restrictions on a parolee's freedom of action. For example, California parolees must report to their parole officer immediately upon release; inform their parole officer about a change of employment location or status within 72 hours; obtain prior approval from their parole officer for travel beyond 50 miles from their residence and prior written approval to leave California or to stay outside their county of residence for more than 48 hours; and must not possess firearms and many other types of weapons. Cal. Code Regs., tit. 15 § 2512 (2005). In addition, many parolees must participate in psychiatric treatment; abstain from drinking alcohol; submit to drug testing; and refrain from participating in gang activity. *Id.* § 2513.[3]

Given the extensive range of impairments of freedom to which parolees have long been subjected, their expectation of privacy is substantially diminished. Cf. *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 654-657 (1995) (concluding that student athletes "have a reduced expectation of privacy" in large part on account of the regulations that flow from "the schools' custodial and tutelary responsibility for children"); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (concluding that railroad employees' expectation of pri-

[3] Similar restrictions are imposed on supervised releasees in the federal system. See 18 U.S.C. 3583(d).

vacy is "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety"). Because the scope of petitioner's legitimate expectation of privacy is so narrow, the State has substantial latitude to impose intrusive conditions in effecting its supervisory responsibilities over him. See *Scott*, 524 U.S. at 365 (rejecting application of exclusionary rule to parole revocation proceedings, which "States have wide latitude under the Constitution to structure" because parolees enjoy only conditional liberty); *Acton*, 515 U.S. at 654 (observing that custodial relationship between student and "State as schoolmaster" is "[c]entral" to reasonableness of suspicionless drug testing of student athletes); *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 831 (2002) (observing that decision in *Acton* "depended primarily upon the school's custodial responsibility and authority" and relying on that same factor to uphold suspicionless drug testing of students engaged in extracurricular activities).

2. The State's interest in effectively supervising parolees presents a "special need" justifying suspicionless searches

Balanced against petitioner's substantially diminished privacy rights is California's compelling interest in effectively supervising him. In *Griffin*, this Court upheld a warrantless search of a probationer's home that was conducted on reasonable suspicion pursuant to a Wisconsin regulation. The Court explained that the "State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, * * * presents 'special needs' beyond normal law enforcement" that justified a "departure[] from the usual warrant and probable-cause

requirements." 483 U.S. at 873-874. In particular, the Court identified rehabilitation of the offender and protection of the community from recidivism as the two "goals" that justify "the exercise of supervision to assure that the restrictions [on liberty] are in fact observed." *Id.* at 875.

California's operation of its parole system presents no less of a special need. Indeed, California "has an 'overwhelming interest' in ensuring that a parolee complies with" the "conditions of his release." *Scott*, 524 U.S. at 365 (quoting *Brewer*, 408 U.S. at 483). Parolees, in contrast to the probationers at issue in *Griffin*, "have been sentenced to prison for felonies and released before the end of their prison terms." *United States* v. *Crawford*, 372 F.3d 1048, 1077 (9th Cir. 2004) (en banc) (Kleinfeld, J., concurring), cert. denied, 125 S. Ct. 863 (2005). See Cal. Penal Code §§ 3000 *et seq.* (West 2000). As such, they are "deemed to have acted more harmfully than anyone except those felons not released on parole." *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring). See *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984) (those sentenced to terms of imprisonment "have a demonstrated proclivity for antisocial criminal, and often violent, conduct"). Because parolees as a class have been adjudged more dangerous than probationers, the supervisory needs of the State recognized in *Griffin* concerning probation searches apply with even greater force to parole searches. See *United States* v. *Reyes*, 283 F.3d 446, 461 (2d Cir.) (*Griffin* principles "apply *a fortiori*" to "federal supervised release, which, in contrast to probation, is meted out in addition to, not in lieu of, incarceration") (citation omitted), cert. denied, 537 U.S. 822 (2002).

California amended its parole scheme in 1996 by imposing a suspicionless search condition to which all inmates must agree to secure release. Cal. Penal Code § 3067(a) (West 2000) (requiring inmate to agree to permit warrantless searches, regardless of cause, as a mandatory condition of parole); see *People* v. *Willis*, 46 P.3d 898, 908 (Cal. 2002).[4] The author of the bill explained: "Prison inmates are released early from prison regardless of the threat they pose to our communities. We must give our local law enforcement officers the tools they need to adequately supervise these parolees." Assembly Comm. on Pub. Safety, *Comm. Rep. for Assembly Bill 2284*, 1995-1996 Reg. Legis. Session (Cal. 1996) (Bill No. 2284). See *People* v. *Middleton*, 131 Cal. App. 4th 732, 739-740 (Ct. App. 2005) (discussing legislative history of 1996 parole amendments).

Available statistics bear out the pressing need for intensive supervision of parolees. As of August 2000, California had 158,177 inmates in its prisons. During

[4] The California Supreme Court held in *People* v. *Reyes*, 968 P.2d 445, 448 (1998), that the consent exception cannot validate the search of an adult parolee because parole was "not a matter of choice" under California's Determinate Sentencing Act of 1976. Petitioner was not sentenced under that scheme, however. Under the law enacted in 1996 and applicable to inmates released on parole for offenses "committed on or after January 1, 1997," an inmate's release on parole is conditioned on acceptance of the parole condition. See Cal. Penal Code § 3067 (West 2000). In light of the new law, the government submits, as it argued in *United States* v. *Knights,* No. 00-1260, that petitioner validly consented to suspicionless parole searches as a condition of his parole, which rendered the search of his person by Officer Rohleder reasonable within the meaning of the Fourth Amendment. See *Green* v. *Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (Easterbrook, J., concurring) ("People who object to the conditions of release before the end of their sentences may say no and remain in prison; if they say yes, they have consented to the conditions.").

that year, 126,117 inmates were released on parole. Of that number, 90,000 were returned to prison, following either a conviction for a new crime or for violating a condition of parole. *Crawford*, 372 F.3d at 1069 (Trott, J., concurring) (citing Jeremy Travis & Sarah Lawrence, *California's Parole Experiment*, Cal. J., Aug. 2002). Further, an April 2001 report prepared by the California Criminal Justice Statistics Center indicates that "68% of adult parolees are returned to prison: 55% for a parole violation and 13% for the commission of a new felony offense." *Ibid.* (citing California Attorney General, *Crime in California* 37 (Apr. 2001)). And the California Policy Research Center reports that "70% of the state's paroled felons reoffend within 18 months." *Ibid.* (citing Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, 12 CPRC (June 2000)).

Recidivism thus is undeniably a special and extraordinary problem. See *Ewing* v. *California*, 538 U.S. 11, 26 (2003) (opinion of O'Connor, J.) (observing that "[r]ecidivism is a serious public safety concern in California and throughout the Nation" that justifies California's "three-strikes" law). Moreover, independent of the concern with parolees committing new crimes, the State has an interest in ensuring that parolees live up to their conditions of parole. Likewise, the fact that parolees are subject to re-incarceration for conduct that is not otherwise criminal—*e.g.*, from failure to report to association with gang members—underscores how differently situated they are from ordinary citizens. And, of course, the prospect of recidivism only magnifies the importance of vigilance in enforcing parole conditions. Given the alarming numbers of prisoners who commit new offenses shortly after being released on parole, it is difficult to overstate the State's interest in closely monitoring and

supervising parolees to ensure that they comply with the conditions of their release. See *Crawford*, 372 F.3d at 1070-1071 (Trott, J., concurring) ("[T]he control and supervision of parolees as they reintegrate into society [thus] involves an arena far different from the needs of 'normal' law enforcement."). Indeed, the State has a special obligation to prevent crimes by parolees because they are under its supervision and because the State has chosen to release the parolee from confinement before the end of his sentence.

3. California's decision to subject parolees to suspicionless searches is a reasonable means of meeting its special supervisory needs

California has made the judgment that it can most effectively supervise parolees and thereby protect public safety by authorizing parole and police officers to conduct suspicionless searches. This Court should respect that judgment because California is entitled to reasonable latitude in developing the most effective policies to combat parolee recidivism. See *Ewing*, 538 U.S. at 24-25 (opinion of O'Connor, J.) ("[O]ur tradition of deferring to state legislatures in making and implementing * * * important policy decisions" implicating public safety "is longstanding.") (citing cases); *Heller* v. *Doe*, 509 U.S. 312, 320 (1993) ("A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (internal quotation marks and citation omitted); cf. *United States* v. *Watson*, 423 U.S. 411, 416 (1976) ("Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," [o]bviously the Court should be reluctant to decide that a search thus

authorized by Congress was unreasonable and that the Act was therefore unconstitutional.") (internal quotation marks omitted).

This Court has upheld several other suspicionless search regimes as effective means to meet governmental special needs. See *Earls*, *supra*; *Acton*, *supra*; *Skinner*, 489 U.S. at 624 ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989) (upholding suspicionless drug testing of Customs Service employees whose jobs would involve drug interdiction or require carrying firearms). The result here should be no different.

In upholding the constitutionality of a parole condition authorizing police officers and parole officers to conduct suspicionless searches, the California Supreme Court concluded that "the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." *People* v. *Reyes*, 968 P.2d 445, 451 (1998). That conclusion about the deterrent effect of random searches is unassailable. A suspicionless search condition provides a powerful incentive for the parolee to comply with parole conditions and avoid further criminal behavior because, by increasing the likelihood that improper behavior will be detected, it dramatically increases the risk he faces by engaging in conduct that violates the terms of his parole. See *Griffin*, 483 U.S. at 875 ("Recent research suggests that more intensive supervision can reduce recidivism."); cf. *Palmer*, 468 U.S. at 528 ("The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison admin-

istrator in the constant fight against the proliferation of [weapons and drugs]."); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972) (upholding statutorily authorized warrantless search of the defendant gun dealer's locked storeroom because, among other reasons, "unannounced, even frequent, inspections are essential" to deter and detect illegal firearms trafficking).

California could reasonably have concluded that a parole search condition pegged to a reasonable suspicion standard would not provide a sufficient level of deterrence. If the possibility of a search is remote, the search condition will not influence the parolee's conduct or ferret out misconduct carried out with stealth. Because many parole violations and many crimes, including the one for which petitioner was prosecuted here, are relatively easy to conceal, and because parolees, facing the threat of parole revocation, have a special incentive to conceal them, see *Knights*, 534 U.S. at 120, a search condition predicated on reasonable suspicion may well fail to deter violations as effectively as the suspicionless search condition California has required. See *Owens* v. *Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982) ("[A] requirement that searches only be conducted when officers have 'reasonable suspicion' or probable cause that a crime has been committed or that a condition of probation has been violated could completely undermine the purpose of the search condition."); *People* v. *McCullough*, 6 P.3d 774, 781 (Colo. 2000) (en banc) ("Requiring individualized suspicion would eliminate a powerful deterrent to parole violations and, consequently, would place in jeopardy the State's overwhelming interest in ensuring that a parolee complies with the conditions of his parole.").

A search condition based on reasonable suspicion also might not be as effective in detecting criminal activity and removing a recidivist or parole violator from the street in the event deterrence fails, as it did here. As this Court explained in *Von Raab*, searches conducted "without any measure of individualized suspicion" may be justified where the government not only "seeks to prevent the development of hazardous conditions," but also "to detect violations that rarely generate articulable grounds for searching any particular place or person," and where the government's need to do so "is sufficiently compelling." 489 U.S. at 668 (emphasis omitted).[5] California's interest in combating recidivism and parole violations by offenders under its supervision amply justifies suspicionless searches of parolees—individuals who, by virtue of their criminal conviction, pose a demonstrated threat to the safety of the community, and whose high rates of recidivism have been thoroughly documented. Cf. *Von Raab*, 489 U.S. at 673, 677 (upholding suspicionless drug testing of Customs officers in the absence of any documented history of drug use by those employees). [6]

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[5] Given the enormous number of inmates who are released on parole each year and given their high rate of recidivism, petitioner's suggestion (Pet. Br. 27) that suspicionless search conditions be approved on a case-by-case basis is not well taken. This Court has permitted the State to regard offenders in the criminal justice system categorically as a threat to public safety, see *Knights*, 534 U.S. at 121; *Scott*, 524 U.S. at 365; *Griffin*, 483 U.S. at 880, and there is no sound reason to depart from that approach here. See *Earls*, 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means.").

[6] Petitioner asserts (Pet. Br. 23) that suspicionless searches could undermine the State's interest in rehabilitating prisoners and rein-

4. *An officer's discretion to conduct searches is not unbridled*

One of petitioner's principal complaints about the suspicionless search condition is that it gives law enforcement officers "[u]nconstrained [d]iscretion." Pet. Br. 17. Petitioner is mistaken for several reasons. First, the authority is strictly limited to parolees. The greatest concern presented by the provision of too much discretion to police officers is that they will intrude on the privacy of ordinary citizens. See *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979) (invalidating random stops of motorists for license and registration check because, among other reasons, stops can involve "unset-

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tegrating them into society because the indignity of such searches will breed resentment in the parolee. The State could reasonably conclude, however, that whatever the risk that suspicionless searches might trigger parolee resentment to a degree that would undermine rehabilitation, that risk was far outweighed by the immediate need to ensure that important steps deemed vital to rehabilitation are taking place and to protect the public from further criminal conduct. See *Middleton*, 131 Cal. App. 4th at 740 n.7 (law establishing the parole condition at issue here "places public safety before all other concerns when deciding whether or not to release a state prison inmate") (quoting Bill No. 2284, at 3). It is for state policymakers, rather than the courts, to make the essentially empirical judgment about the proper balance of considerations bearing on the net efficacy of search conditions.

Petitioner also contends (Pet. Br. 23-24) that a suspicionless search condition discourages others from sharing a residence with parolees. That issue is not presented by this case, which involves the search of petitioner on a public street. See *Knights*, 534 U.S. at 120 n.6 (declining to decide whether probation search condition authorizing suspicionless searches is constitutional because the search at issue was supported by reasonable suspicion); *Smith* v. *Maryland*, 442 U.S. 735, 741 (1979) (in deciding whether an expectation of privacy is reasonable, "it is important to begin by specifying precisely the nature of the state activity that is challenged").

tling show of authority" that "interfere[s] with freedom of movement" and "may create substantial anxiety"). That concern is not implicated by California's statutory parole scheme because an officer is entitled to conduct suspicionless searches only of persons known by him to be parolees. See, *e.g.*, *People* v. *Sanders*, 73 P.3d 496, 505 (Cal. 2003) (search cannot be justified as a valid parole search unless officer is aware that the suspect is on parole and subject to a search condition).

Parolees cannot reasonably expect that law enforcement will give them the same degree of privacy as ordinary citizens enjoy. Rather, parolees can reasonably anticipate that, in their encounters with parole officers or the police, the authorities may well need to seek objective assurance that the parolee is in compliance with the conditions of his release. And petitioner here, having signed an agreement providing that he could be searched by a parole or police officer at any time with or without a warrant or cause, had no basis on which to claim surprise or to be concerned that Officer Rohleder lacked authority when he conducted the search. See *New York* v. *Burger*, 482 U.S. 691, 711 (1987) ("the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute"); *Biswell*, 406 U.S. at 316 ("When a [gun] dealer chooses to engage in this pervasively regulated business * * *, he does so with knowledge that his business records, firearms, and ammunition will be subject to effective inspection.").

Second, the California Supreme Court has held that a parole condition authorizing suspicionless searches does not authorize searches that are "arbitrary, capricious or harassing." *Reyes*, 968 P.2d at 450. The

Reyes court elaborated that "a parole search could become constitutionally 'unreasonable' if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer." *Id.* at 451 (internal quotation marks omitted). The limitations on timing, frequency, duration, and oppressiveness are objective protections against unreasonable searches. The court further explained that a search is "arbitrary and capricious" when its motivation is "unrelated to rehabilitative, reformative or legitimate law enforcement purposes." *Ibid.* The statute authorizing suspicionless parole searches supplements those standards, requiring that they not be conducted for the purpose of harassment. See Cal. Penal Code § 3067(d) (West 2000). These statutory and judicially crafted restrictions are "meaningful" and "represent workable standards state and federal courts apply every day in assessing the propriety of a variety of government actions." *Crawford*, 372 F.3d at 1072 (Trott, J., concurring).[7]

Petitioner contends (Pet. Br. 19) that the suspicionless search condition authorizes "strip searches and body cavity searches" merely because of his status as a parolee. But *Reyes* held that a suspicionless search condition does *not* extinguish petitioner's rights under the Fourth Amendment, which proscribes searches carried out in an unreasonable manner. 968 P.2d at 450-451. See *Terry*, 392 U.S. at 18 ("[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."). There

[7] Other constitutional protections also exist. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (observing that the Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race").

is nothing inconsistent in saying that suspicionless searches of parolees are generally reasonable, but a particular *manner* of effectuating the search may not be. Cf. *United States* v. *Flores-Montano*, 541 U.S. 149, 154 n.2 (2004) (upholding suspicionless border search of gas tank and leaving open "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out") (quoting *United States* v. *Ramsey*, 431 U.S. 606, 618 n.13 (1977)); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538, 541 (1985) (observing in the border context that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion" but requiring reasonable suspicion that traveler is smuggling contraband in her alimentary canal to justify prolonged detention "beyond the scope of a routine customs search and inspection").

Petitioner argues (Pet. Br. 21-22) that the limitations imposed by the California Supreme Court on parole searches are inconsistent with the general rule that the subjective intent of a law enforcement officer plays no role in Fourth Amendment analysis. Nothing in the Fourth Amendment, however, precludes California from providing an additional form of protection for parolees, after having assured a baseline of reasonableness by the objective standards noted above, *i.e.*, whether a parole search becomes unreasonable by its frequency, timing, duration, or oppressiveness. *Reyes*, 968 P.2d at 451. As petitioner points out (Pet. Br. 22), this Court in *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 46 (2000), suggested that an inquiry into the purpose of a regulatory search may be limited to the "programmatic purpose," but it did not deal with a statute like the one at issue in

this case, which makes the searching officer's purpose relevant.

The California Court of Appeals applied its protective standards to the facts of this case and correctly found that Officer Rohleder's search of petitioner was not arbitrary or undertaken for purposes of harassment, was not motivated by any personal animosity towards petitioner, and was not unreasonable in duration or manner of execution.[8] J.A. 13-14.

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[8] Petitioner correctly points out (Pet. Br. 29-31 & n.14) that the United States Parole Commission's *Rules & Procedure Manual* (Aug. 2003) (*Manual*) provides that a special condition "shall permit searches only if the Supervision Officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found." *Manual* § 2.204-18(b)(2), at 196 (Notes and Procedures). The Manual's requirement that such searches be based on reasonable suspicion, however, is directed at the officer, was apparently premised on the Commission's reading of *Griffin*, see *Manual* § 2.204-18(a), at 195-196 (Notes and Procedures) (citing *Griffin*), and has no legal force. See, *e.g.*, *United States* v. *Caceres*, 440 U.S. 741 (1979). Moreover, offenders under federal supervision are subject to certain forms of suspicionless searches, including DNA collection and drug testing. See 18 U.S.C. 3563(a)(5) and (9), 3583(d). In any event, the fact that the federal government and other States have elected to impose an individualized suspicion standard does not disable California from concluding that the significant recidivist problem it faces is appropriately dealt with more effectively by not requiring reasonable suspicion and protecting against arbitrariness through other means. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 90 (1986) ("That Pennsylvania's particular approach [to possession of a weapon] has been adopted in few other States does not render Pennsylvania's choice unconstitutional" because, among other reasons, "our federal system * * * demands tolerance for a spectrum of state procedures dealing with a common problem of law enforcement.") (internal quotation marks and brackets omitted).

5. That suspicionless parole searches also serve law enforcement interests and may be conducted by police officers does not remove them from the ambit of the "special needs" doctrine

Petitioner contends (Pet. Br. 33-35) that the Court's decisions in *Edmond*, *supra*, and *Ferguson*, *supra*, foreclose reliance on the special needs doctrine in this case because the search here served the general interest in crime control and was conducted by a police officer. That contention lacks merit.

In *Edmond*, the Court found unconstitutional the suspicionless seizures of vehicles at a highway checkpoint because its primary purpose was to uncover evidence of drug violations—a purpose that was "indistinguishable from the general interest in crime control." 531 U.S. at 44. Similarly, in *Ferguson*, this Court held that a state hospital violated the Fourth Amendment by testing the urine of pregnant patients for drugs, without obtaining warrants or the consent of the patients involved, and turning positive results over to the police. 532 U.S. at 76-86. The Court rejected the State's argument that the drug testing policy's ultimate goal of protecting the health of pregnant women constituted a "special need" justifying the warrantless intrusions. *Id.* at 81-84. The Court found "special needs" analysis to be inapplicable because the State sought to achieve its ultimate objective through the "use of law enforcement to coerce the patients into substance abuse treatment." *Id.* at 80.

As an initial matter, those cases are inapposite because they involved searches of ordinary citizens. Carrying the restrictions this Court has imposed on searches of ordinary citizens over into searches of parolees would contravene the key holding in *Griffin* that the

need to ensure that the community "is not harmed by the probationer's being at large" permits the State "a degree of impingement upon [a probationer's and parolee's] privacy that would not be constitutional if applied to the public at large." 483 U.S. at 875. Indeed, the Court in *Ferguson* expressly distinguished *Griffin* on the ground that it "is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large." 532 U.S. at 80 n.15. See *United States* v. *Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc) (plurality opinion) ("[T]he whole point of *Ferguson*'s having explicitly distinguished *Griffin* was to harmonize the two cases—not overrule the latter."), cert. denied, 125 S. Ct. 1638 (2005).

Because the search regime at issue here implicates the privacy interests of offenders in the criminal justice system and not ordinary citizens, *Griffin* clearly is the apposite precedent. The only question is whether California's decision to enlist police officers in the administration of its parole supervision regime takes California's policy outside the special needs doctrine. It does not. *Griffin* holds that the pursuit of law enforcement goals—rehabilitation and prevention of recidivism—in the service of a regulatory regime governing the supervision of convicted offenders is itself a special need. See 483 U.S. at 875-880. Indeed, *Griffin* involved a search that was the product of the close collaboration of law enforcement and probation officers. See *id.* at 871 (search that formed basis for Griffin's prosecution was precipitated by tip from police and was conducted by two probation officers who were not Griffin's probation officer, accompanied by three police officers). *Griffin* thus makes clear that the special need that arises in the context of probationers and parolees embodies law en-

forcement objectives, but is nonetheless distinct from the "general interest in crime control" that law enforcement programs targeting ordinary citizens serve.

Officer Rohleder's search was conducted under the auspices of a statute designed to serve the same special supervisory goals as the regulation pursuant to which the search was conducted in *Griffin*.[9] No sound basis for drawing a constitutional line between the two based on the uniform of the law enforcement officer therefore exists. See Cal. Penal Code § 830.5 (West 1992) ("peace officers" include parole and probation officers); *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 443 (1982) ("Even a casual reading of the [California] Penal Code makes clear that the unifying character of all categories of peace officers is their law enforcement function."); *Willis*, 46 P.3d at 908-909 (parole officers, *inter alia*, "often work[] hand in hand with police"; "may 'carry firearms' under specified terms"; may make arrests; and must be trained in the exercise of arrest powers and use of firearms) (quoting Cal. Penal Code § 830.5 (West 1992)); see also *Scott*, 524 U.S. at 375 (Souter, J., dissenting) ("Parole officers * * * often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees.") (internal quotation marks omitted); cf. *Bur-*

[9] Contrary to petitioner's suggestion (Pet. Br. 36), this Court in *Knights* did not reject application of the special needs doctrine on the ground that the search was related to a law enforcement purpose. While the Court observed that the search at issue in *Knights* was not "just like" the search in *Griffin*, it did not hold that the special needs doctrine was inapplicable. 534 U.S. at 117-118. Rather, the Court did not reach that issue because it found the search constitutional under the totality of the circumstances regardless of whether it served a special need. *Id.* at 118-122. So too here the Court may uphold the search under the totality of the circumstances without addressing whether it served special needs. See Part B, *infra*.

ger, 482 U.S. at 712-717 (finding no constitutional significance in the fact that police officers were allowed by statute to conduct the warrantless searches of the automobile dismantling businesses and rejecting claim that statute was designed to afford the police an expedient way to enforce criminal laws).[10] The Fourth Amendment does not provide a ready basis for regulating state decisions allocating resources and responsibilities between parole and police officers. Combating parolees' recidivism and promoting their rehabilitation are special needs that a state may address by authorizing police officers to search them.[11]

B. The Parole Search Of Petitioner Was Constitutional Under The Fourth Amendment's Traditional Totality-of-the-Circumstances Test

Knights held that searches of probationers conducted without probable cause or a warrant may be con-

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[10] Several factors justify enlisting the assistance of police officers to conduct parole searches. First, large caseloads may hinder a parole officer's ability to conduct searches, thus decreasing their deterrent value. See *United States* v. *Monteiro*, 270 F.3d 465, 471 (7th Cir. 2001). Second, because police officers have greater training and expertise in conducting searches, parole officers may wish to enlist their assistance, particularly in instances where a search may entail a significant level of risk. Finally, permitting police officers to conduct parole searches "enhance[s] mutual trust between [parole officers] and their [parolees] by allowing the supervisors to avoid searching the [parolee]." *Owens*, 681 F.2d at 1369 & n.14 (citing *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 270-271 (9th Cir. 1975) (Wright, J., dissenting)).

[11] Outside the parole and probation context, the participation of police officers may have a tendency to belie a stated special need unrelated to law enforcement. But in the parole and probation context here, when the special need is a law enforcement need distinct from general crime control, the participation of one type of law enforcement officer rather than another does not give rise to any comparable inference.

stitutional under the "general Fourth Amendment approach of 'examining the totality of the circumstances,'" regardless of whether they serve a special need or fall under another exception to the warrant requirement. 534 U.S. at 118, 119-122 (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996)). In so holding, the Court explained that because a probationer is "more likely to engage in criminal conduct than an ordinary member of the community," the State's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may * * * justifiably focus on probationers in a way that it does not on the ordinary citizen." *Id.* at 121.[12]

Here, even assuming that Officer Rohleder's role in conducting the parole search rendered the special needs doctrine inapplicable, the search was nonetheless constitutional under *Knights*'s totality-of-the-circumstances analysis. Under that test, the reasonableness of the parole search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-119 (internal quotation marks omitted).

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[12] *Knights* has thus established a flexible Fourth Amendment framework for evaluating searches of offenders in the criminal justice system that recognizes that such searches serve special law enforcement interests and target a discrete class of individuals with diminished privacy rights. Cf. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding suspicionless seizures of motorists at sobriety checkpoint to promote highway safety); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding suspicionless seizures of motorists at Border Patrol checkpoint to prevent alien smuggling).

As explained above, parolees' privacy rights are significantly diminished by their status as convicted criminals under the supervision of the State, as well as by their written agreement to subject themselves to suspicionless searches as a condition of parole. See *Knights*, 534 U.S. at 119-120 (probationer was "unambiguously informed of" search condition). Balanced against that attenuated expectation of privacy is the "overwhelming" governmental interests advanced by the search condition. See *Scott*, 524 U.S. at 365.[13]

There are other factors that provide additional support for concluding that the search was reasonable. First, the search was conducted pursuant to a statute that authorized it. See *Burger*, *supra*; *Biswell*, *supra*. Second, petitioner expressly agreed to the search condition authorizing the search in order to secure his release from prison. See note 4, *supra*. Third, the search took place on a public street, not in the parolee's home with its heightened constitutional protections.

Finally, as crafted by the California legislature and interpreted by the judiciary, the parole condition does not authorize searches that are arbitrary or capricious or for purposes of harassment; the searches may not be motivated by factors unrelated to rehabilitation or protection of public safety and they must be conducted in a reasonable manner. *Reyes*, 968 P.2d at 450-451. With these protections against abuse in place, the absence of individualized suspicion should not tip the balance that

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[13] In *Knights* this Court found that it is "reasonable to conclude that the search condition would further the two primary goals of probation —rehabilitation and protecting society from future criminal violations." 534 U.S. at 119. That finding applies equally to the similar parole search condition here. See Part A(3), *supra*.

the *Knights* Court found weighs in favor of the State's interest in protecting public safety.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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