Case No. S221852

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

PAUL MACABEO,
Defendant and Appellant.

After a Decision of the Court of Appeal, Second Appellate District, Division Five, Case No. B248316, from Superior Court of California, County of Los Angeles, Case No. YA084963, Hon. Mark Arnold

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANT APPELLANT, BRIEF OF AMICI CURIAE CALIFORNIA ACLU AFFILIATES

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AMICI CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f), proposed amici,[1] the American Civil Liberties Union Foundation of Southern California (ACLU SoCal), American Civil Liberties Union of Northern California, and American Civil Liberties Union of San Diego & Imperial Counties (collectively "California ACLU affiliates") hereby respectfully apply to this Court for leave to file the accompanying Brief of Amicus Curiae in Support of Appellant Paul Macabeo in the above-captioned case.

Proposed Amici are the California affiliates of the American Civil Liberties Union ("ACLU"), a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members and supporters dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nations' civil rights laws. Since their founding, both the national ACLU and California ACLU affiliates have had an abiding interest in the promotion of those guarantees of liberty and individual rights, including the freedom from unreasonable searches guaranteed by the Fourth Amendment to the United States Constitution and

[1] No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part; or made a monetary contribution intended to fund the preparation or submission of the brief. No person made a monetary contribution intended to fund the preparation or submission of the proposed brief, other than the proposed amici curiae, its members, or its counsel. *See* Cal. R. Court 8.520(f)(4).

by Article I, § 13 of the California Constitution. The ACLU has also been committed to combating abuse of discretion in law enforcement, including through discriminatory exercise of authority.

The California ACLU affiliates have been involved in numerous cases regarding the appropriate scope of police authority to conduct searches in different circumstances. For example, the California ACLU affiliates have represented parties in litigation challenging the validity of searches in *Haskell v. Harris*, 745 F.3d 1269 (9th Cir. 2014) (en banc) (challenge to California statute requiring all felony arrestees to provide DNA samples); *Offer-Westort v. City and County of San Francisco* (S.F. Sup. Ct. No. CGC-13-529730) (challenge to searches of arrestees' cell phones); *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012) (challenge to the FBI's surveillance of mosques in Orange County); *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930 (C.D. Cal. 2009) (suit over warrantless raid-style searches of African American-run barbershops); *Fitzgerald v. City of Los Angeles*, 485 F. Supp. 2d 1137 (C.D. Cal. 2007) (suit targeting unlawful searches and detentions in Skid Row area of Los Angeles); and *United States v. City of Los Angeles*, 2001 U.S. Dist. LEXIS 26968 (C.D. Cal. Jan. 4, 2001) (representing community intervenors in consent decree brought by United States Department of Justice, which addressed in part issues around searches). The California ACLU affiliates have also filed amicus briefs in several cases, such as *People v. Buza*, 231 Cal. App. 4th 1446 (2014) *review*

granted and opinion superseded, 342 P.3d 415 (Cal. 2015) (regarding constitutionality of requiring arrestees to provide DNA samples); and *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010) (same).

Additionally, the California ACLU affiliates have engaged in efforts to monitor and reduce the disproportionate exercise of law enforcement authority upon communities of color, low-income communities, and other vulnerable populations. For example, they have sued on behalf of Latino students who were racially profiled, detained, and searched by police and school officials;[2] intervened in litigation to ensure that local law enforcement may not confiscate individuals' property based on their immigration status;[3] and pushed for public access to records revealing patterns of police use of automated license plate readers.[4] These efforts also include support for bills before the state legislature that would redefine and prohibit racially biased policing; require collection, analysis, and publication of data (including demographic data) on pedestrian and traffic stops and searches; increase and improve officer training on interacting with persons

[2] *See K.L. v. City of Glendale*, No. CV-110848 (C.D. Cal.filed Oct. 17, 2011); *see also Glendale Unified and Glendale Police settle ACLU lawsuit*, ACLU of Southern California (Feb. 6, 2013), *available at* https://www.aclusocal.org/glendale-unified-school-district-and-glendale-police-department-settle-aclu-lawsuit/ (last visited April 21, 2015).

[3] *See L.A. Police Protective League v. City of L.A.*, 232 Cal. App. 4th 907 (2014).

[4] *See American Civil Liberties Union Foundation of Southern California et al. v. Superior Court of Los Angeles County*, (Cal. App. Ct., 2nd district, Case No. B259392)

who have mental health issues; and encourage appropriate use and policies for officers' body-worn video cameras.

Because this case concerns important questions regarding the scope of law enforcement authority, individuals' rights to be free from unreasonable searches, and the appropriate balance between the two, proper resolution of the matter is of significant concern to amici and their members.

Because of the California ACLU affiliates' longstanding commitment to these issues, they have developed experience both in the legal issues surrounding police authority to conduct searches, and in the dangers of expanding the scope of police discretion for unbiased policing and police-community relations. The attached proposed amicus brief both addresses legal issues and sets forth the expected impact of the rule endorsed by the Court of Appeal. Amici believe their experience in these issues will make this brief of service to the Court.

Dated: April 24, 2015

Respectfully submitted,

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

ACLU FOUNDATION OF
NORTHERN CALIFORNIA

ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL COUNTIES

By:_____
Peter Bibring
Attorneys for Amici Curiae

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

At issue in this case is whether police officers have the authority to conduct a full, warrantless search whenever they have probable cause to believe a person has committed even the most trivial criminal violation, even before deciding whether to make an arrest, and even when custodial arrest is unauthorized under state law.

In the early morning hours of July 19, 2012, Detective Hayes and Officer Raymond of the Torrance Police Department observed Paul Macabeo riding his bicycle and pulled him over for riding through a stop sign without stopping-a traffic infraction that, under California law, cannot be the basis for a custodial arrest. Detective Hayes conducted a search of Mr. Macabeo and took several items, including his cell phone, from his pockets. Officer Raymond then conducted a search of the contents of the cell phone while Detective Hayes continued speaking with Mr. Macabeo. The search of the cell phone yielded photographs of a minor engaged in sexual activity, evidence of violation of Penal Code § 311.11(a), and the officers arrested Mr. Macabeo for this offense. He was neither arrested nor charged with failing to stop at the stop sign.

The trial court upheld the search on the reasoning that, because officers had probable cause to believe Mr. Macabeo had failed to stop at the

stop sign, they *could* have arrested him for that infraction and could have searched him incident to that lawful arrest. The trial court did not address the factors that Mr. Macabeo was not under arrest at the time he and his phone were searched, that under California law he could not have been placed under custodial arrest for failing to stop at the stop sign, or that the officers arrested him based on the evidence found on his cell phone via the contested search. On appeal, the Court of Appeal endorsed the trial court's reasoning without significant additional analysis.

As set forth in Appellant's Opening Brief, and expanded below, this holding simply ignores settled Fourth Amendment law establishing that a warrantless search incident to arrest may only be conducted *after* an arrest actually occurs. If left to stand, the decision would dramatically expand the scope of the exception to the warrant requirement for searches incident to arrest by permitting searches to occur whenever an officer has probable cause to arrest, even before officers decide to effect a custodial arrest—and indeed even when officers have decided not to arrest, such as for minor of infractions for which custodial arrest is unlawful. The decision would permit such "searches incident to probable cause to arrest" even if officers have no reason to believe that the search will yield evidence any crime.

Amici submit this brief primary to emphasize the sweeping practical implications of such dramatic expansion of warrantless searches for

residents of California. The Court of Appeal's holding would provide police discretion to conduct warrantless searches in a staggering array of new circumstances where they would not otherwise effect a custodial arrest, thereby opening the door for potential abuse. A wealth of history and research makes unfortunately clear that untethered discretion will disproportionately result in searches of vulnerable populations, low-income communities, and communities of color. For these reasons, this Court should reverse the Court of Appeal's decision and remand this case to the trial court.

II. INTEREST OF AMICI CURIAE

Amici are the California affiliates of the American Civil Liberties Union ("ACLU"), a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members and supporters dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nation's civil rights laws. Since their founding, both the national ACLU and California affiliates have had an abiding interest in the promotion of those guarantees of liberty and individual rights including the freedom from unreasonable searches guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 13 of the California Constitution. The ACLU has also been committed to combating abuse of discretion in law enforcement, including

through discriminatory exercise of authority.

As discussed in the application to file this brief, the California ACLU affiliates have been involved in a number of cases and legislative campaigns regarding the appropriate scope of police authority to conduct searches in different circumstances, as well as litigation and legislative efforts to monitor and reduce the disproportionate exercise of law enforcement authority upon communities of color, low-income communities, and other vulnerable populations.

Because this case concerns important questions regarding the scope of law enforcement authority, individuals' rights to be free from unreasonable searches, and the appropriate balance between the two, proper resolution of the matter is of significant concern to amici and their members. Amici believe their experience in these issues will make this brief of service to the Court.

III. ARGUMENT

A. The Court of Appeal's Decision Directly Contradicts, and Dramatically Expands, Existing Law on Police Authority to Conduct Warrantless Searches

As discussed in detail in Appellant's Opening Brief, neither existing case law regarding the "search incident to arrest" exception nor the rationales underlying it justify upholding a search that occurs outside the context of an immediate custodial arrest—not only before the decision to

arrest is made, but under circumstances in which a custodial arrest would not have occurred because it would have not have been authorized California law. Without repeating the sound and thorough legal analysis put forth by Appellant, Amici emphasize their agreement with those arguments and with the conclusion that, under existing law, the Torrance police officers' warrantless search of Appellant violated his Fourth Amendment Rights.

United States Supreme Court precedent makes abundantly clear that the warrant exception for a search incident to arrest—and consequently the validity of such a search—is predicated on a custodial arrest actually taking place. In *Knowles v. Iowa*, the Court rejected precisely the rule adopted by Court of Appeal here: there, a police officer pulled Knowles over for speeding, issued him a traffic citation, and then (keep) the citations searched his car. 525 U.S. 113, 115 (1998). "The Iowa Supreme Court upheld the constitutionality of the search under the same reasoning adopted by the lower courts were: "that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest." *Id.* at 115--16. The U.S. Supreme Court reversed, as the Court explained, the legitimate government interests that justify the exception are "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Id* at 116--17 ; *see*

also Arizona v. Gant, 556 U.S. 332, 338–39 (2009) ("The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations."); *United States v. Robinson*, 414 U.S. 218, 234 (1973) (recognizing same); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (full search of an arrestee's house did not fall under the exception because it was not reasonably limited by the need to seize weapons and prevent the destruction of evidence); *Preston v. United States*, 376 U.S. 364, 367–68 (1964) (search did not fall under the exception when it was too remote in time or place to be justified by the need to seize weapons and prevent destruction of evidence). Because the officer did not effect a custodial arrest of Knowles—even though he had probable cause to do so—and instead issued only a citation, the interests that justify a search incident to arrest were not "present to the same extent" and the Court refused to extend the bright-line exception to the Fourth Amendment's warrant requirement. *Id.* at 118--19. The Court's holding in *Knowles* is consistent with the rationale for searches incident to arrests, and other cases to address the exception. *See, e.g., Gustafson v. Florida*, 414 U.S. 260, 266 (1973) ("[I]t is the fact of custodial arrest which gives rise to the authority to search.").

Precedent also makes clear that a warrantless search cannot be bootstrapped as "incident" to an arrest that was made based on the results

of that search, as Appellant's was here. In *Sibron v. New York*, 392 U.S. 40, 63 (1968), the Supreme Court explained that "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *See also Smith v. Ohio,* 494 U.S. 541, 543 (1990) ("The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. … it does not permit the police to search any citizen without a warrant or probable cause [for the search] so long as an arrest immediately follows."); *Johnson v. United States*, 333 U.S. 10, 16–17 (1948) ("the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do."); *Henry v. United States*, 361 U.S. 98, 102–03 (1959) (holding that probable cause to arrest must precede the arrest itself, because "[a]n arrest is not justified by what the subsequent search discloses"). Here, although the officers had probable cause to believe that Appellant had committed the traffic violation of rolling through the stop sign, it is plain that they did not arrest him on that basis—rather, they moved to arrest him when they discovered evidence of unrelated offenses as a result of their search. The Court of Appeal's conclusion that such a search qualified as "incident to arrest" simply ignores the longstanding precedent to the contrary.

Neither the U.S. Supreme Court's decision in *Rawlings v. Kentucky*,

448 U.S. 98 (1980), nor this Court's decision in *People v. Redd,* 48 Cal. 4th 691 (2010), altered the basic rule that the justification for a search incident to arrest must rest on a custodial arrest, not vice versa. In *Rawlings*, although officers searched Rawlings' person before placing him under "formal arrest," it is beyond doubt that their decision to arrest him was based not on the items they discovered through the search—cash and a knife—but rather on his admitted ownership of the 1800 tablets of LSD that his companion had dumped onto a table immediately before the search. *See* 448 U.S. at 101. The circumstances of *Rawlings* raise no concern that the arrest bootstrapped (and would not have happened without) the search that preceded it. *See id.* at 110–11. Because the court had no reason to address that concern, it would be unsound to rely heavily on its passing statement pointing to probable cause as a basis for approving the search, rather than the inevitably of arrest once the drugs were found. In *Redd*, this Court held the contested search valid on grounds, first that the trial court made the factual finding that "the search was conducted during or after the arrest," 48 Cal. 4th at 721, and alternatively, that the officer would have arrested the defendant for providing a false name even without the challenged evidence. *Id*. Neither *Rawlings* nor *Redd* therefore justifies the officers' warrantless search of Appellant here, where their search preceded the custodial arrest, and the custodial arrest would not have occurred without it.

Because the search of Appellant was conducted before his arrest, and indeed was the source of the evidence that formed the basis for his arrest, it was not "incident to arrest" under existing law. Therefore, it was not exempt from the general warrant requirement, and was conducted in violation of Appellant's Fourth Amendment rights.

B. Allowing Officers to Conduct "Searches Incident to Probable Cause to Arrest" Would Dramatically Increase the Number of Searches Conducted by California Law Enforcement

In his Opening Brief, Appellant demonstrates that, as a legal matter, an expansion of the warrant exception for searches incident to any circumstance where officers have probable cause to arrest would "overshadow," if not render moot, decades of careful line-drawing by courts that have established limited exceptions to the warrant requirement for officers in the field searching persons or automobiles on traffic stops, or conducting protective frisks for weapons during lawful detentions. *See* App. Opening Br. at 40–43.[5]

[5] Indeed, the rule adopted by the Court of Appeal is in tension with the U.S. Supreme Court's decision in *Rodriguez v. United States*, issued just this week, which held that although police had legitimately detained Rodriguez to issue a warning ticket for driving on the shoulder, it was unreasonable for them to delay him for approximately seven minutes in order to conduct a canine sniff of the vehicle. 2015 U.S. LEXIS 2807 (Apr. 21, 2015). While the Supreme Court primarily addressed the reasonableness of the seizure in the officers prolonging their detention of

Appellant also points out, *id.* at 41–45 that the authority to conduct searches based on "probable cause to arrest" represents an extraordinarily broad expansion of officers' practical opportunities to conduct searches by allowing such searches even for infractions. California law prohibits custodial arrest for infractions unless the subject refuses to sign a promise to appear or provide a fingerprint, or has no identification. Penal Code § 853.5. If a search incident to arrest requires actual, custodial arrest, officers cannot generally search subjects who have committed only infractions for which custodial arrest is prohibited. But if officers' authority to search is tethered only to probable cause to arrest, officers will be able to search incident to citation, even if custodial arrest would be barred by statute. As the U.S. Supreme Court made clear in *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), and *Virginia v. Moore*, 553 U.S. 164, 171–73 (2008), an officer's "probable cause" to arrest is not negated simply because state law does not permit custodial arrest for that particular offense. Rather, the requirement of "probable cause" relates only to the officer's belief that the subject has committed or is committing an offense, no matter how minor; there is no requirement that the officer have cause to

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Rodriguez, the decision assumes that merely having probable cause to issue a citation for one offense does not provide officers the authority to conduct suspicionless searches for evidence of others.

believe custodial arrest for that offense is authorized under the law. Therefore, under a "search incident to probable cause to arrest" exception, it would be irrelevant not only whether an arrest *actually* occurred, but also whether an arrest *could have occurred* consistently with state law. Every infraction, no matter how trivial, would justify a full custodial search.

In practical terms, data show that this increased authority will lead to the opportunity for law enforcement to conduct millions of additional searches per year, without any reason to believe those searches will result in evidence of criminal activity. As Appellant notes in his brief, over five million infractions are filed in California courts every year. App. Opening Br. at 43–44. That reflects five million additional instances where officers could not, as a general matter, conduct a search incident to a custodial arrest, but would be able to conduct a "search incident to probable cause to arrest" under the rule adopted by the Court of Appeal. And because that figure reflects only filed infractions, it does not include circumstances where officers have probable cause to issue a citation or make a misdemeanor arrest, but use their discretion not to do so—though those circumstances, too, would allow for a "search incident to probable cause to arrest."

The sheer number of infractions that could justify new searches is particularly striking in comparison with the rates of felony and

misdemeanor arrests in California. Even if every one of the felonies and misdemeanors reported in 2013 resulted in a full search incident to arrest, the total number of searches would have been only 1.2 million,[6] compared to the *six million* searches that would have been possible under a "search incident to probable cause to arrest" rule. But because the reported misdemeanor filings would include those incidents where the officer issued a misdemeanor citation in the field without effecting custodial arrest, under Penal Code § 853.6, the total number of custodial arrests that could have given rise to searches incident to arrest in 2013 was somewhere between the 442,741 felony filings and 1,205,536 combined felony and misdemeanor filings.[7] On these numbers, an exception permitting officers to search any time they have probable cause for the most minor infraction

[6] There were 1,205,536 arrests in California in 2013 (reflecting 442,741 felony and 750,985 misdemeanor arrests). Cal. Dept. of Justice, *Crime in California, 2013*, 16, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf (last visited April 23, 2015).

[7] The reported misdemeanor arrest total appears undoubtedly to include those incidents where the officer ticketed and released the person in the field, as they are authorized to do under § 853.6 of the Penal Code. Cal. Dept. of Justice, Criminal Justice Statistics Center, *Data Characteristics and Known Limitations*, 1, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/arrest-limitations.pdf (last visited April 23, 2015). Some portion of the misdemeanor filings therefore did not involve custodial arrests and the accompanying full searches.

should be expected to multiply the number of full "searches incident to arrest" occurring each year by a factor of 4 to 12 times the current rate.

Sample data on searches provide additional support for the scope of expansion at issue here. While there is no statewide data on the rate of searches incident to arrest, some individual departments have collected and reported on search rates. For example, under requirements of a federal consent decree, the Los Angeles Police Department ("LAPD") in 2008 reported conducting 68,714 searches incident to arrest of drivers, passengers, and pedestrians alone[8] with a force of approximately 9,895 sworn officers.[9] If peace officers across the state conducted searches incident to arrest at the same rate as those LAPD officers, one would expect

[8] Los Angeles Police Dept., *Arrest, Discipline, Use Of Force, Field Data Capture, Audit Statistics, And New Directives/Policies, January 1, 2008 – June 30, 2008* (hereinafter "LAPD Biannual Report 1 of 2"), 4–7, *available at* http://assets.lapdonline.org/assets/pdf/Website%20Report,%20Jan.%20-%20June%202008.pdf (last visited April 23, 2015); Los Angeles Police Dept., *Arrest, Discipline, Use Of Force, Field Data Capture, Audit Statistics, And New Directives/Policies, July 1, 2008 – December 31, 2008* (hereinafter "LAPD Biannual Report 2 of 2"), 4–7, *available at* http://assets.lapdonline.org/assets/pdf/FinalConsentDecreeRptJulyDecember2008.pdf (last visited April 23, 2015).

[9] News Release, Los Angeles Police Dept., *LAPD Reaches Milestone Number of Active-Duty Officers* (March 2, 2009), *available at* http://www.lapdonline.org/march_2009/news_view/41030 (last visited April 23, 2015).

California's nearly 80,000 peace officers[10] to conduct roughly 555,000 searches of drivers, passengers, and pedestrians incident to arrest in California per year.[11] Expanding officers' authority to encompass searches incident to the more than 5 million infractions could increase searches incident to "arrest" in such law enforcement contexts by a factor of ten.

The same data suggest that the expanded authority for "searches incident to probable cause to arrest" could dwarf all other grounds for search. In 2008, LAPD conducted a total of 207,481 searches, of which 68,714, or 33%, were searches incident to arrest.[12] Again extrapolating the LAPD data across the state, if allowing searches incident to citation could lead to a tenfold increase in searches incident to "arrest," that could give rise to a threefold increase in the total number of searches conducted by

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[10] Commission on Peace Officer Standards and Training, *Current Employed Full-Time Sworn, Reserve & Dispatcher Personnel, All POST Participating Agencies*, 16 (Jan. 7, 2015), *available at* http://www.post.ca.gov/Data/Sites/1/post_docs/hiring/le-employment-stats.pdf (last visited April 23, 2015).

[11] LAPD did not report searches made by specialized, nongeographic divisions, which made an additional 9,892 arrests in 2008. LAPD Biannual Report 1 of 2, *supra* note 8, at 147; LAPD Biannual Report 2 of 2, *supra* note 8, at 147. Even if all of those additional arrests resulted in searches incident to arrest, the projected statewide searches incident to arrest would increase to only about 635,000.

[12] LAPD Biannual Report 1 of 2, *supra* note 8, at 4–7; LAPD Biannual Report 2 of 2, *supra* note 8, at 4–7.

California law enforcement of which incident to "arrest" would comprise [13] Such a result would represent a seismic shift in the scope of police authority to search, and would eviscerate the careful protections for individuals' privacy rights in their persons and vehicles that the current limits on warrant exceptions are meant to serve.

C. The Potential for Abuse Counsels Against Loosening Established Limits On The Circumstances In Which Officers Can Search

1. *Searches Incident to Arrest Can Be Conducted Without Any Reason to Believe They Will Result in Evidence of Criminal Activity*

A critical aspect of the "search incident to probable cause to arrest" rule endorsed by the Court of Appeal is that it would untether the authority to search from any requirement that the officer reasonably believe the search will yield evidence of a crime, a requirement that represents an important check on officer discretion.

In general, law enforcement authority to conduct a search requires some level of suspicion. With few exceptions, searches conducted without warrants issued upon probable cause are *per se* unreasonable in violation of the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 357 (1967). Searches "undertaken by law enforcement officials to discover

[13] For LAPD, a tenfold increases in searches incident to arrest would result in about 687,000 such searches per year, and increase that department's total number of annual searches to approximately 825,900.

evidence of criminal wrongdoing" fall into this category, absent exigent circumstances. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (internal quotations omitted). Even a pat-down of an individual's outer clothing requires that the officer possess reasonable suspicion that the individual is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968), 26.

Searches that do not require particularized suspicion are strongly disfavored, and permitted in very few instances. 2015 U.S. LEXIS 2807, 14 (U.S. Apr. 21, 2015)*See Knowles*, 525 U.S. at 118 (absent an arrest justifying a full custodial search, an officer cannot conduct a search for evidence of another, as-yet undetected crime); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (disavowing suspicionless searches for general crime control purposes, such as narcotics checkpoints); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (disapproving suspicionless stops of vehicles for the purpose of checking whether the driver is licensed). As the U.S. Supreme Court explained in *Prouse*, the contexts in which searches not based on particularized suspicion may occur are narrowly circumscribed, and such searches "must be undertaken pursuant to previously specified neutral criteria," to avoid the "evil" of "standardless and unconstrained discretion." 440 U.S. at 661–62 (internal quotations omitted).

Searches incident to arrest are among the narrow exceptions to the

requirement of particularized suspicion that the search will yield evidence of a crime. Although an officer needs probable cause for *some* offense in order to make the arrest, once that is satisfied, she is free to conduct a full search even if she has no reason to believe it would yield evidence of that crime or any other. The same would be true of an expanded rule allowing "searches incident to probable cause to arrest." An individual cited for jaywalking across the street to her car—or not cited, as long as probable cause existed—could be searched along with her vehicle, despite the inability of such a search to provide evidence of jaywalking or the absence of any other indicia of criminal activity, in what would amount to a fishing expedition for evidence of criminal activity.

The authority to conduct a search without satisfying any standard of particularized suspicion would give officers an extraordinary degree of discretion. Such discretion is well recognized as creating a "grave danger" of abuse. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *see id.* at 577 (Brennan, J., dissenting) ("Action based merely on whatever may pique the curiosity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct and to avoiding abuse and harassment."); *Florida v. Wells*, 495 U.S. 1, 11 (1990) (Blackmun, J., concurring) ("[t]he exercise of discretion by an individual officer, especially when it cannot be measured against objective, standard criteria,

creates the potential for abuse."); *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (recognizing the "evil" of leaving officers unfettered discretion in the field); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 532-33 (1967) ("the discretion of the official in the field … is precisely the discretion … which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."). Yet such discretion is precisely what rule endorsed by the Court of Appeal would permit.

2. Allowing Searches Incident to Probable Cause To Arrest Would Allow Officer to Justify Searches Based On A Wide Variety of Pretexts that Might Never Otherwise Result in Citation

The ability to conduct essentially suspicionless searches is particularly problematic in light of officers' authority to stop individuals and drivers on pretextual grounds. *See Whren v. United States*, 517 U.S. 806 (1996) (upholding an arrest and seizure of evidence following a pretextual traffic stop on grounds that the constitutional reasonableness of a stop does not depend on the actual motivations of the officers involved). Even though officers may stop an individual for pretextual reasons, under current law they do not develop the authority to search that individual unless they make an arrest—a step state law does not permit them for the wide range of offenses that only constitute infractions. But if officers need not make an arrest in order to conduct a search, they will be free to use

probable cause for the most minor of infractions as pretext to search for evidence of other crimes that they have no objective reason to believe even exists.

Where the specific offense is immaterial, identifying probable cause is not difficult. The sheer volume and range of conduct that may constitute a citable offense makes it easy for an officer to identify probable cause for *some* offense, should he wish to do so. In California, non-arrestable offenses—"infractions," *see* Penal Code §§ 17, 853.5—include virtually all minor traffic and other vehicular offenses, such as jaywalking (Vehicle Code § 21955), speeding (id. § 22350), unsafe turns (id. § 21801), parking violations (id. §§ 22500, 21458), improperly using preferential lanes such as carpool lanes (id. § 21655.5(b)), driving with an obscured license plate (id. § 5201.1), disregarding the traffic signal of a school crossing guard (id. § 2815), failing to yield to an overtaking vehicle (id. § 21753), and following too closely (id. § 21703). They also run the gamut of minor non-vehicular offenses such as littering (Penal Code § 374.4), gaming (id. 330), entry upon posted property (id. § 555) and other trespass (id. § 602(o)), possessing false evidence of age (Bus. & Prof. Code § 25661), and being a minor in possession of alcohol in a public place (id. § 25662). With such a large and complex body of regulations, it is difficult for even the most conscientious person to obey all of them all of the time, and easy for

officers to identify deviations when they are looking for them.

Indeed, courts have acknowledged that "if you follow any vehicle on the roads of this country for even a short amount of time, you will be able to pull that person over for some kind of violation." *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 860-61 (D. Ariz. 2013) (internal quotations omitted) *adhered to,* No. CV-07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013) *aff'd in part, vacated in part,* No. 13-16285, 2015 WL 1654550 (9th Cir. Apr. 14, 2015) and *aff'd,* No. 13-16285, 2015 WL 1654550 (9th Cir. Apr. 14, 2015). Officers themselves have testified that "it is possible to develop probable cause to stop just about any vehicle after following it for two minutes." *Id.* at 861. Justice Brown, dissenting in *People v. McKay*, voiced concern about extending searches incident to arrest even to custodial arrests for minor infractions, given "the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone." 27 Cal. 4th 601, 633 (2002) (Brown, J., dissenting) (citing Department of Transportation studies showing half of all vehicles violate the speed limit alone). *See also id.* at 632 ("Due to the widespread violation of minor traffic laws, an officer's discretion is still as wide as the driving population is large."); *Amador-Gonzalez v. United States*, 391 F.2d 308, 318 (5th Cir. 1968) (recognizing "danger" that "the lowly offense of a

traffic violation -- of which all of us have been guilty at one time or another -- may be established as the basis for searches circumventing the rights guaranteed by the Fourth Amendment").

Police authority to issue citations is often exercised in ways that many find unjustified or even ridiculous. For example, police officers in Los Angeles have reportedly found probable cause to ticket people for things such as honking their horns in traffic[14] and dropping cigarette ash on the street.[15] Similarly, San Francisco and Sacramento officers have used anti-vagrancy regulations to issue citations for sitting in public.[16] State law makes it a misdemeanor to be in possession of a shopping cart (Bus. & Prof. Code § 22435.2)[17] or to inappropriately use a milk crate (id. §

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[14] Emily Foxhall, *LAPD tickets man who honked at Trayvon Martin protesters,* LA TIMES (July 15, 2013), *available at* http://articles.latimes.com/2013/jul/15/local/la-me-ln-zimmerman-protest-honking-20130715 (last visited April 17, 2015).

[15] Steve Lopez, *Here's a jaywalking ticket that's nonsense,* LA TIMES (Aug. 19, 2007), *available at* http://articles.latimes.com/2007/aug/19/local/me-lopez19 (last visited April 17, 2015).

[16] Fisher, Marina and Miller, Nathaniel and Walter, Lindsay and Selbin, Jeffrey, *California's New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-Homeless Laws in the Golden State*, UNIVERSITY OF CALIFORNIA, BERKELEY 18, 21 (February 12, 2015), *available at* http://ssrn.com/abstract=2558944 (last visited April 17, 2015).

[17] *See also* Eric Woomer, *Connecting the Homeless,* VISALIA TIMES-DELTA (Jan. 30, 2015), *available at* http://www.visaliatimesdelta.com/story/news/local/2015/01/30/connecting-homeless/22572307/ (last visited April 20, 2015).

22755).[18] Many cities' local ordinances also make misdemeanors of such conduct as riding a bicycle on the sidewalk[19] or walking a dog without a leash.[20] Officers have the discretionary authority to issue tickets for small technical violations of which most members of the public are unaware, such as entering a crosswalk while the countdown continues but after the "Walk" signal has stopped.[21] Authorizing officers to conduct full custodial searches whenever they can drum up probable cause for any obscure technical violation would have disastrous consequences for Californians' ability to walk or drive down the street secure in their right to bodily privacy.

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[18] Lopez, *Here's a jaywalking ticket that's nonsense, supra* note 10.

[19] LA County Cities' Sidewalk Riding Ordinances, L.A. County Bicycle Coalition at http://la-bike.org/resources/california-bicycle-laws/sidewalk-riding-codes (last visited Apr. 24, 2015); Ordinances Regulating Bicycle Riding on Sidewalks, Santa Cruz County Regional Transportation Commission, at http://sccrtc.org/wp-content/uploads/2011/10/2011-May-Bicycling-on-Sidewalks-Codes.pdf (last visited Apr. 24, 2015); City of Riverside Mun. Code § 10.64.310, available at http://www.riversideca.gov/municode/pdf/10/10-64.pdf (last visited Apr. 24, 2015).

[20] Sac Dog, Sacramento Area Leash Laws, *available at* http://sacdog.org/efforts/LeashLaws.htm (last visited April 24, 2015); NOLO, Leash Laws: Dogs must be leased and under control when they're off their owners' property, *available at* http://www.nolo.com/legal-encyclopedia/free-books/dog-book/chapter2-5.html (last visited April 24, 2015); OC Animal Care, OC Pet Laws, *available at* http://ocpetinfo.com/services/petlaws (last visited April 24, 2015).

[21] Donna Evans, *Police Crackdown on Jaywalking Means Tickets of Up to $250*, LOS ANGELES DOWNTOWN NEWS (Dec. 9, 2013), *available at* http://www.ladowntownnews.com/news/police-crackdown-on-jaywalking-means-tickets-of-up-to/article_f7ebf922-5ec6-11e3-b537-001a4bcf887a.html (last visited April 17, 2015).

D. Significantly Expanding Police Discretion to Conduct Search Would Disproportionately Impact Communities of Color

A dramatic increase in police officers' discretion to search will likely not impact all Californians equally. Communities of color, poor communities, and other vulnerable populations would disproportionately bear the burden of expanded police authority to conduct searches. The near certainty of such a disparate impact, and the foreseeable effect on community-police relations, should weigh heavily against removing the limit on officers' authority that the "search incident to arrest" exception maintains.

Studies of law enforcement in California and across the country demonstrate that highly discretionary authority tends to be applied disproportionately against people of color. For example, analysis of pedestrian and vehicular stop data from Los Angeles revealed that "African Americans and Hispanics are over-stopped, over-frisked, over-searched, and over-arrested." Ian Ayres and Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (2008).[22] That study concluded that "[i]t is implausible that higher frisk and search rates

[22] *Available at* http://islandia.law.yale.edu/ayers/Ayres%20LAPD%20Report.pdf (last visited April 14, 2015)

are justified by higher minority criminality, when these frisks and searches are substantially less likely to uncover weapons, drugs or other types of contraband." *Id. at i.* Of particular note, it also found that African Americans and Hispanics were significantly more likely—76 percent and 16 percent more, respectively—to be asked to consent to a search once stopped than whites were. *Id.* at 6. Recently released vehicle stop and search data from the San Diego Police Department revealed similar racial disparities. Andie Adams, Liberty Zabala, and Omari Fleming, *SDPD Traffic Stop Data Raises Concerns Over Racial Profiling,* NBC San Diego (Feb. 26, 2015).[23] A study of Boston Police Department's stop and search data from 2007-2010 identifies not only wildly disproportionate stops and searches of people of color, but also sheds light on the fact that a whopping 75 percent of reported stops, frisks, and searches conducted during that time were "justified" on the conclusory basis of "investigate person." *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010,* ACLU FOUNDATION OF MASSACHUSETTS 11 (Oct. 2014).[24] Similar analyses of data on discretionary pedestrian and

[23] *Available at* http://www.nbcsandiego.com/news/local/SDPD-Traffic-Stop-Data-Raises-Concerns-Over-Racial-Profiling-294275111.html#ixzz3XvB5xOwf (last visited April 20, 2015).

[24] Available at https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf (last visited April 20, 2015).

traffic stops from New York City, Illinois, Minnesota, Missouri, Nebraska, Rhode Island, and West Virginia have yielded similar results. *See Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 572-76, 588-89 (S.D.N.Y. 2013) (finding that "blacks and Hispanics are more likely to be stopped than whites within precincts and census tracts, even after controlling for the racial composition, crime rate, patrol strength, and various socioeconomic characteristics of the precincts or census tracts where the stops take place"); Alexander Weiss & Dennis P. Rosenbaum, *Illinois Traffic Stops Statistics Act 2010 Annual Report: Executive Summary* (2010);[25] UNIV. OF MINN. INST. ON RACE & POVERTY, *Minnesota Statewide Racial Profiling Report* (2003);[26] Missouri Attorney General., *2013 Vehicle Stops Executive Summary* (2013);[27] ACLU OF NEBRASKA, *Building Public Confidence: Ending Racial Profiling in Nebraska* (Aug. 2014);[28] Amy Farrell & Jack

[25] *Available at* http://www.idot.illinois.gov/assets/uploads/files/transportation-system/reports/safety/traffic-stop-studies/2010/2010%20illinois%20traffic%20stop%20summary.pdf (last visited April 14, 2015).

[26] *Available at* http://www.irpumn.org/uls/resources/projects/aggregate%20report%2092303.pdf (last visited April 14, 2015).

[27] *Available at* https://ago.mo.gov/divisions/litigation/vehicle-stops-report/vehicle-stops-report---2013-executive-summary (last visited April 17, 2015).

[28] *Available at* http://www.aclunebraska.org/images/attachments/209_Building%20Public

McDevitt, *Rhode Island Traffic Stop Statistics Data Collection Study 2004-2005,* NORTHEASTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE (April 2006);[29] *West Virginia Traffic Stop Study: 2009 Final Report,* W. VA. DIVISION OF JUST ICE & COMMUNITY SERVICES (2009).[30]

Recent research has shown that these racial disparities do not mean—and do not depend on—the existence of conscious bias among officers. On the contrary, studies based on implicit association testing, or "IAT," have demonstrated that the human brain may answer questions in biased ways even when the person has no conscious desire to discriminate, or even has a conscious desire *not* to, as a result of how the brain instinctively categorizes information. *See* Chris Mooney, *The Science of Why Cops Shoot Young Black Men,* MOTHER JONES (Dec. 1, 2014).[31] Indeed, renowned scholar and Stanford University professor Jennifer

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%20Confidence%20-%20ACLU%20of%20NE%20Racial%20Profiling%20Report%20-%20Aug%202014.pdf (last visited April 17, 2015).

[29] *Available at* http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1002&context=race_justice_pubs (last visited April 17, 2015).

[30] *Available at* http://www.djcs.wv.gov/SAC/Pages/WVTrafficStopStudy.aspx (last visited April 17, 2015).

[31] *Available at* http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice (last visited April 17, 2015).

Eberhardt recently won a MacArthur "genius" grant for her studies on how "subtle, ingrained racial biases" affect how our brains view people and the objects we associate with them. *See* Geoffrey Mohan, *Stanford's Jennifer Eberhardt wins MacArthur 'genius' grant,* LA TIMES (Sept. 16, 2014).[32] One of her studies, published by the American Psychological Association, demonstrated how unconscious bias may affect discretionary decisions about who to stop and who to search:

> merely exposing people to Black male faces lowers the perceptual thresh[]old at which they detect degraded images of crime-relevant objects (e.g., guns and knives). … exposing people to crime-relevant objects prompts them to visually attend to Black male faces, suggesting that the association of Blacks and crimi[]nality is bidirectional. … these effects on visual attention are not simply due to a negative bias toward Blacks; exposing people to a positive concept that has been linked to Blacks leads to similar effects. … activating the crime concept with police officer participants leads them to attend to Black male faces. Moreover, … these crime primes affect officers' memory for the faces to which they were exposed. Priming officers with crime increases the likelihood that they will misremember a Black face as more stereotypically Black than it actually was. …When we ask police officers directly, "Who looks criminal?," they choose more Black faces than White faces. The more stereotypically Black a face appears, the more likely officers are to report that the face looks criminal.

See Eberhardt, Jennifer L. and Purdie, Valerie J. and Goff, Phillip Atiba

[32] *Available at* http://www.latimes.com/science/la-sci-jennifer-eberhardt-genius-20140917-story.html (last visited April 21, 2015).

and Davies, Paul G., *Seeing Black: Race, Crime, and Visual Processing*, AMERICAN PSYCHOLOGICAL ASSOCIATION JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 87, 878 (2004).[33]

Other studies have shown that these unconscious, seemingly automatic biases can affect people's evaluations of ambiguously aggressive behavior, their determination of objects as weapons or non-weapons, and the likelihood of and speed with which they will decide to shoot someone. *Id.* at 876 (summarizing findings to date). In "shoot/don't shoot" studies conducted specifically on police officer subjects, in which the officers were shown images of black and white faces with images of guns or neutral objects superimposed onto them and forced to immediately make a decision, the officers "were more likely to erroneously shoot an unarmed suspect when he was Black and more likely not to shoot an armed suspect if he was White." Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM, 39, 49 (Michael J. Lynch et al., eds., 2008).[34] These studies show that officers' judgments about "who looks more criminal" are influenced by unconscious

[33] *Available at* http://fairandimpartialpolicing.com/docs/pob5.pdf (last visited April 17, 2015).

[34] *Available at* http://fairandimpartialpolicing.com/docs/rbp-thelaw.pdf (last visited April 21, 2015).

bias. If officers are given dramatically increased authority to conduct searches whenever they have probable cause to arrest, they will likely exercise that discretion to conduct searches in a manner that reflects those biased judgments.

The existence of these implicit biases and their great potential for discriminatory effects have been recognized by many in the law enforcement community. *See, e.g., IACP National Policy Summit on Community-Police Relations: Advancing a Culture of Cohesion and Community Trust*, International Association of Chiefs of Police, 16-17, 20, 27, 32 (Jan. 2015);[35] Tracey G. Gove, *Implicit Bias and Law Enforcement*, THE POLICE CHIEF (April 2015);[36] Lorie A. Fridell, *Psychological Research Has Changed How We Approach the Issue of Biased Policing*, SUBJECT TO DEBATE: A NEWSLETTER OF THE POLICE EXECUTIVE RESEARCH FORUM, 4 (May/June 2014).[37] The Department of Justice (DOJ) Community-Oriented

[35] *Available at* http://www.theiacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf (last visited April 21, 2015).

[36] *Available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=102011%00#1 (last visited April 21, 2015).

[37] *Available at* http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2014/debate_2014_mayjun.pdf (last visited April 21, 2015).

Policing Services (COPS) Office has even developed a training, dubbed "Fair and Impartial Policing," to assist departments in dealing with the issue of implicit bias. *See* DOJ COPS Office, "Ethics and Integrity Training."[38]

The impact of biased and other discriminatory policing on community-police relations is reflected in the public's perception of police. A recent nationwide poll revealed that only 30 percent of African Americans and 43 percent of young people trust the police to be "fair and just." Bill Schneider, *Do Americans trust their cops to be fair and just? New poll contains surprises,* REUTERS (JAN. 15, 2015).[39] Over half of all Americans believe that the police unfairly target minorities—among Hispanics this number jumps to over half, and among blacks it climbs over two-thirds. *Id.* These perceptions will not be helped by permitting five million new searches per year, tethered to the very discretionary authority that minorities already feel is exercised discriminatorily.

The knowledge that officers may not be able to fully control their

[38] *Available at* http://www.cops.usdoj.gov/Default.asp?Item=2618 (last visited April 21, 2015); *see also* http://www.fairimpartialpolicing.com/training-programs (last visited April 21, 2015).

[39] *Available at* http://blogs.reuters.com/great-debate/2015/01/15/one-third-of-americans-believe-police-lie-routinely/ (last visited April 21, 2015).

own biases in exercising discretionary authority provides even more of a reason to limit the opportunities for them to do so. The high potential for abuse in discretionary functions has prompted the Department of Justice to include terms expressly limiting officers' discretion to search in several consent decrees. For example, the New Orleans consent decree requires officers to obtain a supervisor's advance permission to conduct each consent search and to document the subject's consent on a written form. *See* Consent Decree Regarding the New Orleans Police Department, 39 (2013).[40] In New Jersey, until recently state troopers were required to articulate a reasonable suspicion and obtain written consent in order to conduct consent searches. *See* Joint Application for Entry of Consent Decree, item 28 (1999).[41]

The current requirement that an officer must actually make an arrest in order to conduct a full custodial search of a person without a warrant provides a critical objective, standard check on police discretion, and therefore limits the "grave danger" that such discretion will be abused. Endorsing a "search incident to probable cause" warrant exception, as the

[40] *Available at* http://www.laed.uscourts.gov/Consent/NewOrleansDecree.pdf (last visited April 21, 2015)

[41] *Available at* http://www.nj.gov/oag/jointapp.htm (last visited April 21, 2015)

Court of Appeal has, would eliminate that vital check.

CONCLUSION

For the foregoing reasons, Amici California ACLU affiliates respectfully request that this Court reverse the decision of the Court of Appeal below and remand this case to the trial court with appropriate instructions.

Dated: April 24, 2015

Respectfully submitted,

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

ACLU FOUNDATION OF
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Dated: April 24, 2015

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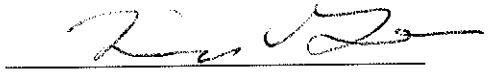

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