IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Appellant, v. BOUHN MAIKHIO, Respondent/Defendant.	Case No. S180289

APPELLANT'S OPENING BRIEF ON THE MERITS

Fourth Appellate District, Division One, Case No. D055068
San Diego County Superior Court, Case No. M031897
The Honorable David Oberholtzer, Judge

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INTRODUCTION

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The California Department of Fish and Game [DFG] is charged with the management and protection of California's fish and wildlife and their habitats, for the benefit of all of California's citizens, through enforcement of the relevant fish and game laws and regulations. One of the most important tools employed by DFG wardens has been their authority under Fish and Game Code[1] sections 1006 and 2012, to stop vehicles and temporarily detain their occupants, for the purpose of administrative inspections, based on the reasonable belief that the occupants have engaged in recent hunting or fishing. The DFG has judiciously employed this tool in order to fulfill its important obligation to preserve and protect California's natural resources.

[1] All future references are to the California Fish and Game Code unless stated otherwise.

This case now presents the important question of whether fish and game wardens are authorized by the Constitution and state law, to conduct such vehicle stops for inspection.

In this case, while surveilling Respondent hand-line fishing on a pier, a warden saw Respondent catch something and place it in a black bag next to him, but he could not see what it was. Respondent left the pier area in his car and the warden conducted a vehicle stop of Respondent. During the stop, the warden saw a black bag in Respondent's car, searched it and found an illegally harvested lobster.

Respondent brought a motion to suppress the evidence and the trial court granted the motion, finding that the vehicle stop was unlawful because the warden had no reasonable suspicion of criminal activity. The court of appeal affirmed the trial court's granting of the motion, finding that neither state law nor the Constitution authorizes fish and game warden vehicle stops without a reasonable suspicion of criminal activity.

This Court should reverse the judgment of the court of appeal, however, because both the Constitution and Sections 1006 and 2012 authorize fish and game wardens to conduct vehicle stops for inspection, without a reasonable suspicion of criminal activity, based on a warden's reasonable belief in recent hunting or fishing, when the stop occurs at or near the time and place of the activity.

Similar to stops and administrative inspections of fisherman or hunters encountered in the field, such vehicle stops for inspection, without a reasonable suspicion of criminal activity, are constitutional under both the implied consent doctrine and pursuant to the Fourth Amendment balancing test under *Brown v. Texas*, 443 U.S. 47 (1979). Accordingly, the judgment of the court of appeal should be reversed.

ISSUES PRESENTED

1. Do Fish and Game Code sections 1006 and 2012 authorize wardens to make a vehicle stop when they have a reasonable belief that the occupants have recently engaged in fishing or hunting?

2. Are hunting and fishing inspections by fish and game wardens, without suspicion of illegal activity, constitutional based on the implied consent doctrine or pursuant to the Fourth Amendment balancing test from *Brown*, 443 U.S. at 47?

3. May a fish and game warden make a vehicle stop for an administrative inspection, without reasonable suspicion of illegal activity, based on the implied consent doctrine or pursuant to the Fourth Amendment balancing test from *Brown*, 443 U.S. at 47?

STATEMENT OF THE CASE

1. Overview of Fish and Game Administration

The DFG plays a vital role in the protection of California's fish, wildlife, and their habitats. *People v. Harbor Hut Restaurant*, 147 Cal. App. 3d 1151, 1154 (1983); Section 711.7(a). Although the People collectively own the state's wildlife, the DFG acts as trustee for California's citizens. Section 711.7(a); *People v. Perez*, 51 Cal. App. 4th 1168, 1175 (1996). The primary objective of the DFG is to exercise supervision over the "trust" in order "to prevent parties from using the trust in a harmful manner." *Harbor Hut Restaurant*, 147 Cal. App. 3d at 1154; *see also National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 437 (1983). More specifically, the DFG's mission is to preserve, conserve, maintain, and protect California's diverse fish, wildlife and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public. Section 1801. Another of the DFG's

important objectives is to alleviate any public health or safety problems caused by wildlife. Section 1801.

To promote the DFG's mission, numerous fish and game laws and regulations have been implemented to prevent poaching and other harmful uses of fish and wildlife in California. For example, it is illegal to kill, capture, or possess game, fish or other wildlife except during open season and as provided by the Fish and Game Code and other regulations. Sections 2000, 2001, and 2002. Threatened and endangered species are the subject of even more stringent laws and regulations. Section 2080, *et. seq*.

The DFG employs wardens to enforce the fish and game laws and regulations. Sections 850–858. They are also peace officers whose authority extends throughout the state. Penal Code section 830.2(e). The Legislature has given broad inspection authority to wardens pursuant to Sections 1006 and 2012.

Specifically, Section 1006 authorizes wardens to conduct inspections of fish and game storage sites and containers. Pursuant to Section 1006, the warden may inspect the following:

> (a) All boats, markets, stores and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibia may be stored, placed, or held for sale or storage.
> (b) All boxes and packages containing birds, mammals, fish, reptiles or amphibian which are held for transportation by any common carrier.

Section 2012, authorizes wardens to demand the display of licenses, fish, wildlife, tags, and gear in a person's possession. Section 2012 provides:

> All licenses, tags, and the birds, mammals, fish, reptiles or amphibians taken or otherwise dealt with under this code, and any device or apparatus designed to be, and capable of being, used to take birds, mammals, fish, reptiles, or amphibians shall be exhibited upon demand to

> any person authorized by the department to enforce this code or any law relating to the protection and conservation of birds, mammals, fish, reptiles, or amphibians.

2. Proceedings Below

Respondent was charged with possession of a lobster out of season and with failing to display his catch in violation of California Code of Regulations [CCR], Title 14, section 29.90(a) and Section 2012. The charges arose out of a fish and game warden's vehicle stop of Respondent for an administrative inspection. (Engrossed Settled Statement [ESS] at 1, lines 23–25 and Transcript of 1538.5 Motion [T.] at 19–26.) Prior to trial, Respondent moved to suppress the evidence of these offenses pursuant to Penal Code section 1538.5. (ESS at 1, lines 23–25.) At a consolidated suppression motion,[2] the prosecution's evidence established the following:

Erik Fleet, a warden with ten years of experience with the Department of Fish and Game, was on duty on the evening of August 19, 2007, near the Ocean Beach Pier, a public fishing pier in San Diego. (T. at 3, 19.) Using a telescope with an 80 millimeter objective that mounts on the window of his truck, (T. at 7, 19), the warden had a close-up view of the fishing activities on the pier so that he could see the actual fish and lobsters caught, except when the pier occasionally obstructed his view. (T. at 7, 14, 19.)

At about 11:00 p.m., Warden Fleet saw Respondent Bouhn Maikhio fishing off the pier with a "hand-line." (T. at 19, 20.) The warden knew that

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[2] The suppression motion was consolidated with motions in two other cases, *People v. Nguyen* (case No. M031902) and *People v. Herrera* (case No. M031898).

hand-lining was a common, but illegal,[3] method of catching lobsters on the pier. (T. at 20.) He also knew that lobster season was closed. Hand-lining, however, was a legal method of catching fish on the pier. (T. at 23.) The warden saw Respondent pull something up on the hand-line and place it in a black bag next to him, but he could not see what it was. (T. at 20.) Respondent then left the pier with two companions, and drove out of the pier parking lot. (T. at 20.)

Warden Fleet stopped Respondent's car after it left the parking lot and asked Respondent if he had any fish or lobsters in the car. (T. at 21.) Respondent said, "no." (T. at 21.) Seeing a black bag on the rear floorboard of Respondent's car, Warden Fleet searched it and found an illegally harvested California spiny lobster. (T. at 22.) Respondent admitted that the lobster was his; he apologized, saying he was stupid for doing what he did. (T. at 22.)

Warden Fleet cited Respondent for possessing a lobster during closed lobster season and for failing to exhibit his catch, violations of California Code of Regulations Title 14, section 29.90(a), and Section 2012, respectively. (T. at 22; Citation.) Warden Fleet released Respondent on his signed promise to appear and returned the lobster to the ocean. (T. at 22.)

The trial judge granted Respondent's motion to suppress. (T. at 46, 47.) The judge ruled that without reasonable suspicion of criminal activity, the warden's vehicle stop of Respondent was unlawful.

On Appellant's appeal, the Appellate Division of the Superior Court reversed the trial court's order. (Order, January 27, 2009; Order after

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[3] California Code of Regulations [CCR], Title 14, Section 29.80(a)(2).

Rehearing, April 7, 2009.) The Appellate Division concluded that, pursuant to Sections 1006 and 2012, Warden Fleet had conducted a lawful vehicle stop of Respondent based on a reasonable belief that Respondent was involved in fishing and a reasonable suspicion that Respondent was involved in criminal activity.

The Court of Appeal accepted transfer of the case for hearing and decision and requested briefing by the parties on the following issues: "(1) whether Fish and Game Code sections 1006 and 2012 authorize vehicle stops without reasonable suspicion of criminal conduct, and (2) whether the warden in this case had reasonable suspicion to believe Respondent was engaged in illegal lobster fishing." (Order, May 20, 2009.) After hearing oral argument, the Court of Appeal affirmed the trial court's ruling. The majority held that Sections 1006 and 2012 did not authorize Warden Fleet's stop of Respondent's vehicle. The majority also held that the vehicle stop was not reasonable under the Fourth Amendment because it was not supported by a reasonable suspicion that Respondent was engaged in illegal lobster fishing.

SUMMARY OF ARGUMENT

As shown by an Attorney General's Opinion construing the predecessor to Fish and Game Code Section 1006, and based on the presumptive intent of the Legislature, state law, pursuant to Sections 1006 and 2012, authorize wardens to conduct vehicle stops for administrative inspection when a warden has a reasonable belief that the occupants have recently engaged in fishing or hunting. (4 Ops. Cal. Atty. Gen. 405, 407–09 (1944); *Orange County Employees Assn., Inc. v. County of Orange*, 14 Cal. App. 4th 575, 582–83 (1993).

Fish and game warden compliance checks[4] of fisherman and hunters encountered in the field, moreover, are constitutional under the implied consent doctrine and under the balancing test from *Brown*, 443 U.S. at 47, without any suspicion of illegality, when a warden has a reasonable belief that an individual is engaging in, or has recently engaged in fishing or hunting, and the stop occurs at or near the time and place of the activity.

Compliance checks of fisherman and hunters encountered in the field are constitutional under the implied consent doctrine, because individuals, such as Respondent, who voluntarily engage in the highly regulated activities of fishing or hunting, impliedly agree that wardens may stop them for reasonable inspections at or near the time and place of these activities.

Additionally, pursuant to the balancing test from *Brown*, compliance checks of fisherman and hunters encountered in the field are also constitutional, without any suspicion of illegal activity, because the state's compelling interest in protecting fish and wildlife, as furthered by compliance checks, outweighs the intrusion on the individual.

Similar to the state's need to conduct compliance checks of fisherman and hunters encountered in the field with no suspicion of illegal activity, wardens are also authorized to conduct reasonable vehicle stops of these individuals, without a reasonable suspicion of criminal activity, under the implied consent doctrine and the balancing test from *Brown*, 443 U.S. at 47, based on a reasonable belief of recent fishing or hunting, when those stops occur at or near the time and place of the activity.

Furthermore, based on the unique nature of fish and game regulations and enforcement, and due to the difficult task facing wardens in

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[4] Appellant uses the terms "compliance checks" and "administrative inspections" interchangeably throughout this brief.

their attempts to enforce these regulations, application of a suspicion of illegal activity requirement to compliance checks of fisherman and hunters encountered on foot or in their vehicles, would seriously imperil the state's vital interest in protecting fish and wildlife from depredation.

Warden's vehicle stops, such as the one in this case, are authorized under Sections 1006 and 2012 and the Constitution, and therefore, the judgment of the court of appeal should be reversed.

ARGUMENT

I

FISH AND GAME CODE SECTIONS 1006 AND 2012 AUTHORIZE WARDENS TO CONDUCT VEHICLE STOPS BASED ON A WARDEN'S REASONABLE BELIEF THAT THE OCCUPANTS HAVE RECENTLY ENGAGED IN FISHING OR HUNTING

Sections 1006 and 2012, provide wardens with the authority to conduct vehicle stops for administrative inspections, based on a reasonable belief the occupants have recently been fishing or hunting. Based on an Attorney General Opinion from 1944 interpreting the predecessor to Section 1006 as authorizing such stops, and on the intent of the Legislature in later enacting Section 1006 without substantial change from its predecessor, Sections 1006 and 2012 provide wardens with the authority to stop individuals whom they reasonably believe have recently engaged in fishing or hunting. 4 Ops. Cal. Atty. Gen. at 407–409; *Orange County Employees Assn., Inc.*, 14 Cal. App. 4th at 582–83.

Section 1006 states,

> The department may inspect the following: (a) All boats, markets, stores and other buildings, except dwellings, and all receptacles except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibian may be stored, placed or held for sale and storage . . . .

Section 2012 provides:

> All licenses, tags, and the birds, mammals, fish, reptiles or amphibians taken or otherwise dealt with under this code, and any device or apparatus designed to be, and capable of being, used to take birds, mammals, fish, reptiles, or amphibians shall be exhibited upon demand to any person authorized by the department to enforce this code or any law relating to the protection and conservation of birds, mammals, fish, reptiles, or amphibians.

In 1944, the Attorney General was asked to render an opinion on "how far law enforcement officers of the Division of Fish and Game may proceed under the provisions of Sections 23[5] and 24[6] in searching automobiles and seizing illegal game which may be found in such vehicles." 4 Ops. Cal. Atty. Gen. at 405. Recognizing that a vehicle was not listed in the statute, the Attorney General rejected the idea that the statute authorized wardens to make random stops of any vehicle driving on the road to determine whether the occupants have been engaged in fishing or hunting. (4 Ops. Cal. Atty. Gen. 405, 407–09 (1944).) After rejecting the unfettered right to stop any vehicle, the Attorney General interpreted the statute as authorizing wardens, who have a reasonable belief that the occupants of a vehicle have recently engaged in hunting, to stop the vehicle

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[5] In this argument, Appellant refers to Fish and Game Code section 1006 interchangeably with Section 23, its predecessor. The two sections are essentially the same: Section 23 states, "The commission shall inspect regularly (1) all boats, markets, stores and other buildings, except dwellings, and all receptacles except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, mollusks, or crustaceans may be stored, placed or held for sale or storage, ..." 4 Ops. Cal. Atty. Gen. at 406–07.

[6] Section 24 authorized wardens to seize illegally taken fish and game and is not at issue in this appeal.

and inquire as to the occupants' take.[7] In providing an example of what a reasonable belief of recent hunting was, the Attorney General stated,

> A warden's observation of a vehicle emerging from a duck club during the open season would give the warden the right to "stop the car and inquire if any game had been taken. If possession of game was denied, the warden would not have the right to search the car in the absence of probable cause for believing that such a denial was untrue. If possession was admitted he would have the right to demand an exhibition of the game under Section 403 of the Fish and Game Code. A refusal to exhibit the game would give rise to probable cause for searching the car without a warrant.

Id. at 409.

Furthermore, in 1959, the Legislature enacted Section 1006 without substantial change from its predecessor. Stats. 1957, ch. 456, pp. 1308, 1330. And in 1972, the Legislature amended the statute, but only added the word "reptiles" to the list of animals. Stats. 1972, ch. 974, Section 4, p. 1766. Based on these actions, the Legislature, by implication, adopted the Attorney General's construal of Section 23, in effect, that the statute authorizes vehicle stops, such as the one in the present case, where there is a reasonable belief in recent hunting or fishing. It is well settled that when an Attorney General Opinion construes a statute and the Legislature thereafter enacts it without substantial change, "it must be presumed that the Legislature is aware of the [Attorney General Opinion] and approves of it." *Orange County Employee's Assn., Inc.,* 14 Cal. App. 4th 582–83; *Henderson v. Board of Education*, 78 Cal. App. 3d 875, 883 (1978).

Here, in conducting the vehicle stop of Respondent, Warden Fleet did exactly what the Attorney General's Opinion authorized. Warden Fleet

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[7] In the DFGs 2010-2011 *California Ocean Sport Fishing Regulations* booklet at page 26, "take" is defined as, "[h]unt, pursue catch, capture or kill fish, amphibians, reptiles, mollusks, crustaceans or invertebrates, or attempting to do so."

not only saw a vehicle leaving a fishing area, he also witnessed Respondent hand-line fishing prior to leaving in his vehicle. Thus, under the Attorney General's Opinion and the presumptive intent of the Legislature, Warden Fleet had the clear authority to stop Respondent's car to inquire as to his catch.[8]

Based on the Attorney General's Opinion and on the presumptive intent of the Legislature, Warden Fleet's vehicle stop of Respondent was properly authorized by Sections 1006 and 2012.[9]

II

FISH AND GAME COMPLIANCE CHECKS ARE CONSTITUTIONAL, WITHOUT SUSPICION OF ILLEGAL ACTIVITY, PURSUANT TO THE IMPLIED CONSENT DOCTRINE AND UNDER THE REASONABLENESS BALANCING TEST FROM *BROWN V. TEXAS*

Fish and game compliance checks of hunters and fisherman encountered in the field are constitutional, without suspicion of illegal activity, under the implied consent doctrine and pursuant to the reasonableness balancing test from *Brown*, 443 U.S. at 47.

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[8] Neither the petition for review nor the answer to the petition raised the issue of the ensuing search of Respondent's car. Therefore, under California Rules of Court, Rule 8.516, the legality of the search does not appear to be an issue before this Court.

[9] In the alternative, even if this Court were to find that Warden Fleet was not authorized to conduct a vehicle stop of Respondent pursuant to Sections 1006 and 2012, article I, section 28, subdivision (d), of the California Constitution, "Proposition 8," would preclude suppression of the evidence obtained by Warden Fleet. *In re Lance W.*, 37 Cal. 3d 873 (1985); *People v. McKay*, 27 Cal. 4th 601 (2002). As shown in the ensuing arguments, vehicle stops, such as the one that occurred here, are lawful under the federal constitution. Therefore, even if the vehicle stop here was deemed a violation of state law, Proposition 8 precludes suppression of the evidence. *In re Lance W.*, 37 Cal. 3d at 873; *McKay*, 27 Cal. 4th 601.

A. FISH AND GAME COMPLIANCE CHECKS ARE CONSTITUTIONAL, WITHOUT SUSPICION OF ILLEGAL ACTIVITY, PURSUANT TO THE IMPLIED CONSENT DOCTRINE

As a general rule, searches and seizures are presumed to be unreasonable in the absence of sufficient individualized suspicion of wrongdoing to support a finding of "probable cause." *Chandler v. Miller*, 520 U.S. 305, 308 (1997). Absent one of the narrowly construed exceptions to the search warrant exception, searches without a warrant are also presumed to be unlawful, *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *In re Tyrell J.*, 8 Cal. 4th 68, 76 (1994).

However, a valid consent is a lawful substitute for probable cause and a search warrant. *United States v. Matlock*, 415 U.S. 164, 165–66 (1974); *Vandenberg v. Superior Court*, 8 Cal. App. 3d 1048, 1053 (1970). "[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973); *United States v. Soriano*, 361 F.3d 494, 501 (9th Cir. 2004).

The validity of an alleged consent to search is typically determined by a "voluntariness" test, in which the key issue is determining whether the consent was in fact voluntary or was the product of duress or coercion. *Schneckloth*, 412 U.S. at 227; *People v. James*, 19 Cal. 3d 99, 107–10 (1977). Consent to search may be expressed by actions as well as words. *People v. Panah*, 35 Cal. 4th 395, 467 (2005) (implied consent for officer to enter when woman agreed to call defendant and allow the officer to speak with him and then opened her apartment door with the officer following); *People v. Martino*, 166 Cal. App. 3d 777, 791 (1985)

(defendant's gesture of opening the door wider and stepping back for the officer to enter constituted substantial evidence of consent).

In a special category of consent cases, several courts have found that consent is established when an individual voluntarily engages in certain types of activities. The United States Supreme Court has applied this implied consent rationale to a closely regulated industry case in *United States v. Biswell*, 406 U.S. 311 (1972). In *Biswell*, the Court upheld the warrantless inspection of the premises of a firearms dealer and reasoned, "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316; *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973) (discussing *Biswell*, the Supreme Court later stated, "the businessman in a regulated industry in effect consents to the restrictions placed upon him."); *accord, Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

Fishing and hunting are highly regulated activities. Hundreds of regulations govern fishing and hunting in California, including Sections 1006 and 2012, which grant wardens broad inspection powers. As discussed above, Section 1006 authorizes wardens to inspect fish and game storage sites and containers and Section 2012 authorizes wardens to demand the display of fish, wildlife, gear, licenses and tags. Additionally, California's fish and game regulations contain licensing requirements[10] that place fisherman and hunters on further notice that they are subject to fish

[10] http://www.dfg.ca.gov/licensing/ols/intro.html and http://www.dfg.ca.gov/marine/pdfs/oceanfish2010.pdf; CCR, Title 14, section 700, Possession of License.

and game regulations. The DFG's 88-page *Ocean Sport Fishing Regulations*[11] booklet sets forth a plethora of regulations a fisherman must follow, including: species restrictions, season restrictions, minimum and maximum size limits, bag limits, tagging, report cards, fishing method restrictions, gear limitations, handling of fish, restricted areas and reporting. Additional regulations can be found in the DFG's 71-page *Freshwater Sport Fishing Regulations* booklet, 48-page *Mammal Hunting Regulations* booklet and 80-page *Waterfowl and Upland Game Hunting Regulations* booklet. These additional regulations set forth similar restrictions and limitations for fishing and hunting in California. http://www.dfg.ca.gov/regulations/index.html. Fish and game laws and regulations are readily available on the internet and the available booklets inform fisherman of the inspection authority of DFG wardens pursuant to Sections 1006 and 2012.[12] Based on the highly regulated nature of fishing and hunting, fisherman like Respondent, who choose to engage in the activity of fishing, have impliedly agreed that fish and game wardens may stop them at or near the time and place of fishing and hunting activity to conduct reasonable compliance checks.

In *Perez*, the California Court of Appeal upheld a stop and inspection of a hunter, on a similar implied consent rationale,[13] despite the fact the warden had no suspicion of an illegality. *Perez*, 51 Cal. App. 4th at

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[11] http://www.dfg.ca.gov/marine/pdfs/oceanfish2010.pdf.

[12] http://www.dfg.ca.gov/marine/pdfs/oceanfish2010.pdf at page 76; http://www.dfg.ca.gov/regulations/FreshFish/unlawfulactions.html.

[13] The court in *People v. Layton*, 552 N.E.2d 1280, 1286 (Ill. App. 1990), specifically articulated this principle by stating that those who engage in the highly regulated activity of hunting are deemed to have consented to certain intrusions on their privacy.

The *Perez* court applied a reasonableness balancing test, as used in *Delaware v. Prouse*, 440 U.S. 648 (1979), to the initial detention at the checkpoint stop and the implied consent analysis to the further detention of those reasonably believed to have recently engaged in hunting.

1168. In upholding the stop and inspection, the *Perez* court recognized the special nature of hunting as a highly regulated activity. (*See Prouse*, 440 U.S. at 648 (conc. op. of Blackmun, J.).) The court stated,

> "In analyzing the reasonableness of the search (inspection) and seizure (detention) of hunters, the special nature of hunting is significant. Indeed, the issue of the constitutionality of warrantless inspections by game wardens was anticipated by Justice Blackmun in his concurring opinion in [Prouse. There,] the court found roving patrols to check the licenses and registration of motorists were unconstitutional. Justice Blackmun stated: 'I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties.'"

Perez, 51 Cal. App. 4th at 1178, *quoting Prouse*, 440 U.S. at 664 (conc. opn. of Blackmun, J.)

The *Perez* court then surveyed numerous statutory inspection regulations authorizing California wardens to conduct fish and game inspections. *Id.* Based on the broad authority of wardens to conduct these varying inspections, the *Perez* court reasonably concluded that individuals who engage in the highly regulated activity of hunting have a reduced expectation of privacy that authorizes reasonable detentions for inspection. *Id.* at 1177. The court stated,

> Given the highly regulated nature of hunting, and the corresponding reduced expectation of privacy of hunters in their gear and their take from hunting, we find it is reasonable to detain hunters briefly, near hunting areas during hunting season, to inspect their licenses, tags, equipment, and any wildlife taken. Defendant contends such inspection may occur only 'on site.' We disagree. The remote and expansive nature of hunting areas permits an inspection at a nearby, reasonable location."

Id. at 1178.

As in *Perez*, the *Layton* court upheld a fish and game detention for administrative inspection, given the highly regulated nature of hunting, the fact that hunting is a privilege to which licensing requirements apply (whether hunting with or without a license), and because hunters may therefore be deemed to have consented to certain intrusions on their privacy. *Id.* at 1287. The *Layton* court further stated, "it is elemental that wildlife licensing and regulatory provisions must be enforceable during the hunt and immediately following it. The roving conservation officer patrol stopping hunters encountered in the field, as here, does not violate the fourth amendment." *Layton*, 552 N.E.2d at 1287.

In *Elzey*, a Georgia court of appeal similarly found that wardens may detain hunters for reasonable inspections without any suspicion of unlawful activity. *Elzey v. State*, 519 S.E.2d 751, 755 (Ga. App. 1999). In so finding, the court agreed with the reasoning of the courts in the *Perez* and *Layton* cases and concluded, "Clearly, a [warden] may approach a hunter in a state-operated wildlife management area to determine whether the hunter has the necessary license and permits and to ask him questions about his hunt, regardless of whether the [warden] has reason to suspect that the hunter has broken any laws." *Id.* at 755.

Accordingly, fish and game wardens may conduct stops and compliance checks of fisherman or hunters under the doctrine of implied consent. Here, Respondent voluntarily engaged in the highly regulated activity of fishing. And implicitly consented to compliance checks. The warden's stop for inspection of Respondent complied with the Constitution.

B. FISH AND GAME WARDEN COMPLIANCE CHECKS ARE CONSTITUTIONAL, WITHOUT SUSPICION OF ILLEGAL ACTIVITY, PURSUANT TO THE REASONABLENESS BALANCING TEST FROM *BROWN V. TEXAS*

Fish and game warden compliance checks, further, are also constitutional under the reasonableness balancing test from *Brown*, 443 U.S. at 47.

The Fourth Amendment requires that searches and seizures be reasonable. *Prouse*, 440 U.S. at 654. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). However, the United States Supreme Court has carved out several exceptions to this requirement. For example, the Supreme Court has approved of searches without individualized suspicion of wrongdoing when the Court has determined that the need for the state's inspection outweighed the intrusion on the individual. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (housing inspections without individualized suspicion upheld to inspect for fire, health and safety violations); *see v. City of Seattle*, 387 U.S. 541 (1967) (inspections of businesses without individualized suspicion upheld for similar safety concerns).

The Supreme Court has also upheld certain regimes of suspicionless searches where the program was designed to serve "special needs," beyond the normal need for law enforcement. The legality of these searches is determined by balancing the need to search against the intrusiveness of the search. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989) (drug testing of train operators); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug tests for customs employees seeking positions with access to drugs); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes).

Additionally, the Supreme Court has approved of highway checkpoint stops for the purposes of combating drunk driving and intercepting illegal aliens by applying the Fourth Amendment balancing test to measure the constitutionality of the stops. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Michigan v. Sitz*, 496 U.S. 444 (1990).

"The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), *quoting Camara*, 387 U.S. at 536–37. This balancing test from *Camara*, an administrative inspection case, was further developed in *Brown*, 443 U.S. at 50–51. The *Brown* test involves balancing three concerns: (1) the public's [state's] interest served by the [search or] seizure; (2) the degree to which the [search or] seizure advances the particular state's [public's] interest; and (3) the severity of the interference with individual liberty that the [search or] seizure engenders. *Id.*; *Sitz*, 496 U.S. at 451.

In the context of fish and game cases, with regard to the "need for the state's inspection" or "state's interest" prong of the balancing test, the state has a compelling need to preserve wilderness areas and the fish and wildlife that thrive there. *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 392 (1978) (Burger, C.J., concurring). Wildlife habitats are under an ever increasing threat. W. Ringel, *Searches & Seizures, Arrests and Confessions*, Section 14.3(b) at 14–16 (2d ed. 1984). Further, much of the damage to natural resources is caused by those who violate fish and game laws. *State v. Howard*, 411 So. 2d 372, 375 (1982).

The state has a vital interest in ensuring the continued health, vitality and stability of fish and wildlife populations. As one California court of appeal stated,

> It is this state's policy to conserve and maintain wildlife for citizens' use and enjoyment, for their intrinsic and ecological values, and for aesthetic, educational and nonappropriative uses. . . . It is also the policy to maintain recreational uses of wildlife, including hunting [and fishing], "subject to regulations consistent with the maintenance of healthy, viable wildlife resources, the public safety, and a quality outdoor experience."

Betchart v. Department of Fish and Game, 158 Cal. App. 3d 1104 (1984). The state has an obvious and compelling interest in protecting and conserving California's fish and wildlife.

Under the second prong of the balancing test from *Brown*, fish and game warden compliance checks of fisherman and hunters encountered in the field greatly further the state's interest in protecting fish and wildlife from depradation. As found in *State v. Sherburne*, 571 A.2d 1181, 1184 (Me. 1990), in order for the state to conserve its natural resources, pervasive regulations have been effectuated. The state's authority to conduct administrative inspections to ensure compliance with these regulations ensures the conservation of these natural resources in many ways.

The regulations reflect important determinations by the state regarding the amount of fish or wildlife that may be taken without depleting or otherwise harming a particular species. CCR, Title 14, sections 27.20(e) and (f) (describes scientific basis and process Department uses to determine whether regulation adjustments or closures to certain species should be made); fish and game regulations include size limits, bag limits, and seasonal limits, all to ensure the maintenance and stability of fish and

wildlife populations. DFG's *California Ocean Sport Fishing Regulations*, www.dfg.ca.gov/regulations/index.html at pages 8–20.

Poaching in violation of these regulatory limits depletes the fish and wildlife populations. *People v. Brady*, 234 Cal. App. 3d 954, 962 (1991); *People v. Tatman*, 20 Cal. App. 4th 1, 6 (1993). The ability of the state to conduct compliance checks is vital to the enforcement of these regulations and to the state's interest in meeting its mandate to protect and manage California's fish and wildlife. Citing poachers for violating the fish and game regulations has a deterrent effect, serving to prevent future violations of the regulations. *New York v. Burger*, 482 U.S. 691, 693 (1987), ("ultimate purpose of the regulatory statute pursuant to which the search is done" is the deterrence of criminal behavior); *Biswell*, 406 U.S. at 315 (proper purpose of administrative scheme is to prevent violent crime). Wardens' compliance checks serve to greatly further the state's interest in protecting and maintaining California's fish and wildlife population.

Finally, under the third prong of the *Brown* test, the degree of the intrusion on the fisherman or hunter due to wardens' compliance checks is limited. Only those individuals whom wardens reasonably believe are engaged in, or have recently engaged in, fishing or hunting activity may be stopped for inspection. Additionally, the intrusion on fisherman and hunters is limited based on the highly regulated nature of fishing and hunting and the fact that licensure is required. Based on these factors, those who engage in these activities have a reduced expectation of privacy when they are engaged in, or have recently engaged in, fishing and hunting activity.

Accordingly, a weighing of the factors pursuant to *Brown*, demonstrates that the state's compelling interest in the protection of California's fish and wildlife, and the high degree that compliance checks of fisherman and hunters further that interest, outweighs the limited

intrusion on the fisherman or hunter. Such compliance checks of fisherman and hunters encountered in the field, without suspicion of wrongdoing, are reasonable under the Fourth Amendment when the warden has a reasonable belief, as here, that the fisherman has recently engaged in fishing activity and the stop and inspection occur at or near the time and place of that activity.

In addition to the general requirement that searches be supported by individualized suspicion, there is also a general requirement that searches be supported by a search warrant. *Mincey*, 437 U.S. at 390; *Tyrell J.*, 8 Cal. 4th at 76; reversed on other grounds. However, the warrant requirement may be dispensed with if such a requirement would be impracticable under the circumstances and would defeat the purpose of the regulatory scheme. *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987); *T.L.O*, 469 U.S. at 351.

Numerous fish and game cases have rejected the warrant requirement as impracticable in the context of the enforcement of fish and game regulations. In *Betchart*, the court upheld the warden's entering and patrolling of privately owned lands to enforce the fish and game laws, notwithstanding the warden's lack of a warrant. The court stated, "California's pervasive scheme of regulating wild game hunting would be a futile pursuit without frequent and unannounced patrols" and found the procedural requirements incompatible with the enforcement of hunting regulations. *Betchart*, 158 Cal. App. 3d at 1109; *see also Harbor Hut Restaurant*, 147 Cal. App. 3d at 1151 (to ensure effectiveness of inspections it is essential that they be unannounced; records can easily be falsified and illegal fish easily disposed of); *People v. Maxwell*, 275 Cal. App. 2d Supp. 1026, 1028–29 (1969) (search of angler's sacks must be made immediately and without a warrant or it will be impossible to make the search).

Because a warrant requirement would be impracticable in the context of fish and game compliance checks, and would defeat the purpose of the administrative scheme, such inspections without a warrant are lawful under the Constitution.

C. A REQUIREMENT THAT FISH AND GAME COMPLIANCE CHECKS MUST BE SUPPORTED BY A SUSPICION OF ILLEGAL ACTIVITY WOULD SERIOUSLY IMPEDE THE STATE'S ABILITY TO ENFORCE FISH AND GAME REGULATIONS

As shown above, reasonable compliance checks of fisherman and hunters encountered in the field are constitutional, pursuant to the implied consent doctrine and under the *Brown* balancing test, without any suspicion of illegal activity. Indeed, requiring fish and game wardens to have suspicion of an illegality before being authorized to conduct compliance checks would seriously imperil the state's ability to enforce fish and game regulations, resulting in the inevitable depletion of California's fish and wildlife.

Other state courts have considered and rejected the contention that fish and game wardens must have a suspicion of wrongdoing before conducting reasonable inspections. For example, in *State v. Boyer*, 42 P.3d 771, 776 (Mont. 2002), the Montana Supreme Court found that wardens were not required to have probable cause before inspecting a fisherman's catch and ultimately ruled that *Boyer* had no reasonable expectation of privacy in his catch. Noting that a probable cause standard was impractical as applied to fish and game inspections by wardens, the court stated,

> [S]ince taking or possessing fish is not illegal per se, simply observing someone catching and keeping fish would not give rise to probable cause of a fish and game violation. Boyer's proposition [that probable cause is required] would virtually require wardens or third parties to have personal knowledge of fish and game violations prior to conducting the contemplated inspection. Montana's vast geography, the anglers' somewhat uninhibited freedom of

> movement, and the remoteness from warrant issuing magistrates and law enforcement entities would severely impede game violation investigations. The inevitable result would be the unnecessary depletion of Montana's wildlife and fish which we are all bound to protect and preserve. We decline to impose this burden.

Id.

Similarly, the Minnesota Supreme Court rejected a probable cause requirement for a warden's inspection of a boat, including compartments where fish might be stored. *State v. Colisimo*, 669 N.W.2d 1 (Minn. 2003). In rejecting an individualized suspicion requirement, the court applied a Fourth Amendment analysis and found that a fisherman has no reasonable expectation of privacy in an open bow boat or other conveyances used to transport fish. *Id.* at 5–7. In finding that probable cause was not required, the court observed that such a requirement would limit a warden's authority to inspect only to situations in which there is information of an illegality from a reliable informant. *Id.* at 7. The court stated, "[t]he idea that [wardens] would be required to personally witness illegal catch activity, coupled with the reality that fishing can take hours or even days, illustrates how absurd it would be to recognize a privacy interest inherent in an angler's take and only then have probable cause to inspect." *Id.*

The court illustrated the unreasonableness of a probable cause requirement by citing to a Minnesota regulation allowing for the daily taking of 30 sunfish per angler. Based on the five anglers on Colisimo's boat, the court reasoned a warden would need probable cause to believe more than 150 sunfish had been taken before an inspection would be allowed. *See also State v. Halverson*, 277 N.W.2d 723, 724 (S.D. 1979) (stops based on probable cause would not satisfy the purpose of the law since the number of hunters is large and game wardens few); *State v. Tourtillott*, 618 P.2d 423, 429–30 (Or. 1980) (game law enforcers face a

difficult task due to the broad expanse of Oregon and the 2 million hunting and fishing licenses sold in 1977); *Perez*, 51 Cal. App. 3d at 1177–78; *Layton*, 552 N.E.2d at 1286–87; *Elzey*, 519 S.E.2d at 751.

As the third largest state, California is a vast expanse containing 163,707 square miles. 7,734 of those square miles are covered by lakes, rivers, streams and other waterways. California's general coastline, moreover, is 840 miles long.[14] The state contains coastal regions, mountains, rivers, deserts, forests, lakes, estuaries and state and national parks. In contrast to this broad expanse, there are only about 200[15] DFG wardens to enforce California's fish and wildlife regulations.

Additionally, California has a large number of fisherman and hunters. About 2 million people purchased a recreational fishing license in California in each of the last ten years.[16] In 2007, the year of this case, about 6,300 commercial fishing licenses[17] and 298,000 hunting licenses[18] were purchased in California.

As recognized by both the Montana and Minnesota Supreme Courts in *Boyer*, 42 P.3d at 776, and *Colisimo*, 669 N.W.2d at 5, the difficulty in applying a criminal-investigation standard to wardens' compliance checks is that such a standard requires wardens to have "personal knowledge" of an illegality before being authorized to make an inspection. However, based on the unique nature of fishing and hunting, specifically, the fact that it is lawful to engage in those activities, it is a rarity for wardens in the field

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[14] http://www.netstate.com/states/geography/ca_geography.htm

[15] http://www.californiafishandgamewardens.com/index-5.html

[16] http://www.dfg.ca.gov/licensing/pdffiles/sf_items_10yr.pdf

[17] http://www.dfg.ca.gov/licensing/pdffiles/cf_items_10yr.pdf

[18] http://www.dfg.ca.gov/licensing/pdffiles/h_items_10yr.pdf

encountering fisherman and hunters to witness them in the act of taking fish or wildlife illegally. Requiring wardens to have evidence of an illegality before conducting compliance checks would mean that hundreds of fish and game regulations would go unenforced.

California has hundreds of regulations imposing bag limits[19] on fish and wildlife. For example, the freshwater fish American Shad, has a daily bag limit of 25. CCR, tit. 14, ch. 2, art. 4, § 5.65. In California, as in Minnesota, requiring a warden to have a suspicion of an illegality before he or she is authorized to conduct a compliance check of a fisherman catching American Shad would require the warden to watch the fisherman possibly all day or over the course of several days in order to witness the fisherman catch a 26th American Shad. Only then would the warden be authorized to conduct a compliance check. Further, the warden would bear the additional burden of being required to watch the fisherman at every precise moment the individual catches a fish, in order to ensure an accurate count. Considering the vast size of California and the limited number of fish and game wardens, if a criminal standard were applied to wardens' compliance checks, the enforcement of bag limit regulations would be severely impeded.

The enforcement of hundreds of other fish and game regulations in California would also be seriously impaired by the application of a criminal standard to wardens' compliance checks. For example, there are hundreds

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[19] A "Bag and Possession Limit" is defined as "No more than one daily bag limit of each kind of fish, amphibian . . . or crustacean named in these regulations may be taken or possessed by any one person unless authorized . . . ." http://www.dfg.ca.gov/regulations/index.html, *Ocean Sport Fishing Regulations* at 22.

of regulations governing the size limits[20] of fish, crustaceans and other wildlife that may be possessed. Fish and game wardens must often watch fisherman or hunters from a distance in order to detect poaching. *Tatman*, 20 Cal. App. 4th at 6 (warden on cliff using telescope saw two men in a boat, apparently harvesting abalone, cover their catch with burlap bags; wardens later found 196 shelled abalones in hidden compartment on boat); *People v. Nguyen*, 161 Cal. App. 3d 687, 690 (1984) (at 10:30 p.m., warden using telescope saw two men illegally fishing with a gill net). However, as illustrated in the present case on appeal, even from a distance, wardens cannot always determine what species is being caught. Further, even when wardens can see the fish or wildlife actually caught, they cannot always determine from a distance whether the particular species complies with size limit requirements. For example, the California spiny lobster has a 3 ¼ inch minimum (carapace) size limit. CCR, tit. 14, § 29.90(c). A warden cannot be expected to tell the difference between a legal, 3 ¼ inch lobster and an illegal 3 inch lobster, from a distance. As Warden Fleet testified at the suppression hearing in this case, "I can't check for compliance until I put a gauge on that lobster . . . ." (R.T. at 46, lines 22–23.) Although wardens employ surveillance techniques to catch poachers, the requirement that they watch every single fisherman or hunter, and be able to develop suspicion of an illegality, before being authorized to inquire about or inspect the individual's catch, would seriously impede the ability of wardens to enforce fish and game regulations.

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[20] In the 2010-2011 DFG *Ocean Sport Fishing Regulations* at 22–23, "Minimum and Maximum Size" is defined as, "No fish, mollusks or crustaceans less than the legal minimum size or greater than the maximum legal size . . . may be possessed, except as otherwise provided . . . ." Examples of size limit requirements can be found in the above regulations at pages 8–20.

There exist literally hundreds of fish and game statutes and regulations specifying bag and size limits, species restrictions, tagging and report card requirements, fishing and hunting method restrictions, gear limitations and reporting requirements. The purpose of these regulations is to ensure a healthy, stable population of fish and wildlife in California and to ensure that depradation of fish and game does not occur. A requirement that wardens have suspicion of an illegality before they are authorized to conduct stops and compliance checks of the fisherman and hunters they encounter in the field would severely imperil the state's ability to protect fish and wildlife from depletion.

III

VEHICLE STOPS BY FISH AND GAME WARDENS, WITHOUT REASONABLE SUSPICION OF CRIMINAL ACTIVITY, ARE CONSTITUTIONAL BASED ON THE DOCTRINE OF IMPLIED CONSENT AND PURSUANT TO THE BALANCING TEST FROM *BROWN V. TEXAS*

Similar to the state's need for wardens to conduct compliance checks of fisherman or hunters encountered in the field with no suspicion of illegality, wardens are also authorized to conduct reasonable vehicle stops of these individuals, without a reasonable suspicion of criminal activity, based on the doctrine of implied consent, when those stops occur close in time and place to the activity. Vehicle stops for inspection are also constitutional under the balancing test from *Brown*, when a warden has a reasonable belief that the occupants have recently engaged in hunting or fishing and the stops occur at or near the time and place of the activity.

A. VEHICLE STOPS BY FISH AND GAME WARDENS, WITHOUT REASONABLE SUSPICION OF CRIMINAL ACTIVITY, ARE CONSTITUTIONAL PURSUANT TO THE IMPLIED CONSENT DOCTRINE

As discussed previously,[21] based on the highly regulated nature of fishing and hunting, when a fisherman or hunter voluntarily engages in these activities, they impliedly agree that wardens may stop them for inspection at or near the time and place of that activity. *Perez*, 51 Cal. App. 3d at 1178; *Layton*, 552 N.E.2d at 1287.

Respondent may argue that because the vehicle stop in *Perez* occurred at a checkpoint stop, rather than as the result of an individual "roving" stop, as occurred here, such a distinction renders the stop in this case unconstitutional. However, a similar argument was rejected by the courts in *Layton*, 552 N.E.2d at 1287 and *Elzey*, 519 S.E.2d at 754–55. In rejecting this contention, the court in *Layton* stated, "The fact that such roadblock and checkpoint stops have been upheld cannot be equated to a rule that these are the only methods of enforcing game laws which do not violate the fourth amendment." *Layton*, 552 N.E.2d at 1286. The court went on to uphold the "roving" stop[22] of a hunter on the basis of implied consent based on the highly regulated nature of hunting for which licensure is required and because those choosing to engage in hunting consent to certain intrusions on their privacy. *Id.* The *Layton* court further stated, "it is elemental that wildlife licensing and regulatory provisions must be enforceable during the hunt and immediately following it. The roving

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[21] *See* Argument II, A. of Appellant's Opening Brief [AOB].

[22] In *Layton,* the court used the term "roving stop" to refer to a warden's stop of a hunter who was returning to his vehicle along with a group of other hunters, apparently after concluding with their hunt. *Layton,* 552 N.E.2d at 1281. Thus, the warden had a reasonable belief that Layton had recently engaged in hunting. *Id.* at 1287.

conservation officer patrol stopping hunters encountered in the field, as here, does not violate the fourth amendment." *Layton*, 552 N.E.2d at 1287.

Hence, under the doctrine of implied consent, just as stops of fisherman or hunters on foot or at game checkpoints are constitutional, so too are individual vehicle stops, provided those stops occur at or near the time and place of the activities.

In *People v. Innis*, 604 N.E.2d 389 (Ill. App. 1992), the same court that decided *Layton*, 552 N.E.2d at 1280, pursuant to the implied consent doctrine, addressed the issue of how close in time a game warden's vehicle stop for inspection must be to the hunting activity. In *Innis*, the warden conducted the vehicle stop of the hunter in a wildlife habitat at about 4:30 p.m. The only evidence before the court as to the time of hunting was the hunter's admission that he had hunted "earlier in the day." *Id.* at 390. Based on the significant difference between the time of the hunting and the time of the stop, the court found the vehicle stop for inspection occurred too long after the hunting activity and affirmed the trial court's granting of the suppression motion. *Id.* at 390–91.

Unlike in *Innis*, in this case the stop for inspection occurred close in time to the fishing activity. Warden Fleet saw Respondent hand-line fishing and stopped him directly after the fishing activity when he drove out of the pier parking lot. Accordingly, under these circumstances, the close in time requirement is satisfied in this case.

With regard to the requirement that a vehicle stop occur at or near the *location* of the fishing or hunting activity, Appellant was unable to find any cases addressing the issue of how close a stop must be to the fishing or hunting area in order to be deemed constitutional. Nevertheless, the vehicle stop in this case clearly fits within the purview of the "at or near the location" requirement. Here, Warden Fleet stopped Respondent after he

began to drive away from the pier parking lot, in close proximity to the area where Respondent had been fishing. Therefore, because Respondent voluntarily engaged in the highly regulated activity of fishing and because the stop occurred at or near the time of the fishing activity, the vehicle stop of Respondent was lawful pursuant to the doctrine of implied consent.

B. FISH AND GAME VEHICLE STOPS, WITHOUT REASONABLE SUSPICION OF CRIMINAL ACTIVITY, ARE CONSTITUTIONAL BASED ON THE REASONABLENESS BALANCING TEST FROM *BROWN V. TEXAS*

In addition to being constitutional under the implied consent doctrine, warden's vehicle stops of hunters or fisherman, with no reasonable suspicion of an illegality, are also constitutional under the Fourth Amendment balancing test pursuant to *Brown*, 443 U.S. at 47.

As previously argued, compliance checks of fisherman and hunters encountered in the field on foot, are constitutional under the reasonableness balancing test from *Brown*, because the state's compelling interest in protecting fish and wildlife, as furthered by compliance checks, outweighs the intrusion on the fisherman, when a warden reasonably believes the individual is engaging in, or has recently engaged in fishing, and the stop for inspection occurs at or near the time and place of the activity. *Brown*, 443 U.S. at 47.[23]

The Fourth Amendment, moreover, does not appear to distinguish between stopping individuals on foot and stopping them in vehicles. Appellant could not find any cases holding that the stop of an individual in a vehicle requires more justification under the Fourth Amendment than the stop of an individual on foot. With regard to game warden compliance checks, the stop of a fisherman on foot and the stop of a fisherman in a vehicle are both reasonable, provided the warden has a reasonable belief of

[23] *See* Argument II, B. of AOB.

recent fishing or hunting and the stop occurs at or near the time and place of the activity.

The analysis under the balancing test from *Brown* demonstrates that vehicle stops for the purposes of conducting a compliance check are just as reasonable as stops of individuals on foot to conduct compliance checks, provided the vehicle stop is based on a warden's reasonable belief that the occupants have engaged in recent fishing or hunting and occurs at or near the time and place of the activity.

As stated previously, the *Brown* test involves balancing three concerns: (1) the public's [state's] interest served by the [search or] seizure; (2) the degree to which the [search or] seizure advances the particular state's [public's] interest; and (3) the severity of the interference with individual liberty that the [search or] seizure engenders. *Brown*, 443 U.S. at 47; *Sitz*, 496 U.S. at 451.

For cases involving stops of fisherman and hunters on foot or stops of these individuals in vehicles, the first two prongs of the *Brown* test remain the same.[24] The state's interest for each remains the compelling interest in protecting fish and wildlife. Further, fish and game compliance checks, whether by way of stops of fisherman and hunters on foot or in vehicles, greatly advance the state's vital interest in protecting fish and wildlife. With regard to the intrusion prong of the *Brown* test, fisherman and hunters, whether in vehicles or on foot, have a reduced expectation of privacy due to the highly regulated nature of fishing and hunting, provided the stops occur at or near the time and place of the activity. Finally, as in this case, when the stop is based on the warden's reasonable belief that an individual has recently engaged in fishing or hunting, the intrusion is

[24] *See* Argument II, B. of AOB at pages 19–21.

minimized because of the diminished expectation of privacy of the fisherman or hunter.

As discussed previously, the "at or near the time and place" requirements were met in this case.[25] Warden Fleet witnessed Respondent hand-line fishing and stopped him directly after and in close proximity to the location where Respondent was fishing. Based on Warden Fleet's reasonable belief that Respondent had recently engaged in fishing and on the time and place elements being met in this case, the vehicle stop here was reasonable pursuant to the balancing test from *Brown,* 443 U.S. at 47.

Numerous courts have applied constitutional standards to determine the legality of vehicle stops by fish and game wardens. In one category of cases, wardens had a reasonable suspicion of illegal activity to justify the vehicle stops. In these cases, the courts merely applied a reasonable suspicion analysis to uphold the stops and there was no need to consider another standard, such as a reasonable belief in recent hunting. *People v. Levens*, 713 N.E.2d 1275 (Ill. App. 1999); *State v. Taylor*, 491 A.2d 1034 (Vt. 1985); *Commonwealth v. Palm*, 462 A.2d 243 (Pa. 1983); *Schultz v. State*, 437 So. 2d 670 (Ala. 1983); *State v. Hillock*, 384 A. 2d 437 (1978).

In another group of cases, wardens made entirely random stops of vehicles, when there was neither a reasonable belief of recent hunting nor a reasonable suspicion of criminal activity. In these cases, the courts recognized the entirely random nature of the stops and found them unconstitutional based on a lack of reasonable suspicion of illegal activity. *State v. Odom*, 595 P.2d 1277 (Or. 1979); *United States v. Munoz,* 701 F.2d 1293 (1983); *State v. Creech*, 806 P.2d 1080 (N.M. 1991); *People v. Coca*, 829 P.2d 385 (Colo. 1992); *State v. Legg*, 536 S.E.2d 110 (W. Va. 2000).

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[25] *See* detailed argument regarding these requirements in Argument III, A. of AOB at pages 30–31.

In at least one case, however, in which the facts did not support a reasonable suspicion of illegal activity, a court found a vehicle stop, to request that a hunter display his license was constitutional. *State v. Keehner*, 425 N.W.2d 41 (Iowa 1988). The court upheld the stop based on the warden's reasonable belief that the vehicle's driver was engaging in hunting from his vehicle, (not illegal activity). *Keehner*, 425 N.W. 2d at 41.

Here, Warden Fleet did not conduct a random stop of a vehicle to *see* whether the occupant had been engaged in fishing, as did the wardens in the *Odom*, 595 P.2d at 1277; *Munoz*, 701 F.2d at 1293; *Creech*, 806 P.2d 1080; *Coca*, 829 P.2d at 385; and *Legg*, 536 S.E.2d at 110, cases. Rather, Warden Fleet witnessed Respondent hand-line fishing and conducted a reasonable stop of Respondent near the time and place of the activity.

The state's compelling interest in protecting fish and wildlife from depletion and the high degree that compliance checks—of fisherman on foot or in vehicles—furthers that state's interest, outweighs the intrusion on the fisherman and is constitutional pursuant to the balancing test in *Brown*, 443 U.S. at 47.

Despite the *Brown* balancing test, Respondent will likely allege that the primary purpose of DFG's regulatory scheme is to uncover evidence of "ordinary" criminal violations and that, pursuant to *Edmond*, 531 U.S. at 37, fish and game vehicle stops for administrative inspection are "per-se unconstitutional." Respondent may also cite to *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), to allege that the DFG's administrative scheme was designed to detect criminal law violations and that stops and compliance checks are thereby unconstitutional. However, the checkpoint program in *Edmond* and the search policy in *Ferguson* were both designed to gather evidence of violations of penal law and are therefore completely

distinguishable from the DFG's administrative scheme, the primary purpose of which is to protect fish and wildlife in California.

In *Edmond*, 531 U.S. at 32, the Court struck down a checkpoint program whose sole and primary purpose was "interdicting drugs in Indianapolis." *Id.* at 35, 44. The program allowed officers to randomly stop motorists on public highways, without reasonable suspicion of any illegality, and, while checking the motorists for compliance with license and registration requirements, a drug-sniffing dog checked for narcotics possession. *Id.* at 35. The *Edmond* Court found that because the primary purpose of the checkpoint program was "for the ordinary enterprise of investigating crimes," the Fourth Amendment required reasonable suspicion of criminal activity to support the stops. *Id.* at 44.

In *Ferguson*, 532 U.S. at 70–73, the Supreme Court invalidated a hospital's program of conducting drug testing of pregnant women who met one or more criteria indicating possible drug use. The hospital's policy was to take drug tests of the women for purposes of coercing them into drug treatment programs at the threat of turning the test results over to the police. *Id.* Police and prosecutors were actively involved in the day-to-day administration of the program. *Id.* at 82. The Court found the hospital's search policy unconstitutional and stated, "[i]n this case, the policy was specifically designed to gather evidence of violations of the penal laws." *Id.* at 83 n.21.

The *Edmond* Court emphasized that the primary purpose inquiry "is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Edmond*, 531 U.S. at 48; *see also Ferguson*, 532 U.S. at 81–82.

In *Ferguson*, however, the Court distinguished the case before it, in which the hospital policy was specifically designed to gather evidence of

penal laws, from the "plain administrative scheme" involving vehicle dismantling businesses in *Burger*, 482 U.S. 691. *Ferguson*, 532 U.S. at 83 n.21. The *Ferguson* Court noted that the statute in *Burger* was upheld because the administrative scheme was not "designed to gather evidence to enable convictions under the penal laws . . . ." *Ferguson*, 532 U.S. at 83 n.21 *quoting Burger*, 482 U.S. at 715.

The Supreme Court's decision in *Burger*, 482 U.S. at 691, demonstrates that *Edmond* and *Ferguson* are inapplicable to this case. In *Burger*, five officers of the Auto Crimes Division of the New York City Police Department entered the defendant's junkyard to conduct an inspection of defendant's license and the records of the automobiles and vehicle parts in his possession. *Id.* at 693–94. The inspection was conducted pursuant to an administrative regulation requiring auto dismantlers to keep records of vehicles in their possession and to provide such records to inspectors upon request. *Id.* at 694. When the officers determined that the dealer was in possession of stolen vehicles and parts, he was arrested and charged with five counts of receiving stolen property and one count of unregistered operator as a vehicle dismantler in violation of an administrative regulation. *Id.* at 695. In rejecting the claim that the administrative inspections were conducted solely to uncover evidence of criminality, the *Burger* Court stated, "[a] State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. The Court found that administrative schemes do not violate the constitution just because they, like penal laws, may also have the ultimate purpose of preventing crime." *Id.* at 713.

The *Burger* Court stated, "An administrative statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and

allowing government officials to ensure that those rules are followed." *Id.* "Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior." *Id.* The "plain administrative purposes" of the fish and game regulations distinguish this case from *Edmond* and *Ferguson*, where the primary purpose of the programs was to gather evidence of ordinary penal violations.

In the present case, the primary purpose of wardens' compliance checks is to accomplish the DFG's main objective of protecting fish and wildlife in California. *Harbor Hut Restaurant*, 147 Cal. App. 3d at 1154; *Betchart*, 158 Cal. App. 3d at 1106–07; Section 1800. Furthermore, even if a primary purpose of the DFG is viewed as enforcing the fish and game laws and regulations, such a primary purpose, pursuant to an administrative scheme, does not render a search scheme unconstitutional. *Burger*, 428 U.S. at 713. Accordingly, based on the administrative nature of fish and game regulations, *Edmond* and *Ferguson* are distinguishable and do not apply to this case.

Under the Fourth Amendment balancing test, because the state's vital interest in protecting fish and wildlife, as furthered by vehicle stops for inspection, outweighs the intrusion on the fisherman, vehicle stops are reasonable under the Fourth Amendment. Reasonable suspicion of illegal activity is therefore not required for vehicle stops by fish and game wardens.

C. A REQUIREMENT THAT WARDENS HAVE A REASONABLE SUSPICION OF ILLEGALITY BEFORE CONDUCTING VEHICLE STOPS WOULD SERIOUSLY UNDERMINE THE ENFORCEMENT OF NUMEROUS FISH AND GAME REGULATIONS

As is true with compliance checks of fisherman and hunters on foot, if wardens are not authorized to conduct vehicle stops of fisherman or

hunters without a reasonable suspicion of illegal activity, the ability of wardens to enforce numerous fish and game laws and regulations would be seriously undermined.

If wardens are authorized under the constitution to detain fisherman and hunters on foot for brief compliance checks when they have a reasonable belief of recent fishing or hunting, then vehicle stops, based on an identical reasonable belief are also constitutional when those stops occur at or near the time and place of the activity. Moreover, a finding that detentions of fisherman or hunters on foot are constitutional, but detentions of fisherman or hunters in vehicles are not, would create a strange and disturbing dichotomy in California: namely, poachers would soon learn that if they can make it to their vehicles before a warden can contact them, they do not have to obey California's fish and game laws and can completely avoid detection.

Considering the size of California, such a finding would create a disturbing picture. In contrast to the State's vast expanse, there are only about 200[26] DFG wardens to enforce California's fish and wildlife regulations. In effect, a holding by this Court that a criminal-investigation standard applies to wardens' vehicle stops would require wardens to actually catch fisherman or hunters in the act of poaching before they can conduct vehicle stops and check their compliance. That would make numerous fish and game laws unenforceable, especially once poachers learn that their vehicles are a safe haven.

Poachers, by nature, actively work to conceal their actions. For example, in this case, at 11:00 p.m. at the Ocean Beach pier, Respondent used hand-lining—a legal method of catching fish—to catch a lobster out

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[26] http://www.californiafishandgamewardens.com/index-5.html

of season and hid the lobster in a black bag next to him; s*ee also Tatman*, 20 Cal. App. 4th at 6 (warden on cliff using telescope saw two men in a boat, apparently harvesting abalone, cover their catch with burlap bags; wardens later found 196 shelled abalones in hidden compartment on boat); *Nguyen*, 161 Cal. App. 3d at 690 (at 10:30 p.m., warden using telescope saw two men illegally fishing with a gill net).

In some cases, depending on the topography of the warden's surveillance location, such as the sea cliffs in northern California, it may not be possible for the warden to reach the suspected poacher before he leaves in a vehicle. *Tatman*, 20 Cal. App. 4th at 6 (possible abalone poachers stopped by wardens after pulling away from boat dock). However, applying a criminal standard to wardens' vehicle stops would mean that when the warden cannot reach the possible poacher in time, the poacher is free to drive away and the warden is powerless to stop the vehicle.

Furthermore, the enforcement of deer hunting regulations on the numerous roads in California's deer hunting zones would be seriously compromised if a reasonable suspicion standard is applied to wardens' vehicle stops. Deer hunting zones in California include a myriad of roads covering broad areas. California DFG *Mammal Hunting Regulations*: http://www.fgc.ca.gov/regulations/current/mammalregs.asp#360. Based on the vast size of deer hunting zones, the fact that deer hunters typically travel in vehicles, the limited number of field wardens and large number of hunters, application of a criminal standard to such vehicle stops would seriously imperil the ability of hunters to enforce deer hunting regulations California.

Another regulation for which enforcement would be seriously undermined, is the ban on the importation of certain portions of hunter-harvested deer and elk (skulls and spinal cords) into California. Cal. Code

of Regs., tit. 14, section 712. The purpose of this ban is to protect California's deer and elk populations from chronic wasting disease. This disease affects the brains of deer and elk and belongs to a group of diseases known as "transmissible spongiform encephalopathies." This group of diseases includes Creutzfeldt-Jakob disease in humans (mad cow disease). Currently, there is no evidence that California's deer and elk herds have chronic wasting disease, but the disease has been found in eight other states and one province of Canada.[27] If a criminal standard is applied to wardens' vehicle stops, wardens would be prohibited from stopping hunters based on a reasonable belief they are importing hunter-harvested deer or elk unless there is reasonable suspicion to believe that the banned parts of the carcass are in the vehicle. Since this personal knowledge on the part of wardens would be extremely rare, wardens would be prevented from enforcing the ban on transporting these potentially diseased parts of elk and deer at the expense of California's deer and elk populations. In short, application of a criminal standard to wardens' vehicle stops would seriously compromise the ability of wardens to stop this potentially dangerous disease from entering California.

Requiring that wardens have a reasonable suspicion of criminal activity before they are authorized to conduct reasonable vehicle stops for inspections would seriously imperil the state's vital interest in protecting fish and wildlife from depredation.

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[27] http://www.dfg.ca.gov/news/issues/cwd_faq.html.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: July 27, 2010

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CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rule of Court, Rule 8.204(c)(1), I certify that this Appellant's Opening Brief on the Merits contains 10,896 words and is printed in a 13-point typeface.

Dated: July 27, 2010

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DECLARATION OF
SERVICE BY MAIL

Supreme Court No. S180289
Court of Appeal No. D055068
San Diego Sup. Ct. App. No. CA211304
Court No. M031897
Respondent: Bouhn Maikhio

I, Janette A. Myers, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 1200 Third Avenue, Suite 700, San Diego, California, 92101-4103. I served the following document(s): **APPELLANT'S OPENING BRIEF ON THE MERITS,** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Gary R. Nichols
Office of the Public Defender
450 "B" Street, Suite 900
San Diego, CA 92101

The Honorable David Oberholtzer
Judge of the Superior Court
220 West Broadway
San Diego, CA 92101

San Diego Superior Court
Clerk of the Appellate Division
220 West Broadway
San Diego, CA 92101

Court of Appeal State of California
Fourth Appellate District
Division One
750 "B" Street, Suite 300
San Diego, CA 92101-8196

Office of the Attorney General
110 West "A" Street, Suite 1100
San Diego, CA 92101

I then sealed each envelope, and with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on July 27, 2010.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 27, 2010, at San Diego, California.

Janette A. Myers

PROOF OF SERVICE BY MAIL
C.C.P. §§ 1013(a); 2015.5