SUPREME COURT

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

ARGUMENT

I

FISH AND GAME CODE SECTIONS 1006 AND 2012 IMPLICITLY AUTHORIZE VEHICLE STOPS WITHOUT ANY REASONABLE SUSPICION OF CRIMINAL CONDUCT

In order to effectively manage and protect California's fish and wildlife, Fish and Game Code sections 1006[1] and 2012 necessarily imply that California Department of Fish and Game (DFG) wardens have the authority to conduct vehicle stops without any reasonable suspicion of criminal conduct. Wildlife is a publicly owned resource, maintained through regulated management, which may not be taken or possessed except as provided by the Fish and Game Code. *See* Section 1801; *see also*

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

Betchart v Department of Fish and Game, 158 Cal. App. 3d 1104, 1107 (1984). Government officials have additional powers necessary for due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers. *Betchart*, 158 Cal. App. 3d at 1109 (citing *In re Cathey*, 55 Cal. 2d 679, 689 (1969)).

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 amphibia 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.

These inspection statutes unquestionably authorize inspection unaccompanied by any quantum of individualized articulable suspicion. In *People v. Maxwell*, 275 Cal. App. 2d Supp. 1026 (1969), the court held that Section 1006 authorized DFG wardens to demand the inspection of sacks that two deckhands of a sportfishing boat handed to two passengers even though the wardens had no cause to believe that any crime had been committed, on the sole basis that the wardens could reasonably infer that the sacks contained fish.

The statutes authorize inspection of any receptacle where wildlife may be held and any device used to take animals. Here the warden testified he observed Respondent engaged in hand-line fishing, catch something, and

place the catch into a black bag. According to the clear meaning of the statutes, the warden had the authority to inspect that catch, that bag used to hold the catch, and that line used to make the catch. The statutes do not require that there be any evidence of wrongdoing.

Sections 1006 and 2012 clearly indicate that DFG wardens are empowered to make brief detentions to inspect where wildlife is likely to be found, limited by those few areas where there are particularly high expectations of privacy, namely one's body and one's home. Respondent argues that the legislative concern for the privacy of personal space is diminished by construing "receptacle" to extend to vehicles. (Respondent's Answer Brief (RAB) at 19.) This proposition is without basis in case law, statute, or logic, which may explain why that proposition is without any citation.

There was no cognizable constitutional impediment to conducting a vehicle stop to carry out an inspection under Sections 1006 and 2012 which occurred near in time and place to the closely regulated activity of fishing. Fourth Amendment rights are personal rights that may be asserted only by a defendant who has a legitimate expectation of privacy in the invaded place or the thing searched. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 143 (1978). If a fish and game warden has the implied power to stop people who are fishing on a pier, and inspect their lines, catch and receptacles, why would the warden no longer be allowed to make the same inspection if the person walks away from the pier, or gets to their vehicle, or starts to drive away? Not only did this seizure occur close in time and location to the regulated activity of fishing, but the Respondent's actions of possessing the catch, possessing the receptacle used to contain the catch (the black bag) and possessing the equipment used to obtain that catch continued to subject him to inspection as he drove away under Sections 1006 and 2012. Thus, this

case does not have any Fourth Amendment issues involving attenuation or the limits on investigation of past regulatory activity as discussed in *United States v. Hensley*, 469 U.S. 221 (1985).

Until and unless the person has some intervening recognized privacy interest, the warden's inspection should still be allowed. Individuals have a reduced expectation of privacy in a vehicle. *New York v. Class*, 475 U.S. 106 (1986); *In re Arturo D.*, 27 Cal. 4th 60, 70 (2002). The Court explained this reduced expectation, that a vehicle's function is transportation, it seldom serves as a place for storage of personal effects, it is open to public scrutiny, and it is subject to extensive regulation including inspection, licensing, operation, and equipment. *Class*, 475 U.S. at 112-13 (citing *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) and *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). In contrast, an individual has an increased expectation of privacy in his home or in his person. *People v. Ramey*, 16 Cal. 3d 263, 276 (1976); *Payton v. New York*, 445 U.S. 573 (1980); *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). Section 1006 takes into account these recognized Fourth Amendment expectations of privacy by excluding from inspection dwellings and an individual's clothing. Thus, Respondent's being in a vehicle rather than on the pier when the brief detention took place is of no import, because a car is not afforded any heightened Fourth Amendment protection as are homes, or searches of one's physical person.

In *People v. DeLong*, 11 Cal. App. 3d 786, 791 (1970), the court of appeal found the objective of a regulatory statute authorizing the inspection of a firearm could "not be frustrated simply by depositing firearms which have been exposed to view or which are otherwise known to the officers to be present in such part of the vehicle or in such container as obscures them from view." The court of appeal upheld a suspicionless regulatory search

against a constitutional Fourth Amendment challenge. Penal Code section 171e authorized police to inspect anyone carrying a firearm to determine if that firearm is loaded in order to enforce Penal Code sections 171c and 171d. Penal Code sections 171c and 171d prohibited carrying loaded firearms in certain locations such as public schools, state buildings and colleges, and government residences. In *DeLong* a police officer observed defendant put two firearms in the trunk of his car on a junior college campus. The police officer lawfully opened the trunk to determine if the guns were loaded because loaded guns were prohibited in that area. While examining the guns, the officer discovered marijuana in plain view in the trunk. In the present case, the objectives of Sections 1006 and 2012, inspection of Respondent's observed catch, bag holding that catch, and the equipment used to obtain the catch, cannot be frustrated simply by Respondent placing those items in his vehicle.

While Section 1006 does not specifically allow for inspections of vehicles, neither does it preclude vehicle inspections. The Attorney General's Opinion of 1944 said that "receptacles" could not be extended to mean cars by implication of the enumerated places to be inspected which were boats, markets, stores, buildings, and receptacles. 4 Ops. Cal. Atty. Gen. 405 (1944). This would appear to be an application of the maxim "expressio unius est exclusion alterius," the express mention of one thing excludes all others. However, this maxim is only applicable where the statute is a systematic and complete scheme. Such maxims are not to be used to contradict or vary a clear expression of legislative intent of a vital concern to the People of the State. *In re Cathey*, 55 Cal. 2d at 689, *citing Dickey v. Raisin Proration Zone No.* 1, 24 Cal. 2d 796, 811 (1944). Section 1006 not only provided for specific areas allowed to be inspected, but also excluded two and only two specific areas from inspections, a person's

clothing and a person's dwelling. Thus the places excluded from permissible inspections did not include vehicles.

However, the Attorney General's advisory opinion also concluded that a DFG warden had the right to stop a vehicle if he had reason to believe the driver had recently been hunting. 4 Ops. Cal. Atty. Gen. 405. Specifically the opinion stated a warden could stop a car to ask if any game had been taken, if the warden knew the driver was a duck club member coming from a duck club during open season. That opinion went on to note that the warden could inspect the vehicle, if possession of game was admitted, or if possession was denied and the warden had probable cause to believe the denial was untrue. Respondent and the court of appeals majority opinion rejected this part of the Attorney General's advisory opinion on the basis that it was inconsistent with the Fourth Amendment principles after the United States Supreme Court's decision in *Terry*, 392 U.S. at 1. However, *Terry* does not inform this discussion because that line of cases deals with the requirement that law enforcement possess an articulable and reasonable suspicion of criminal activity before making a detention, and adds the requirement that to search a person's body (in performing a patdown for weapons) the officer reasonably suspect that the person stopped is armed and dangerous. *Id.* at 24. In contrast, a DFG warden's inspection is not based upon any quantum of individualized suspicion of wrongdoing, but instead is justified based the right to inspect in order effectively manage and protect California's fish and wildlife. Whether the warden has the implied power to stop an individual on the pier where he has observed an individual catching something on a fishing line and placing it in a bag, or to stop that same individual once he got in his vehicle is a detention not based upon reasonable suspicion of criminal activity, but is a detention based upon the statutory power to inspect.

Furthermore, as previously discussed this same analysis was applied in *Maxwell*, 275 Cal. App. 2d Supp. at 1026, the year after *Terry*, holding Section 1006 authorized wardens to demand the inspection without reasonable suspicion of any criminal wrongdoing. Finally, the warden was not required to detain Respondent immediately, officers are not required to initiate a detention or arrest the moment they have the right to do so. *See Hoffa v. United States*, 385 U.S. 293, 310 (1966).

II

THE ADMINISTRATIVE INSPECTIONS AUTHORIZED UNDER FISH AND GAME CODE SECTIONS 1006 AND 2012 ARE CONSTITUTIONAL EVEN THOUGH THEY DO NOT REQUIRE ANY INDIVIDUALIZED SUSPICION BECAUSE THEY QUALIFY AS SPECIAL NEEDS SEARCHES

A. SPECIAL NEEDS SEARCHES AND SEIZURES DO NOT REQUIRE INDIVIDUALIZED SUSPICION

The Fourth Amendment requires that searches and seizures be reasonable. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). While a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000), the United States Supreme Court has carved out several exceptions to this requirement. One such exception is when a search is found to serve "special needs" beyond the need for normal law enforcement.

The legality of a search or seizure under the "special needs" exception is determined by 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 v. Texas*, 443 U.S. 47 (1979); *Michigan v. Sitz*, 496 U.S. 444, 451 (1990). Two examples of those cases that have been

used by way of analogy in the case at bar are the checkpoint cases and the administrative inspections of certain "closely regulated" businesses. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border checkpoint); *Sitz*, 496 U.S. at 444 (sobriety checkpoint); *United States v. Fraire*, 575 F.3d 929 (2009) (hunting checkpoint); *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspections of vehicle dismantlers); *United States v. Biswell*, 406 U.S. 311 (1972) (administrative inspections of firearm dealers); and *People v. Firstenberg*, 92 Cal. App. 3d 570 (1979) (administrative inspections of nursing homes). It is worth noting that there are numerous other examples of special need searches, such as random drug testing of student athletes (*Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995)); random metal detector searches of students, to help in keeping weapons off campuses (*In re Latasha W.*, 60 Cal. App. 4th 1524 (1998)); pre-departure airport screening procedures, including the use of a magnetometer, at airports, as an "administrative search" to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board (*People v. Hyde*, 12 Cal. 3d 158 (1974)); and drug and alcohol testing for railway employees involved in train accidents (*Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989)).

B. THE PRIMARY PURPOSE OF THE FISH AND GAME INSPECTIONS ARE NOT FOR GENERAL CRIME CONTROL BUT FOR PRESERVATION AND REGULATION OF THE WILDLIFE RESOURCE

Where the primary governmental interest is for general crime control purposes the special needs exception will not apply. *Edmond*, 531 U.S. at 44 (a highway checkpoint program set up for purposes of drug interdiction found to be general crime control thereby violating the Fourth Amendment); *Ferguson v. City of Charleston*, 532 U.S. 67, 121 (2001) (a

state hospital program to test pregnant women for drug use when the results are made available to law enforcement found to be general crime control thereby violating the Fourth Amendment).

Respondent's claim that the vehicle stop in this case was unconstitutional because the primary purpose was for general law enforcement is without merit, because Respondent inappropriately focuses his argument on the field actions of the DFG warden in making the vehicle stop rather than the primary purpose of the statute which authorizes the search by the DFG warden. The issue is whether the regulatory scheme of the Fish and Game Code, and specifically Sections 1006 and 2012, are aimed at the special purpose of effectively managing and protecting California's fish and wildlife, not whether the officer's decision to act upon that authority was primarily aimed at general law enforcement. While Respondent's partial quote from *Ferguson* seems to support his position, "we consider all the available evidence in order to determine the relevant primary purpose," the full quotation makes clear the analysis for the primary purpose is at the level of the authorization of the program, "In looking to the *programmatic purpose*, we consider all the available evidence in order to determine the relevant primary purpose." *Ferguson*, 532 U.S. at 81 (emphasis added). (*See* RAB at 45.) As was repeatedly stated in *Edmond*, when a court examines the primary purpose of the state's interest, a court is to look at the basis for that authority and not the mind of the individual officer acting at the scene. *Edmond*, 531 U.S. at 45-46, 47, and 48.

Additional support for the conclusion that the primary purpose of the Fish and Game Code is not ordinary law enforcement is found in vehicle checkpoint cases. The Court has upheld sobriety checkpoints finding that the primary purpose was roadway safety even though that purpose was

accomplished by means of ordinary law enforcement. *See Prouse*, 440 U.S. at 39 and 43; *Fraire*, 575 F.3d. at 933 (commenting on *Sitz*, 496 U.S. at 444). Similarly, the Court in *Prouse* indicated that a checkpoint for driver licenses and registration served the primary purpose of roadway safety, which was distinguishable from the general interest in crime control. *Prouse*, 440 U.S. at 658-59. In *Fraire*, 575 F.3d at 929, the Court found that a vehicle checkpoint at the entrance to Kings Canyon whose primary purpose was to mitigate the illegal taking of animals due to prohibited hunting was not general interest in crime control. The Court explained, "the checkpoint accomplished this goal through the use of law enforcement techniques does not automatically transform it into a crime control device for Fourth Amendment purposes." *Id.* at 933 (citing to *Edmond*, 531 U.S. at 42). Finally, in *People v. Perez*, 51 Cal. App. 4th 1168 (1996), the court of appeal upheld a fish and game checkpoint, while noting that the checkpoint operated "as a search or inspection for violations of the law, is primarily regulatory in purpose" to preserve and manage the state's wildlife resource and is therefore justified. *Id.* at 1175. Taken together these cases clearly demonstrate that while enforcement of fish and game statutes serve the primary purpose of preserving the state resource, which is not an ordinary law enforcement purpose, but rather a significant regulatory purpose that is accomplished through the use of ordinary law enforcement techniques.

C. THE CLOSELY REGULATED BUSINESS EXCEPTION APPLIES TO THE ENFORCEMENT OF THE FISH AND GAME CODE BECAUSE IT MEETS ALL THE REQUIREMENTS INCLUDING NOTICE

In *Burger*, 482 U.S. at 702-03, the Court ruled that a warrantless inspection of certain "closely regulated" businesses is reasonable if three criteria are met. First, there must be a substantial governmental interest underlying the regulatory scheme authorizing the inspection. Second, the

warrantless inspections must be necessary to further the regulatory scheme. Third, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. For example, it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope; and it must limit the discretion of the inspecting officers.

Here the warrantless inspection under the closely regulated provisions of the Fish and Game Code, specifically Sections 1006 and 2012 meet those three criteria under *Burger*. First, the state's interest in protecting fish and wildlife through regulation and inspection is compelling. *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 392 (1978); *Betchart*, 158 Cal. App. 3d at 1104; *Fraire*, 575 F.3d at 929. Second, clearly warrantless inspections are necessary to further this interest as stated in *Betchart*, 158 Cal. App. 3d at 1109. "California's pervasive scheme of regulating wild game hunting would be a futile pursuit without frequent and unannounced patrols" and found the procedural requirements for inspection warrants incompatible with the enforcement of hunting regulations; *see also People v. Harbor Hut Restaurant*, 147 Cal. App. 3d 1151 (1983) (to ensure effectiveness of inspections it is essential that they be unannounced; records can easily be falsified and illegal fish easily disposed of); *Maxwell*, 275 Cal. App. 2d Supp. at 1028–29 (search of angler's sacks must be made immediately and without a warrant or it will be impossible to make the search). Third, Sections 1006 and 2012, as enforced in this case, advise the angler that when fishermen or hunters voluntarily engage in these activities, they implicitly agree that wardens may stop them to inspect their catch, their receptacles used to hold their

catch, or their equipment at or near the time and place of that activity, and such searches will not extend to their person or their homes.

Respondent mistakenly claims that the closely regulated business exception should not apply to the present case because that exception requires express notice and there is no specific regulation authorizing a vehicle stop. Respondent cites to *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), for support of his position. (*See* RAB at 25.) *Colonnade*, however, actually supports the People's position that where a field detention or inspection is authorized no additional basis is required to make a vehicle detention. In *Colonnade*, the Court held that forcible entry to a liquor licensee's business was not justified because while Congress had the authority to allow such an entry given the closely regulated business of liquor licensees, it chose not to do so and instead only made it a separate offense for a licensee to refuse admission to the inspector. The Court reasoned that in the absence of such specific authority the standard restrictions of the Fourth Amendment apply. The standard restrictions did not allow forcible entries into business without a warrant and therefore the use of such force rendered the search unlawful. In the present case the standard restrictions of the Fourth Amendment that individuals are not subject to inspection by government officials without individualized suspicion of wrongdoing is exactly what has been specifically authorized by Sections 1006 and 2012. Those sections allow a DFG warden to briefly detain an individual to inspect his catch, containers, and fishing equipment solely on the basis that the warden has cause to believe the individual recently engaged in the closely regulated activity of fishing. Since the detention is authorized there is no Fourth Amendment significance to whether that detention occurs in the field or in a vehicle.

Respondent's contention that *State v. Larsen*, 650 N.W.2d 144 (2002) rejected the same analogy the People have argued is inaccurate. While the Minnesota Supreme Court in *Larsen*, 650 N.W.2d 144 (2002), was asked to decide that a warrantless inspection of a fish house was justified on federal constitutional grounds on the basis that the three criteria for a closely regulated business exception applied, that Court did not base its decision on that basis. Instead the Minnesota Supreme Court based its decision on state constitutional grounds and on irrelevant distinctions between activities for closely regulated businesses and closely regulated, albeit recreational, fishing.

The Minnesota Supreme Court in rejecting this argument made repeated references to that fact that "the views of the Supreme Court on federal constitutional protection from search and the views of this court based on the Minnesota Constitution do not always coincide." *Id.* at n.7. Specifically, the Minnesota Supreme Court referenced how driving under the influence checkpoints, while justified under the federal constitution, were not upheld under the Minnesota Constitution. *Id.* at 149, *compare Sitz*, 496 U.S. at 455 (approving driving under the influence checkpoints under the federal constitution), with *Ascher v. Comm'r of Public Safety*, 519 N.W.2d 183, 186-87 (Minn. 1994) (rejecting driving under the influence checkpoints under Minnesota Constitution).

> Our ruling in *Ascher* then, that even the state's interest in apprehending drunk drivers does not outweigh the right of privacy in an automobile, is compelling in reaching our conclusion that respondent had a reasonable expectation of privacy that was violated when Officer Fritz entered his fish house on January 31 without permission, probable cause or other justification.

Larsen, 650 N.W. 2d at 150. Thus it is clear that *Larsen* was decided upon Minnesota Constitutional grounds, not Minnesota's interpretation of the Fourth Amendment Federal Constitutional grounds. However, in California, Article I, section 28(d) of the California Constitution, the "Truth in Evidence" provisions of Proposition 8, abrogated California's "independent state grounds" theory of exclusion, leaving the United States Constitution and its Amendments as the sole basis for imposing an "Exclusionary Rule" on the admissibility of evidence. *In re Lance W.*, 37 Cal. 3d 873 (1985); *People v. Gutierrez*, 163 Cal. App. 3d 332, 334 (1984). *See also Ingersoll v. Palmer*, 43 Cal. 3d 1321 (1987) and *People v. Banks*, 6 Cal. 4th 926 (1993) (upholding driving under the influence checkpoints as constitutional under the California and federal constitution). Thus, *Larsen* cannot be considered authority for rejecting the application of the closely regulated business exception to fish and game inspections.

An examination of the distinctions that the Minnesota Supreme Court in *Larsen* made between the regulated recreational activity of fishing and the highly regulated business exception cases do not justify their conclusion. In *Larsen* there were only three distinctions noted: (1) the lack of serious personal safety concerns or felonious criminal conduct, (2) the regulations not being more pervasive than state traffic rules for which Minnesota requires reasonable suspicion of unlawful conduct, and (3) a reference to a distinction in *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973), in which Minnesota emphasizes that the defendant was not involved in any business. *Larsen*, 650 N.W.2d. at 153. None of these distinctions are one of the three requirements noted under *Burger*. The first requirement is that the interest be a substantial government interest. The *Larsen* Court rejected the application of the closely regulated business exception on the basis that the conduct at issue was most likely only

punishable as a misdemeanor. What this argument fails to recognize is that the issue is whether the governmental interest is significant, not the severity of underlying illegal conduct. Courts have recognized the significant governmental interest in numerous cases which involve only misdemeanor conduct. *See Sitz*, 496 U.S. at 444 (governmental interest in traffic safety for misdemeanor conduct of driving under the influence); *Prouse*, 440 U.S. at 648 (governmental interest in traffic safety for misdemeanor conduct of driving without a license); *Perez*, 51 Cal. App. 4th at 1168 (governmental interest in protecting state resource of wildlife for misdemeanor conduct of hunting regulation violations). The second distinction, that fish and game regulations are no more pervasive than traffic regulations for which Minnesota requires individualized suspicion, is as previously discussed a state constitutional issue which is contrary to the federal constitution and California rules of evidence exclusion. *In re Lance W.*, 37 Cal. 3d at 873. The third distinction is equally without convincing force, that the closely regulated business exception should not apply to recreational fishing because that activity is not a business. The quote that this rationale came from stated, "A central difference between [*Colonnade* and *Biswell*] and this [case] is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business." *Larsen*, 650 N.W.2d at 153, *quoting Almeida-Sanchez*, 413 U.S. at 271. The rationale expressed for the justification in *Almeida-Sanchez* was that there was a bargained-for-exchange that comes with choosing to engage in this regulated activity, not just that a business was involved. *Id.* Just two years later the Minnesota Supreme Court seemed to retract from this rationale by specifically noting that mere recreational fishing is a highly regulated privilege and those who engage in such a

privilege accept the conditions imposed by those regulations including inspection of the catch and the conveyance used to transport the catch. *State v. Colosimo*, 669 N.W.2d 1, 5 (Minn. 2003).

Respondent's citation to *United States v. Munoz*, 701 F.2d 1293 (9th Cir. 1983), for the proposition that the closely regulated business exception cannot be applied to fish and game inspection provisions is inapt. In *Munoz*, a game trooper was conducting a roving patrol and stopped all vehicles he encountered to check for wood cutting permits, to interview visitors as to what they had seen or done, and to check for possible game violations. At the time the game trooper ordered defendant to stop his vehicle, the trooper had no information that the driver was involved in any regulated activity such as wood cutting[2] or hunting. In *Munoz* the government analogized the public's privacy interest while visiting national parks to that of those engaged in closely regulated business activities and argued there was almost no expectation of privacy. The Court rejected this argument because it found that while national parks are regulated, one of the primary purposes of the parks is a visitor's right to be left alone. The Court in *Munoz* noted that the closely regulated business exception "premise[s] the relaxation of traditional Fourth Amendment requirements on a consent implicit in a businessman's participation in a regulated industry" and here there was no evidence that the defendant was engaged in any participation of the regulated activities of hunting or wood cutting. *Id.* at 1299. Additionally, the Court noted that in the closely regulated business exception the inspection needs to be expressly authorized by statute. In *Munoz* there was no statute authorizing the trooper to inspect based on the information he

[2] The court specifically noted it was not deciding whether the stop would have been justified if the officer had first seen that the defendant was carrying wood in the truck. *Id.* at n.12.

had at the time he ordered defendant to stop. In contrast, in the present case there is no primary conflicting purpose that those engaged in fishing have a right to be left alone. Here, the Respondent was observed to be engaged in a highly regulated activity. Finally, in the case at bar Sections 1006 and 2012 expressly authorize the DFG warden to inspect the catch, the receptacles, and the equipment that the warden observed the Respondent use just prior to stopping him.

D. THE STOP OF RESPONDENT'S VEHICLE IS JUSTIFIED UNDER THE SPECIAL NEEDS DOCTRINE BECAUSE THIS EFFECTIVE METHOD OF PROMOTING THE SIGNIFICANT STATE INTEREST OUTWEIGHS RESPONDENT'S DIMINISHED INDIVIDUAL FOURTH AMENDMENT INTEREST IN THIS CLOSELY REGULATED ACTIVITY

As previously discussed, the legality of a search or seizure under the "special needs" exception is determined by 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.

Here, the governmental interest in managing and preserving the state's wildlife resources through Fish and Game Code inspections and regulations is a compelling interest. "The state has a great and legitimate interest in the preservation and management of its natural resources, including wildlife." *Perez*, 51 Cal. App. 4th at 1175 (citing *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 254 (1972); *see also Betchart*, 158 Cal. App. 3d at 1110; *Fraire*, 575 F.3d at 933.

The DFG warden's practice of making observations of fishing activity and subsequently contacting anglers out of the view of other anglers is particularly effective in reducing illegal fishing and preserving the state interest in the protection of wildlife. In *Fraire*, 575 F.3d. at 933-

34, the court noted that the effectiveness of a program can be demonstrated by common sense. In the present case there is a clear relationship between these targeted inspections of those observed recently fishing and the objective of preserving wildlife by ensuring that the protective regulations governing wildlife are being complied with. Common sense holds that there is a significant deterrent effect on the illegal angler if that individual is caught and cited. When an individual is caught and cited for illegally fishing the resulting punishment by way of a fine and the likelihood of an increased penalty for a second offense would logically have a significant deterrent effect. In contrast, if the illegal angler merely stops illegally fishing while a warden is present there is no substantial deterrent effect.

As noted in the Appellant's Opening Brief, there are about 200 fish and game wardens in California. (AOB at 5.) Because there are so few wardens, the vast majority of angling activity on public piers happens when there are no wardens present to observe it. If anglers knew when they were and when they weren't being observed by wardens, poaching would likely dramatically increase with consequent reductions in wildlife resources. Wardens know this is true because when they do walk on a pier, they typically see many anglers dropping their illegal catch into the water. DFG trained Warden Fleet to stop anglers after they have left the pier, so anglers can never be sure if they are being observed by wardens or not. The goal of this tactic is to preserve wildlife resources by promoting compliance with the Fish and Game Code and regulations adopted pursuant to the Code.

Here the warden testified that he uses this method of making hidden observations for illegal fishing because if he were to go out to the pier he would only be able to contact a single party, while exposing himself to all the others engaged in the illegal activity who would likely dump their illegal catch, flee the pier, or not enter that pier and go to another location.

A warden has a much greater ability to catch people illegally fishing if he does not blow his cover, and is able to both observe illegal activity and make detentions out of the presence of others who may be engaged in that same illegal activity. Lastly the warden's staying out of sight until he is in contact with the party allows the warden, who is trained and tasked with protecting wildlife, to be the person responsible for returning the illegally captured wildlife, rather than the poacher whose interest is to dump any incriminating evidence.

In evaluating the effectiveness as part of the balancing analysis of the inspection stop it is important to remember that effectiveness is to be measured only as to whether the approach taken is a reasonable method. *See Sitz*, 496 U.S. at 453-54. The effectiveness of the method is not required to be the most reasonable, only that it be reasonable; The choice among such reasonable alternatives is not for a reviewing court to decide. *Id.* Nor is the method required to be the least intrusive. *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985).

Here the severity of the intrusion on the individual's liberty is slight. In *Martinez-Fuentes*, 428 U.S. at 557-58, the Court noted the objective Fourth Amendment intrusion caused by a traffic stop is slight because it involves a brief detention and merely intrudes on a motorist's right of free passage without interruption. While, the subjective Fourth Amendment intrusion is substantially greater for a roving patrol stop (as compared to a checkpoint stop) because it generates concern or fright by the lawful traveler, (*see Prouse*, 440 U.S. at 656), that subjective intrusion pursuant to Sections 1006 and 2012 is lessened by the fact that the stop is being conducted only upon those who recently engaged in the highly regulated activity of hunting or fishing and thereby necessarily have a reduced expectation of privacy. *Perez*, 51 Cal. App. at 1178.

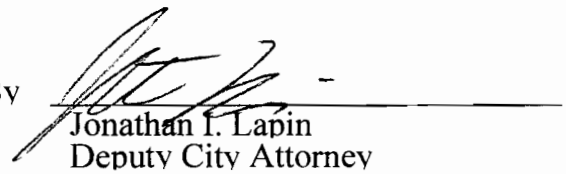
In balancing the overall interest, the stop of Respondent's vehicle is justified under the special needs doctrine because it was a reasonably effective method of promoting the significant state interests in preserving wildlife by ensuring compliance with the extensive regulations designed to protect the resource, and by voluntarily engaging in a highly regulated activity, Respondent had a reduced expectation of privacy.

CONCLUSION

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

Dated: December 7, 2010

JAN I. GOLDSMITH, City Attorney

By 
Jonathan I. Lapin
Deputy City Attorney

Attorneys for Plaintiff/Appellant

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 Reply Brief on the Merits contains 5,767 words and is printed in a 13-point typeface.

Dated: December 7, 2010

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By _____
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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 REPLY 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:

Matthew Braner
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 December 8, 2010.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2010, at San Diego, California.

Janette A. Myers

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