No. 02-1794

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.

MANUEL FLORES-MONTANO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: November 26, 2003

QUESTIONS PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that the federal government possesses the resources to prevent the entry into this country of illicit drugs and illegal immigrants and to ensure that alien terrorists and other criminals are excluded from the country. *See, e.g., Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). In particular, WLF has appeared in federal court proceedings to ensure the security of the border between the United States and Mexico. *See, e.g., Ambros-Marcial v. United States*, No. CIV-03-230 (dec. pending, D. Ariz.); *Defenders of Wildlife v. Meissner,* No. 99-2262 (D.D.C. 2000).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Amici are concerned that the decision below, if allowed to stand, threatens to undermine the ability of the federal government to take effective steps to prevent the entry into this country of terrorists' weapons, illicit drugs, and illegal aliens. By declaring the gas tanks of incoming vehicles off limits to random searches by customs officials, the Ninth Circuit has provided a road map to those seeking to circumvent border security measures. *Amici* do not believe that the drafters of the Fourth Amendment intended to create such a massive chink in our nation's armor.

Amici are filing this brief with the consent of both parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement contained in the Brief for Petitioner.

In brief, on February 12, 2002, Respondent Manuel Flores-Montano drove his automobile from Mexico to the Otay Mesa Port of Entry along the California border. Based on several factors, the Customs Inspector who examined Flores's car became suspicious that illicit drugs or other contraband might be secreted in the car's gas tank.[2] Flores was removed from the car, which was driven to a secondary inspection station. In less than an hour, Customs officials had obtained the services of a trained mechanic, raised Flores's car on a lift, removed the gas tank from the car, removed an access plate

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[2] Nonetheless, the United States does not contend in this Court, and did not contend in the courts below, that its inspector had a "reasonable suspicion" that the gas tank contained drugs. Rather, it contends that its inspection of the gas tank did not require any such suspicion.

from the gas tank, and discovered 37 kilograms of marijuana secreted in the tank.[3]

Flores was arrested and charged with unlawfully importing marijuana and possession of marijuana with intent to distribute. Flores moved to suppress the marijuana discovered in the gas tank. He argued that the government lacked a "reasonable suspicion" that drugs were secreted in his gas tank and that *United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), had held that the Fourth Amendment prohibits Customs officials inspecting incoming vehicles at the U.S. border from removing a vehicle's gas tank in the absence of such a reasonable suspicion.[4] In response to the motion, the government said that it was not relying on "reasonable suspicion" as the basis for its search, but rather on a contention that *Molina-Tarazon* was wrongly decided.

Relying on *Molina-Tarazon*, the district court granted the motion to suppress on June 19, 2002. Pet. App. 2a-3a. In a brief, unpublished order, the Ninth Circuit summarily affirmed on March 14, 2003. The appeals court explained:

> A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further review. See *United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002);

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[3] Had nothing illicit been found in the gas tank, the mechanic was prepared to reinstall the gas tank in a matter of minutes, and Mr. Flores could have been on his way.

[4] *Molina-Tarazon* held that removal of a gas tank for the purpose of inspection is a "nonroutine" search, and that those seeking to enter the United States are not subject to "nonroutine" searches in the absence of a "reasonable suspicion" that they may be carrying contraband. *Molina-Tarazon*, 279 F.3d at 717, Pet. App. 31a.

United States v. Hooton, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Pet. App. 1a.

SUMMARY OF ARGUMENT

In holding that the Fourth Amendment prohibits Customs officials from engaging in suspicionless searches at the international border unless the search can be classified as "routine," the Ninth Circuit has seriously misread this Court's case law. The Court has never separated border searches into distinct "routine" and "nonroutine" categories, with the propriety of the latter always being predicated on the government possessing some quantum of evidence that the search is likely to uncover contraband.

Rather, the Court has made clear that the same analytic framework applies to searches at the international border as applies to all other government searches: "[t]he permissibility of a [search or seizure] is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)). Under that balancing approach, as the "routine-ness" of a random border search decreases, the greater must be the government's legitimate interests if the search is to pass Fourth Amendment muster. But the Court has *never* suggested that border searches that are pigeon-holed as "nonroutine" may never be conducted in absence of at least a "reasonable suspicion" that the search will uncover contraband.

In *Montoya de Hernandez*, the Court explained that in light of Congress and the Executive's broad power to police

the nation's borders, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Montoya de Hernandez,* 473 U.S. at 538. Thus, the Court explained, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* But in so holding, the Court was not setting aside a category of "routine searches" that are *exempt* from the normal Fourth Amendment balancing process. Rather, the Court's statement was simply a shorthand way of explaining that, under the normal Fourth Amendment balancing process, the most routine of border searches will never violate the Fourth Amendment even when conducted without reasonable suspicion, because such searches do not constitute an "intrusion on the individual's Fourth Amendment interests."

The search conducted in this case -- the removal of a car's gas tank in order to search it for contraband -- is obviously a somewhat more intrusive search (and thus somewhat less "routine") than, say, an inspection of the contents of luggage in the car. But it is significantly less intrusive (and more "routine") than, say, disassembling the car to the last o-ring. It makes little sense to decide Fourth Amendment issues of this sort by deciding which of the two extremes more closely resembles the challenged search, thereby determining whether the challenged search should be placed into the "routine" bin or the "nonroutine" bin. Rather, the reasonableness of the search conducted in this case should be determined by balancing the intrusiveness of the search against the government's interest in conducting such searches in order to protect border security. By focusing solely on the routine/nonroutine issue, the Ninth Circuit failed to undertake the required balancing.

If the proper balancing process is undertaken, there can be little doubt that the search of Flores's car complied with the Fourth Amendment. The government has demonstrated without contradiction that: (1) a significant percentage of contraband being smuggled across the border is secreted in gas tanks; (2) removal and disassembly of the gas tank often is the only effective means of determining whether the gas tank contains contraband; (3) other law enforcement techniques may cause Customs officials to suspect that a car contains contraband, but the evidence may often (as here) fail to reach the "reasonable suspicion" level; and (4) removing and inspecting gas tanks, either randomly or based on something less than reasonable suspicion, significantly reduces the flow of contraband across the border, both because it often leads to the interdiction of contraband and because it deters others from smuggling contraband in the same manner. While the government's actions intruded on Flores's rights to some degree (*e.g.,* it delayed him for one hour and created some slight risk of damage to his car), that intrusion is not sufficiently serious to outweigh the government's interest in conducting such searches.

In this case, the contraband discovered by Customs officials was an illegal drug. But gas tanks can also be used for smuggling items even more dangerous than drugs. For example, terrorists could well decide to smuggle weapons of mass destruction into this country in a car's gas tank, if they believed that Customs officials were barred by the Fourth Amendment from conducting random searches of gas tanks. At a time when the need to secure the nation's border is greater than ever, now is not the appropriate time for the Courts to be tying the hands of those charged with carrying out that task.

ARGUMENT

I. THE NINTH CIRCUIT IMPROPERLY FAILED TO CONSIDER THE GOVERNMENT'S STRONG INTEREST IN SEARCHING GAS TANKS TO PREVENT THE ENTRY OF CONTRABAND

A. The Fourth Amendment's Balance of Reasonableness Is Qualitatively Different at the International Border Than in the Interior

It is of overriding significance in this case that the search of which Flores complains occurred at the nation's border as he was attempting to enter from Mexico. The Fourth Amendment protects against "unreasonable" government searches and seizures, but the scope of what constitutes a "reasonable" search has long been recognized to be far broader when the search occurs at the border than when it occurs elsewhere. As the Court has explained:

> That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration. . . . There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.

United States v. Ramsey, 431 U.S. 606, 616, 619 (1977).

To be sure, the Court has imposed some Fourth Amendment limitations on searches and seizures at the border. For example, if the government wishes to *detain* a traveler for an extended period of time because it suspects that the individual is smuggling contraband in his/her alimentary canal, the Fourth Amendment requires that the government have at least a "reasonable suspicion" of the smuggling activity. *Montoya de Hernandez,* 473 U.S. at 541. But even then, the Court declined to impose on the government the higher evidentiary burdens proposed in that case by the lower court (a "clear indication") and the respondent ("probable cause"). Moreover, the Court made clear that although those seeking to enter the country are entitled to be free from "unreasonable" searches and seizures, "not only is the expectation of privacy less at the border than in the interior, . . . the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *Id.* at 539-40.

Flores was not subjected to the extended detention at issue in *Montoya de Hernandez*. Rather, his car was subjected to a nondestructive search procedure that was completed in one hour. He nonetheless asserts that the Fourth Amendment demands the same quantum of evidence ("reasonable suspicion") that was required of the government in order to hold Ms. Montoya de Hernandez incommunicado for 16 hours under constant surveillance. Nothing in this Court's case law demands such a result.

B. The Court Has Never Categorically Restricted the Government's Power to Engage in Suspicionless Border Searches to Those Instances in Which the Search Is Minimally Intrusive

The Ninth Circuit recognizes that, notwithstanding the Fourth Amendment, the government has broad authority to engage in suspicionless, warrantless searches of those seeking to enter the country. *See, e.g.*, Pet. App. 21a. It nonetheless insists that only "routine" searches are authorized by "[t]he border search exception" and, "[i]n order to conduct a search that goes beyond the routine, an inspector must have a reasonable suspicion that the person to be searched may be carrying contraband." *Id*. at 21a-22a. Because it deems the removal and search of a vehicle's gas tank for contraband to be a "nonroutine" search, it held that the search in this case in the absence of "reasonable suspicion" violated the Fourth Amendment. *Id.* at 1a.

The Ninth Circuit's division of border searches into two mutually exclusive categories for purposes of Fourth Amendment analysis -- "routine" and "nonroutine" -- finds no support in the Court's case law. Rather, this Court has held that "[t]he permissibility of a [search or seizure] is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Montoya de Hernandez*, 473 U.S. at 537 (quoting *Villamonte-Marquez*, 462 U.S. at 588). Obviously, a search that is less "routine" (*i.e.*, one that intrudes to a greater extent on an individual's legitimate expectations of privacy) may intrude to a greater extent on the individual's Fourth Amendment interests. But even so, a less "routine" random search will not violate the Fourth Amendment if that intrusion is outweighed by the government's interest in conducting such searches. The Court has *never* suggested that border searches

that are pigeon-holed as "nonroutine" may not be conducted in the absence of at least a "reasonable suspicion" that the search will uncover contraband.

In *Montoya de Hernandez*, the Court explained that in light of Congress and the Executive's broad power to police the nation's borders, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Montoya de Hernandez,* 473 U.S. at 538. Thus, the Court explained, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* But in so holding, the Court was not setting aside a category of "routine searches" that are *exempt* from the normal Fourth Amendment balancing process. Rather, the Court's statement was simply a shorthand way of explaining that, under the normal Fourth Amendment balancing process, the most routine of border searches will never violate the Fourth Amendment even when conducted without reasonable suspicion, because such searches do not constitute an "intrusion on the individual's Fourth Amendment interests."[5]

Border searches come in many forms, each entailing a different level of intrusiveness (or "routine-ness"). The search conducted in this case -- the removal of a car's gas tank in order to search it for contraband -- is obviously a somewhat

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[5] The Court stated that it was "suggest[ing] no view on what level of suspicion, *if any*, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches." *Id.* at 541 n.4 (emphasis added). Accordingly, the Court could not have intended its decision to prohibit suspicionless "nonroutine" border searches; if the Court had intended such a prohibition, it would not have included the "if any" language in its description of the level of suspicion required for what it deemed "nonroutine" border searches.

more intrusive search (and thus somewhat less "routine") than, say, an inspection of the contents of luggage in the car. But it is significantly less intrusive (and more "routine") than, say, disassembling the car to the last o-ring. It makes little sense to decide Fourth Amendment issues of this sort by deciding which of the two extremes more closely resembles the challenged search, thereby determining whether the challenged search should be placed into the "routine" bin or the "nonroutine" bin. Rather, the reasonableness of the search conducted in this case should be determined by balancing the intrusiveness of the search against the government's interest in conducting such searches in order to protect border security. By focusing solely on the routine/nonroutine issue, the Ninth Circuit failed to undertake the required balancing.

Judicial treatment of x-ray screening devices well illustrates that somewhat intrusive and suspicionless searches do not violate the Fourth Amendment so long as they serve sufficiently important government interests. This Court has labeled use of an x-ray as a "nonroutine" search. *Montoya de Hernandez*, 473 U.S. at 541 n.4. Nonetheless, their use at public airports is universally accepted because they serve a vital public safety need. *See, e.g., Torbet v. United Airlines, Inc.,* 298 F.3d 1087 (9th Cir. 2002) (Fourth Amendment does not prohibit suspicionless search of baggage at airport terminal, even if owner seeks to leave airport rather than undergo search). On the other hand, the courts would be very unlikely to tolerate a law requiring individuals to pass through an x-ray device as a condition for receiving permission to walk down a public street. The government interests promoted by such a system would likely be deemed insignificant in comparison to the burden on Fourth Amendment rights.

In his opposition to the certiorari petition, Flores contends that "every Circuit court that has considered this

issue has . . . held that if the search is nonroutine, then the applicable standard is reasonable suspicion." Opp. Cert. 25. Not true. Of the six decisions from appeals courts outside the Ninth Circuit cited by Flores, only *United States v. Rivas,* 157 F.3d 364 (5th Cir. 1998), adopted the same standard adopted by the Ninth Circuit in *Molina-Tarazon*. The other decisions are distinguishable.[6] Indeed, one of the appeals court decisions cited by Flores, *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986), appears to reject the *Molina-Tarazon* standard. *Oyekan* required the Eighth Circuit to address the issue left open by this Court in *Montoya de Hernandez*: what level of suspicion, if any, is required for "nonroutine" border searches such as strip, body cavity, or involuntary x-ray

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[6] *United States v. Robles*, 45 F.3d 1 (1st Cir.), *cert. denied*, 514 U.S. 1043 (1995), did not address whether all "nonroutine" border searches required a showing of "reasonable suspicion." Rather, the government *conceded* that it was required to demonstrate "reasonable suspicion" to justify its having drilled a hole in a metal cylinder shipped from Colombia, 45 F.3d at 12; the court held that the government met that standard. In *United States v. Johnson*, 991 F.2d 1287 (7th Cir. 1993), the Seventh Circuit upheld the routine search of the luggage of a woman arriving on an overseas flight. The issue of "nonroutine" searches never arose in the case, and the appeals court only briefly touched upon that subject in *dicta*. In *United States v. Carreon,* 872 F.2d 1436 (10th Cir. 1989), the Tenth Circuit upheld a border search consisting of drilling a hole in the wall of a camper. The court said that the Customs inspector had a "reasonable suspicion" that drugs were secreted in the camper (and overturned a district court decision that had suppressed drug evidence because the search was not supported by "probable cause"); but the court never specifically addressed whether "reasonable suspicion" was required, let alone whether "reasonable suspicion" is always required for "nonroutine" searches. In *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002), the Third Circuit held that Customs officials did not need "reasonable suspicion" to pat down the clothing of a woman arriving at the airport from Jamaica; the court *never discussed* whether all "nonroutine" searches required "reasonable suspicion."

searches. The Eighth Circuit determined that the Fourth Amendment required "reasonable suspicion" for such searches. *Oyekan*, 786 F.2d at 837. But the court arrived at that determination by employing the normal Fourth Amendment balancing process, *not* by automatically imposing a "reasonable suspicion" requirement on all border searches classified as "nonroutine." *Id.* at 836.

Flores asserts that the balancing approach traditionally applied in Fourth Amendment cases is inappropriate here because it would lead to unpredictability in the law. Cert. Opp. 26 (citing *Montoya de Hernandez*, 473 U.S. at 541, for the proposition that "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question."). That citation is inapposite. In the quoted phrase, the Court was criticizing the Ninth Circuit's creation of a third level of suspicion ("clear indication") in addition to the two levels of suspicion already recognized by the Court ("reasonable suspicion" and "probable cause"). *Amici*'s suggestion that border searches be subject to the balancing approach traditionally applied in Fourth Amendment cases will not, if adhered to in this case, require the Court to adopt any new verbal formulas. Rather, depending on the balance between the degree of the search's intrusiveness and the importance of the government interests being served by the search, one of three legal conclusions can be reached regarding any border search: either the government may proceed without any suspicion that it will find contraband, or it may proceed only with reasonable suspicion, or it may proceed only with probable cause.

C. The Government's Interest in Removing and Inspecting Gas Tanks Even in the Absence of "Reasonable Suspicion" Far Outweighs Flores's Fourth Amendment Interest in Preventing Such Actions

The Court has mandated that all Fourth Amendment claims are to be judged under the balancing approach described above. *Montoya de Hernandez*, 473 U.S. at 537. The Ninth Circuit erred in failing to conduct that balancing process, and its decision is subject to reversal on that ground alone.

Because of the importance of the issue raised in the case and the need for guidance in the courts of appeals, *amici* submit that the Court should undertake the balancing process on its own, rather than simply remanding the case to the Ninth Circuit. It is particularly appropriate for the Court to do so here, because the balance tips so decided in the government's favor.

The important government interests served by removing and inspecting gas tanks at border check points even in the absence of "reasonable suspicion" are well documented in the various declarations submitted by the government in opposition to the motion to suppress. Most notably, the government has demonstrated that smuggling contraband into the country in gas tanks is a very common occurrence:

> Over the past five and a half years, gas tank drug seizures have accounted for approximately 25% (24.58) of *all* vehicle drug seizures. Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles.

Declaration of Jason P. Ahern, Director of Field Operations for the Southern California Customs Management Center, ¶ 4. Pet. App. 12a.

Moreover, the government has demonstrated that removal and disassembly of the gas tank often is the only effective means of determining whether the gas tank contains contraband; that Customs officials may often have reason to suspect that a vehicle's gas tank contains contraband, yet their suspicion may not rise to the level of a "reasonable suspicion"; and allowing the removal and inspection of gas tanks, either randomly or based on something less than reasonable suspicion, significantly reduces the flow of contraband across the border both because it often leads to the interdiction of contraband and because it deters others from smuggling contraband in the same manner. *Id.* at ¶¶ 6, 8, Pet. App. 12a-13a; Declaration of Diane Hinckley ¶ 6, Pet. App. 16a-17a.

These significant government interests in suspicionless removal and inspection of gas tanks far outweigh the relatively slight burden imposed on Flores as a result of the government's actions in his case. The removal of his gas tank delayed Flores for about an hour and imposed a slight risk of damage to his car.[7] Those burdens no doubt are somewhat greater than the burdens imposed by other routine types of searches by Customs officials (*e.g.,* opening luggage). But the search of inanimate objects (such as a gas tank) are virtually always going to be far less objectionable to a property owner than would be a search of his person -- yet even the Ninth Circuit permits suspicionless border searches of pockets, shoes, and the outside of clothing being worn by travelers. Pet. App.

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[7] Mr. Ahern's declaration indicates that if any damage occurs, Customs officials will instruct vehicle owners on how to present compensation claims to the government. Pet. App. 13a.

22a.[8] In light of the government's strong showing regarding the need for suspicionless removal and inspection of gas tanks, the rather slight intrusiveness of such searches is insufficient to brand such searches "unreasonable" under the Fourth Amendment.

II. THE DECISION BELOW THREATENS TO UNDERMINE THE GOVERNMENT'S ABILITY TO TAKE EFFECTIVE MEASURES TO PREVENT TERRORISM

In this case, the contraband discovered by Customs officials was an illegal drug. But gas tanks can also be used for smuggling items even more dangerous than drugs. For example, terrorists could well decide to smuggle weapons of mass destruction into this country in a car's gas tank, if they believed that Customs officials were barred by the Fourth Amendment from conducting random searches of gas tanks. At a time when the need to secure the nation's borders is greater than ever, now is not the appropriate time for the Courts to be tying the hands of those charged with carrying out that task.

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[8] *Amici* do not mean to suggest that a suspicionless border search of an inanimate object could *never* be so intrusive as to constitute a Fourth Amendment violation. For example, the Ninth Circuit worried that if it upheld the suspicionless removal and inspection of gas tanks as "routine," then "it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box." Pet. App. 23a. But such searches would be *highly* intrusive and thus could not withstand Fourth Amendment challenge unless the government could demonstrate that the burden on the car owner was outweighed by an *extremely* strong government interest that could not be accomplished without such complete disassembly.

The Department of Homeland Security has been working tirelessly in recent months to tighten the nation's borders to prevent terrorist attacks within the United States. Any ruling from this Court that restricts the Department's authority to conduct suspicionless border searches is likely to set back border-tightening efforts. For example, the Department recently announced rules designed to reduce the ability of terrorists to import weapons in one of the more than seven million cargo containers shipped into this country each year. New York Times, "U.S. Plans to Toughen Rules for Cargo Shipping Industry"(Nov. 19, 2003) at A25. The rules require shippers to install electronic tamper sensors and reinforced metal seals on cargo containers. Shippers who fail to comply are threatened with onerous, suspicionless inspections. A decision affirming the decision below would call into question the government's power to conduct such inspections.

The Department has recently deployed along the border 24 x-ray trucks capable of scanning entire tractor-trailers to search for weapons. *See* Testimony of Robert C. Bonner, Commissioner of U.S. Bureau of Customs and Border Protection, before the House Select Committee on Homeland Security, Subcommittee on Infrastructure and Border Security (Oct. 16, 2003). If the Ninth Circuit is correct that the border exception only permits suspicionless searches that are of the most "routine" nature, then the Department's use of its x-ray trucks is subject to challenge.

In a recent border search case, the Third Circuit stated, "[I]t is beyond peradventure, as the Seventh Circuit has noted, that 'the events of September 11, 2001, only emphasize the heightened need to conduct searches' at our border." *Bradley*, 299 F.3d at 202 (quoting *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002)). Congress "has granted the Executive plenary authority" to police the nation's borders to prevent the

introduction of contraband. *Montoya de Hernandez,* 473 U.S. at 537. In the absence of evidence that the Executive is abusing that authority, the courts should not be second-guessing the Executive's efforts to carry out its mandate.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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