IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. JORGE ESPARZA-MENDOZA, Defendant/Appellant.	**ORAL ARGUMENT REQUESTED** Case No. 03-4218 (District Court 1:02-CR-099-PGC)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
HONORABLE PAUL G. CASSELL

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT, ACLU OF UTAH, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

LUCAS GUTTENTAG
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
405 14th Street, Suite 300
Oakland, CA 94612
Telephone: (510) 625-2010
Facsimile: (510) 622-0050

KEKER & VAN NEST, LLP
CECILLIA D. WANG
MICHAEL S. KWUN
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Counsel for Amici Curiae American Civil Liberties Union Immigrants' Rights Project, ACLU of Utah and National Association of Federal Defenders

DAVID M. PORTER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
801 I Street, 3rd Floor
Sacramento, CA 95814
Telephone: (916) 498-5700
Facsimile: (916) 498-5710

I. INTRODUCTION

The question in this appeal is whether the Fourth Amendment is wholly inapplicable to an entire class of individuals within the United States on the ground that they are noncitizens who have been previously deported. Under the district court's unprecedented interpretation, this group–and others–would be stripped entirely of *any* protection under the Fourth Amendment.

In holding that "previously-removed alien felons" are outside the Fourth Amendment, the district court stands alone among the federal courts that have confronted this issue. As demonstrated below, the district court's analysis is unsupported by precedent, history or constitutional text. Judge Cassell's ruling relies primarily on tentatively-expressed dicta in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that has never been adopted by a majority of the Supreme Court. The ruling also misconstrues the decisions of the Supreme Court and this Court, disregards contrary authority, and contravenes the history and core values of the Fourth Amendment.

Amici submit that the view espoused by the district court would introduce impermissible uncertainty into the protections afforded by the Fourth Amendment and would lead to discrimination in law enforcement based on race, ethnicity and alienage. Because law enforcement agents cannot possibly make accurate, *ex ante* determinations as to whether a subject is a "previously-removed alien felon," the district court's rule would not only abrogate the Fourth Amendment rights of that population, but would jeopardize the rights of any citizen or noncitizen who might be mistaken for such a person.

II. STATEMENT OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Through its Immigrants' Rights Project, the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

The American Civil Liberties Union of Utah (ACLU of Utah) is a state affiliate of the ACLU devoted to protecting the basic civil liberties of all Utah residents and extending those protections to groups that have traditionally been denied them. The ACLU of Utah has a long history of involvement, both as *amicus* and as direct counsel, in litigation in support of constitutional rights.

The National Association of Federal Defenders (NAFD) is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide, including private

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* submit this brief with the parties' consent. *See* Exh. A & B.

criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization. NACDL was founded in 1958 to promote study and research in the field of criminal law and to encourage the integrity and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

III. ARGUMENT

A. THE DISTRICT COURT'S OPINION CONFLICTS WITH SETTLED PRECEDENT

1. The District Court Departs From The Settled Understanding That the Fourth Amendment Applies To All Searches And Seizures Within The United States

The district court held that a "previously-removed alien felon ... cannot assert a violation of the Fourth Amendment because he is not one of 'the People' [sic: capitalization added by the district court] the Amendment protects." *United States v. Esparza-Medoza,* 265 F.Supp.2d 1254, 1255 (D.Utah 2003). No other federal court has reached this conclusion with respect to a search within the United States. In both *United States v. Guitterez*, 983 F.Supp. 905 (N.D. Cal. 1998), *rev'd on other grounds*, 203 F.2d 833 (1999), and *United States v. Iribe*, 806 F.Supp. 917 (D. Colo. 1992) (Matsch, J.), *rev'd in part on other grounds*, 11 F.3d 1553 (1993), the courts expressly held that the Fourth Amendment protects previously-deported undocumented aliens against unreasonable searches and seizures within the United States. *See also United States v. Rubio-Cota*, No. 2:03-CR-831 TS (D. Utah Sept. 3, 2003) (unpublished) (Appellant's Br., Exh. C).

The federal courts have regularly applied the Fourth Amendment regardless

of whether a defendant is a "previously-removed alien felon" or not, and have adjudicated the *merits* of suppression motions filed by such defendants in illegal reentry cases.[2] The decision below represents a radical departure from these cases, and would upset the settled understanding that the Fourth Amendment protects all individuals within the United States.

2. The District Court's Decision Rests On An Erroneous Reading Of *Verdugo-Urquidez*

The district court relied primarily–and erroneously–on language in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), to conclude that the Fourth Amendment's reference to the right of "the people" reflected an intent to protect only "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community," and to exclude all others. 265 F.Supp.2d at 1259 (quoting 494 U.S. at 265). The district court erred in relying on this dicta.

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[2] Such opinions are numerous. We list only a representative sample here. *See, e.g.*, *United States v. Cota-Herrera*, No. 02-1556, 2003 U.S. App. LEXIS 16117 (10th Cir. Aug. 6, 2003) (unpublished); *United States v. Pineda*, No. 01-2240, 2003 U.S. App. LEXIS 740 (1st Cir. Jan. 17, 2003) (unpublished); *United States v. Angulo-Guerrero*, 328 F.3d 449 (8th Cir. 2003); *United States v. Kaczmarak*, No. 02-4948, 2003 U.S. App. LEXIS 7260 (4th Cir. Apr. 17, 2003) (unpublished); *United States v. Carvajal-Garcia*, No. 01-4532, 2002 U.S. App. LEXIS 25434 (3d Cir. Nov. 27, 2002) (unpublished); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001); *United States v. Ramirez-Garcia*, 269 F.3d 945 (9th Cir. 2001); *United States v. De la Fuente-Ramos*, No. 99-6146, 2000 U.S. App. LEXIS 29309 (10th Cir. Nov. 16, 2000) (unpublished); *United States v. Roque-Villanueva*, 175 F.3d 345 (5th Cir. 1999); *United States v. Aldaco*, 168 F.3d 148 (5th Cir. 1999); *United States v. Navareta-Mares*, No. 99-4011, 1999 U.S. App. LEXIS 18485 (10th Cir. Aug. 9, 1999) (unpublished); *United States v. Guerrero-Hernandez*, 95 F.3d 983 (10th Cir. 1996); *United States v. Mendoza-Carrillo*, 107 F.Supp.2d 1098 (D.S.D. 2000); *United States v. Ortiz-Gonzalbo*, 946 F.Supp. 287 (S.D.N.Y. 1996).

Verdugo-Urquidez considered whether a noncitizen defendant could invoke the Fourth Amendment against the search of property *outside the United States*. The Court held that, as to searches outside the United States, a noncitizen without sufficient connections to the United States cannot invoke the Fourth Amendment to challenge the extraterritorial search. 494 U.S. at 271-73.[3] In so holding, the *Verdugo* Court distinguished an earlier case, *Reid v. Covert*, 354 U.S. 1 (1957), which had held that the Constitution applies to United States *citizens* abroad. 494 U.S. at 270; Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 89-94 (1996) (hereinafter Neuman). Thus, *Verdugo-Urquidez* set a limit on the *extraterritorial* reach of the Fourth Amendment.

Contrary to the opinion below, the holding of *Verdugo-Urquidez* did not reach the question of a noncitizen's Fourth Amendment rights *within* the United States. The Chief Justice's tentative "textual exegesis" of the phrase "the people" was dicta. Indeed, the Chief Justice went out of his way to *avoid* reaching a conclusion on whether the Fourth Amendment would protect an alien against a search within the United States, stating no more than that the text "suggests" that "the people" might have a narrow meaning. 494 U.S. at 265. The Chief Justice noted that his analysis was "by no means conclusive." *Id.*[4]

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[3] Thus, *Verdugo-Urquidez* left open the question whether a noncitizen who does have "sufficient connection" with the United States would have Fourth Amendment rights as to extraterritorial searches. *See United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1994) (dicta).

[4] Other language in the Chief Justice's opinion makes this clear. *See* 494 U.S. at

Justice Kennedy's concurring opinion makes clear that the language relied upon by the district court was dicta. As the critical fifth vote in the majority, Justice Kennedy expressly disavowed the Chief Justice's observations about the term "the people":

> I cannot place any weight on the reference to "the people" in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its source or its reach. Given the history of our Nation's concern over warrantless and unreasonable searches, explicit recognition of "the right of the people" to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.

494 U.S. at 276 (Kennedy, J., concurring). Justice Kennedy recognized that the majority's holding rested on whether the search occurred *outside* the United States. *Id.* at 278 ("If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply.").[5] Plainly, Justice Kennedy did *not* endorse the view that the Fourth

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266-67 ("The available historical data show… that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens *outside of the United States territory*. There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens *in foreign territory or in international waters*.") (emphasis added).

[5] Although the court below noted Justice Kennedy's disagreement with the Chief Justice's statements, Judge Cassell did not quote or even address this language from Justice Kennedy's concurring opinion. Rather, the district court simply stated that in joining the opinion of the Court, Justice Kennedy necessarily agreed with every point made. 265 F.Supp.2d at 1260-61. The court below did not cite any authority for the remarkable proposition that Justice Kennedy joined the Chief Justice's textual aside, despite Justice Kennedy's express statement to the contrary.

Amendment should be construed narrowly to searches within the United States.[6]

The two other published district courts that have considered the question both concluded that *Verdugo-Urquidez* does not support the conclusion reached below.[7] In *Iribe*, Judge Matsch recognized that the holding of *Verdugo-Urquidez* was based on the extraterritorial nature of the search, and that "[t]he broad language of the Chief Justice was not required for the holding and was not joined by the majority of the Justices." 806 F.Supp. at 919.

> This is not an extraterritorial application of the Fourth Amendment. Here, the question is whether only citizens of the United States have protection under the Fourth Amendment against unreasonable searches and seizures by local police officers. A negative answer is required by those cases, recognized by Chief Justice Rehnquist at pages 270-271 of the *Verdugo* opinion, holding that aliens enjoy this country's constitutional rights when they are here unless the Fourth Amendment is to be interpreted differently from the Equal Protection clause, the Fifth Amendment, the Sixth Amendment and the Fourteenth Amendment. This court rejects the notion that Denver police officers are not restrained from conducting unreasonable searches and seizures of the person and property of an alien in Colorado.

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[6] Indeed, a majority of five Justices rejected that portion of the Chief Justice's opinion. Justice Stevens, concurring the judgment, criticized the Chief Justice's historical discussion as "simply irrelevant." *Id.* at 279 n.* (Stevens, J., concurring in the judgment). The dissenters in *Verdugo-Urquidez* disagreed with the Chief Justice's dicta as well. Justice Brennan, joined by Justice Marshall, reasoned that anyone subjected to prosecution by the United States government should be entitled to all the protections of the Bill of Rights. *Id.* at 283-86 (Brennan, J., dissenting). Justice Blackmun, dissenting separately, agreed that "when a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of 'the governed' and therefore is entitled to Fourth Amendment protections."). *Id.* at 297 (Blackmun, J., dissenting). These four Justices, along with Justice Kennedy, all rejected the Chief Justice's dicta.

[7] Commentators, including Professor Neuman who was extensively quoted by the district court, have agreed that the Chief Justice's language about "the people" is not binding. Neuman at 105.

806 F.Supp. at 919. Similarly, in *Guitterez*, the district court noted that the Chief Justice's dicta did not garner a majority of votes. 983 F.Supp. at 912 n.7. Notably, the government declined to file an appeal in either *Iribe* or *Guitterez* and, judging from the dearth of any published opinions on the issue, has until now declined to raise the issue in subsequent cases.[8]

While acknowledging *Iribe* and *Guitterez*, the court below rejected the reasoning of those opinions, citing an unpublished opinion of this Court, *Grillet-Matamoros v. INS*, No. 93-9568, 1994 U.S. App. LEXIS 12676 (10th Cir. June 1, 1994) (unpublished).[9] That decision provides no support whatsoever for the district court's reasoning. This Court has never suggested that the dicta in *Verdugo-Urquidez* is binding precedent.

3. The District Court's Decision Is Inconsistent With Supreme Court Precedent On The Rights Of Noncitizens

In addition to misreading *Verdugo-Urquidez*, the decision below contravenes

[8] Indeed, in the instant case the government apparently only raised this issue after Judge Cassell requested briefing *sua sponte*. *See* Docket Sheet at 3 (minute entry dated Feb. 3, 2003) (copy attached as Exh. C); *see also* Appellant's Br. at 5.

[9] According to the district court, in *Grillet-Matamoros*, this Court treated the dicta in the *Verdugo-Urquidez* opinion as binding, and held that "aliens receive constitutional protections when they have come within the territory of the United States and developed *substantial connections* with this country." 265 F.Supp.2d at 1261. In fact, *Grillet-Matamoros* was a civil deportation case in which this Court rejected an immigrant's claim that he had a First Amendment right to remain in the United States in order to practice his religion. *Grillet-Matamoros* actually cited *Verdugo-Urquidez* for the proposition that the immigrant did have First Amendment rights *within* the United States, 1994 U.S. App. LEXIS12676, at *5 (citing *Verdugo-Urquidez*, 494 U.S. at 271, and *Kwong Hai Chew*, 344 U.S. at 596 n.5), but held that the immigrant could not assert his First Amendment rights as a basis to avoid deportation. *Id.* at *6.

settled precedent on the rights of aliens. The district court makes a fundamental error in relying on cases holding that Congress has the "undoubted authority to exclude aliens." 265 F.Supp.2d at 1270. It is true that one of the tenets of the "plenary power" doctrine is that noncitizens have limited rights under the Constitution–but these limitations are fundamentally concerned with the sovereign's power to exclude or expel aliens and have never overridden criminal procedure rights. In applying the doctrine, the Court has consistently distinguished between civil immigration proceedings (to which the plenary power doctrine applies) and criminal proceedings involving immigrants (to which it does not).

For example, while the Supreme Court held that Congress could exclude persons of Chinese descent from this country, *The Chinese Exclusion Case*, 130 U.S. 581, 604-06 (1889), it struck down a statute that allowed the imposition without trial of a sentence of one year at hard labor prior to deportation, because such criminal punishment could not be meted out without offering the full protections afforded by the Constitution, *Wong Wing v. United States*, 163 U.S. 228, 236-37 (1896). Thus, the Supreme Court rejected the government's argument (163 U.S. at 234) that noncitizens who have entered the United States unlawfully have no constitutional rights.

In the one hundred years and more following *Wong Wing,* the Supreme Court has steadfastly refused to extend the plenary power doctrine to the criminal context. In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court held that the government had violated the Fourth Amendment rights of a noncitizen, rejecting the argument that the government has special search and seizure powers

when the subject is an alien.[10] Overriding the government's arguments based on the administrative search and border search exceptions to the Fourth Amendment warrant requirement, the Court stated, "It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one." 413 U.S. at 273. The Court held that the Fourth Amendment rights of individuals are so fundamental that they cannot give way to the need to control immigration. *Id.* at 273-74; *see also United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (holding illegal reentry defendant can collaterally attack validity of underlying deportation order and rejecting argument that due process does not apply).

The civil/criminal distinction was also at the heart of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). There the Court held that the remedial provision of the exclusionary rule, like many other criminal procedure protections, does not apply in deportation proceedings, because such proceedings are *civil* in nature, not criminal. *Id.* at 1038-39, 1043.[11]

The fundamental premise of the Constitution's discrimination between aliens and citizens is the sovereign's power to control immigration. *See*, *e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976) (rejecting government's

[10] Although the defendant in *Almeida-Sanchez* held a "valid work permit," and therefore apparently was lawfully admitted, the decision in no way depended on his lawful status.

[11] Indeed, the government would presumably be allowed to use the evidence obtained as a result of the illegal seizure here in removal proceedings against Mr. Esparza-Mendoza. It cannot, however, use that evidence in this criminal case.

argument that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"); *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power *over naturalization and immigration*, Congress regularly makes rules that would be unacceptable if applied to citizens.") (emphasis added); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 & nn. 10-11 (1952).[12] The district court ignored this crucial point about the plenary power doctrine, and thus erroneously extends to the criminal context cases concerning Congress' power to exclude or expel. *See* 265 F.Supp.2d at 1270 & nn.116, 117 (comparing different due process rights of permanent resident aliens in deportation proceedings and undocumented aliens in exclusion proceedings under *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)).

In order to avoid precedents limiting the plenary power doctrine to civil proceedings, the district court mistakenly relies on *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), in which the Supreme Court stated in passing that "the *Bill of Rights* is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully* enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our

[12] In *Harisiades*, the Court noted that among the rights held by noncitizens are the right to file a petition for habeas corpus and rights in criminal proceedings under the Fifth and Sixth Amendments. 342 U.S. at 586-87. While the Court did not specifically mention the Fourth Amendment, this omission is not significant. The Court also did not mention the Eighth Amendment right against cruel and unusual punishment, but surely noncitizens have that right in criminal proceedings in the United States.

borders." 265 F.Supp.2d at 1260 (emphasis in decision below) (quoting *Kwong Hai Chew*, 344 U.S. at 596 n.5). From this footnote in *Kwong Hai Chew*, the district court suggests that an alien who has not been lawfully admitted has no rights under the Constitution. This understanding is wrong, and the court rips the language in *Kwong Hai Chew* from its constitutional context. Since well before *Kwong Hai Chew*, it has been settled that even aliens who have not been admitted to the United States, or who entered unlawfully, have constitutional rights. *See*, *e.g.*, *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903) (noncitizens who enter clandestinely have due process rights). The Supreme Court has continued to reaffirm this. *See*, *e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("[e]ven [an alien] whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [under the Fifth and Fourteenth Amendments]"); *Plyler v. Doe*, 457 U.S. 202 (1982) (immigrant children have constitutional right not to be discriminated against in public education because of illegal entry into United States). The district court sought to limit the significance of these cases and their obvious rejection of the meaning he assigns to *Kwong Hai Chew* by emphasizing that the rights at issue in the foregoing cases were protected by the due process clauses of the Fifth and Fourteenth Amendment, which refer to "persons" rather than to "the people." But nothing in those decisions can support the extraordinary and unprecedented ruling that noncitizens have no constitutional rights unless the term "persons" is used.[13] *See Iribe*, 806 F.Supp. at 919.

[13] Indeed, *Mathews v. Diaz* suggests the contrary, as it lists the constitutional provisions that "rest on" a "legitimate distinction" between citizens and aliens, but

Finally, the district court's reliance on the plenary power doctrine is misplaced here because that doctrine concerns *Congress*' power to enact laws. Yet the case at bar does not involve any act of Congress.

B. THE DISTRICT COURT'S DECISION IS CONTRARY TO THE TEXT AND HISTORY OF THE FOURTH AMENDMENT

The district court's novel historical and textual analysis is fraught with errors:

First, the district court relies on a mistaken presumption that "the people" is a term of art in the Constitution, denoting a "national community." 265 F. Supp. 2d at 1259-60. The court observes that the term "the people" appears not only in the Fourth Amendment, but also the Preamble, Article I, and the assembly and petition clauses of the First Amendment, and the Second and Ninth Amendments. The court fails, however, to cite any controlling authority for its "term of art" theory and relies on the dicta in *Verdugo-Urquidez* that, as already noted, the Chief Justice himself admitted that was "by no means conclusive." 265 F.Supp.2d at 1259.

The district court also cites a law review article by Professor Akhil Amar that states that the term "the people" carries primarily a "collective connotation." However, Amar himself acknowledges that the interpretation of "the people" is "trickier" in the Fourth Amendment than in the Second, because the Fourth Amendment uses both terms "the people" and "persons." 265 F. Supp. 2d at 1262-63 (quoting Akhil R. Amar, The *Second Amendment: A Case Study in*

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does not include the Fourth Amendment. 426 U.S. at 78 n.12.

Constitutional Interpretation, 2001 Utah L. Rev. 889, 892-93).[14]

In any event, the court's "term of art" reasoning collapses under its own weight. The district court concedes that in the Fourth Amendment, "the people" could include at least some noncitizens, such as tourists and lawful permanent residents. 265 F.Supp.2d at 1267. But the court likely would not find that tourists and lawful permanent residents are among "the people" who elect the House of Representatives, *see* U.S. Const. art I, § 2, cl. 2, or among "the people" to whom powers of government are reserved under the Tenth Amendment. The phrase "the people" plainly is not a term of art with a monolithic meaning in the Constitution. *See* Neuman at 105 & n.16 (quoting Madison's Report on the Virginia Resolutions).

Second, the district court erroneously relies on the social compact theory, which conceives of the Constitution as a contract among the people of the United

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[14] The district court also miscites Professor Amar in drawing his conclusion that the term "the people" was meant to limit the Fourth Amendment's protection to "the right of prospective jurors, voters, and others who are sufficiently attached to the political community." 265 F. Supp. 2d at 1263. Amar does not posit any categorical limitation on *whom* the Fourth Amendment protects but rather argues that the Framers intended the *remedy* for Fourth Amendment violations to be a jury trial for damages, rather than the exclusionary rule:

> Why, then, did the Fourth [Amendment] use the words 'the people' at all? Probably to highlight the role that jurors—acting collectively and representing the electorate—would play in *deciding which searches were reasonable and how much to punish government officials who searched or seized improperly*.

See 265 F. Supp. 2d at 1264 (quoting Amar); *see also* Akhil R. Amar, *First Amendment First Principles*, 107 Harv. L. Rev. 757 (1994). Amar's position (which has not, of course, been adopted by the courts) does not support the district court's conclusion at all.

States. 265 F.Supp.2d at 1263. The court fails, however, to consider the principle–espoused by James Madison, among others–that while aliens were not parties to the original social compact, those who *were* parties may have chosen to grant aliens rights under the compact.[15] *See* Neuman at 58 (quoting Madison's Report on the Virginia Resolutions).

The district court further errs in its citation to the original state constitutions that, according to the court, were the models from which the United States Constitution was derived. 265 F.Supp.2d at 1264-65. The court cites the Pennsylvania and Vermont Constitutions of 1776 and 1777, respectively, in support of the proposition that the Founders meant a "national community" when they used the term "the people." *Id.* at 1265. But while prefatory language in each of these documents states that the right protected derives from "the people," the following *operative* language prohibits officers from unlawfully seizing "any person or persons." *See* Pa. Const. art. X (1776); Vt. Const., ch. I, § XI (1777) (quoted by district court at 265 F.Supp.2d at 1264-65).[16] If these state constitutions

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[15] Indeed, Madison's point presents a clear alternative purpose for the Framers' use of the term "the people" in the Fourth Amendment: The right against unreasonable search and seizure is one that benefits all "the people." The Framers recognized that in order to protect that right, it would have to apply to all searches and seizures within the United States, regardless of whether the person searched or seized was a member of the polity.

[16] The 1776 Pennsylvania Constitution provided:

> the people have the right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected place, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not

were, as the court below suggested, models for the federal Fourth Amendment, they show that the use of the term "the people" was rhetorical, and meant that the right is based on a collective interest in freedom from government power, and not that there are limits on who has the right. *Cf. Verdugo-Urquidez,* 494 U.S. at 276 (Kennedy, J., concurring) (use of the phrase "the people" in the Fourth Amendment "may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it").

Third, the lower court's approach is analytically flawed because of its inconsistent fidelity to originalist methods, as demonstrated by its vague conclusion. The court states that "the drafters of the Constitution intended the phrase 'the people' to be read more narrowly than the broader formulations found in other amendments." 265 F.Supp.2d at 1262. But forced by historical fact, Judge Cassell acknowledges that "the people" cannot now be limited to those who were actually members of the American political community at the time of the Founding. Among other things, such an interpretation would exclude women.

In order to avoid this awkward fact, the court laboriously asserts–without

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to be granted.

The 1777 Vermont Constitution provided:

> the people have a right to hold themselves, their houses, papers and possession [sic] free from search and seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

any authority–that "the Founders likely would have understood the term 'the People' [sic] as extending beyond just those persons who were formally part of the nation's political community to include those who were closely connected with such persons." 265 F.Supp.2d at 1266. The court then acknowledges that women were not voters at the time of the Framing, but somewhat desperately suggests that the Framers intended to include them within the scope of the Fourth Amendment's protections by sweeping them into the "houses" protected from search, on the theory that women were occupants of those "houses."[17]

The district court engages in similarly faulty historical analysis in asserting that different subcategories of noncitizens may have different rights under the Fourth Amendment on the ground that such subclasses have differing levels of connectedness to the "national community." The court provides no sensible explanation for these fine distinctions. For example, there is no authority for the surprising assertion, 265 F.Supp.2d at 1267, that the Framers would have considered tourists, who are likely to have fewer ties to the United States than previously deported noncitizens who often have close family ties to U.S. citizens and have lived in this country for many years, more deserving of the Fourth Amendment's protections.

Nor does the district court address other textual arguments that undermine its conclusion that the Framers intended the phrase "the people" to exclude

[17] By its ad hoc attempt to squeeze women into the class covered by "the people," the district court acknowledges that even if "the people" is read narrowly, "the people" may have intended to grant the protections of the Fourth Amendment to others, as well.

"previously-removed alien felons." When the Framers intended for rights or responsibilities to extend only to "citizens," they said so explicitly, as evidenced by numerous provisions of the Constitution.[18] The simple use of the phrase "the people" in the Fourth Amendment, without elaboration, has never before been held to exclude any class of aliens, much less the district court's newly defined (yet textually unsupported) subcategory of "previously-removed alien felons."

The court below also brushes aside important historical facts about the treatment of noncitizens at the time of the Founding. The court states, "At first blush, it might be argued that the Framers would have understood all aliens as standing outside the political community of the times," 265 F.Supp.2d at 1267, but promptly acknowledges that, in fact, the historical record contains important evidence to the contrary. For example, alien suffrage existed in some states at the time of the Founding, and the Constitution continues to permit alien suffrage today. *Id.* at 1268. The court dismisses this history, however, by asserting that "whatever the practice was at the time of the drafting of the Constitution, aliens were excluded from the franchise relatively quickly, generally within the early decades of the nineteenth century." 265 F. Supp. 2d at 1268. This approach is logically inconsistent, as the district court's originalist rationale otherwise depends on an assertion of what prevailing views were *at the time of the Founding*. Moreover, the district court asserts, incorrectly, that "no aliens have voted in elections since at least 1928." *Id.* However, as Professor Neuman and others have

[18] *See* U.S. Const. art. I, § 2, cl. 2, art. I, § 3, cl. 3, art. II, § 1, cl. 5, art. IV, § 2, cl. 1, amend. XIV, amend. XV, amend. XIX, amend. XXIV, amend. XXVI.

pointed out, even today, noncitizens are granted limited rights to vote in some localities. *See* Neuman at 70.

The district court draws further erroneous conclusions from other historical facts. The court notes that around the time of the Founding, and as late as 1875, the colonies and the Congress of the Confederation and later, the states and the Congress of the United States, passed legislation prohibiting foreign nations from transporting convicted criminals to this country. 265 F. Supp. 2d at 1268-69 (citing Neuman at 21-22). The court concludes from this legislation that "it appears that the Framers would have had grave concern about *criminal* aliens in particular," 265 F. Supp. 2d at 1268 (emphasis in original), and that "it is difficult to see how criminal aliens would have been considered part of or connected to the nation's political community," *id.* at 1269. The district court was right to phrase its conclusions so tentatively, as they are non sequiturs. While it is true that the Framers banned the wholesale exportation of convicted criminals by England and other foreign powers to the United States, that legislation has no bearing on the distinct question of whether the Framers intended to leave anyone within the United States–"criminal alien" or otherwise–outside the protective scope of the Fourth Amendment.

In any event, the fact is that the political community at the time of the Framing did not include many categories of people who today unquestionably have Fourth Amendment rights. Thus, the district court's originalist project of divining the Framers' intent in writing "the people" may be pointless. In a different context, the Supreme Court has recently disapproved the district court's particular

brand of originalism. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (majority op. by Kennedy, J.) (noting that right not expressly granted in Bill of Rights may exist nonetheless, as Framers "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."). And in the Fourth Amendment in particular, the Court has recognized that its protections extend to contexts the Framers could not have had in mind when they wrote of "searches and seizures." *See*, *e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (Fourth Amendment applies to government's use of electronic listening devices); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437 (10th Cir. 1990) (video surveillance). Thus, the Supreme Court has not applied the district court's originalist analysis to the Fourth Amendment.

C. THE DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT NO "PREVIOUSLY-REMOVED ALIEN FELON" CAN MEET A "SUBSTANTIAL CONNECTION" TEST

As set forth above, the court below erred in holding that some "substantial connection" test applies to *any* searches or seizures conducted within the United States, regardless of the alienage status of the individual who is searched or seized. But even assuming *arguendo* that such a rule were to apply, the court further erred in holding, as a matter of law (265 F. Supp. 2d at 1271), that no "previously-removed alien felon" could ever meet the "substantial connection" test.

First of all, the district court reasons incorrectly that because of statutory civil disabilities faced by all undocumented immigrants (and not just previously removed immigrants with a felony record), it is "nearly impossible" for previously removed alien felons to establish firm connections within this country." 265

F.Supp. at 1269. This reasoning misses the point that many of these civil disabilities are also imposed on United States citizens who have felony convictions,[19] yet there is no question that the Fourth Amendment applies to them.

Moreover, Judge Cassell's assertion is belied by the fact that although undocumented aliens do not have the rights to vote, serve on juries, or own guns, many have strong ties to this country. Even "criminal aliens" work, raise families (often including spouses and children who are United States citizens), and make other contributions to society.[20] *See*, *e.g.*, *Rubio-Cota*, slip op. at 2-3, 6 (Appellant's Br., Exh. C). Indeed, Congress has long recognized that aliens with criminal convictions may have significant ties to this country, through statutes that provide for relief from deportation.[21] A great many immigrants–even "criminal aliens"–can demonstrate such ties. In the years prior to 1996, waivers of deportation based on these ties to the United States were awarded to about half of

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[19] *See*, *e.g.*, Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153 (1999) (surveying state and federal law).

[20] Judge Cassell's statement that deportation is perceived merely as an "inconvenience," or as a "blessing," 265 F. Supp. 2d at 1273, is wrong. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("deportation…visits a great hardship….a penalty–at times a most serious one"); *cf. Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may result in "loss of both property and life; or of all that makes life worth living.").

[21] The early provision for such relief from deportation was the Seventh Proviso of Section Three of the Immigration Act of 1917, 39 Stat. 874, 878. In 1952, Congress provided a provision for discretionary "waiver of deportation," 8 U.S.C. § 1182 (1994), which might be granted based on factors such as family ties, military service, employment history, property or business ties, and community service. In 1996, Congress replaced former 8 U.S.C. § 1182 with a more limited form of relief through a provision for "cancellation of removal." 8 U.S.C. 1229b(a); *INS v. St. Cyr*, 533 U.S. 289, 294-96 (2001).

the applicants. *See St. Cyr*, 533 U.S. at 296 & n.5.[22]

D. THE DISTRICT COURT'S RULE WILL LEAD TO DISCRIMINATION AND UNDERMINE THE CORE VALUES OF THE FOURTH AMENDMENT

The inevitable consequence of a ruling that limits the Fourth Amendment within the United States would be to foster discrimination not only against "previously-removed alien felons," but against other immigrants and United States citizens, on the basis of race, ethnicity, and alienage. Law enforcement officers would be invited to make snap decisions about whether a person is a "previously-removed alien felon," often based on nothing more than appearance and speech patterns. If the Fourth Amendment does not apply to "previously-removed alien felons," officers will be more likely to stop and search those who seem "foreign." In our pluralistic society, where many United States citizens and lawful immigrants represent all the world's ethnicities and speak English with many different accents or sometimes not at all, such law enforcement judgments cannot be made without discriminating against many individuals.

Moreover, the district court fails to acknowledge that the question whether an individual has been "previously removed" can present complex factual

[22] The district court further errs in its citation to *United States v. Roy*, 734 F.2d 108 (2d Cir. 1984), which held that an escaped prisoner had no expectation of privacy and therefore no Fourth Amendment rights, because he was a "trespasser on society." 734 F.2d at 111. The court draws an analogy from this single out-of-circuit case to conclude that a "previously-removed alien felon" is a "trespasser in this country" and therefore has no Fourth Amendment rights. 265 F.Supp.2d at 1271. There is no precedent for this leap and, as Judge Friendly pointed out in his concurrence in *Roy*, the "metaphor" of a "trespasser on society" has "frightening implications." 734 F.2d at 113 (Friendly, J., concurring in the result on grounds that officers had probable cause to search).

determinations and legal questions. *See Mendoza-Lopez*, 481 U.S. 828 (holding that defendant in illegal reentry case may collaterally attack validity of deportation order and indictment should be dismissed if deportation violated due process); *United States v. Meraz-Valeta*, 26 F.3d 992 (10th Cir. 1994) (merits of collateral attack on deportation order depended on whether immigration judge followed regulations, whether defendant received effective counsel, and whether defendant suffered prejudice from any procedural violations or ineffective representation). Police officers, acting on the spur of the moment in the field, can hardly be expected to make those judgments.

Thus, as the district court in *Guitterez* explained, the "substantial connection" test would undermine "the inviolable protections traditionally afforded to persons accused of conduct, including resident aliens and those who 'appear' to be aliens." 983 F. Supp. at 916; *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 883-84 (1975) (Congress' immigration powers "cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens"); *cf. United States v. Mendoza-Carrillo*, 107 F.Supp.2d 1098, 1107 (D.S.C. 2000) ("[G]iving law enforcement officials an incentive to discover a person's identity in whatever way they can puts the privacy rights of legal aliens and any citizen that might for any reason be suspected of illegally entry at too great a risk."). The ruling below will undoubtedly exacerbate existing problems of racial profiling. *See*, *e.g.*, Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics,* N.Y. Times, Jan. 26, 2000, at A17; James Pinkerton, *Border Patrol Twice Stops U.S. Judge on Way to Court,* Houston Chron., Oct. 1, 2000, at 1.

The district court suggests that the foregoing problems are a "policy consideration" that does not warrant "extending" the Fourth Amendment to previously deported noncitizens. But that begs the question, for the Fourth Amendment has always applied to searches and seizures within the United States, regardless of the immigration status of the defendant. Abrogating that principle would engender the very danger that the Founders sought to prohibit, namely preserving the security of the people. The scope of the Fourth Amendment is no mere "policy consideration," but rather is a cornerstone of the Bill of Rights.

IV. CONCLUSION

For the reasons and upon the authorities stated above, *amici* respectfully submit that the decision of the district court should be reversed and remanded.

Dated: December 24, 2003

KEKER & VAN NEST, LLP
CECILLIA D. WANG
MICHAEL S. KWUN

LUCAS GUTTENTAG
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT

DAVID PORTER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

By:_____
CECILLIA D. WANG

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,957 words.

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I certify that the foregoing information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Dated: December 24, 2003 KEKER & VAN NEST, LLP

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CECILLIA D. WANG

PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this Court at whose direction the following service was made. I am over the age of eighteen years and not a party to this action. My business address is Keker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

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Benjamin A. Hamilton, Esq.
356 East 900 South
Salt Lake City, UT 84111
Counsel for Petitioner

Michael S. Lee, Assistant U.S. Attorney
United States Attorney's Office
185 South State Street, Suite 400
Salt Lake City 84111
Counsel for Respondent

Executed on December 24, 2003, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

ROBERT W. THOMAS

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