No. 07-

IN THE

Supreme Court of the United States

ROCIO SANCHEZ, OLGA CASTRO, MYRNA MARTINEZ, KAREN BJORLAND, CHERYL MACLYMAN, AND RHONDA KERN,
Petitioners,

v.

COUNTY OF SAN DIEGO, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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60

QUESTION PRESENTED

In 1971, this Court held in *Wyman v. James*, 400 U.S. 309, 317, that a state official's entry into a welfare recipient's home does not constitute a "search" subject to Fourth Amendment standards because it occurs outside the "traditional criminal law context." Subsequent decisions of the Court have called that holding into very serious question, but have not overruled it outright. The result is a recognized circuit conflict over whether home entries in the social-services context are "searches" for Fourth Amendment purposes and, if so, what Fourth Amendment standard applies. The circuits also are divided on the more specific question of whether the Fourth Amendment permits the government to require that all welfare applicants submit to suspicionless home entries as a condition of eligibility.

In order to resolve these conflicts, petitioners ask this Court to answer the following question presented:

Are suspicionless searches like those required by San Diego County as a condition of welfare eligibility, in which pursuant to a program developed by the district attorney's office, county fraud investigators from the district attorney's office enter all applicants' homes and look through their most intimate areas, a violation of the applicants' Fourth Amendment rights?

PARTIES TO THE PROCEEDING

Petitioners are Rocio Sanchez, Olga Castro, Myrna Martinez, Karen Bjorland, Cheryl Maclyman, and Rhonda Kern, applicants for public assistance subject to San Diego County's "Project 100%" program requiring home entries by agents of the County District Attorney's office as a condition of welfare eligibility, plaintiffs-appellants below.*

Respondents are the County of San Diego; San Diego County Board of Supervisors; San Diego County Department of Health and Human Services; Jean Shepard, Director of the San Diego County Health and Human Services Agency, in her official capacity; San Diego Office of District Attorney; and Bonnie Dumanis, District Attorney of the County of San Diego, in her official capacity, defendants-appellees below.**

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* A further plaintiff, "Aurora," whose name appears in the Ninth Circuit caption did not participate in the litigation before the Ninth Circuit, and is not included among the petitioners to this Court.

** Both Bonnie Dumanis and Jean Shepard are substituted in place of the prior officeholders who were sued in their official capacities. *See* Fed. R. App. P. 43(c)(2).

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

(continued)

Page(s)

CONSTITUTIONAL PROVISION

STATUTES

OTHER AUTHORITY

PETITION FOR A WRIT OF CERTIORARI

Petitioners Rocio Sanchez, Olga Castro, Myrna Martinez, Karen Bjorland, Cheryl Maclyman, and Rhonda Kern respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' decision is reported at 464 F.3d 916 and is reprinted in the Appendix to the Petition ("App.") at 1a-51a. The court of appeals' order denying en banc rehearing is reported at 483 F.3d 965 and is reprinted at App. 111a-119a. The district court's March 7, 2003, order granting summary judgment, which the Ninth Circuit reviewed and affirmed, appears in the appendix hereto at App. 52a-90a.[1]

JURISDICTION

The court of appeals issued its decision on September 19, 2006. App. 1a. A timely petition for rehearing en banc was denied on April 16, 2007. App. 111a. This Court granted petitioners' request for an extension of time to petition for certiorari to and including August 15, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] A subsequent opinion that resolved certain matters not at issue here was entered on May 12, 2003, and is available electronically at 2003 U.S. Dist. LEXIS 27351 (S.D. Cal. May 12, 2003). It appears in the appendix hereto at App. 97a-110a. A settlement of all remaining issues was approved on December 12, 2003, by an order entered on December 16, 2003, App. 91a-96a, clearing the way for an appealable final judgment dated December 31, 2003, and entered January 5, 2004, App. 120a-125a.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

San Diego County's "Project 100%" requires every welfare applicant, including those for whom there is no basis for suspecting ineligibility or fraud—and even those able to prove eligibility through other, less intrusive means—to submit to a "home visit" from the County District Attorney's Public Assistance Fraud Division. This visit entails a required home entry and can involve detailed inspection of personal areas of the home, including bedrooms and bathrooms.

The express purpose of the program is to uncover evidence of ineligibility or fraud. The County also anticipates that the program may uncover evidence that will lead to criminal prosecution of applicants for past welfare fraud or for crimes other than welfare fraud. Failure to comply with the required "home visit" necessarily results in denial of welfare benefits.

The Ninth Circuit invoked this Court's decision in *Wyman v. James*, 400 U.S. 309 (1971), to uphold the program. It did so despite recognizing explicitly that intervening decisions by this Court call into question the continuing validity of *Wyman*'s broad holding that the Fourth Amendment does not apply at all under these

circumstances. It also did so over the "trenchant" dissenting opinion of a member of the panel, *see* App. 119a (Kozinski, J., dissenting from denial of rehearing en banc) (describing Judge Fisher's panel dissent). The divisive nature of the issue prompted further dissent from eight of the active judges on the court of appeals below on the question whether rehearing en banc was warranted. App. 112a-118a.

The decision below deepens a long-standing conflict among the courts of appeals on the status of *Wyman* and the Fourth Amendment standard applicable to home entries in the social-services context. It also puts the Ninth Circuit in direct conflict with the Seventh on the constitutionality of programs like the one at issue here. Review by this Court is warranted to resolve the uncertainty relating to these important constitutional questions.

A. Factual Background

San Diego's Project 100% was conceived in 1997 by the County District Attorney's Office, with the stated aim of "redoubling" its efforts to combat welfare fraud and assure "program integrity."[2] In fact, the program was launched at a time when the number of welfare agency referrals to the District Attorney's office requesting *for-cause* investigations—*i.e.*, in cases where there was some reason to suspect ineligibility—was sharply declining.[3] As the County's welfare case load more than halved from 1994 to 1999, forcing a 37% reduction in County welfare staff, and

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[2] *See, e.g.*, Excerpts of the Record ("ER") 86 Ex. 48, at 14 (Answer ¶64); ER 85 Ex. 1, at 36, 115 (Apr. 22, 2002 Dep. Test. of L. Aragon, Deputy Dist. Attorney, Pub. Assistance Fraud Division Chief ("Aragon Dep.")); ER 85 Ex. 18, at 60 (Apr. 18, 2002 Dep. Test. of J. Zinser, Deputy Dir. for Strategy & Planning Div., Health & Human Servs. Agency).

[3] ER 86 Ex. 38 (Mar. 5, 1997 Mem. from L. Aragon to G. Thompson, Asst. Dist. Attorney).

as "for-cause" referrals to the District Attorney's office for investigations of suspected fraud dropped, the District Attorney avoided staffing cuts by assigning its Fraud Investigators the new task of investigating *every welfare applicant* by looking through their homes on Project 100% home visit "walk-throughs."[4]

Pursuant to the Project 100% program, every welfare applicant is informed that a mandatory "home visit" must be completed before he or she will be approved for aid. App. 3a-4a. The applicant is not told when this "home visit" will occur, although generally it takes place during regular business hours within 10 days of the application. *Id.* at 3a. The home visits are conducted not by social workers, but by "investigators from the Public Assistance Fraud Division of the D.A.'s office, who are sworn peace officers with badges and photo identification." *Id.*

Once they arrive at the applicant's home, the District Attorney's agents interview the applicant and then conduct a "walk-through" of the home. App. 4a. During this walk-through, "[t]he investigator will also ask the applicant to view the interior of closets and cabinets." *Id.*[5] Failure to

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[4] *See* ER 85 Ex. 16, at 16-17 (Jan. 30, 2002 Dep. Test. of J. Vukotich, Asst. Deputy Dir., Health & Human Servs. Agency); ER 85 Ex. 21, at 3226 (Mar. 14, 2000 Health & Human Servs. Agency Mem. noting decline in County welfare staff as caseloads dropped, but that "[i]n contrast, the District Attorney's investigation staff has not changed during this time period").

[5] The investigators look through bedroom closets and dresser drawers. *See, e.g.*, ER 85 Ex. 7, at 53-54 (Apr. 29, 2002 Dep. Test. of J. Duvall, Public Assistance Fraud Investigator, Office of Dist. Attorney ("Duvall Dep.")); ER 85 Ex. 9, at 55-56 (Dec. 12, 2001 Dep. Test. of J. Hale, Supervisor of Dep't of Soc. Servs. Fraud Bureau); ER 85 Ex. 2, at 69-71 (Feb. 14, 2002 Dep. Test. of E. Bogard, Public Assistance Fraud Investigator, Office of Dist. Attorney ("Bogard Dep.")); ER 85 Ex. 7, at 52-53 (Duvall Dep.). They inspect bathrooms and medicine cabinets, count toothbrushes, and look for men's bath products. ER 85 Ex. 8, at 82-83 (Apr. 3, 2002 Dep. Test. of E. Gonzalez, Fmr. Fraud Prevention

submit to the "home visit" (including the "walk-through") automatically results in denial of the application for public assistance. *Id.* at 3a-4a.

The express purpose of these investigations is to uncover evidence of fraud in connection with the welfare application. *Id.* In addition, should they find it, "the investigators are required to report evidence of potential criminal wrongdoing for further investigation and prosecution." *Id.* at 4a. This extends beyond the application that is the subject of the home entry: investigators will refer for prosecution evidence of other criminal behavior. App. 4a n.3. The D.A.'s Public Assistance Fraud Division chief testified that his investigators are trained *not* to give rehabilitative counseling or advice to applicants, and that their "focus is highly limited" to legal compliance:

> [I]t is not our expectation that they are going to go outside of that. And I'm trying to envision what a rehabilitation would be under those circumstances. Get off the couch. Get a job. I don't know. So, no . . . —so I—no. I don't envision rehabilitation as a part of that. I can't even imagine what that would look like.

ER 85 Ex. 1, at 170-71 (Aragon Dep.).

Supervisor ("Gonzalez Dep.")); ER 85 Ex. 12, at 46 (Aug. 21, 2001 Dep. Test. of Pet'r Myrna Martinez ("Martinez Dep.")). They look through children's bedrooms and inspect the children's belongings, including their clothing and even their dirty laundry. ER 85 Ex. 8, at 84 (Gonzalez Dep.); ER 85 Ex. 2, at 88-90 (Bogard Dep.); ER 85 Ex. 14, at 51 (Apr. 25, 2002 Dep. Test. of F. Reid, Supervising Investigator, Office of Dist. Attorney ("Reid Dep.")). They also request closer inspection of potential evidence, such as bank statements or other personal papers they might spot on a desk. ER 85 Ex. 5, at 77 (May 2, 2002 Dep. Test. of L. Crosby, Training Supervisor, Pub. Assistance Fraud Investigation); ER 85 Ex. 7, at 21 (Duvall Dep.).

When the investigator conducts the home inspection, no part of the home is off-limits, and no official policy or protocol limits or guides the discretion of investigators in deciding where to search inside the home or what items to inspect.[6] Not surprisingly, subjects of these home investigations testified that they were "frightened," "upset and degraded," and even reduced to tears by the District Attorney's "humiliating and embarrassing" intrusions into their homes.[7]

B. Proceedings Below

1. Petitioners, applicants for public assistance in San Diego County, brought the instant case, a facial challenge to Project 100% as a violation of the Fourth Amendment's guarantee against unreasonable searches.[8] The district court's jurisdiction was invoked under 28 U.S.C. § 1331. After certifying a class, the district court granted the defendants' motion for summary judgment. App. 52a-90a.

2. a. A divided panel of the Ninth Circuit affirmed, App. 1a-51a, relying almost exclusively on *Wyman v. James*, 400 U.S. 309, a 1971 decision of this Court. In *Wyman*, the Court held that a home visit by a government social worker to the home of a government aid recipient did not constitute a "search" for Fourth Amendment purposes. Because the home visit did not arise "in the traditional criminal law context," the Court reasoned, it could not "be equated with a search" implicating the Fourth Amendment. *Id.* at 317. And even assuming the home visit could be treated as a search,

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[6] ER 85 Ex. 14, at 65 (Reid Dep.); ER 85 Ex. 7, at 19 (Duvall Dep.).

[7] ER 85 Ex. 3, at 43-44 (Aug. 21, 2001 Dep. Test. of Pet'r Karen Bjorland); ER 85 Ex. 12, at 40, 43-46 (Martinez Dep.).

[8] Although petitioners sought relief under a variety of additional state and federal theories, this Court's review is sought only with respect to the controlling federal constitutional law issues.

the Court continued, it was valid under the Fourth Amendment because it was not unreasonable. *Id.*

Applying *Wyman*, the panel majority held, first, that no Fourth Amendment "search" occurs when, as a condition of welfare eligibility, agents of the District Attorney enter and walk through a private home (including bedrooms and bathrooms), searching for evidence of welfare ineligibility or welfare fraud. As a result, the Fourth Amendment simply is not implicated by the Project 100% home entries and walk-throughs. App. 6a-10a.

In the alternative, the panel went on to hold—again relying on *Wyman*—that even if the home entries could be characterized as "searches," such searches would be "reasonable" as a matter of law under the Fourth Amendment. App. 11a-21a. The majority explained:

> [B]ecause the Project 100% visits serve an important governmental interest, are not criminal investigations, occur with advance notice and the applicant's consent, and alleviate the serious administrative difficulties associated with welfare eligibility verification, we hold that the home visits are reasonable under the Supreme Court's decision in *Wyman*.

App 15a.

b. Judge Fisher dissented, unable to "agree with the majority's conclusion" that *Wyman* "'directly controls' our resolution of this case." App. 28a. Judge Fisher focused on significant distinctions between Project 100% and the home visits approved in *Wyman*:

> *Wyman* involved a primarily *rehabilitative* home visit by a social assistance caseworker . . . . That is a far cry from the program carried out by the County of San

> Diego, whose Project 100% home visits entail a law enforcement agent—trained *not* to give advice to welfare applicants—walking through the applicant's home in search of physical evidence of ineligibility that could lead to criminal prosecution either for welfare fraud or other crimes unrelated to the welfare application.

Id.

According to Judge Fisher, *Wyman* neither compelled nor warranted either of the majority's holdings: that walk-throughs of homes by agents of the District Attorney are not Fourth Amendment "searches," or that even if they are, Project 100% would be "reasonable" under the Fourth Amendment. App. 28a-51a.

3. Petitioners filed a motion for rehearing en banc. App. 111a. The motion was denied, but only over public dissent by eight of the Ninth Circuit's active judges. Judge Kozinski dissented "for the reasons expressed in Judge Fisher's trenchant panel dissent." App. 119a. Judge Pregerson, writing for himself and six other judges, would have held that *Wyman* does not govern petitioners' challenge to Project 100%:

> The majority opinion clings to *Wyman v. James*, 400 U.S. 309 (1971), asserting that it directly controls this case. This is unsupportable for three reasons. First, as clearly outlined in Judge Fisher's dissent, the program upheld in *Wyman* was significantly different in scope and goal from San Diego's program. Second, allowing *Wyman* to constrict the bounds of our Fourth Amendment jurisprudence ignores over thirty-five years of intervening law. Third, allowing this opinion to stand is an assault on

> our country's poor as we require them to give up their rights of privacy in exchange for essential public assistance.

App. 112a-113a.

REASONS FOR GRANTING THE PETITION

As recognized by both the panel majority and dissenting judges below, the holding of this Court's 1971 decision in *Wyman v. James* has been called into serious question by subsequent decisions of the Court. As a result, the circuit courts are divided as to whether home entries in the social-services context constitute "searches" subject to the Fourth Amendment and, if so, what Fourth Amendment standard governs their constitutionality. The lower courts also are in conflict on the narrower question presented here: whether programs like San Diego's Project 100%, which condition welfare eligibility on submission to suspicionless home entries by fraud investigators, are permissible under the Fourth Amendment.

Because the conflict in the lower courts is the product of the uncertain status of this Court's own precedent, it is most unlikely to resolve itself without the Court's intervention. This Court should grant certiorari to clarify the status of *Wyman* and, at a minimum, to confirm that *Wyman's* analysis of rehabilitative home-visits by social workers has no application where, as here, agents of the District Attorney's office with no rehabilitative agenda search the most intimate areas of a person's home.

I. RECOGNIZED TENSION IN THIS COURT'S JURISPRUDENCE HAS PRODUCED A CIRCUIT CONFLICT OVER THE FOURTH AMENDMENT STATUS OF HOME ENTRIES RELATED TO SOCIAL-SERVICES PROGRAMS.

A. It Is Not Clear From This Court's Decisions Whether *Wyman* Is Still Good Law.

As even the panel majority below recognized, App. 11a n.8, the continuing validity of *Wyman v. James*, 400 U.S. 309 (1971), on which it rested its decision, has been called into serious question by subsequent decisions of the Court. That question, as well as the lower-court divisions it has produced, is likely to persist unless and until this Court directly addresses the status of *Wyman*.

1. In 1971, this Court considered in *Wyman* whether the government could require that beneficiaries of the Aid to Families with Dependent Children ("AFDC") program submit to home visits by caseworkers or risk termination of benefits. 400 U.S. at 310. The Court concluded, first, that the AFDC home visits did not constitute "searches" for Fourth Amendment purposes. Because they did not arise "in the traditional criminal law context," the Court reasoned, the home visits could not "be equated with a search" implicating the Fourth Amendment. *See id.* at 317.

The Court went on to say, in what amounted to dicta, that even if the AFDC home visits could be considered "searches," they would be permissible under the Fourth Amendment because they were not unreasonable. The Court relied for this conclusion on a close analysis of eleven factors implicated by the facts of the case before it.[9] It was careful

[9] The factors the Court considered relevant to the reasonableness of the AFDC home visits were: 1) the public interest in protecting the needs of the child who is the ultimate beneficiary of the welfare assistance; 2) the state interest in ensuring that assistance only reaches its intended

not to suggest that "termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances." *Id.* at 326.

2. In the more than 35 years since *Wyman* was decided, this Court has decided a number of cases that are difficult, if not impossible, to square with *Wyman*'s holding that an AFDC home visit does not constitute a "search" under the Fourth Amendment. First, and most fundamentally, when *Wyman* was decided in 1971, it remained uncertain whether the Fourth Amendment "regulate[d] only searches and seizures carried out by law enforcement officers" engaged in criminal law-enforcement activities, or whether it extended as well to searches conducted by other state officials, as in the school and social-services contexts. *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985) (search of students' belongings by school officials). The Court answered that question in 1985, in *New Jersey v. T.L.O.*, holding—contrary to the first premise of *Wyman*—that government inspections that occur outside the traditional criminal context are indeed "searches" subject to Fourth Amendment constraints. *Id.*; *cf. Wyman*, 400 U.S. at 317 (concluding that the home visits in question

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beneficiaries; 3) the public's interest and expectation in "know[ing] how [its] charitable funds are utilized and put to work"; 4) the interest in rehabilitation; 5) the fact that home visits are at "the heart of welfare administration"; 6) the relatively non-intrusive nature of the search at issue; 7) the fact that nothing in the record "supports an inference that the desired home visit [at issue] had as its purpose the obtaining of information as to criminal activity"; 8) the inability of the state to verify all of the information it sought solely through other, less-intrusive means; 9) the visit is not one by police or uniformed authority but instead is conducted by a caseworker whose "primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility"; 10) the visit is "not a criminal investigation, does not equate with a criminal investigation," and "is not in aid of any criminal proceeding"; and 11) "the warrant procedure . . . [has] seriously objectionable features in the welfare context" compared to the home visit at issue, because it would, *inter alia*, justify entry by force and be unlimited in what hours it could be utilized. *Wyman*, 400 U.S. at 318-23.

"simply could not be equated with a search in the traditional criminal law context").

New Jersey v. T.L.O. was the first of what has become known as the "special needs" line of cases. In all of those cases, the Court has reaffirmed the same principle that it appeared to disavow in *Wyman*: that governmental intrusions into personal privacy are "searches" that implicate the Fourth Amendment whether or not they arise in the criminal context. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (school drug-testing of students); *Illinois v. Lidster*, 540 U.S. 419 (2004) (vehicle checkpoint seeking citizen assistance). Because those inspections advance a "special need" separate from criminal law enforcement, they are subject to a different Fourth Amendment standard under this Court's holdings. Rather than applying the Fourth Amendment warrant requirement, the Court has assessed the "reasonableness" of such programs by the now-familiar balancing of the government's interest in and need for the program against its intrusiveness. *See T.L.O.*, 469 U.S. at 337; *Vernonia*, 515 U.S. at 652-53. But the fact that the inspections are not part of a criminal law-enforcement effort does not mean that they are not "searches" at all, entirely unregulated by the Fourth Amendment—as this Court appears to have held in *Wyman*, and as the Ninth Circuit held below, in reliance on that 1971 precedent.

Second, in the decades since *Wyman* was decided, this Court has decided a number of cases establishing the special sanctity of the home under the Fourth Amendment, and emphasizing that governmental intrusion into the home "is the chief evil" against which the Fourth Amendment protects. *Payton v. New York*, 445 U.S. 573, 585 (1980) (Fourth Amendment requires warrant for home arrest, though not for arrest in public); *see also Wilson v. Arkansas*, 514 U.S. 927, 927 (1995) (Fourth Amendment requires police to "knock and announce" before they enter private

home). Most recently, in *Kyllo v. United States*, the Court explained that the Fourth Amendment "draw[s] 'a firm line at the entrance to the house'"—and that any nonconsensual governmental entry of a private home is therefore a "search" subject to Fourth Amendment restrictions. 533 U.S. 27, 40 (2001) (quoting *Payton*, 445 U.S. at 590). In *Kyllo* itself, the Court applied that principle to hold that even use of a thermal-imaging device aimed at a private home from a public street constituted a "search" under the Fourth Amendment. It would appear to follow, *a fortiori*, that an actual physical entry into a home by a governmental official easily would meet the threshold for a Fourth Amendment "search."

The effort of the court below to reconcile *Wyman* with this more modern precedent only highlights how irreconcilable the two really are. The Ninth Circuit majority reasoned that *Kyllo* is distinguishable from the home entry at issue here because it "involved a classic criminal law enforcement investigation." App. 18a n.14. But that purported distinction runs head-on into the *T.L.O.* line of "special needs" cases, which clearly establishes that a governmental inspection need *not* occur as part of a "classic criminal law enforcement investigation" in order to constitute a "search" under the Fourth Amendment.[10] In short, *Wyman*'s first and principal holding—that a governmental entry into a private home that occurs in the social-services context, rather than the criminal context, is not a "search" regulated by the Fourth Amendment—has been undermined badly, if not completely superseded, by subsequent decisions of this Court.

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[10] It is also difficult to reconcile with the facts of this case, in which agents of the County prosecutor enter private homes with no rehabilitative purpose, but with the expectation that evidence of criminal behavior may be uncovered—a search that very much resembles a "classic criminal law enforcement" inspection.

3. *Wyman*'s discussion of the "reasonableness" of the AFDC home visits under the Fourth Amendment—relying on an analysis of eleven case-specific factors, *see supra* n.9—also has been superseded by this Court's subsequent precedent. As discussed above, when *Wyman* was decided, this Court had yet to articulate the "special needs" balancing test that now generally governs searches undertaken outside the criminal context, and calls for a weighing of the governmental interest and the need for the program in question against the degree of intrusion into individual privacy interests. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305 (1997) (drug testing of candidates for state office); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of a probationer's home as condition of parole). The application of the "special needs" balancing test in such cases stands in sharp contrast to the unfocused analysis of eleven different case-specific factors undertaken by the *Wyman* Court.

B. Confusion Over The Status Of *Wyman* Has Produced A Conflict In The Courts Of Appeals.

1. Given the tensions in this Court's case law, it is perhaps not surprising that the lower courts are in conflict as to the proper Fourth Amendment treatment of home entries by government officials in the social-services context. As the Fifth Circuit recognized in *Roe v. Texas Department of Protective & Regulatory Services*, 299 F.3d 395, 401 & n.4 (2002), "[s]electing the applicable test for a social worker's investigative home visit . . . [is] an issue over which other courts of appeals have divided."

On one side of the divide is the Ninth Circuit in the decision below. As discussed above, the panel majority concluded that *Wyman* continues to govern this area in full, and thus held that home entries and walk-throughs by agents of the district attorneys office under Project 100% do not

constitute "searches" that implicate the Fourth Amendment at all. App. 2a, 8a-10a.

Several other circuits—the Third, Fourth, Seventh, Tenth, and Eleventh—have held to the contrary, treating home entries by government agents as Fourth Amendment "searches" even when they occur in the social-services context. Those courts have been required to narrow *Wyman* to its facts or otherwise distinguish away the precedent from this Court most directly on point. *See Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087 (3d Cir. 1989) (Fourth Amendment applies to social workers entering homes to investigate allegations of child abuse); *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995) (reading *Wyman* as case in which Fourth Amendment applies, but is not violated because consent rendered search permissible, and applying same analysis to similar facts); *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003) (Fourth Amendment applies to social workers entering homes to investigate allegations of child abuse); *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995) (applying Fourth Amendment to social worker's home entry but finding no violation); *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993) (Fourth Amendment applies to home entry to investigate fitness of foster parent). In fact, even the Ninth Circuit, in a decision predating the decision below, has held that Fourth Amendment standards regulate home entries by social workers investigating the welfare of a child. *See Calabretta v. Floyd*, 189 F.3d 808 (1999).

The confusion does not end there. Among the majority of circuits holding that social-services home entries do constitute "searches" under the Fourth Amendment, there is an additional divide as to precisely what Fourth Amendment standard should govern. Several of those circuits continue to apply the traditional warrant requirement of the Fourth Amendment to home searches conducted by government

social workers. *See Roska*, 328 F.3d at 1242 (Tenth Circuit) ("no special need . . . renders the warrant requirement impracticable when social workers *enter a home*"); *Good*, 891 F.2d at 1094 (Third Circuit) (rejecting argument that exception to warrant requirement applies to social workers entering homes to investigate charges of child abuse); *see also Calabretta*, 189 F.3d at 817 (Ninth Circuit) (where "sanctity of the home is involved," special needs exception does not apply and warrant is required before social worker may enter).

The Fourth Circuit, on the other hand, has relied on *Wyman* to hold that the "special needs" balancing test, rather than the warrant requirement, should apply to home entries by social workers investigating the fitness of foster parents. *See Wildauer*, 993 F.2d at 372. Though for the Fourth Circuit—unlike the panel below—*Wyman* does not compel the conclusion that a social-services home entry is not a "search," it does affect the applicable Fourth Amendment standard: "[I]nvestigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context." *Id.* (citing *Wyman*, 400 U.S. at 318).[11]

In sum, the federal circuits—driven largely by uncertainty over the status and proper reading of *Wyman*—are deeply and persistently divided over the proper analysis of social-services home entries under the Fourth Amendment. That division is most unlikely to cure itself without this Court's guidance.

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[11] Of course, the facts of this case—which involve a program designed by the district attorney's office to subject all applicants to suspicionless searches of their homes as a condition of welfare eligibility, with the expectation that such searches might uncover evidence that will lead to criminal prosecutions—argue against application of the "special needs" balancing test. *Cf. Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (refusing to apply "special needs" test to program with significant law-enforcement involvement and purpose); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (same).

2. The decision below also creates a circuit conflict on the narrower question presented: whether the Fourth Amendment permits systematic, mandatory inspections of the homes of all welfare applicants. The Ninth Circuit, again relying on *Wyman*, held that such inspections are consistent with the Fourth Amendment. But the Seventh Circuit, in *S.L. v. Whitburn*, 67 F.3d 1299 (1995), has held to the contrary.

In *Whitburn*, the Seventh Circuit assessed the constitutionality of a program in which home inspections to verify food stamp eligibility occurred in cases where the application could not be verified through other, less-intrusive means. Applying *Wyman*, the court upheld the program, but only on the ground that the home inspections were not mandatory, in that "the applicant's refusal to consent to the home visit is not a criminal act, and benefits are not denied or cut off because the applicant has refused to allow the home visit." 67 F.3d at 1307. Both the Wisconsin program at issue in *Whitburn* and the home visit in *Wyman* are, in the view of the Seventh Circuit, "unexceptional application[s] of the principle that the Fourth Amendment's 'prohibition does not apply . . . to situations in which voluntary consent has been obtained." *Id.* (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)).

That principle does not apply here. San Diego not only requires home inspections in the case of *every* welfare applicant, but directly links benefits to an applicant's consent to the search, denying benefits automatically when an applicant refuses to allow the search. Indeed, benefits are denied even if the applicant could verify eligibility in some other way. Such a program would not be permissible under the Seventh Circuit's decision in *Whitburn*.[12]

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[12] The Minnesota federal district court also has invalidated a welfare home-visit program under the Fourth Amendment, using the same

C. This Court Should Clarify That *Wyman* Does Not Permit The Kind Of Search Conducted Here.

As shown above, the Court's intervention is required to clarify whether and in what form *Wyman* survives intervening decisions by this Court. This case presents the perfect opportunity for the Court to clarify the scope of *Wyman*—which under no possible reading could justify the searches at issue here.

First, even assuming *arguendo* that *Wyman* has continued application in the narrow context of rehabilitative home visits by social workers, this is not such a case. Unlike *Wyman*, this case does not involve in-home counseling by a social worker at a kitchen table or in the living room, but careful inspection of the home—from top to bottom—by an agent of the County prosecutor who is *prohibited* from giving helpful advice or counseling, and who is *looking for evidence* of ineligibility and fraud, despite the absence of any individualized suspicion. As Judge Fisher argued in dissent from the decision below, an in-home interview by a social-assistance caseworker, under regulations that flatly prohibit "snooping in the home," *Wyman*, 400 U.S. at 321, is a far cry from an inspection by the District Attorney's investigator, who goes through closets, dresser drawers, and medicine cabinets. App. 37a (Fisher, J., dissenting); *see also* App. 118a (Pregerson, J., dissenting from denial of rehearing en banc).

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reasoning as the Seventh Circuit in *Whitburn*. In *Reyes v. Edmunds*, 472 F. Supp. 1218 (D. Minn. 1979), the court considered a program that, like Project 100%, made home entries a condition of eligibility for welfare benefits—though, unlike Project 100%, only where there had been a tip or other information calling into question a recipient's eligibility. The court held that *Wyman* did not govern where home entries were made by fraud investigators focused on criminal fraud, rather than social workers with a rehabilitative mission, and ruled even this narrower home-entry program unconstitutional. *Reyes*, 472 F. Supp. at 1224-26.

Second, and significantly, it is difficult to imagine a more coercive situation than the one created by Project 100%. The home visit is mandatory: the applicant is told that refusal to submit to the search will result in an automatic denial of the application for assistance. If this Court were to hold that *Wyman* remains governing law, then it also should confirm the view of several lower courts that *Wyman* is properly read as applying only when a social-services home entry reasonably can be construed as "consensual," *see, e.g.*, *Whitburn*, 67 F.3d at 1307; *Calabretta*, 189 F.3d at 816—decidedly not the case when assent is a condition of receiving subsistence welfare benefits. *See* App. 116a-117a (Pregerson, J., dissenting from denial of rehearing en banc) (stating that "there can be no true consent here," where applicants "are not given notice of when the visit will occur; they are not informed of their right to withhold consent; they are told the visit is mandatory; and they are aware of the severe consequences of refusing the search").

Nor is there any reason to expand *Wyman* to cover this case. Nothing indicates that there is a serious welfare-fraud problem that would justify the searches at issue here. On the contrary, the number of "for-cause" referrals was falling in the time period just before Project 100%'s inception. *See supra* n.3. And in any event, there is no indication that searches like those required by Project 100% actually would identify or deter fraud, even if it were a serious problem. Experience shows that computer-matching systems are both more likely to uncover fraud and far less intrusive on personal privacy. *See* Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 Colum. Hum. Rts. L. Rev. 663, 669-70 (2005). And mandatory home visits make no sense as a measure to combat fraud when applicants are denied benefits for refusing home

inspections even if they can prove the veracity of all the facts on their application in some other manner.[13]

Finally, the Court should use this opportunity to articulate a limiting principle that would prevent the expansion of *Wyman* to reach a far broader category of intrusive home searches. As one of the dissenting judges below noted:

> The government is a provider of countless benefits and services, many of which require verification of eligibility—such as disability benefits, Medicare and Medicaid benefits, veterans benefits, student financial aid grants and lunch subsidies for school students. If the majority is correct that a person's expectation of privacy in the home is reduced any time he or she has a relationship with the state that requires an eligibility determination, then there seems little to prevent the government from implementing a home visit program similar to Project 100% with respect to these beneficiaries as well.

App. 46a-47a n.12 (Fisher, J., dissenting). By the same token, the reading of *Wyman* endorsed by the panel below would permit agents of the Internal Revenue Service to enter and search the home of any person claiming a dependent as a tax deduction, in order to verify the claim. *Wyman* itself did not contemplate so intrusive a search, *cf. Wyman*, 400 U.S. at 324 (comparing AFDC home visit to request by IRS that

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[13] It may be that Project 100% is most effective not as a means of combating fraud, but as a deterrent to eligible applicants. It is common for verification procedures to be implemented with the goal or effect of reducing total expenditures associated with the program, by way of "informal rationing": When procedures become burdensome enough, only the neediest will be willing to submit to them. *See* Mulzer, *supra*, at 679-80.

"taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted")—but until this Court clarifies the more limited scope of *Wyman*, the lower courts will continue to misread that decision in a way that would authorize a broad range of governmental intrusions into the home.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR ADDRESSING THE IMPORTANT CONSTITUTIONAL QUESTION AT STAKE.

This case provides the Court with an unusually good vehicle for resolving the conflict in the lower courts over the Fourth Amendment status of home entries by government officials in the social-services context. As many of the cases cited above illustrate, the issue presented by this case most commonly arises in connection with other legal issues that also must be addressed in connection with the Fourth Amendment question. For example, the issue frequently arises as the first of several questions to be resolved as part of a qualified immunity defense to a § 1983 claim. *See, e.g.*, *Roska v. Peterson*, 328 F.3d at 1251 (deciding several issues, including Fourth Amendment issue, to conclude qualified immunity defense was valid); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d at 395 (same); *Wildauer v. Frederick County*, 993 F.2d at 374 (same). It may also arise in the context of a criminal trial, on a motion to exclude evidence discovered during an allegedly unconstitutional home visit.

This case, however, cleanly presents the single issue of whether searches like those required by Project 100% violate the Fourth Amendment. Because it arises from a facial challenge to San Diego's Project 100%, it involves no procedural complications or other issues that might complicate review. The Court should take this opportunity to resolve the status of *Wyman* and the conflict in the lower courts over the Fourth Amendment's application to home

searches conducted by government officials in the social-services context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 15, 2007