No. 10-388

IN THE

JAN 28 2011

Supreme Court of the United States

ROBERT HUBER, et. us.,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Is the New Jersey Department of Environmental Protection ("NJDEP") required to obtain an administrative search warrant before inspecting portions of residential land subject to a conservation easement, established for the public's benefit and protection, to assure compliance with the easement's restrictions?

Was the NJDEP's inspection of the portions of the Hubers' property subject to the conservation easement a search under the Fourth Amendment?

If, despite the existence of the conservation easement, the inspection was a search, did the NJDEP's inspection pursuant to a comprehensive regulatory scheme, here the New Jersey Freshwater Wetlands Protection Act ("FWPA"), N.J. Stat. Ann. § 13:9B-1, *et seq.*, satisfy the special needs exception which permits a warrantless inspection under the Fourth Amendment?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION... 10

LEGAL ARGUMENT..... 12

1. The DEP's Inspection of the Portion of the Hubers' Property Subject to a Conservation Easement Was Not a Search Under the Fourth Amendment..... 12

2. Even If Its Inspection of the Portion of the Property Subject to the Easement is a Search Under the Fourth Amendment, the NJDEP Was Not Required to Obtain a Warrant..... 17

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

CASES

Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974) 16

Bd. of Educ. v. Earls, 536 U.S. 822 (2002) 18, 19

California v. Ciraolo, 476 U.S. 207 (1986) 14

Camara v. Mun. Court of S.F., 387 U.S. 523 (1967) 18, 20, 21, 22

Cardinale v. Louisiana, 394 U.S. 437 (1969) 27

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 18

Dandridge v. Williams, 397 U.S. 471 (1970) 14

Dewey v. Des Moines, 173 U.S. 193 (1899) 13

Cited Authorities

	Page
Ferguson v. City of Charleston, 532 U.S. 67 (2001)	18
Griffin v. Wisconsin, 483 U.S. 868 (1987)	18, 23
Harris Trust & Sav. Bank v. Salomon Smith Barney, 530 U.S. 238 (2000)	14
Herb v. Pitcairn, 324 U.S. 117 (1945)	25
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)	26
Katz v. United States, 389 U.S. 347 (1967)	10, 14
Mahony v. Danis, 95 N.J. 50 (1983)	12
Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990)	18

Cited Authorities

	Page
Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)	18
New Jersey v. T.L.O., 469 U.S. 325 (1985)	18
New York v. Burger, 482 U.S. 691 (1987)	18, 24, 25
Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998)	26
Palmieri v. Lynch, 392 F.3d 73 (2d Cir. 2004), *cert. denied*, 546 U.S. 937 (2005)	11, 22, 23
Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989)	18
Smith v. Maryland, 442 U.S. 735 (1979)	14
Tide-Water Pipe Co. v. Blair Holding Co., Inc., 42 N.J. 591 (1964)	13
United States v. Biswell, 406 U.S. 311 (1972)	18
United States v. Calandra, 414 U.S. 338 (1974)	26

Page

United States v. Janis,
428 U.S. 433 (1976) 26

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 18

Yee v. Escondido,
503 U.S. 519 (1992) 13

CONSTITUTION

United States Constitution Amendment IV..... *passim*

STATUTES

N.J. Stat. Ann. § 13:1D-9(d)..... 24

N.J. Stat. Ann. § 13:9B-1 i

N.J. Stat. Ann. § 13:9B-2 17

N.J. Stat. Ann. § 13:9B-3 1

N.J. Stat. Ann. § 13:9B-7 1

N.J. Stat. Ann. § 13:9B-16..... 1

N.J. Stat. Ann. § 13:9B-16(a) 3

N.J. Stat. Ann. § 13:9B-21(m)..... 6, 21, 24

Page

RULES

N.J. Ct. R. 1:36-3 25

Sup. Ct. R. 15.2 1

TREATISES

American Law of Property § 8.5 (1952) 12

Restatement of the Law of Property § 450 (1944) 12

REGULATIONS

N.J. Admin. Code. § 7:7A-1.4 3

OTHER AUTHORITIES

39 N.J. Reg. 3587(a), Sept. 4, 2007 4

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COUNTERSTATEMENT OF THE CASE

The Hubers characterize their petition as seeking review of a federal constitutional question, specifically whether the NJDEP was required under the Fourth Amendment to obtain a warrant before inspecting portions of their yard. But, this case is really about the extent to which, under State law, an environmental regulator may enter and inspect property subject to a conservation easement, at a reasonable time and in a reasonable manner, to ensure that the property owner is complying with the restrictions set forth in the easement established for the public's benefit and protection.

The Hubers are the owners of property located in Clinton Township, New Jersey which contains a house with a deck, patio, driveway, and front, back and side yards. Notably, much of the Hubers' outdoor property is also subject to a conservation easement[1] which preserves it as regulated wetlands and transition areas[2], in perpetuity, for the benefit of the public. (Pet. App. 17a, 21a; Appellants' App. 94a-99a). The Hubers neglected to mention this salient fact in their petition for certiorari. *See* U.S. Sup. Ct. R. 15.2.

The eastern boundary of the conservation easement runs generally parallel to the back of the Hubers' residence, in a north-south direction, and encompasses

1. The property within the conservation easement contains regulated freshwater wetlands and wetland transition areas as defined by the FWPA, N.J. Stat. Ann. § 13:9B-7 and -16.

2. A "transition area" is an area of land adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem. N.J. Stat. Ann. § 13:9B-3.

most of their back yard. (Appellants' App. 86a, 98a). This boundary runs from the Hubers' northern property line to the southern property line, and exists approximately 13 feet off the northern back corner of the Hubers' house and approximately 18 feet off the southern back corner of the house. *Id.* A small portion of the Hubers' deck, and portions of a patio and retaining wall beneath it, extend into the conservation easement. (Pet. App. 10a). The western boundary of the conservation easement is defined by a tributary to the South Branch of the Raritan River, which runs along the entire length of the western boundary of the Hubers' property (over 150 feet from the eastern conservation easement boundary). (Pet. App. 22a; Appellants' App. 106a; Huber Hr'g Tr.145, Feb. 19, 2008).

The conservation easement was created by a Freshwater Wetlands Statewide General Permit and Transition Area Waiver - Averaging Plan (the "Wetlands Permit"), issued to the developer of the property on October 7, 1992. (Pet. App. 2a-3a; Appellants' App. 94a-99a). The Wetlands Permit included a modification to the wetland transition areas on the Hubers' property, called a transition area averaging plan, that effectively reduced the transition areas on one side of the property, while increasing the size of the continuous transition areas, proportionally, on the other side of the property. *Id.* FWPA transition areas serve as:

> (1) [a]n ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem, providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but

> not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects; and
>
> (2) [a] sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species.
>
> [N.J. Stat. Ann. § 13:9B-16(a)].

When transition area averaging plans are included in wetland permits, conservation easements are created to ensure that the newly modified transition areas and associated wetlands remain protected in perpetuity. (Pet. App. 20a-21a; Appellants' App. 94a-99a). Conservation easements under the FWPA are designed to retain land or water areas predominantly in their natural, scenic or open or wooded conditions, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife. N.J. Admin. Code. §7:7A-1.4.

Here, the conservation easement, dedicated to Clinton Township, specifically required that "no regulated activities shall occur in the modified transition area or adjacent wetlands without the prior approval of the [NJDEP]." (Pet. App. 15a-16a; Appellants' App. 98a). Thus, the Appellate Division determined that "[d]eed restrictions, such as this conservation easement, serve to protect the freshwater wetlands" as required by New Jersey's comprehensive freshwater wetlands and transition area preservation scheme. (Pet. App. 20a-21a (internal citations omitted)). Accordingly, the Appellate Division

concluded that, under New Jersey law, the NJDEP was authorized to enforce the conservation easement against the Hubers in furtherance of its statutory objective of protecting the wetlands and transition areas. *Id.* (internal citations omitted). In this regard, the Appellate Division accepted the NJDEP's explanation that "a transition area subject to a conservation easement is especially important 'because it represents the portion of the transition area that remains after other portions have been eliminated. It is therefore important that it remain entirely unaltered.'" (Pet. App. 21a (citing 39 N.J. Reg. 3587(a), Sept. 4, 2007)).

The Wetlands Permit required the developer to "sign a [NJDEP] approved deed restriction for the subject parcel(s). The restriction shall be included on the deed, and recorded in the office of the County Clerk ...." (Pet. App. 3a; Appellants' App. 98a). The Wetlands Permit further stated that "[t]he restriction shall run with the land and be binding upon all successive owners." *Id.* These requirements were satisfied when the developer transferred the property by deed dated August 8, 1994 and recorded it with the Hunterdon County Clerk's Office on August 16, 1994. (Pet. App. 4a, 15a-16a; Appellants' App. 101a-104a). As the Wetland Permit required, the deed stated that it was "[s]ubject to [the Wetlands Permit]..., which is dedicated to Clinton Township by conservation easement..." (Pet. App. 16a, 21a; Appellants' App. 102a). The deed also contained the metes and bounds description of the easement. *Id.*

The Hubers purchased the property on January 4, 1999. Their deed, recorded on February 23, 1999, reflected that they took the property "[s]ubject to easements and restrictions of record." (Pet. App. 4a; Appellants' App.

113a). As a result, the Hubers purchased the property with notice that the property is subject to the conservation easement described in the Wetlands Permit. (Pet. App. 15a-16a; 51a).

Despite the conservation easement, the Hubers proceeded to continually maintain the property located within it, by mowing and clearing vegetation, placing fill and sod, and allowing the deck, patio and retaining wall to encroach on the easement-- all of which were activities prohibited by the FWPA and the easement. Thus, on July 3, 2002, in response to the complaint of a neighbor who had observed these prohibited activities, NJDEP Inspector Michael Nystrom conducted the inspection of which the Hubers complain. (Pet. App. 5a; Huber Hr'g Tr. 55, Feb. 20, 2008). Other NJDEP inspectors conducted later inspections.[3] (Pet. App. 26a). Observations made during several of these inspections led the NJDEP to issue a Notice of Violation on September 5, 2002, and an Administrative Order and Notice of Civil Administrative Penalty Assessment for these violations on October 2, 2003, thereafter challenged by the Hubers. (Pet. App. 7a; Appellants' App. 1a, 121a).

Inspector Nystrom, the NJDEP representative who conducted the first inspection of the property on July 3, 2002, testified during a hearing in the New Jersey Office of Administrative Law that he went to the Hubers' property to verify the presence or absence of wetlands there. (Huber Hr'g Tr. 55, 100, Feb. 20, 2008). He vividly

3. The Hubers have not alleged that they objected to any of the NJDEP's inspections of their property conducted after July 3, 2002.

recalled that the Hubers were working in the yard that day and that he introduced himself and asked for permission to enter the property, which they granted. (Pet. App. 9a; Huber Hr'g Tr. 56, 62-63, Feb. 20, 2008). Additionally, the FWPA empowered Inspector Nystrom "to enter any property, facility, premises or site for the purpose of conducting inspections, sampling of soil or water, . . ., and for otherwise determining compliance with the provisions of the FWPA." N.J. Stat. Ann. § 13:9B-21(m). The Administrative Law Judge ("ALJ") deemed Inspector Nystrom's testimony credible. (Pet. App. 75a; Huber Hr'g Tr. 62-63, Feb. 20, 2008).

Mr. Huber, on the other hand, testified that he was on vacation at the beach during this inspection and, as a result, he did not consent to it. (Pet. App. 9a; Huber Hr'g Tr. 58, Feb. 21, 2008). Unlike the findings with regard to Nystrom's testimony, the ALJ did not make any findings concerning the credibility of Huber's testimony. *Id.* And even more importantly, the Hubers did not challenge the NJDEP's right to inspect their property or complain about the NJDEP's inspection until they appealed to the Appellate Division. (Pet. App. 23a). Throughout the administrative process, the Hubers never claimed the NJDEP should have obtained a warrant and never moved to suppress Nystrom's testimony concerning his observations that day or the photos he took.[4] Consequently, although the ALJ made general findings concerning the nature, extent and results of the inspection, he did not

4. Indeed, the Hubers had numerous opportunities to challenge the admissibility of the evidence collected by Inspector Nystrom prior to and during the three-day hearing before the ALJ but failed to do so. Nor did they raise to the Commissioner in their exceptions to the ALJ's decision that the evidence was inadmissible.

make findings specific to the Fourth Amendment since the Hubers did not raise the issue.

During the inspection, Inspector Nystrom verified the presence of wetlands on the Hubers' property within the conservation easement. (Pet. App. 26a-27a). The inspection consisted of his taking photographs of the alleged violations in the conservation easement, performing three temporary 8 to 12 inch deep soil borings, using a hand auger, within the area of the easement, and logging his visual observations of the property's condition, including his assessment of the soil borings. (Pet. App. 9a, 22a, 25a-26a; Appellants' App. 132a-137a). As to the soil borings, Nystrom selected the boring locations consistent with the wetlands and transition areas within the conservation easement that had been delineated by a valid Letter of Interpretation ("LOI") dated May 28, 1991, (Pet. App. 2a, 27a; Appellants' App. 106a-108a), and extracted soil from the ground at each location, visually inspecting it to determine whether it demonstrated characteristics consistent with wetlands soil and hydrology, and then replacing the soil in the ground. (Pet. App. 5a-6a). He also visually examined the area surrounding each soil boring to determine if it contained hydrology consistent with wetlands and hydrophytic (water-loving) vegetation. *Id.* Inspector Nystrom neither attempted to access nor actually entered the Hubers' residence or deck; rather, he limited his inspection to the area of the conservation easement. (Huber Hr'g Tr. 49-51, 111, Feb. 20, 2008).

Based on his observations, Inspector Nystrom confirmed that the property located within the conservation easement contained wetlands. (Pet. App. 27a). He saw that fill in the form of soil and sod had been placed within wetlands and transition area, (Huber Hr'g Tr. 41-46, Feb.

20, 2008), and that both the wetlands, (Huber Hr'g Tr. 52-54, Feb. 20, 2008), and transition areas, (Huber Hr'g Tr. 49-51, Feb. 20, 2008), had been mowed in violation of the conservation easement and the FWPA. (Pet. App. 5a, 27a).

It was not until one of the later inspections conducted by Inspector Armand Perez on August 15, 2002, that the NJDEP observed that the deck, patio and retaining wall behind the Hubers' home were partially constructed within the area of the conservation easement. (Pet. App. 6a; Huber Hr'g Tr.122-127, Feb. 19, 2008). During these subsequent consensual inspections, Inspector Perez also independently confirmed that the fill material and illegal lawn were located within the conservation easement. (Huber Hr'g Tr. 82-85, Feb. 19, 2008). In addition to his own observations of the Hubers' ongoing violations, Inspector Perez also relied on his review of: (1) the Wetlands Permit and LOI (Pet. App. 26a; Huber Hr'g Tr. 53-55, 97, Feb. 19, 2008); (2) charts and maps which visually depict the conservation easement boundaries on the property (Pet. App. 7a; Huber Hr'g Tr. 53-55, Feb. 19, 2008); (3) aerial photographs of the property showing its pre- and post-disturbance condition (Pet. App. 9a; Huber Hr'g Tr. 61-82, Feb. 19, 2008); and (4) photographs, taken by a neighbor, showing the mowed conservation easement and Mr. Huber placing fill material within it. (Pet. App. 22a, 27a; Hr'g Tr. 99-102, Feb. 19, 2008; Hr'g Tr. 45, Feb. 20, 2008). Nothing in the record establishes, nor have the Hubers asserted, that their property is fenced or otherwise obstructed from the public's view.

Finally, during the hearing, Mr. Huber either admitted or did not dispute these violations. In fact, he acknowledged placing fill, (Pet. App. 5a, 22a, 27a; Hr'g Tr. 14, Feb. 19, 2008; Hr'g Tr. 199-200, Feb. 20, 2008),

and continually mowing the lawn within the conservation easement. (Pet. App. 10a, Hr'g Tr. 206, Feb. 20, 2008). Further, the Hubers did not dispute that the deck, patio and retaining wall encroached on the conservation easement. (Pet. App. 27a; Hr'g Tr. 119-121, Feb. 21, 2008).

As a result, the Appellate Division affirmed the Commissioner's decision requiring that the wetlands and transition areas be restored to their original state and imposing a penalty of $4,500, determining that "[t]he evidence from Nystrom's inspection, along with substantial other credible evidence which we have described, amply supports the Commissioner's final decision." (Pet. App. 27a). The Appellate Division also determined that the NJDEP did not need a warrant to inspect the Hubers' property because it was conducted pursuant to the "comprehensive regulatory scheme under the FWPA." (Pet. App. 24a). Specifically, the court held that "the Wetlands Permit applicable to this property brought it directly under the regulatory arm of the DEP just as much as if it were a regulated industry.... [Inspector Nystrom] did not have to secure an administrative search warrant to fulfill his regulatory duties." (Pet. App. 25a; 21a).

Following the Appellate Division's decision, the Hubers filed a petition for certification with the Supreme Court of New Jersey on February 17, 2010 . Their petition was denied on June 18, 2010, with costs and without a written opinion. (Pet. App. 87a). The Hubers then filed a motion for leave to file a motion for reconsideration as within time and an underlying motion for reconsideration with the Supreme Court of New Jersey. These motions were also denied.

REASONS FOR DENYING THE PETITION

A petition for a writ of certiorari will only be granted for compelling reasons, which are absent here. The Hubers contend that the NJDEP's inspection of their property implicates the Fourth Amendment because it did not obtain a search warrant before conducting its inspection. In doing so, they neglect to highlight for the Court a crucial, operative fact--that their property is subject to a valid, recorded conservation easement, designed to preserve the land within the easement as a wetlands and wetland transition area, in perpetuity, for the benefit of the public under the FWPA.

The NJDEP maintains that it was not required to obtain a search warrant before conducting its inspection of the portion of the Hubers' property subject to the conservation easement. Rather, the easement permitted the NJDEP to enter it to determine if wetlands or transition areas had been disturbed and to collect samples, if necessary, to assist with delineating the wetlands' boundary. This is precisely what the NJDEP did. It did not attempt to inspect the Hubers' residence, and its inspection did not damage the property or unduly burden the Hubers. In short, it was reasonable.

The Hubers posit that the Appellate Division's decision has far reaching implications because it misconstrues this Court's Fourth Amendment jurisprudence. Not so. The Appellate Division's judgment that the NJDEP did not require a warrant is sound and in harmony with myriad cases interpreting the Fourth Amendment. Under *Katz v. United States*, 389 U.S. 347 (1967), and its progeny, the Hubers had no actual expectation of privacy in the portion of the property subject to the easement that society would recognize as reasonable, particularly because the

easement is designed to protect the public's interest in crucial wetlands and transition areas, areas which the Hubers spoiled. Thus, the NJDEP's inspection of the easement was not a search under the Fourth Amendment.

Even if the inspection were a search, the NJDEP was not required to obtain a warrant because, as this Court has repeatedly recognized in a variety of contexts and the Appellate Division recognized in this case, warrantless searches are permissible when the government can satisfy the special needs exception. Here, the NJDEP was enforcing a comprehensive regulatory scheme, not pursuing a criminal investigation, when it entered the conservation easement. The easement, reflected in the Hubers' deed and title history, significantly diminishes the Hubers' expectation of privacy with respect to the portion of their property in which the government had a protected interest.

In support of their Fourth Amendment claims, the Hubers cite to the Second Circuit's decision in *Palmieri v. Lynch*, in an attempt to portray the Appellate Division's decision as another case leading down a "slippery slope." 392 F.3d 73 (2d Cir. 2004), *cert. denied*, 546 U.S. 937 (2005). Yet, *Palmieri* supports the constitutional validity of the NJDEP's inspection. Notably, this Court denied Palmieri's petition for a writ of certiorari under facts similar to those presented here, with one addition. Unlike the property in *Palmieri*, the Hubers' property was dedicated to the public's interest by a conservation easement. Given the similar factual circumstances and the existence of the conservation easement, this Court should deny the Hubers' petition as it did Palmieri's.

In sum, nothing in the Hubers' petition warrants this Court's review, and their petition should be denied.

LEGAL ARGUMENT

1. The DEP's Inspection of the Portion of the Hubers' Property Subject to a Conservation Easement Was Not a Search Under the Fourth Amendment.

The NJDEP was not required to obtain a warrant to inspect the portion of the Hubers' property within the conservation easement. Under New Jersey law, "[a]n easement is an incorporeal interest in land, entitling one person to make some use of another's property; the interest must be a property right protected against the possessor and others." *Mahony v. Danis*, 95 N.J. 50, 58 (1983) (citing *American Law of Property* § 8.5 (1952) and the *Restatement of the Law of Property* § 450 (1944)).[5] The Supreme Court of New Jersey has also accepted the "universally accepted principle of easement law that the landowner may not, without the consent of the easement holder, unreasonably interfere with the latter's rights or change the character of the easement so as to make the use thereof significantly more difficult or burdensome" and the "corollary principle that there is, arising out of every easement, an implied right to do what is reasonably necessary for its complete enjoyment, that right to be exercised, however, in such reasonable manner as to

5. The *Restatement* defines an easement as an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and (e) is capable of creation by conveyance. *Mahoney*, 95 N.J. at 58.

avoid unnecessary increases in the burden upon the landowner." *Tide-Water Pipe Co. v. Blair Holding Co., Inc.*, 42 N.J. 591, 604 (1964) (internal citations omitted). Here, the Appellate Division concluded, as a matter of New Jersey law, that the NJDEP was authorized to enforce the conservation easement. (Pet. App. 20a-21a). This necessarily means that, like the holder of any easement, NJDEP may reasonably access and inspect the easement. The record demonstrates that the NJDEP's inspection of the conservation easement was entirely reasonable.

Although the Hubers neglect to mention its existence in their petition, the conservation easement is crucial to a Fourth Amendment analysis. Under the Fourth Amendment people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." United States Constitution Amendment IV. While the Hubers urge that the NJDEP ran afoul of the Fourth Amendment because it failed to obtain a warrant before inspecting the portion of the property covered by the easement, their argument presumes there was a search. However, by virtue of the easement's very existence, there was no search under the Fourth Amendment because the NJDEP was effectively exercising its interest in the Hubers' land when it entered to determine whether the Hubers had violated the easement's restrictions.[6] Having encroached upon and

6. Although whether there was a search was not squarely raised below, the NJDEP has consistently maintained that it was not required to obtain a warrant before inspecting the Hubers' easement, and this Court may consider these arguments. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992)(parties not limited to the precise arguments they made below concerning federal claim); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)(parties not confined

despoiled the public's conservation easement, the Hubers are hard pressed to rely upon the Fourth Amendment to deny environmental officials access to the very land in which the government enjoyed a protected legal interest and had an obligation to safeguard.

Observing that the "Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), this Court established a two-step test to determine whether a search has occurred. A Fourth Amendment search does not occur unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (aerial surveillance of private homes and surrounding areas does not constitute a search); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (warrantless use of pen register did not violate Fourth Amendment). Under this test, the inspection of the portion of the Hubers' property subject to the conservation easement was not a search under the Fourth Amendment.

The Hubers can assert no expectation of privacy, much less a reasonable one, in the portion of their yard covered by a conservation easement containing restrictions subject to enforcement by a government entity. As the ALJ found and the Appellate Division affirmed, the easement and

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to the same arguments advanced in the courts below upon federal question there discussed); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 245 (2000)(recognizing same); *cf. Dandridge v. Williams*, 397 U.S. 471, 475-476, n. 6 (1970) (Court may consider grounds supporting the judgment in favor of the prevailing party below different from those relied on or even considered by the lower court).

Wetlands Permit were recorded in the Hubers' chain of title and referenced in the Hubers' deed, putting them on notice that the government had the right to enter upon and inspect it. (Pet. App. 14a-17a; 51a). Given the comprehensive legislative scheme enabling the NJDEP's oversight of wetlands and transition areas, it was authorized to access the easement to determine whether the Hubers had honored the easement's restrictions. (Pet. App. 21a).

Significantly, the inside of the Hubers' home was not the subject of the inspection. And, just as the NJDEP did not inspect the inside of the home, the NJDEP did not attempt to monitor the Hubers' lifestyle activities on their deck, patio or other areas that might be within the home's curtilage. Nor is this a case about covert governmental surveillance of individuals to establish whether they were committing environmental crimes, such as illegal dumping of hazardous chemicals. Rather, the July 3, 2002 inspection of the easement focused entirely on the property, not the Hubers, and was confined to the land within the easement to determine the extent of the encroachment upon it.

Further, the July 3, 2002 inspection was reasonable. Nystrom inspected the easement during the day, while, according to him, the Hubers were home. He asked if he could enter the easement, and, he reports, the Hubers acquiesced. But, even if they had not (they claim they were not home and thus not able to consent), he testified he was authorized to enter anyway, which was correct given the easement and the NJDEP's comprehensive statutory authority to regulate wetlands and transition areas. His inspection consisted primarily of making visual observations, which he memorialized in a written log and

in photographs, and performing three small soil borings, which he replaced after he visually examined them. Under these circumstance, the Hubers cannot fairly claim the inspection was unreasonable.

Moreover, nothing in the record suggests that the Hubers had any subjective expectation of privacy in the easement area Nystrom inspected. The Hubers never claimed that the easement was shielded from view by a fence or shrubbery or that they had posted anything like a "no trespassing" sign. Indeed, their neighbor supplied photographs of Mr. Huber placing fill in the easement, and, at the administrative hearing, the NJDEP introduced aerial photographs of the spoliation of the easement over time. And, the Hubers did not own the waterway, flowing along their property, over which the easement could readily be seen from adjacent property. *See, e.g.*, *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 864-865 (1974)(state health inspector's action in conducting daylight, visual pollution tests of smoke being emitted from a business' chimneys, from the outdoor premises of the business without a warrant or the owner's consent, was not an unreasonable search within the meaning of the Fourth Amendment because inspection fell within "open fields" exception).

For these same reasons, society would reject, as unreasonable, the Hubers' claim of a privacy interest in the area of the conservation easement. This is so given the easement's restrictions encompassing the wetlands and transition areas and the NJDEP's critical role in protecting and preserving these valuable environmental resources for the public's benefit and protection. The Appellate Division and the Commissioner recognized

the sensitivity of these areas and discussed at length the NJDEP's authority and obligation to protect them. *See* Pet. App.18a-21a; 43a-45a. Indeed, the New Jersey Legislature declared the vital importance of wetlands and transition areas, finding that they "provide a variety of important environmental functions, including protecting and preserving drinking water, providing a natural means of flood and storm damage protection, serving as transition areas between dry land and water courses, providing essential habitats for the majority of New Jersey's fish and wildlife, and maintaining a critical base flow to surface waters through the gradual release of stored flood waters." (Pet. App. 43a, citing N.J. Stat. Ann. § 13:9B-2). Thus, by enacting the FWPA the Legislature sought "to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance." *Id.* The Hubers' claim of a privacy interest in their activities within the easement, inimical to the public's interest and contrary to the express provisions of the FWPA, its implementing regulations and the easement itself, is dubious.

In sum, the Hubers had no reasonable expectation of privacy within the portion of their property covered by the conservation easement, and the NJDEP's inspection was not a search under the Fourth Amendment.

2. Even If Its Inspection of the Portion of the Property Subject to the Easement is a Search Under the Fourth Amendment, the NJDEP Was Not Required to Obtain a Warrant.

Issuance of a warrant is normally a constitutional prerequisite to a valid search or seizure of private property.

New York v. Burger, 482 U.S. 691, 699-704 (1987). But the warrant requirement is relaxed when officials act to enforce regulatory provisions designed to protect the public at large, rather than to advance a criminal prosecution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 80-81 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *see also Camara v. Mun. Court of S.F.*, 387 U.S. 523, 538 (1967) (observing that code enforcement system, based on "reasonable legislative or administrative standards" has been found to meet probable cause requirements without individualized suspicion for such inspections). Hence, "[s]earches pursuant to a regulatory scheme need not adhere to the usual requirements" where special governmental needs are present, *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), and warrantless searches have been allowed when they were conducted pursuant to some legislated regulatory scheme in situations in which there was found to exist a diminished expectation of privacy.[7] This case presents another in a long line of cases in which

7. The Court has applied the special needs exception to inspections of highly regulated industries, *see, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroads); *New York v. Burger*, 482 U.S. 691 (1987) (businesses that implicate public safety and that traditionally have been closely regulated); *United States v. Biswell*, 406 U.S. 311 (1972) (gun store premises); public school searches, *see, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985); highway roadblocks, *see, e.g., Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driving checkpoint); routine monitoring of probationers, *see, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987); and drug testing of public school children and government employees. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (high school students involved in any extracurricular activity); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (high school athletes); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing).

a court has sustained a warrantless inspection under the special needs doctrine.

In applying the special needs doctrine, a court must weigh the governmental conduct - in light of the purported special need and against the privacy interest advanced - by analyzing three principal factors: (1) "the nature of the privacy interest allegedly compromised by the [challenged governmental conduct]," *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002); (2) "the character of the intrusion imposed by the [challenged conduct]," *id.* at 832; and (3) "the nature and immediacy of the [state's] concerns and the efficacy of the [governmental conduct] in meeting them." *Id.* at 834.

Applying the special needs exception here, the NJDEP did not need a warrant to conduct its inspection. First, as explained above, the nature of the Hubers' privacy interest was substantially diminished, if not eliminated altogether. They simply cannot avoid the fact the property is encumbered by a conservation easement in which the NJDEP enjoys a protected legal interest and has a duty to preserve. The NJDEP, as the holder of the easement, was not required to secure a warrant to access the property subject to the easement. Indeed, the authority to access the easement to check its condition is inherent in the property right that an easement creates. Further, the Hubers had notice of the easement, as it was recorded in their chain of title and noted in their deed, and they are therefore bound by it. (Pet. App.17a). In addition, the Hubers' property was entirely exposed to the public view from the front, side and back, and was not fenced or posted with signs demonstrating a subjective desire to keep their yard private.

Second, the character of the NJDEP's intrusion onto the Hubers' property was minimal. It primarily consisted of a visual and photographic inspection of the easement. Even though the NJDEP manually extracted three soil cores to confirm the presence of wetlands on the property, these soil cores were located along the perimeter of the property, away from the residence and in plain sight from off-property locations, were at most 12 inches deep and caused no permanent damage to the property. (Pet. App. 5a-6a; 25a-26a).

Lastly, NJDEP needed to inspect the property given its substantial interest in prompt and expeditious enforcement of the FWPA. The nature of its concern and the scope of the disturbance on the easement more than validates the inspection. The Appellate Division recognized that the property contained sensitive regulated wetlands and transition areas that the NJDEP has both a compelling interest and obligation to preserve and protect. (Pet. App. 21a). To further this interest, the NJDEP must be able to enter the portion of the property subject to the easement at a reasonable time and in reasonable manner as it did here.

The Hubers rely on *Camara v. Mun. Court of S.F.* for the proposition that the NJDEP should have obtained a search warrant before accessing the conservation easement. In *Camara*, this Court upheld the requirement to obtain a search warrant even though a city ordinance granted its housing inspectors access to occupied residences for the broad purpose of performing "any duty imposed upon them by the Municipal Code." *Camara*, 387 U.S. at 526. The Hubers' reliance on *Camara* is misplaced because, unlike this case, *Camara* did not involve the

government's access to a residence in which it had a property interest, here an easement. Nor was the Hubers' residence the focus of the NJDEP's inspection; rather, that was confined to those outdoor portions of the Hubers' property subject to the conservation easement. Thus, with respect to this portion of the property, there is minimal, if any, need to "safeguard [the Hubers'] privacy and security ... against arbitrary invasions by governmental officials," which is the "basic purpose" for the warrant requirement and this Court's decision in *Camara*. 387 *U.S.* at 528, 534.

In *Camara*, this Court also identified several concerns stemming from the vague and broad administrative inspection scheme at issue there. 387 U.S. at 532. "Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." *Id.* But the concerns related to the occupied residence in *Camara* are not present when considering the regulated wetlands and transition areas involved here. Under the FWPA, there is no question that if NJDEP seeks to conduct an inspection, it will be to inspect only that portion of the property containing regulated wetlands and/or transition areas and not to inspect the occupied residence. N.J. Stat. Ann. § 13:9B-21(m)(NJDEP confined to "conducting inspections, sampling of soil or water, . . ., and for otherwise determining compliance with the provisions of the FWPA"). Thus, the FWPA effectively eliminates "the possibility of criminal entry under the guise of official sanction" and reduces any potential threat to personal and family security -- concerns which

drove this Court in *Camara*. 387 U.S. at 532. Unlike the ordinance in *Camara*, the FWPA provision at issue here carefully balances the public's needs against the rights of the individual.

The Hubers also cite to the Second Circuit's decision in *Palmieri v. Lynch* to suggest that a Fourth Amendment "slippery slope" is forming. The Hubers' vast overstatement aside, the NJDEP's limited inspection of their easement was valid as the Second Circuit concluded under similar circumstances in *Palmieri*, a case in which this Court denied the landowner's petition for certiorari. There, the Circuit Court carefully balanced the minimal intrusion onto the property against the significant governmental interest in protecting natural resources and the public beaches and waterways, and concluded that the government's entry into Palmieri's fenced backyard without a warrant to conduct an inspection connected to Palmieri's application for a wetlands permit did not violate the Fourth Amendment. Rather, the environmental regulatory scheme authorizing warrantless searches was sustained under the special needs test. So too, here. The similarity of the factual underpinnings of both cases and the added element here -- that the regulated property was dedicated to the benefit of the public by a conservation easement -- compel the same result.

The Second Circuit's decision in *Palmieri*, like the Appellate Division's decision here, is focused and limited. First, as here, the warrantless inspection in *Palmieri* was conducted pursuant the narrow scope of an environmental regulatory scheme that only provided for the warrantless inspection of property containing regulated wetlands, not inspection the residence itself. *See Palmieri*, 392

F.3d at 81. Second, like the Hubers, Palmieri owned property that was subject to an environmental regulatory scheme. *Id.* at 82. Third, Palmieri, like the Hubers, had a diminished expectation of privacy. *Id.* at 82. Last, as here, the inspection in *Palmieri* was conducted pursuant to an important and compelling need to protect the sensitive and valuable regulated wetlands at issue. *Id.* at 84-85.

Under these circumscribed sets of facts, neither the Appellate Division's decision nor the Second Circuit's decision in *Palmieri* represents a threat to the general privacy rights guaranteed by the Fourth Amendment. Instead, the warrantless searches upheld by these decisions apply to only a small and closely regulated subset of the general population. *Accord Griffin,* 483 *U.S.* at 875. Accordingly, the Appellate Division's decision upholding the NJDEP's inspection as reasonable within the context of the Fourth Amendment offers no compelling reason for this Court's review.

Here, the Appellate Division concluded that the NJDEP had statutory authority to enter the property. In reaching its decision, the Appellate Division carefully considered the factual circumstances surrounding the Hubers' knowing violation of the FWPA and the corresponding Wetlands Permit, and their encroachment upon the enforceable conservation easement. (Pet. App.17a-21a). The Appellate Division observed that New Jersey statutory schemes permitting agencies to conduct warrantless inspections have generally involved a pervasively or closely regulated industry and an administrative inspection scheme, (Pet. App. 23a-24a (internal citations omitted)), and, in reviewing these schemes, New Jersey courts have adopted the analytical

framework set forth in *Burger*. (Pet. App. 24a). After reviewing the three criteria[8] that must be met in order for a warrantless search of a closely regulated industry or activity to be deemed constitutionally reasonable, the Appellate Division concluded the *Burger* analysis is satisfied by the comprehensive regulatory scheme under FWPA, finding that "[t]he Wetlands Permit applicable to this property brought it directly under the regulatory arm of the DEP just as much as if it was regulated industry." Since inspection is authorized by the FWPA to ascertain compliance with the Act, *see* N.J. Stat. Ann. §N.J.S.A. 13:9B-21(m); *see also* N.J. Stat. Ann. §13:1D-9(d), the NJDEP was not required to obtain an administrative search warrant.

The Hubers claim that warrantless inspections of "pervasively regulated businesses" are at least two degrees removed from warrantless inspections of "a home." (Pet. 18). There was no inspection of the "home" here. The Appellate Division did not find that the Hubers were literally operating a closely regulated business on their property but rather concluded that the wetlands and transition areas on their property were subject to such a comprehensive regulatory scheme, whose breadth and importance is well-settled in New Jersey case law, that a portion of their property was akin to a closely regulated industry. The closely regulated industry exception is but

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8. There must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made; the warrantless inspection must be "necessary to further [the] regulatory scheme;" and the regulatory inspection "in terms of the certainty and regularity of its application," must provide a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 702-703 (internal citations omitted).

one example of application of the special needs doctrine. *See Burger*, 482 U.S. 702. Even if it does not squarely apply here, as explained above, the doctrine is satisfied, and a search warrant was not required.

Even if the Appellate Division blurred or extended the application of the closely regulated entity exception here, the Hubers' petition does not present compelling reasons warranting this Court's exercise of its power of certiorari. As explained above, the Appellate Division's decision is in harmony with this Court's decisions interpreting the Fourth Amendment. That is, the NJDEP's inspection does not meet the test for a search, and even if it were a search, it was permitted under a long line of cases authorizing warrantless searches under the special needs doctrine. And, the Appellate Division's decision is unpublished and consequently of no precedential value. N.J. Ct. R. 1:36-3. So, even if that court's application of the closely regulated business exception to the warrant requirement was flawed, as the Hubers claim, its judgment is still correct for the reasons explained above, and the NJDEP was permitted to enter and inspect the portion of the Hubers' property subject to the conservation easement without first obtaining a search warrant. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) (Supreme Court reviews judgments, not statements in opinions; "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Finally, the Hubers contended in the Appellate Division that, because Nystrom's inspection of the conservation easement was conducted without a warrant, the evidence obtained should have been suppressed.

(Pet. App. 12a). The exclusionary rule is not generally applied in the administrative context, particularly when the benefits of exclusion are outweighed by its cost. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984)(holding that exclusionary rule does not bar the introduction of unconstitutionally obtained evidence in civil deportation proceedings); *see also Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) (holding that exclusionary rule does not bar introduction of unconstitutionally obtained evidence in parole revocation hearing); *United States v. Janis*, 428 U.S. 433, 454 (1976) (holding that exclusionary rule does not bar the introduction of unconstitutionally obtained evidence in federal civil tax proceedings); *United States v. Calandra*, 414 U.S. 338, 347-352 (1974) (holding that exclusionary rule does not bar introduction of unconstitutionally obtained evidence in grand jury proceedings).

Nothing compels a different conclusion here, particularly where there were independent sources of information available such as aerial photographs and photographs taken by the Hubers' neighbor, as well as Mr. Huber's own admissions concerning his mowing and placing fill within the easement, all of which establish that the Hubers disturbed the wetlands and transition areas thereby violating the conservation easement restrictions.

What is more, at no time prior to or during the hearing did the Hubers move to suppress the evidence gathered on July 3, 2002 , *i.e.* Nystrom's visual observations of the soil borings and easement or his photographs. Rather, they waited until they appealed to claim that the evidence should have been suppressed for lack of a warrant. The NJDEP submits that, had the Hubers filed a motion to

suppress, the ALJ would have rejected it, after making findings of fact requisite to such analysis.[9]

CONCLUSION

For the foregoing reasons, the Hubers' Petition for a Writ of Certiori should be denied.

Respectfully submitted,

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9. Indeed, this Court has recognized that federal questions not raised in the trial court "are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

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