

April 18, 2018

The Honorable Susan Talamantes Eggman
Member, California Assembly
California State Capitol, Room 4117
Sacramento, California 95814

The Honorable Patrick O'Donnell
Chair, California Assembly Committee on Education
1020 N Street, Room 159
Sacramento, California 95814

Re: Assembly Bill 2926 (as amended March 20, 2018)

COMMENTS

Dear Assembly Member Eggman:

Pacific Legal Foundation (PLF) is a nonprofit civil rights law firm widely recognized as the top property rights watchdog in the United States. We are writing to provide our analysis of Assembly Bill 2926 (Eggman), to inform stakeholders and legislators of considerations that we think may be valuable in their decisions on the bill. In our view, AB 2926, if adopted, will empower the resulting advisory committee to consider “health and safety” inspections of private homes that may violate the protections against unreasonable searches contained in the Fourth Amendment.

The Fourth Amendment

The Fourth Amendment provides that “[t]he 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 or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹ Both reasonable expectations of privacy,² *and* property rights are protected by the Fourth Amendment.³ Generally speaking, to be constitutional, the search of seizure of a person, their property, or their home, by government agents must occur pursuant to a warrant based upon probable cause and

¹ U.S. Const. amend. IV (emphasis added).

² See *Katz v. United States*, 389 U.S. 347 (1967).

³ See *United States v. Jones*, 565 U.S. 400 (2012).

issued by a neutral magistrate. And while there are several narrowly drawn exceptions to the warrant requirement, these exceptions do not operate as a complete license for the government to search or seize at will and for any reason.⁴

Special Protection for Private Homes

Under the privacy-based approach first laid down by Justice Harlan’s concurrence in *Katz v. United States*, whether a search requires a warrant under the Fourth Amendment depends upon: 1) Whether a person has exhibited an actual (subjective) expectation of privacy, and 2) Whether the expectation is one that society is prepared to recognize as reasonable.⁵ Both the majority opinion,⁶ and Justice Harlan’s concurrence,⁷ recognized the high expectation of privacy due to private citizens in their own homes. This recognition has remained steadfast at the Supreme Court.⁸ The Fourth Amendment draws “a firm line at the entrance to the house.”⁹ Furthermore, the Supreme Court has in recent years reinvigorated a property-based approach to the Fourth Amendment.¹⁰ Again, private homes have been specifically singled out by the Court as deserving heightened protection.¹¹ “[W]hen it comes to the Fourth Amendment, the home is first among equals.”¹²

Limitations on Administrative Searches

The legislature may wish to be particularly wary of the idea that routine warrantless searches of the private homes of home schoolers would fall under the so-called “administrative search” theory, which is a very limited exception to the Fourth Amendment’s warrant requirement. While officials can obtain warrants for “area inspections” to further public health and safety in specific settings, where either the government searches every person, place, or thing in a specific location or involved in

⁴ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (“[T]he Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.”).

⁵ *Katz v. United States*, 389 U.S. at 360 (Harlan, J., concurring).

⁶ *Katz v. United States*, 389 U.S. at 359.

⁷ *Katz v. United States*, 389 U.S. at 360 (Harlan, J., concurring).

⁸ “[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.” *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

⁹ *Id.* at 40.

¹⁰ See *United States v. Jones*, 565 U.S. 400 (2012).

¹¹ See *Florida v. Jardines*, 569 U.S. 1 (2013).

¹² *Id.* at 6.

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a specific activity or where groups of individuals with reduced expectations of privacy are searched, homeowners or leaseholders have a “constitutional right to insist that the inspectors obtain a warrant to search...”.¹³ In addition, “to be constitutional, the subject of an administrative search must, among other things, be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.”¹⁴ Unlike administrative searches previously held to be constitutional, home schooling families do not have a lowered expectation of privacy, like a public school student who is suspected of carrying contraband.¹⁵ Just because private citizens have opted to home school their own child or children legally under California law does not mean that they have a lowered expectation of privacy in their own homes.

Conclusion

The implementation of AB 2926 will encourage and empower the resulting advisory committee to consider “health and safety” inspections of private homes that may violate the protections against unreasonable searches contained in the Fourth Amendment. Thank you for taking the time to consider our views as you consider AB 2926. If you have any questions regarding this analysis, please feel free to contact Timothy Snowball at Pacific Legal Foundation, by telephone at (916) 503-9034 or by email at tsnowball@pacificlegal.org.

Sincerely,



TIMOTHY R. SNOWBALL
Attorney

cc: Vice-Chair Kevin Kiley
Members, CA Assembly Committee on Education
California Assembly Committee on Education Staff
Republican Policy Staff

¹³ *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 540 (1967).

¹⁴ *Los Angeles v. Patel*, 135 S. Ct. 2443, 2446 (2015).

¹⁵ *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).