No. 04-1067

IN THE

Supreme Court of the United States

State of Georgia,
Petitioner,

v.

Scott Fitz Randolph,
Respondent.

On Writ of Certiorari
to the Supreme Court of Georgia

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Is a warrantless search of the home valid on the basis of the consent of one occupant over the express objection of another?

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Respondent Scott Fitz Randolph respectfully requests that this Court affirm the judgment of the Supreme Court of Georgia in this case.

STATEMENT OF THE CASE

1. On July 6, 2001, police responded to a report of a domestic dispute between respondent Scott Fitz Randolph and his estranged wife. The couple had separated several months before, and she had left with the couple's son, as well as most of her belongings, to stay with her family in Canada. On July 4, 2001 – approximately thirty-six hours before the police were called to the house – she arrived at the house to collect

her remaining belongings and return to Canada. Oct. 3, 2002 Suppression Transcript (Suppress. Tr.) 23-24.

On the morning of July 6, respondent had taken the couple's son to a neighbor's house in an attempt to prevent his estranged wife from taking their son out of the country again or, more generally, traveling with him while she was under the influence of drugs and alcohol. Suppress. Tr. 6, 24, 27.

Mrs. Randolph responded by calling the police. Suppress. Tr. 28. When police arrived, they faced dueling allegations. Mrs. Randolph contended that respondent had been using cocaine. He denied that accusation, contending instead that *she* had been using cocaine and had also been drinking heavily. The officer later testified that "there was a lot of animosity going on. This was a marriage about to break apart." *Id.* 15-16.

The police requested permission from respondent, who is an attorney, to search the residence without a warrant. He flatly denied them consent. Suppress. Tr. 8, 29. He also contacted the owners of the house – his parents, to whom he personally paid rent – who advised the police by phone that they also did not consent to a search of the premises. *Id.* 30, 38.

Notwithstanding that consent had been expressly denied by both respondent and the owners of the house, the police nonetheless secured consent from respondent's wife. She then took the officers upstairs, to a room that she identified as respondent's personal bedroom. Suppress. Tr. 8. There, the police found a "piece of cut straw" and what appeared to be cocaine. *Id.* 9.

Officers then contacted the district attorney, who advised them to secure a warrant before continuing the search. Suppress. Tr. 9. Mrs. Randolph subsequently withdrew her consent to the search as well. *Ibid.*

The officers collected the materials they had seen, arrested both respondent and Mrs. Randolph, and took them

to the police station. They then obtained a search warrant on the basis of the evidence found in the home. The ensuing search uncovered various evidence of drug use. Suppress. Tr. 10-11.

2. The State indicted respondent for possession of cocaine. Respondent moved to suppress the evidence seized from the home on the ground that it was the fruit of an unlawful search. The trial court denied the motion in a one-page order, summarily ruling that Mrs. Randolph "was still in possession of common authority to grant consent for police to search the marital home," with the asserted consequence that she could admit the police over respondent's objection. J.A. 23.

3. On respondent's interlocutory appeal, the Georgia Court of Appeals reversed. Pet. App. 7a-47a. It acknowledged that this Court had held in *United States* v. *Matlock*, 415 U.S. 164 (1974), that "'the consent of one who possesses common authority over premises or effects is valid as against the absent nonconsenting person with whom that authority is shared,'" because "it is reasonable to expect that a co-habitant with the authority to give such consent might, in fact, exercise that authority." Pet. App. 8a (quoting *Matlock*, 415 U.S. at 170). It saw this case as quite different: when an occupant does not cede control of the premises to another, but rather is physically present and objects to the search, "it is reasonable for [the] occupant to believe his wishes will be honored." *Id.* 9a. The court reasoned as well that extending *Matlock* to cases in which an occupant expressly objects would draw the police into marital disputes, *id.* 11a, and would unreasonably allow the police to ask for consent from numerous occupants successively until one granted permission to search, *id.* 13a.

4. The Supreme Court of Georgia affirmed. Pet. App. 1a-6a. Joining the Florida, Minnesota, and Washington Supreme Courts, the court held that a contemporaneous objection to a warrantless search by one occupant cannot be

overridden by the consent of another. *Id.* 3a (citing *Silva* v. *State*, 344 So. 2d 559, 562 (Fla. 1977); *In the Matter & Welfare of D.A.G.*, 484 N.W.2d 787, 789 (Minn. 1992); *State* v. *Leach*, 782 P.2d 1035, 1040 (Wash. 1989)).[1] The court agreed with the view of those courts and a leading commentator that it is not reasonable to permit one occupant to override the Fourth Amendment rights of another.

5. This Court granted the State's petition for a writ of certiorari. 125 S. Ct. 1840 (2005).

SUMMARY OF THE ARGUMENT

I. The State cannot justify the extension of this Court's third party consent precedents to permit a search over the objection of an occupant of the premises.

A. This Court has recognized a "basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004). The State contends that the search in this case falls within the "consent" exception to the strong prohibition against warrantless searches even though respondent strenuously objected to the search. That argument must be rejected because respondent did not, in this case, "consent" to the search in any ordinary sense of the term and because there is no cause for expanding the "consent" exception to include cases where one resident objects and another consents.

This Court has sustained consent searches because they do not impinge on personal privacy (the individual having waived his right to exclude the police), and because they serve important law enforcement interests when police are unable to secure a warrant. See, *e.g.*, *Zap* v. *United States*, 328 U.S. 624, 628 (1946). The same considerations explain

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[1] Although not cited below, the New York courts agree. See *People* v. *Miller*, 572 N.Y.S.2d 149 (Ct. App. 1991) (reaffirming *People* v. *Mortimer*, 46 A.D.2d 275, 277-78 (Ct. App. 1974)).

this Court's decisions approving searches based on "third party consent" when an individual leaves his property under the control of another person. In that scenario, the individual "assumes the risk" that the person to whom control over the property has been relinquished will admit the police. Prohibiting third party consent would also place on the police the extraordinary burden of locating every person with a privacy interest in property before conducting a consent search.

This Court has never held that a search could be sustained on the basis of "consent" in the very different circumstance in which an occupant makes a clear and contemporaneous objection. In that scenario, the strong presumption of unconstitutionality is not overcome, because the search dramatically intrudes on personal privacy, gives rise to extraordinary personal insecurity, and advances no legitimate law enforcement interest.

B. The State's proposed rule would be devastating to personal privacy. The protections of the Fourth Amendment are at their apex in the home. The State's position, however, would disparage the privacy rights of every person who lives with others – the overwhelming majority of American society today, and more than ninety-eight percent of the population at the time of the Constitution's framing. Without any justification, the State leaps from the fact that individuals choose to live their intimate lives with spouses, children, or social guests to the specious conclusion that persons who share some aspects of their private lives with others are somehow indifferent as to whether the government can conduct wholesale, intrusive searches of their homes. Under the State's approach, the right to privacy is in tension with the very life activities that privacy within the home is intended to protect. Properly understood, the right to live a social life coexists comfortably with the right to exclude the government from one's most private spaces.

When, as in this case, an individual is physically present and lodges a direct and contemporaneous objection to a warrantless search, it cannot seriously be contended that he has relinquished control over the premises and "assumed the risk" that someone else would authorize a warrantless search. The State's approach ignores the best evidence of an individual's decision whether to relinquish his right to exclude the government – namely, his express and contemporaneous statement that he wishes to assert his Fourth Amendment rights.

C. The State's rule should also be rejected because it would create a pervasive sense of personal insecurity. The State contends that every person who lives with others is powerless to ensure privacy in his or her home. Rather, privacy rights on its view are entirely contingent on the acquiescence of every other person in the residence. The police could secure permission to search, over the objection of a resident, from any "occupant," a category of persons that lower courts have held to include even minor children. The police could seek permission from every resident seriatim until a single person – whether out of spite, ignorance of the objections of others, or fear that any objection would be meaningless – overrode the objections of all the others. Such a "right" to privacy is no right at all.

D. The State has not argued, much less shown, that an exception to the ordinary warrant requirement is justified by any "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). Indeed, the fact that a co-occupant who *does* wish to reveal information to the police is free to do so negates the State's claim that warrantless searches in this context serve a legitimate law enforcement function. First, the police can use any information provided by a consenting co-occupant as the basis for a warrant application. Crucially, however, that information will be assessed by a neutral magistrate to determine whether there is probable cause

sufficient to override an objecting occupant's assertion of his right to privacy and will result in issuance of a warrant that carefully balances the right to search with the occupant's interest in privacy. Second, the co-occupant is free to remove contraband from the residence and to give it to police, thereby providing them with both evidence itself and an additional basis for seeking a warrant. Either approach accomplishes legitimate law enforcement interests while better protecting the personal privacy that is seriously undermined by a generalized search of the premises.

II. The State contends that its contrary rule is nonetheless compelled by this Court's "third party consent" rulings. That argument lacks merit.

A. The State rests its position on this Court's statements that occupants may validly grant third party consent "in their own right" so long as they have "common authority" over the premises. *Matlock*, 415 U.S. at 171 & n.7. Those statements did not purport to decide the question presented here, as this Court has never addressed the question whether a search could be sustained on the basis of "consent" notwithstanding the clear objection of a person with a privacy interest in the premises.

Neither of the cited statements from *Matlock* in any event is contrary to respondent's position. When control over the premises has been relinquished, the occupant who grants consent does so "in his own right." Persons with "common authority" are simply those who presumptively exercise control over the premises. The relevant point is that the presumption may be overcome by an objection. The very fact that the authority is "common" – so that no occupant has superior rights over the other – refutes the State's suggestion that this Court's precedents recognize an inviolate right of each occupant to admit the police, notwithstanding the objection of the others.

B. The State notably fails to identify any *source* for the supposed right of each occupant to override the others'

objection to a search by the police. Despite the arguments advanced by the Solicitor General, the common law of property provides no basis for the State's position. Even assuming that an occupant would have had the right at common law to admit a guest over his co-occupant's objection (and the Solicitor General fails to establish that such a right exists), a long line of precedents holds that Fourth Amendment rights are not dependent on whether the police could be admitted or excluded under the law of property. Such an argument in any event would not justify the State's position, under which individuals who have "common authority" over the premises but who *do not* have property rights (*e.g.*, children living at home) nonetheless would be able to override the Fourth Amendment rights of occupants who *do* (*e.g.*, their parents).

C. The State's central argument is that the source of the power of persons with "common authority" over the premises to admit the police is the fact that their co-occupants have a "reduced expectation of privacy" as a necessary consequence of living with others. This theory seems to rest on supposed social expectations about the relationship between co-occupants in shared living spaces. The State and its *amici* advance two variations on this theory, neither of which is persuasive or consistent with this Court's precedents.

1. The State's principal contention – or at least its assumption – is that occupants anticipate that their co-occupants will invite guests into the residence over their objection. That position cannot be reconciled with this Court's decision in *Minnesota* v. *Carter*, 525 U.S. 83 (1998), which held that even individuals who *lack* property rights (in that case, an overnight guest) nonetheless have a recognized expectation of privacy because of the commonly shared understanding that a property-owning host would not permit entry – and certainly would not permit the search of a guest's possessions – if the guest objected. It follows *a fortiori* that there is an understanding that an occupant would not admit into the home a third party over the objection of his co-

occupant. In any event, understandings regarding the admission of *social* guests do not determine individual rights with regard to keeping out the *government*, which is the subject of the Fourth Amendment.

2. Nor does the undisputed ability of other occupants to reveal to third parties information gleaned from conversations bear on the question whether those occupants can permit the sweeping intrusion into an individual's privacy that a warrantless search effects. To be sure, this Court has held that when an individual reveals information to a third party, he assumes the risk that that third party may provide that information to the government without a warrant. But those cases differ from this one in two critical ways. First, they involve the disclosure of information. This case, by contrast, involves wholesale government intrusion into a space – the home – that contains a significant amount of material that the individual being searched has *not* revealed to anyone. Second, those cases involve the privacy that attaches to information, as opposed to the home itself, a place that has special importance under the Fourth Amendment.

The judgment of the Supreme Court of Georgia that the warrantless search in this case violated the Fourth Amendment accordingly should be affirmed.

ARGUMENT

I. The Strong Presumption That a Warrantless Search of a Home Is Unconstitutional Cannot Be Overcome When an Occupant Objects to the Search.

The police in this case searched respondent's home – the principal space protected by the Fourth Amendment, see, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) – without his consent or a warrant. "Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989). Those

"well-defined circumstances" include cases of "consent or exigency." *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004). But in all other circumstances, this Court has permitted warrantless searches of a home only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable" and an exception is justified in light of the "balance [of] the governmental and privacy interests." *Skinner*, 489 U.S. at 619.

The State argues that this case falls within the limited exception to the warrant requirement for searches based on the "consent" of an occupant. Its position is that every occupant (*i.e.*, not merely a property owner or leaseholder) has an inviolate right to consent to a search notwithstanding the objection of all of the other occupants (including the property owners). In fact, the State's argument would require a dramatic expansion of the "consent" exception, which this Court has never extended to a case in which an occupant has clearly and contemporaneously objected to the search.

A. This Court Has Approved Searches on the Basis of "Third Party Consent" Only When the Individual Has Voluntarily Relinquished His Right to Exclude the Police.

"Consent" searches are "reasonable," this Court has held, because they impinge on personal privacy only slightly (if at all) while simultaneously furthering a substantial law enforcement interest. No cognizable intrusion on privacy rights occurs in a traditional consent case, given the individual's "voluntary relinquishment" of his right to exclude the police. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973). Consent searches are also a valuable law enforcement tool when officers are unable to secure a warrant. See *id.* at 227.

The same calculus explains this Court's decisions finding searches valid on the basis of "third party consent." Because the Fourth Amendment protects a personal right to privacy,

whether the individual has retained control over the property to be searched or instead has given up control to someone else is highly relevant to the Amendment's application. It is settled, for example, that the right to privacy does not apply to abandoned property. *E.g.*, *California* v. *Greenwood*, 486 U.S. 35 (1988) (trash left outside for pickup). The relinquishment of privacy interests is complete in that circumstance, and the property can be searched and seized without a warrant and without consent. *Ibid.*

In other cases, the individual with a privacy interest only temporarily relinquishes control by leaving the property for a time under the supervision of another. In this circumstance, the Fourth Amendment continues to apply. It has never been suggested, for example, that the police can barge through the front door of a home whenever it happens to be watched by a housesitter.

But the temporary relinquishment of control can nonetheless have Fourth Amendment consequences. This Court has concluded that the person in whose hands the property has been entrusted has the power to consent to a search. The Court has twice approved such searches – once when consent was given by a person to whom the defendant had entrusted the property being searched (*Frazier* v. *Cupp*, 394 U.S. 731 (1969)) and once when one of the occupants of a house consented and none of the others was present or objected (*United States* v. *Matlock*, 415 U.S. 164 (1974)).[2] In these circumstances, the defendant had no complaint that his privacy had been intruded upon. By voluntarily relinquishing *control* over the property, he "assume[d] the risk" that the person to whom the property had been entrusted would admit the police. *Frazier*, 394 U.S. at 740; *Matlock*, 415 U.S. at 171 n.7. While it was possible that the absent party would

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[2] In a third case, *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), the Court held that the Fourth Amendment was not violated if officers made a reasonable mistake about the person's status as an occupant.

have objected had he been there, this Court's decisions reflect the fact that countervailing law enforcement interests required a bright-line, objective rule. Otherwise consent searches would be unadministrable, as it would be impractical to require police to identify, locate, and obtain permission from every occupant of a residence before conducting a warrantless search.

When persons with a privacy interest in the place or thing to be searched either are absent or are present and do not object to the search, the occupant who consents does so with the right to control entry onto the premises. Consent is thus granted by the present occupant "in his own right." *Matlock*, 415 U.S. at 171 n.7. The police are moreover entitled to operate under a bright-line rule that, absent a contemporaneous objection, each occupant with control over the premises has the authority to consent to a search on behalf of those who are absent. "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). If a resident consents in that circumstance, the ensuing search is "reasonable" for purposes of the Fourth Amendment. *Rodriguez*, 497 U.S. at 187.

But this Court has never held – indeed, has never suggested – that the police could search a home over the clear and contemporaneous objection of one of the residents simply because a consenting resident had common authority over the property. Indeed, this Court's cases clearly reject that proposition. For example, the Court's foundational third party consent cases held that hotel employees could not validly consent to the search of guests' rooms, even though the employees had a right to access the room. See *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel clerk); *United States* v. *Jeffers*, 342 U.S. 48 (1951) (assistant manager); *Lustig* v.

United States, 338 U.S. 74 (1949) (manager). Although the hotel owned the room and a guest had granted "implied or express permission" to enter the room "to such persons as maids, janitors or repairmen in the performance of their duties," the Court reasoned that the police in these cases could not reasonably have believed that the guests had relinquished to the hotel the power to admit third parties in their absence. *Jeffers*, 342 U.S. at 51. The Court accordingly held that the searches violated the Fourth Amendment:

> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.

Stoner, 376 U.S. at 489. The Court recognized that permitting third parties to control whether police could enter the premises would make the right to privacy essentially meaningless. "That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." *Id.* at 490. The appropriate course, the Court explained, was instead for the police to seek a warrant and secure the premises in the interim. *Jeffers*, 342 U.S. at 52.

In *Chapman* v. *United States*, 365 U.S. 610 (1961), the Court again held that a supposed third party consent was invalid. This time, the case involved the search of a rented home after the landlord consented to the entry. The search discovered illegal moonshine manufactured by the tenants. This Court held that the landlord could not validly authorize the search because the tenants had not granted him the requisite control over the premises. *Id.* at 616-17. The Court

reiterated that a broad rule rendering the protection from warrantless searches contingent on the actions of third parties would render the Fourth Amendment ineffective. "[T]o uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Ibid.* (alterations in original) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)).

Accordingly, common authority over a premises is not, in itself, sufficient to confer a right to consent to the search of a home where others also have privacy interests at stake. In the "third party consent" cases, common authority was combined with the relinquishment of control over the premises by the absent party. Thus, *Matlock* explained that the Court's precedent held that "the consent of one who posseses common authority over premises" is "valid" only "as against the *absent*, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). It is only in these limited circumstances that it "is reasonable to recognize" that "the others have assumed the risk that one of their number might permit the common area to be searched." *Id*. 171 n.7.

As respondent now demonstrates, the State's attempt to extend this Court's third party consent precedents to the circumstance in which one occupant overrides the objections of the others should be rejected. The State's proposed rule would authorize an extraordinary intrusion into personal privacy. It would create a pervasive sense of insecurity, as every person who lives with others would fear that he was powerless to ensure his privacy in the home. And it would not advance any substantial law enforcement interest.

B. The State's Rule Would Approve an Extraordinary Intrusion into the Core Privacy in the Home That Is the Principal Concern of the Fourth Amendment.

1. This case involves a search of a private home. Despite respondent's express objection, officers intruded into his residence, including his bedroom. The home represents the single most important spatial zone of personal privacy protected by the Fourth Amendment. This Court explained the historical and textual foundation for the unique protection afforded to individual privacy in the home in *Wilson* v. *Layne*:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B.). * * * The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "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 or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amdt. IV (emphasis added).

526 U.S. 603, 609-10 (1999).

This Court's modern precedents unhesitatingly adhere to the original meaning of the Fourth Amendment:

> The axiom that a man's home is his castle, or the statement attributed to Pitt that the King cannot enter and all his force dares not cross the threshold, has acquired over time a power and an independent significance justifying a more general assurance of

> personal security in one's home, an assurance which has become part of our constitutional tradition.

Minnesota v. *Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring). "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed * * *." *United States* v. *U.S. District Court*, 407 U.S. 297, 313 (1972). "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). See also *Payton* v. *New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house.").[3]

This Court has vigorously enforced the personal right to privacy in the home, recognizing that it allows each of us to define our own personal relationships and order our lives apart from the government. "The Fourth Amendment protects 'the right of the people to be secure in their * * * houses,' and it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Carter*, 525 U.S. at 99 (Kennedy, J., concurring). "This Court has characterized that right as 'basic to a free society.' And over the years the Court consistently has been

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[3] Because the home is a specially protected place under the Fourth Amendment, this Court has held, among other things, that officers must first secure an arrest warrant to arrest a suspect in his own home (*Payton*, 445 U.S. 573); must have a search warrant to make an arrest in a third party's home (*Steagald* v. *United States*, 451 U.S. 204 (1981)); may not execute an arrest warrant in the home accompanied by the media (*Wilson*, 526 U.S. 603); and must have a warrant to employ technology not in general public use to discern information about the interior of the premises (*Kyllo*, 533 U.S. 27) and to monitor indiscriminately an electronic device that signals its presence in the home (*United States* v. *Karo*, 468 U.S. 705 (1984)).

most protective of the privacy of the dwelling." *Wyman* v. *James*, 400 U.S. 309, 316 (1971) (quoting *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949) and *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967)). "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). See also *Schneckloth*, 412 U.S. at 242 ("The guarantees of the Fourth Amendment stand 'as a protection of * * * values reflecting the concern of our society for the right of each individual to be let alone.'" (quoting *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966)).

Living with others necessarily imposes a range of compromises on an individual, ranging from authority over the television remote control to noise levels, decor, and the choice of friends. But the fact that virtually all individuals allow others into their homes, and that most individuals in fact share their homes permanently with family members, hardly undercuts their expectations of privacy. At the time of the framing, for example, 98.6% of all households had more than one member, and the average household size varied from roughly six to eleven people. Robert V. Wells, THE POPULATION OF THE BRITISH COLONIES IN AMERICA BEFORE 1776, at 87 tbl. III-7 & 105 tbl. III-16 (1975) (reporting data for Massachusetts and Rhode Island).

Indeed, the intimate associational activities that occur in the home underlie the special constitutional protection accorded to the home. See *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("The Fourth Amendment protects 'the right of the people to be secure in their * * * houses,' and it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people."). The prototypical "marital bedroom," after all, is by definition a shared space. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965) (decrying the possibility of searches that would intrude on the "sacred

precincts of marital bedrooms"); *Lawrence* v. *Texas*, 539 U.S. 558, 564-65 (2003) (extending the protected interest beyond that of married couples). In short, when this Court stated that "[t]he guarantees of the Fourth Amendment stand 'as a protection of * * * values reflecting the concern of our society for the right of each individual to be let alone,'" *Schneckloth*, 412 U.S. at 242 (quoting *Tehan*, 382 U.S. at 416), it was not suggesting that for individuals to be *left* alone, they were required to *be* alone.[4]

2. The State's argument in this Court would permit the government to intrude directly into this core area of personal privacy without making a showing of probable cause and securing a warrant as required by the Constitution. As discussed in Part I-A, *supra*, in this Court's previous cases involving first-person and third-party consent, the government did not intrude on any cognizable privacy interests because the conduct of the individual whose privacy was at stake effectively waived the right to exclude the government. He either granted consent himself or left the property under the control of another person (either by leaving the premises or by not objecting when present[5]), thereby "assum[ing] the risk" that the person in whom control had been vested would admit the police. In both instances, the individuals took steps that could reasonably be expected

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[4] Cf. *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979) (rejecting argument that adult bookstore had reduced expectation of privacy because customers visited the premises); *Stoner*, 376 U.S. at 489 (rejecting argument that hotel guest had reduced expectation of privacy because hotel employees entered the room).

[5] The courts of appeals have recognized in analogous contexts that the failure to state an objection represents assent to a request for permission to search. See *United States* v. *West*, 321 F.3d 649, 651 (CA7 2003); *United States* v. *Stapleton*, 10 F.3d 582, 584 (CA8 1993); see also *United States* v. *Meza-Gonzalez*, 394 F.3d 587, 592 (CA8 2005); *United States* v. *Patten*, 183 F.3d 1190, 1194-95 (CA10 1999).

to "forfeit their constitutional rights." *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991).[6]

Here, by contrast, the State takes the much more extreme position that *merely by living with others* – an activity which is constitutionally protected by the First, Fourth, and Fourteenth Amendments – an individual sacrifices his right to privacy. It thus forthrightly contends that a "reduced expectation of privacy simply grows out of sharing the premises with someone else." Br. 19. The United States makes the similarly sweeping claim that every person is exposed to the prospect that his core Fourth Amendment rights will be overridden, "unless he lives alone, or at least has a special and private space within the joint residence." Br. 15 (quoting *United States* v. *Morning*, 64 F.3d 531, 536 (CA9 1995), cert. denied, 516 U.S. 1152 (1996)).

The State cannot, and does not, dispute that when an occupant makes a contemporaneous objection to a search, he is asserting his right to privacy and is making clear to officers that he has not ceded to another person control over the residence. In that circumstance, it is absurd to suggest that the individual has waived his right to exclude the police and that the search can be deemed "reasonable" on that basis. As the court of appeals concluded, "when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such [a] presumption cannot stand." Pet. App. 12a. It is thus "inherently reasonable that police honor a present occupant's express objection to a search of his dwelling." *Id.* 10a. The United States itself concedes that "[t]he fact that an occupant expresses an objection to a search would matter if, in the absence of such an objection, it is

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[6] See also, *e.g.*, *Zap* v. *United States*, 328 U.S. 624, 628 (1946) ("[W]hen petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.").

assumed that all occupants agree to [be] bound by a consenting party's action." Br. 24. In these circumstances, it manifestly was *not* "reasonable" for an "objectively reasonable officer" (*Muehler* v. *Mena*, 125 S. Ct. 1465, 1472 (2005) (Kennedy, J., concurring)) to conclude that respondent's wife "ha[d] the right to permit the inspection in [her] own right" (*Matlock*, 415 U.S. at 171 n.7).

For essentially the same reason, a resident who is present and has expressly objected to a search has not in any sense "assumed a risk" that his rights will be overridden. As the Georgia Supreme Court explained, quoting a leading commentator: "While one co-inhabitant may have assumed the risk that a second co-inhabitant will consent to a search of common areas in the absence of the first co-inhabitant, the risk assumed by joint occupancy goes no further – the risk 'is merely an inability to control access to the premises during one's absence.'" Pet. App. 2a-3a (quoting 3 LaFave, SEARCH & SEIZURE § 8.3(d), at 731 (3d ed. 1996)).

Stripped of any suggestion that respondent himself voluntarily relinquished his right to exclude the police, the State's position reduces to the claim that his wife had the power to waive his right to privacy. But the Fourth Amendment confers a "personal" right to privacy, not a right that attaches to a group or to a place. It has long been settled that the Amendment protects "the privacy of the individual, his right to be let alone." *Davis* v. *United States*, 328 U.S. 582, 587 (1946). Cf. *Minnesota* v. *Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) ("The people's protection against unreasonable search and seizure in their 'houses' was drawn from the English common-law maxim, 'A man's home is *his* castle.'"). It is precisely the fact that the "rights assured by the Fourth Amendment are personal rights" that underlies this Court's seminal holding in *Rakas* v. *Illinois* that individuals may not object to a search of an area in which they lack any expectation of privacy. 439 U.S. 128, 138 (1978) (quoting *Simmons* v. *United States*, 390 U.S. 377, 389 (1968)).

If "Fourth Amendment rights are personal rights that may not be *asserted* vicariously," *Rakas*, 439 U.S. at 133 (emphasis added), it necessarily follows that they may not be *waived* vicariously either. Yet, permitting the police to disregard an individual's objection to a warrantless search of his home based on the consent of a third party inescapably amounts to a waiver of the objector's personal Fourth Amendment rights. See *Stoner*, 376 U.S. at 489. As the court of appeals recognized, "the right involved is the right to be free from police intrusion, not the right to invite police into one's home. Thus, the issue is not Mrs. Randolph's right to consent to a search, but whether she may waive her husband's right to be free from the search. Given [respondent's] unequivocal assertion of that right, it seems disingenuous to conclude that he waived it." Pet. App. 12a-13a.[7]

C. The State's Proposed Rule Would Deprive Individuals of Any Ability to Protect Their Privacy in Their Homes and As a Result Would

[7] The State asserts that this Court broadly rejected a "waiver" theory of consent searches in *Schneckloth*. Br. 12. The particular terminology – "waiver" versus "voluntary relinquishment" – makes no difference: the point is that individuals have a right to keep out the government that they give up in cases of genuine consent, but that respondent affirmatively invoked here. In any event, the State is incorrect. *Schneckloth* did not reject the idea that consent "waives" a defendant's right to prevent a search but rather rejected the defendant's argument that a consent search is subject to the strict standards applicable to the waiver of "trial rights." 412 U.S. at 241. On that basis, it held that police officers are not required to advise individuals of their right to refuse to consent to a search. *Ibid.* *Rodriguez* subsequently confirmed that "third party consent" does not amount to one person waiving the rights of another when that person has unilateral authority to admit the police to the premises. Such a search is "reasonable." See *Rodriguez*, 497 U.S. at 183 (quoting *Schneckloth* and distinguishing consent searches from waivers of trial rights).

Create an Extraordinary and Pervasive Sense of Personal Insecurity.

1. Refusing to recognize the effectiveness of an objection would engender the personal insecurity that the Fourth Amendment was enacted to prevent. On the State's view, any person's right to be free from warrantless governmental intrusion into his home is contingent on the acquiescence of every other occupant. The insecurity that arises from such a rule is visited upon the entirely innocent and upon persons whose homes are never, in fact, searched. It condemns everyone who lives with others to the constant prospect that the government can invade their privacy.

A right that can freely be overridden in such a fashion is grossly diminished in value. Indeed, it is hard to call such a conditional privilege a "constitutional right" at all. None of us has a genuine personal right to be let alone in our homes if everyone with whom we live at the moment has a superior right – whether out of whim, malice, ignorance, or fear – to admit the government. But that is precisely the State's position. Any occupant has the absolute right to admit the government to search the premises despite the objection of another resident – indeed, despite the objection of *all* the other residents.

The wholly contingent and ephemeral nature of privacy in the home under such a rule is plain. And the sense of personal insecurity that it would it create is extraordinary. For example, the State's position is that a search may be authorized by another resident even in the absence of any suspicion whatsoever, for consent searches are perfectly valid notwithstanding the lack of any suggestion of illegality. See 4 LaFave, *supra*, § 8.1 n.9. The search, when it occurs, will very likely intrude into our most private spaces because the State's rule would permit the police to search wherever there is "common authority" over the premises. Because few individuals distance themselves from their families to the extent of maintaining rooms that are separate and off-limits to

the others, such a search would presumably encompass the entire residence.[8]

Throughout the residence, the police could make the most exacting searches into private spaces. The level of privacy an individual can expect to preserve if the government is permitted to search his house under the theory that he has consented is minuscule. There are no limits on the breadth and depth of searches that rest on "consent" – to the contrary, such searches are notoriously extensive and lack any of the "particularity" required by a warrant. Officers may search through every drawer in every room and every file on every computer. *E.g.*, *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) (consent includes authorization to open containers); *United States* v. *Martinez*, 949 F.2d 1117 (CA11 1992) (consent to search warehouse includes authorization to pry

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[8] Even in the rare instances in which such a separate space was maintained, there would be the significant risk that it would nonetheless be searched because the police mistakenly believed that there was common control over the premises. *Rodriguez*, 497 U.S. at 188-89. In this very case, for example, officers searched respondent's separate bedroom. According to the testimony at the suppression hearing, respondent and his wife were separated; she had returned to the home only to gather more belongings before leaving once again for Canada. Before entering the bedroom in which they found drug evidence during the "consent" search, officers were advised that it was respondent's own bedroom. See *supra* at 2. They had no reason to believe that Mrs. Randolph had authority over that part of the house. And while the trial judge stated summarily that Mrs. Randolph retained common authority over the residence generally (J.A. 23), he made no such finding with respect to the bedroom. Furthermore, respondent was "a practicing attorney [and] had an office in a room of the house." State Br. 3. The State recognizes that the consequence of its position is that even a search of the separate office would be valid if respondent's spouse had "apparent authority" over the residence (*ibid.*), which she very likely would. See, *e.g.*, *United States* v. *Clutter*, 914 F.2d 775, 778 n.1 (CA6 1990).

open trunk of vehicle found inside); *United States* v. *Ibarra*, 948 F.2d 903 (CA5 1991) (consent authorizes police to break into boarded-up attic). "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. 27, 37 (2001). But on the State's view, *no* intimate detail is truly held safe from the government's eyes.

In most residences, numerous individuals could have sufficient "control" – or at least apparent control (see *Rodriguez*, 497 U.S. at 188-89) – to provide consent for sweeping searches. Thus, courts have held that sufficient "control" was exercised by, for example, a landlord who occasionally accessed a tenant's room to clean it. *United States* v. *Aghedo*, 159 F.3d 308 (CA7 1998). Another recurring scenario is consent granted by minor children. *E.g.*, *Clutter*, 914 F.2d 775 (fourteen-year-old and twelve-year-old); *United States* v. *Bethea*, 598 F.2d 331 (CA4 1979) (seventeen-year-old); *State* v. *Lotton*, 527 N.W.2d 840 (Minn. App. 1995) (ten-year-old); *Doyle* v. *State*, 633 P.2d 306, 309 (Alaska App. 1981) (child who appeared to be between the ages of eleven and fourteen); see also *Lenz* v. *Winburn*, 51 F.3d 1540 (CA11 1995) (announcing rule approving consent by minor children). On the State's view, children can freely override their parents' invocation of their Fourth Amendment rights.

In fact, despite the objection of every other occupant, the police would be free (indeed, if the State prevailed, would likely feel obligated) to continue to ask occupants seriatim for permission to search. Here, "after [respondent] had refused to give the officers permission to search," his wife consented. Pet. App. 1a. That is bad enough, but it is hardly the stopping point. Even if the father says "no" to a request to search, then the mother says "no," then the aunt living in the home says "no," there is always the realistic prospect that minor children or the guest in town for the week will say "yes." *E.g.*, U.S. Br. 18 (urging the Court to extend to this context its statement in *United States* v. *Karo*, 468 U.S. 705, 716 n.4 (1984), that

"[a] homeowner takes the risk that *his guest* will cooperate with the Government" (emphasis added)).

Any of these occupants is a potential source of authority to override the Fourth Amendment rights of all the others. None has to be told that the others have refused or that he has the right to do so as well. In effect, the State proposes to constitutionalize a principle that we routinely reject even in childrearing – that if you want something but are told "no," you can just ask the other parent. Such a rule – which places every person's personal privacy in the hands of the least discreet or most ignorant member of the household – is antithetical to the protection afforded to persons in their homes. "[I]f the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of defendant's property after he has expressly denied his consent to such a search. Constitutional rights may not be defeated by the expedient of soliciting several persons successively until the sought-after consent is obtained." Pet. App. 13a (quoting *Lawton* v. *State*, 320 So. 2d 463, 465 (Fla. App. 1975)).

2. This Court has appropriately rejected claims that a search was valid on the basis of "third party consent" when, as here, it would leave individuals powerless to maintain their personal privacy. Thus, as discussed in Part I-C, *supra*, in cases such as *Stoner* v. *California*, 376 U.S. 483 (1964), *United States* v. *Jeffers*, 342 U.S. 48 (1951), and *Chapman* v. *United States*, 365 U.S. 610 (1961), this Court recognized that a rule that placed the Fourth Amendment right to be free from warrantless searches in the hands of third parties would render that right essentially meaningless because individuals would have no way to ensure their personal privacy.

These decisions are controlling here. It is inconceivable that this Court would have permitted the searches in *Stoner* and *Chapman* if the guests or tenants had actually been present and had objected, but that is essentially the rule for which the State is arguing. Like the guest in *Stoner* and the

tenant in *Chapman*, respondent did not relinquish control of the premises to any other person who had the authority to admit the police. Permitting his Fourth Amendment right to privacy in the home to be overridden in this circumstance would render that right a "nullity." *Chapman*, 365 U.S. at 616-17.

D. The State's Proposed Rule Serves No Substantial Law Enforcement Interest.

1. As discussed in Part I-A, *supra*, the Court's previous decisions sustaining consent searches have recognized that any minimal intrusion on privacy that exists after the waiver of the right to exclude the government is offset by the benefits to important law enforcement interests. In particular, when officers lack probable cause to secure a warrant, consent lets them pursue an investigation. In turn, the bright-line rule of *Matlock* is necessary to maintain the viability of consent searches. This Court has declined to construe the Fourth Amendment in a manner that would "create serious doubt whether consent searches could continue to be conducted." *Schneckloth*, 412 U.S. at 229. If consent by the only occupant present at the scene were not a valid basis for a search, it is difficult to see how consent searches could be conducted as a practical matter in many cases. Officers who solicit consent to search from a resident must be able to rely on the permission they receive in the absence of any objection. Otherwise, the police would constantly be obliged to identify and track down all the other occupants, a nearly impossible burden.

By contrast, there is no evidence that legitimate law enforcement concerns require the substantial further step of finding valid "consent" in the face of a clear objection by a person with a privacy interest in the premises. To the contrary, the existence of a cooperating occupant substantially reduces the need for the police to conduct a warrantless search. An occupant may, for example, bring particular items out of the house and give them to the police. The State makes

this very point: "Had [respondent's wife] simply avoided any verbal exchange with police about consent and elected instead to physically retrieve the straw with white residue on it from the upstairs bedroom where it had been in plain view, those voluntary actions would have been constitutionally permissible under [*Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971)]." Br. 17. Of course, the resulting seizure in that scenario is far less intrusive than the generalized search of the premises that the State would authorize based on no suspicion whatsoever. Equally important, a credible cooperating occupant can also provide the police with information sufficient to secure a warrant to search the premises. Credible first-hand observations offered by a resident unquestionably will establish probable cause. Respondent's position thus does not significantly diminish the ability of the police to conduct investigations and leaves ample room for a co-occupant to "cooperate with the authorities" (U.S. Br. 15) and to distance herself from alleged illegality (*id.* 21).[9]

2. The warrant process mandated by the Constitution better balances law enforcement interests and personal privacy. First, when a warrant is required, law enforcement officials will seek to assure themselves that the third party providing damaging information is actually reliable, since otherwise they will lack probable cause. Thus, they may decide not to seek a warrant if the information seems

[9] The State's premise that the occupant granting consent does so voluntarily and enthusiastically is also questionable. Not only may the occupant not know of her right to refuse, but the State's proposed rule would create a classic "prisoners' dilemma" that would encourage co-occupants to abandon the right to privacy provided by the Constitution. When an individual declines to consent to a warrantless search, officers will be free to respond, "Don't you want to cooperate? Maybe we should ask the other people who live here." This tactic will inevitably create the impression that refusing to consent will taint the occupant with suspicion, producing extraordinary pressure to consent.

fabricated out of spite or if the third party's account lacks plausible details. Second, law enforcement officials must convince a neutral magistrate that there is probable cause to believe *particular* evidence or contraband will be found within the dwelling. Finally, the warrant itself must meet the particularity requirement, which means that any authorized search must be tailored to avoid intruding more than is necessary on privacy interests within the home, again a preferable approach to a free-ranging search of the entire residence. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004); *Michigan* v. *Clifford*, 464 U.S. 287, 298 (1984).

No doubt, the State would prefer that its officers not be put to the bother of getting a warrant. But that interest is manifestly insufficient to justify an exception to the warrant requirement. See *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (exceptions permitted only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable"). "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." *Johnson* v. *United States*, 333 U.S. 10, 15 (1948). The Court has made precisely this point in rejecting claims that third parties validly consented to a search of private premises. *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951). The Georgia Supreme Court thus rightly refused to "exalt[] expediency over an individual's Fourth Amendment guaranties." Pet. App. 3a (quoting *State* v. *Leach*, 782 P.2d 1035, 1040 (Wash. 1989)). Accord *Steagald* v. *United States*, 451 U.S. 204, 222 (1981) ("Any warrant requirement impedes to some extent the vigor with which the Government can seek to enforce its laws, yet the Fourth Amendment recognizes that this restraint is necessary in some cases to protect against unreasonable searches and seizures."); *Wilson* v. *Layne*, 526 U.S. 603, 612 (1999) ("Were such

generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down.").

A warrant is particularly appropriate when, as in this context, the person invoking the Fourth Amendment is the target of the police inquiry. Most cases involving consent do not involve a loss of personal privacy because the target freely waives her right to require a warrant. By contrast, as the United States acknowledges, "third-party consent issues often arise when the consent is aimed to facilitate an investigation against a co-occupant." Br. 24. This Court has appropriately refused to find a search authorized when the supposed "consent" would be "no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 228.

Nor is it correct that "giving effect to an occupant's consent may be necessary to avert destruction of contraband by the nonconsenting occupant" (U.S. Br. 22), such that the ruling below "would thwart the ability of law enforcement officials to locate and seize evidence of a crime before evidence is destroyed" (State Br. 17). As the Solicitor General elsewhere acknowledges, officers may simply secure the premises and particular individuals while they obtain a search warrant. Br. 22, 23 n.8 (citing *Illinois* v. *McArthur*, 531 U.S. 326 (2001); *Michigan* v. *Summers*, 452 U.S. 692, 702-03 (1982)). The destruction of evidence is also an exigent circumstance justifying a warrantless entry. *Welsh* v. *Wisconsin*, 466 U.S. 740, 749 (1984).

3. The State's broader rule permitting any resident to authorize a search over the objection of all the others actually has the potential to undermine law enforcement interests. A genuine assessment of law enforcement interests recognizes that the police are entrusted to protect individual rights, not merely to investigate crime. It disserves that vital social

function when officers ignore citizens' invocation of their rights:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

United States v. *Drayton*, 536 U.S. 194, 207 (2002). This Court has been appropriately wary of police practices that are "designed to circumvent" defendants' invocation of their rights. *Missouri* v. *Seibert*, 124 S. Ct. 2601, 2614 (2004) (Kennedy, J., concurring in the judgment) (invalidating two-step practice of initially questioning suspect without providing *Miranda* warnings, then providing warnings only before second round of questioning).

The State's rule also creates the troubling prospect that one occupant will grant consent in an attempt to shift blame onto others. Faced with inquiries from officers, an occupant "may believe in the classic hope that by cooperating with the police [s]he can keep their focus off of [her]." See Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 180 (1991). Indeed, the United States acknowledges that "an individual may have significant reasons of her own for consenting to a search." Br. 21. The consenting occupant may not only claim to officers that others in the residence are engaging in unlawful acts, but may also direct them to areas that would draw suspicion only to them. *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). Under such circumstances, it is particularly unjustifiable to impute the consenting individual's assent to an individual who has objected.

Indeed, as the courts below explained, a pernicious consequence of the practice employed in this case is the very real prospect that the police will be used as pawns in domestic disputes, with one member of the household inviting a search by the police to harm another. Requests for third party consent often arise in the midst of domestic disputes. See, *e.g.*, *United States* v. *Donlin*, 982 F.2d 31 (CA1 1992); *United States* v. *Hendrix*, 595 F.2d 883 (CADC 1979); *Brandon* v. *State*, 778 P.2d 221 (Alaska Ct. App. 1989). The party granting consent may do so out of personal spite, rather than a desire to cooperate with the police, with the result that constitutional privacy will ebb and flow based on the state of our personal relationships. This case, in which respondent's wife consented in the midst of a domestic dispute, is a perfect illustration. "This was a marriage about to break apart." Oct. 3, 2002 Suppression Transcript 15-16 (testimony of investigating officer). As the court of appeals recognized:

> The facts of this case illustrate the problem with dueling responses to a request for consent to search. The Randolphs were clearly at odds, hurling accusations of wrongdoing at one another. Thus Mrs. Randolph's motive for consenting to the search in the face of her husband's refusal is troubling. Under these circumstances, it is preferable that a neutral magistrate determine whether Mrs. Randolph's accusations were founded or whether they stemmed from the ongoing altercation.

Pet. App. 10a n.6. "Testimony given by Sergeant Murray indicated that he could verify neither accusation" by these "bickering spouses." *Id.* 24a. Even if no incriminating information had been found during the search, respondent's expectation of privacy would have been shattered by police intrusion into the innocent – but perhaps embarrassing – details of his life.

A search by the police of the residence in this situation exacerbates family discord, inevitably escalating the disputes

in question. The Constitution should not be construed to undermine familial institutions, including marriage, by setting family members against each other. The court of appeals reasoned persuasively: "When possible, Georgia courts strive to promote the sanctity of marriage and to avoid circumstances that create adversity between spouses. Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility." Pet. App. 10a-11a (citing *Robeson* v. *Int'l Indem. Co.*, 248 Ga. 306, 308-09 (1981)). Not only has this Court long recognized the privileged constitutional status of marriage and family generally (see, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965)), but the Fourth Amendment in particular contributes to the protection of those institutions (see, *e.g.*, *California* v. *Ciraolo*, 476 U.S. 207, 212-13 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.")).[10]

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[10] Cases involving disagreements among the occupants also threaten to insert the police into indeterminate disputes about the breadth of one occupant's authority to consent to a search to various portions of a residence. "[W]e unreasonably burden law enforcement officers when we require them to stake the later admissibility of any evidence seized on their ability to immediately and fully divine a consenter's relationship to the premises and to the objecting co-occupant as well as the consenter's motives in giving consent to search." Pet. App. 18a (Ellington, J., concurring). The United States thus acknowledges that there will be cases "involv[ing] circumstances in which two occupant have differing degrees of authority over the residence," thereby forcing officers to confront knotty cases involving the search of "a particular area of the house over which [the objecting occupant] had greater authority." Br. 27. In this very case, the State acknowledges the difficulties that would have arisen "had Mrs. Randolph given consent for police to search her husband's law office, which was

4. The State's remaining arguments merely amount to requests to adopt wholesale exceptions to the warrant requirement that are contrary to the plain text of the Constitution and this Court's Fourth Amendment precedents. The State contends that "[t]here is no legitimate interest in possessing contraband, so that 'government conduct that only reveals the possession of contraband compromises no legitimate privacy interest.'" Br. 18 (quoting *Illinois* v. *Caballes*, 125 S. Ct. 834, 837 (2005)). But a search of a residence – unlike the dog sniff in *Caballes* – manifestly *does* reveal a host of private facts beyond the possession of contraband. The State's argument therefore seems instead to be that no Fourth Amendment violation occurred because the police seized drugs. The constitutional violation, however, arises in the first instance from the warrantless search, and cannot be excused by the subsequent seizure. The State's contrary argument – that no Fourth Amendment violation occurs so long as the police seize contraband – would render the exclusionary rule a nullity.[11]

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also in the Randolph home, and contraband was only found in the law office." Br. 18. But neither the State nor the Solicitor General provides any ready means of resolving this quandary. In construing the Fourth Amendment, "[t]he people in their houses, as well as the police, deserve more precision." *Kyllo*, 533 U.S. 27, 39 (2001).

[11] The United States also contends that the Georgia Supreme Court's ruling will "give officers an incentive to adjust the timing of a request for consent" because officers "could wait for an objecting occupant to leave before seeking consent from a cooperating co-occupant." Br. 23. If the Solicitor General is truly serious that police officers are committed to circumventing the Court's Fourth Amendment rulings, that is a reason for *increasing* the burden for permitting a warrantless search of the residence. But in any event, this argument is meritless. Under the State's proposed rule, officers have an indistinguishable incentive to "adjust the timing of a request for consent" by "wait[ing] for [a cooperating] occupant to [arrive] before seeking consent." *Ibid.*

The State's further assertion that its rule is necessary to deal adequately with a "case involving child or spouse abuse, which has not yet ripened into exigent circumstances, and * * * the abuser * * * refuses police access to check the premises for signs of abuse," Br. 19, is a red herring. As the State implicitly acknowledges, if there genuinely is a present risk of harm to the victim, the police do not need a warrant to enter the premises. And in all other cases, nothing prevents the victim from leaving the home and seeking police assistance in finding safe shelter, seeking a temporary restraining order, or pressing criminal charges. Given these alternatives, it is incumbent upon the State to explain why a warrantless search should be permitted in the absence of exigent circumstances. The very premise of the Fourth Amendment is that in such ordinary circumstances the Constitution entrusts neutral magistrates, rather than police officers on the street, with the responsibility to determine whether there is probable cause to believe that an individual is, for example, an "abuser." No one doubts that the personal statements of a credible victim would be sufficient to secure a search warrant.[12]

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[12] Nor does the body of lower-court case law otherwise support the conclusion that it is "reasonable" to override the Fourth Amendment objection of an occupant. A number of state supreme courts squarely support the ruling below. See *supra* at 4 & n.1. A large proportion of the decisions cited by the State and the Solicitor General as supposedly holding to the contrary are inapposite because they did not involve an objection. *United States* v. *Lewis*, 386 F.3d 475 (CA2 2004); *United States* v. *Aghedo*, 159 F.3d 308 (CA7 1998); *Lenz* v. *Winburn*, 51 F.3d 1540 (CA11 1995); *United States* v. *Baldwin*, 644 F.2d 381 (CA5 1981); *United States* v. *Bethea*, 598 F.2d 331 (CA4 1979); *People* v. *Sanders*, 904 P.2d 1311 (Colo. 1995); *State* v. *Zimmerman*, 529 N.W.2d 171 (N.D. 1995); *In Re Anthony F.*, 442 A.2d 975 (Md. 1982); *State* v. *Frame*, 609 P.2d 830 (Or. App. 1980); *State* v. *Washington*, 357 S.E.2d 419 (N.C. App. 1987); *Welch* v. *State*, 93 S.W.3d 50 (Tex. Crim. App. 2002). The remaining cases overwhelmingly do not consider the

II. There Is No Merit to the State's Argument That This Court's Third Party Consent Precedents Compel Reversal of the Ruling Below.

The State contends that the Supreme Court of Georgia's decision cannot be reconciled with this Court's "third party consent" decisions. Those cases, it contends, confer on each resident of jointly occupied premises the inviolate right to admit the police notwithstanding the other occupants' invocation of their Fourth Amendment rights. This Court's precedents do not support that extraordinary contention.

A. The State Misreads This Court's Decision in *Matlock*.

As discussed in Part I-A, *supra*, the controlling precedents here are *Stoner* v. *California*, 376 U.S. 483 (1964), and *Chapman* v. *United States*, 365 U.S. 610 (1961). Those decisions reject claims that valid third party consent was granted by persons with property interests in the premises when it could not fairly be said that the occupant had relinquished the authority to admit the police. A rule that holds that an individual loses his right to privacy notwithstanding that he has not waived his rights "by word or deed, either directly or through an agent" would cause the Fourth Amendment's protections to "disappear." *Stoner*, 376 U.S. at 489, 490.[13]

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question of "reasonableness" as an abstract matter but rather misread this Court's decision in *Matlock* to compel a finding that consent is valid in these circumstances.

[13] *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), reinforces *Stoner*'s reasoning. The question in *Rodriguez* was whether consent was valid when granted by a person who reasonably, but erroneously, appeared to have common authority over the premises. The majority and dissent in *Rodriguez* disagreed over whether *Stoner* prohibited reliance on "apparent authority." The majority concluded that *Stoner* precluded "only such reliance upon apparent authority as is unrealistic." *Id.* at 187. Compare *id.* at 194-95 &

United States v. *Matlock*, 415 U.S. 164 (1974), is not to the contrary. In that case, the police searched a home in which several people resided – including two parents (who rented the home), their daughter, her live-in companion (the defendant), and a grandchild. The police arrested the defendant in the front yard of the house and secured him in a squad car on the street. They then sought and received consent from the daughter to search the residence, finding drugs. Of particular note, the defendant did not object to the search. This Court held the consent was valid.[14]

The holding of *Matlock* obviously says nothing about the very different circumstance in which an occupant *does* object. To the contrary, language in *Matlock* supports respondent's position. The Court in *Matlock* explained that prior precedent established that "the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). In support, it cited *Frazier* v. *Cupp*, 394 U.S. 731 (1969), a case in which the defendant (Frazier) had left a duffel bag that he jointly owned with another person (Rawls) in Rawls's mother's house. The police came to the house when Frazier was not

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n.1 (Marshall, J., dissenting) (arguing that *Stoner* precludes "apparent authority" altogether). The relevant point for present purposes is that, when one occupant purports to grant consent over the objection of another, there is no "apparent authority" whatsoever, let alone a "realistic" appearance of authority.

[14] As noted, the defendant in *Matlock* was arrested in the front yard, and was being held in a police car when the officers sought consent. The case could accordingly be characterized as involving the Fourth Amendment rights of either an "absent" occupant or, alternatively, one who was present but did not object. For the reasons discussed in the text, the difference is immaterial. One just as clearly relinquishes control by not objecting when a co-occupant admits a third party to the premises as by leaving the premises in the hands of the co-occupant altogether.

there and secured permission from Rawls and his mother to search the bag. *Id.* at 740. The Court held that the police had received valid consent because Frazier had relinquished control to Rawls: "[I]n allowing Rawls to use the bag, and in leaving it in his house, [Frazier] must be taken to have assumed the risk that Rawls would allow someone else to look inside." *Ibid.*

The State has no explanation for why this Court emphasized in *Frazier* and then reiterated in *Matlock* the relevance of the absence of the property owner. On the State's view, that fact was utterly irrelevant. The State's rule would have permitted Rawls to authorize a search even over the objection of Frazier had he been present. *Matlock* moreover did not purport to disturb the Court's prior holding that common authority is, in many circumstances, simply insufficient to authorize third party consent. See Part I-A, *supra*.

This Court's further statement in *Matlock* that persons with "common authority" over the premises may consent to a search must be understood in the context of the facts of the case and the Court's reliance on *Frazier*. The right of another occupant to enter a countervailing objection to a search was not before the Court. Properly understood, as discussed above, "common authority" is only sufficient in circumstances in which it is fair to say that the nonconsenting resident has relinquished control of the premises to his co-occupant in his absence. It is only in such circumstances that "it is reasonable to recognize" the right of the co-inhabitant to provide third party consent to the search. *Matlock*, 415 U.S. 171 n.7.[15]

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[15] *Illinois* v. *Rodriguez*, 497 US. 177 (1990), reinforces this conclusion. The dissent in *Rodriguez*, like respondent here, explained that consent searches rest on a voluntary relinquishment of personal privacy. *Id.* at 190. Notably, the majority in *Rodriguez* did not take issue with this characterization of the Court's precedents. Rather, the disagreement turned on whether the

The State contends to the contrary that an occupant's "common authority" over the premises is itself a sufficient *source* of his alleged authority to grant consent over the objection of another occupant. That assertion misunderstands the Court's reference to "common authority," which instead described the class of persons who presumptively have the authority to consent because they themselves are occupants of the property to be searched. That is obvious from the remainder of the sentence in question, which explains that consent may be granted by persons "who possessed common authority over *or other sufficient relationship* to the premises or effects sought to be inspected." 415 U.S. at 171 (emphasis added). Such a relationship would presumably include, for example, a housesitter or long-term guest, individuals who have no "common authority" with the actual property owners. If such a person decides to admit the police, that decision will be effective except with respect to other occupants who state an objection.

In any event, the State does not actually rely on a "common authority" over the premises. Rather, its position is necessarily that respondent's wife had a *superior* authority to control access to the home. The State and its *amici* thus argue that "no co-occupant can reasonably expect to have total control over a premises he or she shares with another" (State Br. 19) and that "[b]y entering into a joint occupancy, an individual relinquishes any unilateral entitlement to determine whom to allow on the premises and when to permit entry" (U.S. Br. 15). In this case, the State says, respondent's wife had "just as much authority over the residence as [he] did." Br. 16-17. But the State and its *amici* then inexplicably

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relinquishment (i) vitiated the individual's expectation of privacy such that no "search" occurred, or (ii) instead rendered the search "reasonable." The majority adopted the latter view. As a consequence, the Court held, a reasonable mistake about the authority of a person to grant consent will not invalidate a search. *Id.* at 186-87 n.*.

maintain that the right of respondent's wife to control access to the premises trumps her husband's, such that in the event of a disagreement, her decision to admit the police prevails over his decision to exclude them. This inviolate, unilateral power hardly can arise from the "common authority" the State and its *amici* insist co-occupants share.

The State also notes that a footnote in *Matlock* stated that a co-occupant has the right to grant consent "in his own right." 415 U.S. at 171 n.7. But that statement is perfectly consistent with respondent's position. When one occupant relinquishes control to another, the latter has the right to admit others to the premises "in his own right." What the State cannot establish – because *Matlock* does not suggest it – is that an occupant's "own right" to admit others overrides the express objection of his co-occupants.

B. There Is No Source for the Supposed Right of One Occupant to Admit the Police to Search a Home over the Objection of a Co-Occupant.

The State's claim that one occupant may override the Fourth Amendment objections of all the others is insupportable for the further reason that it completely fails to identify any source for that supposed right. Such an extraordinary power must be rooted in *something*. The power to override a vital constitutional protection cannot be conjured from thin air. The State and its *amici* suggest two possible sources: an affirmative right in the common law; and social expectations regarding the relationship among co-occupants. Neither can be reconciled with this Court's precedents.

1. The Common Law of Property Does Not Support the State's Position.

The United States invites this Court to hold that the search in this case was valid on the basis of an affirmative right possessed by his wife. The Solicitor General thus opines that the "foundational premise of the law of consent searches" – apparently so foundational that the government

cannot identify any supporting authority at all – is that "an individual may make a voluntary decision to permit the police to inspect property over which she has control." Br. 5. The source of this alleged right is mysterious. Obviously, no one has a "constitutional right to admit the police." The fact that an individual may waive his right to exclude the government does not suggest that, conversely, an individual has a constitutional right to admit the police over the objection of his co-occupants. See *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.").

The Solicitor General instead suggests that respondent's wife had the inviolate authority to admit the police based on the common law of property. Br. 16 n.4. In support of this claim, it cites various cases describing the rights of tenants in common. *Ibid.* This Court's precedents, however, firmly reject this proposed reliance on property rights. Even the State makes this very point, acknowledging that this Court "has moved away from relying upon distinctions developed in property and tort law and looks to whether 'the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" State Br. 10 (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)). The State recognizes that *Matlock* in particular "made clear this 'common authority' is not derived from property law," State Br. 15, as this Court stated unambiguously that "[t]he authority which justifies the third-party consent does not rest upon the law of property," *Matlock*, 415 U.S. 164, 171 n.7 (1974). In support, *Matlock* cited both *Chapman* and *Stoner*, which held that hotel owners and landlords could not grant consent despite their property interests in the premises. *Ibid.* The Solicitor General similarly acknowledges that fact, but then inexplicably ignores it. See Br. 16 n.4 ("Although *Matlock* observes that the authority of a third party to give effective consent to a search does not rest on the particularities of a cotenant's right under the law of property,

a cotenant's ability to preclude a search consented to by another cotenant is consistent with the common law.").

The Court has thus repeatedly held that the Fourth Amendment confers a personal right of privacy that does not depend on antecedent property interests, including the ability to completely control access to the premises. The right to privacy runs with the person, not with the place or with the ownership of the property. The police must respect the Fourth Amendment rights of an individual, not those of a "house." The classic example of this proposition is *Katz* v. *United States*, 389 U.S. 347 (1967). In *Katz*, this Court held that the defendant had a protected privacy interest in a public phone booth, in which he obviously held no property rights. As a matter of property law, *any person* could have invited the police to enter the phone booth, for officers needed no authorization at all. Yet, despite the fact that Katz had no power under the common law to prevent the police from entering the phone booth, the Court recognized that he had a constitutionally protected right of privacy in that space for the period of his conversation. In language that would later be oft-repeated, the Court held: "[T]he Fourth Amendment protects people, not places." *Id.* at 351. To take another simple example cited by this Court, "[i]f the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto." *Minnesota* v. *Olson*, 495 U.S. 91, 99-100 (1990). That she in fact does have such an expectation completely undermines the State's position.[16]

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[16] Thus, the fact that the police did not commit a common law "trespass" in this case (U.S. Br. 16 n.4), is irrelevant: this Court has firmly "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property." *Kyllo* v. *United States*, 533 U.S. 27, 32 (2001).

It accordingly makes no difference whether respondent's wife had a property right to admit third parties into the home as a general matter. The question is not whether she had the authority to admit the police under state law or custom, but whether the Fourth Amendment prohibited the police from accepting the invitation in light of respondent's objection. To hold that the supposed right of respondent's wife to admit the police trumps respondent's objection is to nullify respondent's Fourth Amendment right to be free from a warrantless intrusion by the police. "While a co-inhabitant has authority to consent to a search of joint premises, 'a present, objecting party should not have his constitutional rights ignored * * * [due to a] property interest shared with another.'" Pet. App. 3a (quoting *Silva* v. *State*, 344 So. 2d 559, 562 (Fla. 1977)).

Each of us thus retains the full force of our right to personal privacy in our home despite the fact that few of us have complete control over who enters our residence. Those who own or lease property frequently have co-owners or co-lessees with equivalent rights to admit or exclude. Others who hold no distinct property interests – children and guests, in particular – may have no common law property rights *at all* to control access to the premises. Nonetheless, each has a

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The *amicus curiae* brief of the National Association of Criminal Defense Lawyers moreover demonstrates that the Solicitor General misdescribes the relevant body of property law. See also, *e.g.*, THOMAS W. WATERMAN, TREATISE ON THE LAW OF TRESPASS § 783 (N.Y. 1875) ("If a father give his son verbal permission to sell timber, and receive the avails, an action of trespass cannot be maintained against the vendee of the son, for cutting and removing the timber. But the wife, when she is not the general agent of her husband, nor specially authorized to act in the particular instance, cannot grant a valid license to a stranger to enter on her husband's land, and remove property therefrom in his absence.").

constitutionally recognized "reasonable expectation of privacy."

2. Reliance on the law of property is moreover both grossly underinclusive and overinclusive with respect to the persons who can grant consent to search. It is underinclusive because many occupants who have sufficient "control" over the premises to grant consent under the *Matlock* framework have *no property rights whatsoever*. In *Matlock* itself, for example, the premises were leased by the parents of the defendant's companion. At the time of the search, the house was also occupied by their daughter and the defendant, and the former individual was held to have granted valid consent despite the fact that she had no property rights in the premises. In this very case, the residence was owned by respondent's parents. Although the record is silent on the point, it would not be at all surprising in these circumstances if it were respondent who personally had an agreement to lease the premises (given that he personally paid the rent), such that respondent's wife would hold no leasehold interest. Consent to search is also regularly sought and received from minor children who have no property rights in the premises, including the right to bring in social guests. See *supra* at 23-24.[17]

Conversely, the government's reliance on property rights as the source for the "control" allowing consent to search is also overinclusive. As noted, parties with property rights (*e.g.*, hotel owners or landlords) often do not possess the form of "control" necessary to give rise to a right to consent to a

[17] The common law principles of property law cited by the Solicitor General (Br. 16 n.4) thus undermine its position. Each assumes that the person granting consent holds a property interest in the premises. Stripped of that false premise, property law actually would dictate a holding that persons who do not hold a property interest (including, in all likelihood, respondent's wife) cannot consent to entry by the police over the objection of a property owner or leaseholder.

search even though they have a property right in the premises. Moreover, on the government's view, the very individuals who do have property rights may have their wishes overridden by those who do not. When consent is granted by children, for example, any objections of the parents who own the residence are overridden. Similarly, according to the State, the parents who leased the home in *Matlock* would have been powerless to object to the search.

2. There Is No Basis for the State's Reliance on a Supposed Social Understanding That One Occupant May Admit Guests Over the Objection of the Others.

The State argues that the search of respondent's home over his contemporaneous objection was nonetheless constitutional because he had a "reduced expectation of privacy" as a consequence of the fact that he did not live alone. Inescapably, this argument is an assault on the bedrock principle that the protections of the Fourth Amendment are at their apex – not their nadir – in the home. See Part I-B, *supra*. Neither of two variations on this argument made by the State has any merit.

1. Although its position is never entirely clear, the State seemingly relies on the assumption that there is a social understanding among co-occupants that each may admit guests over the objections of the others. But that assumption is simply wrong: no one expects that his cohabitants will, over his objection, grant a guest permission to enter the house, much less enter and rummage through the occupants' rooms and possessions. As the court of appeals explained, "it is reasonable for an occupant to believe his wishes will be honored as, 'ordinarily, persons with equal rights in a place would accommodate each other by not admitting persons over another's objection while he was present.'" Pet. App. 9a (quoting *State* v. *Leach*, 782 P.2d 1035, 1038 (Wash. 1989) (quoting, in turn, 3 LaFave, *supra*, § 8.3(d) at 251-52))).

This Court's decision in *Minnesota* v. *Olson*, 495 U.S. 91 (1990), is highly instructive. There, the Court held that the Fourth Amendment protects an overnight guest, notwithstanding that she has no right to control the entry of others into the home:

> The host may admit or exclude from the house as he prefers, but it is unlikely that he will admit someone who wants to see or meet with the guest over the objection of the guest. On the other hand, few houseguests will invite others to visit them while they are guests without consulting their hosts; but the latter, who have the authority to exclude despite the wishes of the guest, will often be accommodating. The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.

Id. at 99. As Justice Kennedy has explained, there is thus a "social custom" that those with property rights over the residence "will exercise [their] discretion to include or exclude others for the guests' benefit," and "where these social expectations exist * * * they are sufficient to create a legitimate expectation of privacy, *even in the absence of any property right to exclude others*." *Minnesota* v. *Carter*, 525 U.S. 83, 101 (1998) (emphasis added).[18]

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[18] Also analogous is *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), in which the question was whether the Fourth Amendment rights of hospital patients were violated when hospital officials, in a program created in coordination with law enforcement officials, turned over the results of those patients' drug tests to police. The dissenters argued that there could be no Fourth Amendment violation because the hospital officials who disclosed the information were private parties. *Id.* at 94 (Scalia, J., dissenting) (citing *United States* v. *White*, 401 U.S. 745, 749

Indeed, even if a resident defied social convention and sought to admit a third party over the objection of his co-residents, the third party himself would likely decline to enter in the face of the awkward dispute. But at the very least, it is almost impossible to imagine that the guest would be admitted before the other residents were first given the opportunity to secure any items or areas that they wanted to keep private and, once admitted, would be permitted to root around in the other residents' belongings.

The same logic applies *a fortiori* to a person such as respondent who, unlike a guest, actually owns or leases the residence and as a consequence has at least co-equal authority to control access to the premises. Such a person retains an undiluted expectation of privacy in the home even if his co-owners or co-lessees technically have the property right to admit another guest over his objection.

There is moreover never a greater expectation among occupants that each will have the opportunity to speak for himself than when the government seeks to intrude into the

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(1971)). The majority rejected that argument, explaining that although it was *possible* that hospital officials would disclose the information, patients would not reasonably *expect* them to do so. "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* at 78. The Court explained in an accompanying footnote: "While the existence of such laws [requiring medical professionals to provide evidence to the authorities in certain circumstances] might lead a patient to expect that members of the hospital staff might turn over evidence acquired in the course of treatment to which the patient had consented, they surely would not lead a patient to anticipate that hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes." *Id.* at 78 n.13. See *id.* at 97 n.4 (Scalia, J., dissenting) ("I think it clear that the Court's disposition requires the holding that violation of a relationship of trust constitutes a search.").

home. Faced with a request from the police to conduct a warrantless search of a residence, it is unlikely in the extreme that all of the residents would remain disinterested and elect to leave the decision to the happenstance of whomever the officers meet at the door when they are present and able to decide for themselves whether to object. All of the occupants may decide that they want to cooperate with the police, and none may ultimately voice an objection to another occupant's decision to admit the police, but the relevant point is that each will expect the *opportunity to decide*. The State's contrary position that each resident freely intends to irrevocably cede to all the others his personal right to privacy in the home – a vital constitutional protection – is implausible.

But even if one resident chose to invite others into the house over the expressed objection of other residents, that fact would not translate into carte blanche for one resident to invite the *government* to enter the home over other residents' objections. Even assuming that respondent's wife had the power to admit social guests over his objection (an ambitious assumption, given that the State cites no authority in support of it), she would not as a consequence have the equivalent right to admit the *police*. The government simply stands in a different relationship to the individuals within a dwelling than do private parties. Private individuals do not have the authority, simply by entering a house and noticing incriminating information within it, to initiate a criminal prosecution. Indeed, an individual who entered a private dwelling with the consent of one individual but then intentionally interfered with the rights of other residents would face potential civil liability. Moreover, the level of intrusion on an individual's privacy that comes from "permit[ting] law enforcement officers to inspect * * * commonly held premises," U.S. Br. 18, is of a dramatically greater magnitude than the intrusion one risks when social guests enter the home. Social guests do not root through bedrooms, closets, closed doors, and computer files.

2. Nor can the State's argument be resuscitated on the theory that – notwithstanding the expectation that co-occupants will respect each others' wishes – one occupant may nonetheless admit the police, so that each occupant "assumes the risk" that his or her objection will be overridden. Standing alone, this argument merely begs the question presented by this case. In *Stoner*, for example, it could equally be said as an abstract matter that a guest assumed the risk that hotel employees – who had the right to be in the room – would admit the police.[19] This Court held, however, that the Fourth Amendment prohibited such an intrusion. So, too, in this case: if the Georgia Supreme Court is correct that an occupant's objection may not be overridden, then no such "risk" is "assumed."

The Solicitor General contends that the facts of this case are analogous to those in the line of decisions holding that when an individual reveals private information about himself, "the disclosing individual 'assumes the risk that his confidant will reveal that information to the authorities.'" U.S. Br. 17 (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984)). In fact, this case is utterly unlike those in the two most important respects. First, respondent in this case kept the contents of his home private, whereas the defendants in those cases voluntarily disclosed private information to third parties. Those rulings stand for the proposition "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith* v. *Maryland*, 442 U.S. 735, 743-44 (1979) (summarizing the line of

[19] The same would be true if this Court held that one occupant may validly consent to the strip-search of another – each occupant could be said to have "assumed the risk" that he would be subjected to strip-searches despite his own objection. However, simply asserting that an occupant assumes such a risk does nothing to assist the Court in determining whether such a rule should, in fact, be adopted.

authority cited by the Solicitor General).[20] But those cases have never been read to establish that in addition to having access to the information thus disclosed, the police may also search the premises where the conversation took place without a warrant.

Second, respondent has a Fourth Amendment right to be free from a warrantless search of his home, whereas those defendants had no right to keep the police from talking to the people to whom they had disclosed information. The cases cited by the Solicitor General thus carefully distinguish "an intrusion into a zone of privacy." *Miller*, 425 U.S. at 440. Specifically invoking the holding of *Jeffers*, *supra*, that a hotel employee may not authorize a search of a guest's room, this Court explained in *Hoffa* v. *United States*:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure.

385 U.S. 293, 301 (1966).

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[20] See, *e.g.*, *Smith*, 442 U.S. at 735 (pen register: "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed."); *United States* v. *Miller*, 425 U.S. 435, 440 (1976) (bank records: "All of the documents obtained * * * contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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