

CREATING THE RIGHT TO DENY YOURSELF
PRIVACY: THE SUPREME COURT BROADENS
POLICE SEARCH POWERS IN CONSENT CASES
IN *FERNANDEZ V. CALIFORNIA*

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ABSTRACT

This Article analyzes Fernandez v. California, in which the Supreme Court considered whether the Fourth Amendment enabled police to obtain valid consent to search from one occupant of a home after officers had removed an objecting occupant from the premises. The Fernandez Court ruled that obtaining consent in this manner satisfied Fourth Amendment reasonableness because the right of a lawful occupant of a home to invite police to enter the dwelling should not be trampled upon by others. This work examines the concerns created by Fernandez’s ruling. This Article asserts that, in creating its new right-to-invite rule, Fernandez undermined the traditional Fourth Amendment protection of the warrant requirement and the Court’s long-recognized view of the home as the core of privacy. Further, Fernandez essentially provided a guide to officers on how to purposely alter their environment to assure they obtain consent to commit a warrantless search. Finally, Fernandez’s heavy use of hypothetical scenarios not directly pertinent to its own case allowed the Court to further erode Fourth Amendment protections.

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INTRODUCTION

In the Fourth Amendment¹ case, *Fernandez v. California*, the Supreme Court created a right enabling a resident to invite law enforcement into the home.² *Fernandez* declared, “The lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search.”³ This rule was necessary to preserve the rights of the homeowner or apartment dweller because “[a]ny other rule would trample on the rights of the occupant who is willing to consent.”⁴ In his concurring opinion, Justice Scalia sought backing from property law to establish that a guest invited into a home by one tenant did not commit a trespass upon entry even if another tenant objected to his or her presence in the home.⁵ The *Fernandez* Court crafted its Fourth Amendment right-to-invite rule as support for holding that police could obtain

1. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

2. *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014).

3. *Id.*

4. *Id.*

5. *Id.* at 1138 (Scalia, J., concurring).

valid consent to enter and search from one occupant of a home “if the objecting occupant is absent.”⁶

Fernandez’s new right-to-invite rule borders on the revolutionary because the Fourth Amendment, with its emphasis on privacy, by prohibiting “unreasonable searches,”⁷ and security, in forbidding unreasonable “seizures,”⁸ has long been interpreted as preserving the right to keep the government *out* of the home.⁹ Our nation’s founders would likely have been stunned by the Court’s creation of a right to invite officials into their most private enclave, for

“[v]ivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as ‘the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,’ because they placed ‘the liberty of every man in the hands of every petty officer.’ The historic occasion of that denunciation, in 1761 at Boston, has been characterized as ‘perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. “Then and there,” said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”¹⁰

According to the reasoning of *Fernandez*, James Otis and John Adams did not see the complete picture; the right of lawful occupants of property to let people *in* is such an important part of the Fourth Amendment that it can override others’ rights to keep the government at bay.¹¹

This was not the only surprise to come out of the Court’s latest ruling on the consent exception to the Fourth Amendment’s warrant

6. *Id.* at 1130, 1137 (majority opinion); see also *id.* at 1134, where the Court declared, “We therefore hold that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.”

7. U.S. CONST. amend. IV.

8. *Id.*

9. United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972).

10. *Payton v. New York*, 445 U.S. 573, 583 n.21 (1980) (quoting *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965)).

11. *Fernandez* declared, “[T]he lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent.” 134 S. Ct. at 1137.

requirement. As will be fully explored in this Article, *Fernandez*'s new rule and the reasoning to support it has significant implications for the Fourth Amendment. This Article begins, in Part I, with a review of the precedents regarding the key focus of *Fernandez*: third-party consent. Part II presents *Fernandez* by examining the facts of the case and the Court's decision. Part III critically examines the implications of the *Fernandez* case. Section III.A considers the effect *Fernandez*'s right-to-invite rule will have on such Fourth Amendment fundamentals as the warrant requirement and the privacy of the home. Section III.B will explore *Fernandez*'s invitation to officers to alter their environment to assure they obtain consent to commit a warrantless search. Finally, Section III.C focuses on the consequences of *Fernandez*'s heavy reliance on hypothetical scenarios not directly pertinent to its own case. As will be discussed, each of these innovations could undermine long-recognized Fourth Amendment rights.

I. PRECEDENTS ESTABLISHING THE SCOPE OF THIRD-PARTY CONSENT

Spouses or cohabitants have repeatedly found themselves in the unenviable position of deciding whether to allow police searches in the absence of their partners. In *Amos v. United States*, Internal Revenue collectors confronted the wife of a man whom they suspected was in possession of ““blockade whisky.””¹² The wife opened her door and allowed the agents to enter and search her home after they “told her that they were revenue officers and had come to search the premises ‘for violations of the revenue law.’”¹³ At the defendant's trial, the government entered into evidence, over defense objection, the whiskey found by the collectors.¹⁴ The Supreme Court rejected the government's contention that the defendant's wife had waived his constitutional rights by letting the officers into the home because the collectors, demanding entry without a warrant, had “implied coercion” and therefore “no such waiver was intended or effected.”¹⁵

Another spouse placed between police and their quarry was Mrs. Coolidge in *Coolidge v. New Hampshire*.¹⁶ In this case, police

12. *Amos v. United States*, 255 U.S. 313, 315 (1921).

13. *Id.*

14. *Id.*

15. *Id.* at 317.

16. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

took Edward Coolidge to the station for questioning about a missing fourteen-year-old babysitter.¹⁷ At the same time, two other officers went to Coolidge's home and asked his wife about "any guns there might be in the house."¹⁸ Unaware of her husband's guilt, "Mrs. Coolidge of her own accord produced the guns and clothes for inspection, rather than simply describing them."¹⁹ When she asked if the police wanted the guns, one officer said, "We might as well take them."²⁰ Here, the Court deemed the need to consider whether Mrs. Coolidge had the power to waive her husband's Fourth Amendment rights to be obviated by the fact that her volunteering the weapons did not trigger a government search or seizure in the first place.²¹ *Coolidge* declared, "To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion."²² The Court reached this conclusion despite its awareness of the aura of authority police might have over spouses in such settings. *Coolidge* noted:

In a situation like the one before us there no doubt always exist forces pushing the spouse to cooperate with the police. Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse. But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with the police.²³

The first case where the Court fully explored the authority of one spouse or cohabitant to provide consent to search a mutually occupied home was *United States v. Matlock*.²⁴ In this case, police arrested Matlock for bank robbery in the front yard of the Pardeeville, Wisconsin home in which he was living.²⁵ Matlock had been sharing a second-floor bedroom of the home with Mrs. Gayle Graff, a daughter of the Marshalls, the family who had been leasing the home.²⁶ Although aware that Matlock lived in the house, the

17. *Id.* at 445-46.

18. *Id.* at 488.

19. *Id.* at 489.

20. *Id.*

21. *Id.* at 487-89.

22. *Id.* at 489-90.

23. *Id.* at 487-88.

24. *United States v. Matlock*, 415 U.S. 164 (1974).

25. *Id.* at 166.

26. *Id.*

arresting officers “did not ask him which room he occupied or whether he would consent to a search.”²⁷ Instead, three officers went to the house and told Mrs. Graff, who had answered the door, “they were looking for money and a gun and asked if they could search the house.”²⁸ She voluntarily consented to a search, which included their shared bedroom, that resulted in the recovery of \$4,995 in cash from a diaper bag found in the room’s closet.²⁹

The Court in *Matlock* had to decide “whether Mrs. Graff’s relationship to the east bedroom was sufficient to make her consent to the search valid against respondent Matlock.”³⁰ The *Matlock* Court noted that, in *Amos*, it had left open “the question whether a wife’s permission to search the residence in which she lived with her husband could ‘waive his constitutional rights.’”³¹ The Court, however, now felt it clear 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.”³² This “third party consent” was based in part on the fact that the absent person, in jointly using the area or item, “assumed the risk” that the person with whom he or she was sharing might permit others to search the area or item.³³ Therefore, the government could obtain consent to search not only from the defendant, but also “from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.”³⁴ The Court concluded that Mrs. Graff’s consent “was legally sufficient”³⁵ because she and Matlock shared a dresser in the room, “the woman’s clothing in the room was hers,” she and Matlock “slept together regularly in the room,” and Matlock held himself and Mrs. Graff out to others as “husband and wife.”³⁶

The common authority to consent was so powerful that according to *Illinois v. Rodriguez*, its mere appearance could result in admission of evidence at trial.³⁷ In *Rodriguez*, police responded to the Chicago residence of Dorothy Jackson, whose daughter, Gail

27. *Id.*

28. *Id.*

29. *Id.* at 166-67.

30. *Id.* at 167.

31. *Id.* at 170.

32. *Id.*

33. *Id.* at 171.

34. *Id.*

35. *Id.* at 177.

36. *Id.* at 175-76.

37. *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

Fischer, “showed signs of a severe beating.”³⁸ Fischer informed police that Edward Rodriguez had assaulted her in what she called “our” apartment, and was still currently there sleeping.³⁹ She agreed to travel to the apartment with police and to let them in “with her key so that the officers could enter and arrest him.”⁴⁰ When Fischer unlocked the door, the officers entered, finding powder cocaine and drug paraphernalia in plain view.⁴¹ Police then proceeded to the bedroom, where they found and arrested Rodriguez.⁴²

Fischer’s authority to consent turned out to be hollow. Having moved out of “the apartment several weeks earlier,” “Fischer was not a ‘usual resident’ but . . . an ‘infrequent visitor’” who was not on the lease, paid no rent, could not invite others to the apartment on her own, and had even moved out some of her possessions.⁴³ She therefore lacked the “common authority” needed to grant valid third-party consent to search.⁴⁴ The issue thus confronting the *Rodriguez* Court was “[w]hether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.”⁴⁵ *Rodriguez* declared that Fourth Amendment reasonableness did not mandate that police “always be correct, but that they always be reasonable.”⁴⁶ In *Rodriguez*, although the officers incorrectly believed that Fischer possessed common authority to provide valid consent, they were reasonable in making this mistake and therefore their entry and search were “valid” under the Fourth Amendment.⁴⁷

The Court next considered, in *Georgia v. Randolph*, a third-party consent case where the defendant was present and explicitly refusing consent to search.⁴⁸ Unlike *Rodriguez*, the police in *Randolph* had no misconceptions about the status of the relationship between Janet and Scott Randolph, who were in bitter conflict as a

38. *Id.* at 179.

39. *Id.*

40. *Id.*

41. *Id.* at 180.

42. *Id.*

43. *Id.* (quoting Joint Appendix at 140, *Rodriguez*, 497 U.S. 177 (No. 88-2018)).

44. *Id.*

45. *Id.* at 179.

46. *Id.* at 185.

47. *Id.* at 188-89.

48. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

result of a failing marriage.⁴⁹ Janet had previously moved out of the couple's Americus, Georgia home, taking their son and some belongings with her to her parents in Canada.⁵⁰ Returning some two months later, she called police to report that Scott had taken their son away after a domestic dispute.⁵¹ Janet also told police that Scott's cocaine "habit had caused [them] financial troubles."⁵² When Scott then arrived back at the house, he advised the officers that he had taken their son to a neighbor to prevent Janet from again taking the child out of the country.⁵³ He denied using cocaine and claimed that Janet abused drugs and alcohol.⁵⁴ Janet responded that "'items of drug evidence'" were in the house.⁵⁵ When he was asked for consent to search the home, Scott "unequivocally refused" while his wife "readily gave" officers permission to search.⁵⁶ Janet led police to Scott's upstairs bedroom where an officer found and collected "a drinking straw with a powdery residue he suspected was cocaine."⁵⁷

The recovery of cocaine in *Randolph* presented the Court with the issue of "whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."⁵⁸ *Randolph* began its analysis by reaffirming the Fourth Amendment warrant requirement that ordinarily forbids "warrantless entry of a person's house as unreasonable *per se*."⁵⁹ Here, consent to search by "a fellow occupant who shares common authority" was one of the "'jealously and carefully drawn'" exceptions to this general rule.⁶⁰ *Randolph* pointedly noted, "None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained."⁶¹

To address this new situation, *Randolph* relied on the "constant element in assessing Fourth Amendment reasonableness" in consent

49. *Id.* at 106-07.

50. *Id.* at 106.

51. *Id.* at 106-07.

52. *Id.* at 107.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 108.

59. *Id.* at 109.

60. *Id.* (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

61. *Id.*

cases: “widely shared social expectations.”⁶² With third-party consent, reasonableness was in part “a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other’s interests.”⁶³ *Randolph* noted that in *Matlock*, tenants sharing quarters “understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another.”⁶⁴ On the other hand, the Court recognized that “courtesy or deference” make it unlikely that one tenant would admit someone over the objection of a co-inhabitant.⁶⁵ For instance, *Randolph* considered it “fair to say that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, ‘stay out.’”⁶⁶ *Randolph* thus recognized the reality that if “people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority.”⁶⁷ Finally, the Court concluded that if a person has “no recognized authority in law or social practice” to open a door to a visitor against the wishes of “a present and objecting co-tenant,” then a police officer at the door has “no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.”⁶⁸

The reasonableness of the government’s entry in defiance of one of the occupants became even more suspect when the Court considered the law’s “centuries-old principle of respect for the privacy of the home,”⁶⁹ which deserved “special protection as the center of the private lives of our people.”⁷⁰ Quite simply, “[d]isputed permission is thus no match for th[e] central value of the Fourth Amendment” that “a man’s house is his castle.”⁷¹ *Randolph* therefore held “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present

62. *Id.* at 111.

63. *Id.*

64. *Id.*

65. *Id.* at 113.

66. *Id.*

67. *Id.* at 113-14.

68. *Id.* at 114.

69. *Id.* at 115 (quoting *Wilson v. Layne*, 526 U.S. 603, 610 (1999)).

70. *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)).

71. *Id.* (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)).

resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.”⁷²

Randolph finally considered what it called “two loose ends.”⁷³ For the first loose end, the Court noted that, in *Matlock*, it had spoken of a cohabitant having “the right to permit the inspection in his own right.”⁷⁴ *Randolph* was careful to clarify that this “right” was “not an enduring and enforceable ownership right as understood by the private law of property.”⁷⁵ Instead, this right was “the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances.”⁷⁶ In enabling a present occupant to refuse police entry even when another tenant had given permission, *Randolph* did not divest a property right of the consenting occupant, but instead simply rendered a decision based on “customary social understanding.”⁷⁷

Randolph’s second loose end involved the “drawing [of] a fine line” between the potential objecting tenant who is present and refuses entry and thus prevents a search, and the potential objecting tenant who, although not present, is “nearby but not invited to take part in the threshold colloquy,” and therefore “loses out.”⁷⁸ The Court defended drawing this line, however thin, deeming it a “pragmatic decision” of “practical value” and “simple clarity.”⁷⁹ Such accolades, however, were premised on one caveat—that “there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.”⁸⁰

In the near century of third-party consent precedent, the Court has considered all sorts of cases involving spouses asked to give permission to search. These cohabitants have been intimidated into consenting to official entry⁸¹ or happily cooperative in volunteering evidence due to their innocent ignorance of their spouse’s guilt.⁸²

72. *Id.* at 120.

73. *Id.*

74. *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

75. *Id.* at 120-21.

76. *Id.* at 121.

77. *Id.*

78. *Id.*

79. *Id.* at 121-22.

80. *Id.* at 121.

81. *Amos v. United States*, 255 U.S. 313, 317 (1921).

82. *Coolidge v. New Hampshire*, 403 U.S. 443, 489-90 (1971).

Others have clearly possessed common authority to provide consent⁸³ while one only seemed to be empowered to do so.⁸⁴ In deciding these cases, the Court crafted two pragmatic rules: (1) If a potential objector was absent at the time of the request to enter, then the present cohabitants possessing common authority over mutually used premises could consent to a police search of the home because the potential objector had assumed the risk that such permission would be given in his or her absence;⁸⁵ and (2) if, in contrast, the potential objector was home and communicating his or her refusal to consent to police, the other cohabitants could not override his or her objections.⁸⁶ The further question regarding the continuing effectiveness of a present occupant's refusal of consent after he or she is removed from the home by an officer's arrest was not decided until *Fernandez*.

II. *FERNANDEZ V. CALIFORNIA*

A. Facts

On October 12, 2009, around 11:00 a.m., the defendant, Walter Fernandez, accosted Abel Lopez after he had just cashed a check near the corner of 14th Street and Magnolia in Los Angeles, California.⁸⁷ When Fernandez asked Lopez what neighborhood he was from, Lopez responded, “I’m from Mexico.”⁸⁸ Fernandez then laughed and told Lopez that he “was in his territory and should give him his money” and that “[t]he D.F.S. rules here. They rule here.”⁸⁹ Fernandez then pulled out a knife and pointed it at Lopez’s chest.⁹⁰ When Lopez defensively put up his hands to protect himself, Fernandez cut his wrist.⁹¹ Lopez then ran away, calling 911 from his cell phone and reporting that “someone wanted to kill him.”⁹² In response to Lopez’s flight, Fernandez whistled, causing three or four men to attack Lopez, knock him to the ground, kick him, and hit him

83. *United States v. Matlock*, 415 U.S. 164, 175-76 (1974).

84. *Illinois v. Rodriguez*, 497 U.S. 177, 180, 182 (1990).

85. *Matlock*, 415 U.S. at 171.

86. *Georgia v. Randolph*, 547 U.S. 103, 120 (2006).

87. *People v. Fernandez*, 145 Cal. Rptr. 3d 51, 52 (Ct. App. 2012), *aff’d*, 134 S. Ct. 1126 (2014).

88. *Id.* at 53.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

“in [his] face and all over his body.”⁹³ The attackers “took [Lopez’s] cell phone and his wallet, which contained \$400 in cash.”⁹⁴

Hearing the dispatcher report a radio call that Drifters gang members might have committed a crime involving use of a deadly weapon, Detective Kelly Clark and Officer Joseph Cirrito drove to an alley “where they knew Drifters gathered.”⁹⁵ As the officers stood in the alley, a “very scared” man walking quickly by them said, ““He’s in there. He’s in the apartment.””⁹⁶ The officers then saw a man run through the alley and into the building to which the witness had pointed.⁹⁷ “A minute or so later, . . . officers heard sounds of screaming and fighting” coming from this building.⁹⁸ Officer Cirrito later testified that when he heard the “yelling and screaming,” he did not know “if [I had] a crime that’s happening right in front of me.”⁹⁹

After backup arrived, Clark and Cirrito knocked on the door of the unit emitting the screams, and Roxanne Rojas answered.¹⁰⁰ Rojas later testified that she “knew one of the officers,” having grown up with him when attending elementary and middle school.¹⁰¹ She even called him by his first name while he, seeing she was shaken, asked, ““What’s going on, Roxanne?””¹⁰² Rojas, holding a baby, appeared to be crying and had a red face and a large bump on the bridge of her nose that was so fresh it swelled as she spoke to the officers.¹⁰³ Further, blood on her shirt and hand appeared to come from a fresh injury.¹⁰⁴ When Officer Cirrito asked what had occurred, Rojas stated that she was in a fight.¹⁰⁵

When Rojas denied that anyone was in the apartment other than her son and herself, Cirrito asked her to step outside so police could

93. *Id.*

94. *Fernandez v. California*, 134 S. Ct. 1126, 1130 (2014).

95. *Fernandez*, 145 Cal. Rptr. 3d at 53.

96. *Id.*

97. *Id.*

98. *Id.*

99. Joint Appendix at 75, *Fernandez*, 134 S. Ct. 1126 (No. 12-7822).

100. *Fernandez*, 145 Cal. Rptr. 3d at 53.

101. Joint Appendix, *supra* note 99, at 91.

102. Roxanne Rojas testified, “[S]ince he hadn’t seen me like so shaken up, he said, ‘What’s going on, Roxanne?’” *Id.*

103. *Fernandez*, 145 Cal. Rptr. 3d at 53. Officer Cirrito later testified that “[Rojas] was out of breath. She seemed upset, and also, physically, I observed swelling. It was like swelling as I was talking to her, her forehead from the bridge of her nose.” Joint Appendix, *supra* note 99, at 63.

104. Joint Appendix, *supra* note 99, at 63.

105. *Fernandez*, 145 Cal. Rptr. 3d at 53.

conduct a protective sweep of the residence.¹⁰⁶ At this point, Fernandez, agitated and dressed only in boxer shorts, stepped forward and said, ““You don’t have any right to come in here. I know my rights.””¹⁰⁷ Believing Fernandez had assaulted Rojas, the officers arrested Fernandez, allowed the robbery victim, Lopez, to identify him as his attacker, and then booked him at the police station.¹⁰⁸ After removing Fernandez, police secured the apartment.¹⁰⁹

About an hour later, Clark returned to the apartment, told Rojas of Fernandez’s arrest, and sought consent to search the apartment.¹¹⁰ Rojas provided both oral and written consent.¹¹¹ *Fernandez*’s majority and dissent had differing views regarding the voluntariness of Rojas’ consent. Justice Alito, writing for the Court, noted that the trial court found the consent to be voluntarily given and “the correctness of that finding is not before us.”¹¹² Further, the Court determined that neither the trial judge nor the jury found Rojas’ testimony suggesting coercion to be credible.¹¹³ Justice Ginsburg, in her dissenting opinion, expressed “doubt that [Rojas’] agreement to the search was, in fact, an unpressured exercise of self-determination” due to Rojas’ testimony that when she objected to the police questioning her four-year-old son outside her presence and without her permission, an officer told her “that their investigation was ‘going to determine whether or not we take your kids from you right now or not.’”¹¹⁴ Rojas had also testified that she felt that “[she] had no rights” and that police “‘pressured’” her into giving consent “[a]fter about 20 to 30 minutes.”¹¹⁵ While admitting she signed the consent form, Rojas said she “‘didn’t want to sign’” and only did so “because she ‘just wanted it to just end.’”¹¹⁶ Conceding that the trial court found the officers’ behavior did not amount to “‘duress or

106. Joint Appendix, *supra* note 99, at 64; *Fernandez v. California*, 134 S. Ct. 1126, 1130 (2014).

107. *Fernandez*, 134 S. Ct. at 1130.

108. *Id.*

109. *Fernandez*, 145 Cal. Rptr. 3d at 53.

110. *Fernandez*, 134 S. Ct. at 1130.

111. *Id.*

112. *Id.* at 1130 n.2 (citing Joint Appendix, *supra* note 99, at 152).

113. *Id.* (citing Joint Appendix, *supra* note 99, at 152).

114. *Id.* at 1143 n.5 (Ginsburg, J., dissenting) (quoting Joint Appendix, *supra* note 99, at 93).

115. *Id.* (quoting Joint Appendix, *supra* note 99, at 93).

116. *Id.* (quoting Joint Appendix, *supra* note 99, at 100).

coercion,” Justice Ginsburg noted that the judge did agree that Rojas “may have felt pressured.”¹¹⁷

Armed with Rojas’ consent, police searched the apartment, recovering “Drifters gang paraphernalia, a butterfly knife, boxing gloves, and clothing.”¹¹⁸ The biggest find came as a result of the officers’ interview of Christian, Rojas’ four-year-old son, who alerted police to a heating vent mounted on the wall of the living room.¹¹⁹ Here officers found a sawed-off shotgun.¹²⁰ As a result of these events, the prosecution charged Fernandez with robbery; infliction of corporal injury on a spouse, cohabitant, or child’s parent; possession of a firearm by a felon; possession of a short-barreled shotgun; and felony possession of ammunition.¹²¹ After the trial court denied his motion to suppress the evidence recovered from the apartment, Fernandez pleaded *nolo contendere* to the firearms and ammunition charges.¹²² A jury convicted Fernandez on the remaining counts.¹²³

B. The Court’s Opinion

The Court in *Fernandez*, in an opinion written by Justice Alito, framed the issue presented in the case as “whether *Randolph* applies if the objecting occupant is absent when another occupant consents.”¹²⁴ *Fernandez* characterized *Randolph*’s limit on a cohabitant’s power to consent as a “narrow exception” to the rule that “police officers may search jointly occupied premises if one of the occupants consents.”¹²⁵ The Court “refuse[d] to extend *Randolph*” to invalidate consent given “by an abused woman well after her male partner had been removed from the apartment they shared.”¹²⁶ For *Fernandez*, this eminently reasonable ruling fit with “the ultimate touchstone of the Fourth Amendment”—

117. *Id.* (quoting Joint Appendix, *supra* note 99, at 152).

118. *People v. Fernandez*, 145 Cal. Rptr. 3d 51, 54 (Ct. App. 2012), *aff’d*, 134 S. Ct. 1126 (2014).

119. Joint Appendix, *supra* note 99, at 82.

120. *Fernandez*, 145 Cal. Rptr. 3d at 54.

121. *Fernandez*, 134 S. Ct. at 1131.

122. *Id.*

123. *Id.*

124. *Id.* at 1129-30.

125. *Id.* at 1129 (footnote omitted).

126. *Id.* at 1130.

“reasonableness.”¹²⁷ The permissibility of warrantless consent searches had “long been recognized” because they were a “standard investigatory technique[],” enabling homeowners to clear themselves of suspicion and alleviating officers of the needless inconvenience of warrants.¹²⁸ Indeed, *Fernandez* considered it “absurd” to force police to obtain a warrant if a sole owner or occupant voluntarily consented to a search.¹²⁹

Fernandez then scrutinized *Randolph*’s “narrow exception” to the general consent rule.¹³⁰ The Court repeatedly emphasized that *Randolph*’s limit on consent applied only when “a physically present inhabitant[]” expressly refused consent.¹³¹ Dutifully counting eleven relevant references in two opinions in the *Randolph* case,¹³² *Fernandez* characterized *Randolph* as going “to great lengths” to limit its holding to only those situations where the objecting occupant was actually present.¹³³ The Court then distinguished *Randolph* from *Fernandez* by noting that the defendant “was not present when Rojas consented.”¹³⁴

Fernandez then explained why the defendant’s two arguments for *Randolph*’s continued relevance were unsound. First, the defendant urged, “[T]here is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.”¹³⁵ *Fernandez* found the fact that police removed the person who objected to their search to be of no constitutional significance because in doing so, they acted objectively reasonably under the Fourth Amendment.¹³⁶ Police first had reasonable grounds to remove a suspected abuser, *Fernandez*, from the apartment so they could speak with his victim outside of his “potentially intimidating presence.”¹³⁷ Next, officers based their

127. *Id.* at 1132 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

128. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973)).

129. *Id.*

130. *Id.* at 1133. This time, the *Fernandez* Court phrased the general rule as “consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search.” *Id.*

131. *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 122 (2006)).

132. *Id.* at 1133-34 (citing *Randolph*, 547 U.S. at 106, 108, 109, 114, 119, 120, 121, 122, 126).

133. *Id.* at 1133.

134. *Id.* at 1134.

135. *Id.* (quoting *Randolph*, 547 U.S. at 121).

136. *Id.*

137. *Id.*

arrest of Fernandez on the traditional standard of probable cause.¹³⁸ The Court therefore held “an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.”¹³⁹

Fernandez next considered the defendant’s second, and equally unsound, argument that “his objection, made at the threshold of the premises that the police wanted to search, remained effective until he changed his mind and withdrew his objection.”¹⁴⁰ The Court first protested that this argument was “inconsistent with *Randolph*’s reasoning” because it could not be squared with *Randolph*’s “customary social usage” standard.¹⁴¹ For instance, counter to the defendant’s contentions, a caller invited into a home when the objecting party “is not on the scene” and “will not return during the course of the visit” would likely “accept [an] invitation to enter.”¹⁴² Further, a rule recognizing an objection to consent until the objector changed his mind would create “a plethora” of “the very sort of practical complications that *Randolph* [itself] sought to avoid.”¹⁴³ For example, the *Fernandez* Court worried about the duration of the absent tenant’s objection.¹⁴⁴ Should an objection’s power last an entire prison term if the objector finds himself sentenced to years in prison, or should the Court instead specify some precise time limit to define a “reasonable” period?¹⁴⁵ Would a court applying the defendant’s proposed test have to continually assess the objector’s “common authority,” say, by seeing if he kept up on rental payments?¹⁴⁶ Who in the police department would be bound by the objection—the original officers, other officers assigned to the same investigation, or still others on “arguably related” cases?¹⁴⁷ Rejecting the defendant’s approach in favor of the Court’s ruling makes “all of these problems disappear.”¹⁴⁸

Finally, *Fernandez* was philosophically opposed to recognizing the defendant’s objection, declaring, “Denying someone in Rojas’ position the right to allow the police to enter *her* home would also

138. *Id.*

139. *Id.*

140. *Id.* at 1135.

141. *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 121 (2006)).

142. *Id.* (emphasis added).

143. *Id.*

144. *Id.*

145. *Id.* at 1135-36.

146. *Id.* at 1136.

147. *Id.*

148. *Id.*

show disrespect for her independence.”¹⁴⁹ After beating Rojas, Fernandez “would bar her from controlling access to her own home until such time as he chose to relent.”¹⁵⁰ Appalled by this prospect, the Court concluded, “The Fourth Amendment does not give him that power.”¹⁵¹

III. THE TROUBLING IMPLICATIONS OF *FERNANDEZ*

A. *Fernandez* Turned the Fourth Amendment on Its Head by Creating for Occupants of Homes the Right to Invite the Police to Enter the Dwelling and Conduct a Search

In its attempt to open Rojas’ home to investigation of domestic violence, *Fernandez* devalued the warrant requirement, traditionally a Fourth Amendment bulwark against government invasions of privacy.¹⁵² The Court questioned the primacy of the Warrant Clause at the outset of its analysis by noting, “[T]he text of the Fourth Amendment does not specify when a search warrant must be obtained.”¹⁵³ *Fernandez* instead exalted reasonableness alone as “the ultimate touchstone of the Fourth Amendment.”¹⁵⁴ Characterizing consent as a “long recognized” warrant exception, the Court declared that pursuing a warrant after an owner had already consented “would needlessly inconvenience everyone involved.”¹⁵⁵ According to *Fernandez*, the warrant procedure, “[e]ven with modern technological advances, . . . imposes burdens” on officers and magistrates and consenting occupants.¹⁵⁶ Residents needed to be spared the delay occasioned while waiting for a court to ensure that police have a lawful right to search.¹⁵⁷

The cumulative impact of these statements did not go unnoticed by Justice Ginsburg, who, in viewing the Court as “[s]uppressing the warrant requirement,” vehemently declared, “Instead of adhering to the warrant requirement, today’s decision tells the police they may dodge it, nevermind ample time to secure

149. *Id.* at 1137.

150. *Id.*

151. *Id.*

152. *See* *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

153. *Fernandez*, 134 S. Ct. at 1132 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)).

154. *Id.* (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

155. *Id.*

156. *Id.* at 1137.

157. *Id.*

the approval of a neutral magistrate.”¹⁵⁸ Further, *Fernandez*’s crabbed view of warrants conflicted with the Court’s most recent case deciding conflicts in consent, *Randolph*, which the Court claimed to champion.¹⁵⁹ *Randolph*, citing language from *Coolidge v. New Hampshire*, cautioned, “‘The warrant requirement . . . is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency.’”¹⁶⁰

Fernandez’s worry about inconvenient warrants signals a deeper concern about the future viability of this Fourth Amendment fundamental. In questioning the warrant mandate’s textual basis, the Court undermined decades of precedent detailing the central role of warrants in preserving Fourth Amendment privacy. The Court has previously recognized “the warrant requirement” as “a principal protection against unnecessary intrusions into private dwellings”¹⁶¹ and a “bulwark of Fourth Amendment protection.”¹⁶² Further, the Warrant Clause has provided a test for defining Fourth Amendment reasonableness, as noted in *Chimel v. California*:

“To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response.”¹⁶³

Justice Frankfurter provided an even more explicit response to this inquiry: “There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant It is no criterion of reason to say that the district court must find it reasonable.”¹⁶⁴

The Court has previously declared, “The warrant clause of the Fourth Amendment is not dead language.”¹⁶⁵ Instead, the Warrant Clause has been

158. *Id.* at 1139 (Ginsburg, J., dissenting).

159. *Id.* at 1135 (majority opinion).

160. *Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006) (alteration in original) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

161. *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984).

162. *Franks v. Delaware*, 438 U.S. 154, 164 (1978).

163. *Chimel v. California*, 395 U.S. 752, 765 (1969) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)).

164. *Rabinowitz*, 339 U.S. at 83.

165. *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 315 (1972).

“a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. . . . It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the ‘well-intentioned but mistakenly over-zealous executive officers’ who are a part of any system of law enforcement.”¹⁶⁶

It is curious that the Court in *Fernandez* found itself in the position of promoting a warrantless intrusion into the most sacred of places—the home. As recently as 2013, the Court, in *Florida v. Jardines*, deemed the home “first among equals” and at the Fourth Amendment’s “‘very core.’”¹⁶⁷ Further, the Court in *Keith*, specifically determined that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”¹⁶⁸ The Court in *Jardines* also urged that the Fourth Amendment provides “‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”¹⁶⁹ The Court has consistently honored the “‘centuries-old principle of respect for the privacy of the home.’”¹⁷⁰ In *Randolph*, the Court recognized, “We have, after all, lived our whole national history with an understanding of ‘the ancient adage that a man’s house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown.’”¹⁷¹ Of particular interest to the Court in *Fernandez* should have been *Miller v. United States*, in which the Court quoted William Pitt’s declaration that “‘[t]he poorest man may in his cottage bid defiance to all the forces of the Crown’” including the King himself.¹⁷² *Silverman* further explained, “‘A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty—worth protecting from encroachment.’”¹⁷³ After *Fernandez*, this “hunk of

166. *Id.* at 315-16 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

167. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

168. *Keith*, 407 U.S. at 313.

169. *Jardines*, 133 S. Ct. at 1414 (quoting *Silverman*, 365 U.S. at 511).

170. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quoting *Wilson v. Layne*, 526 U.S. 603, 610 (1999)).

171. *Id.* (alteration in original) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)).

172. *Miller*, 357 U.S. at 307.

173. *Silverman*, 365 U.S. at 511 n.4 (quoting *United States v. On Lee*, 193 F.2d 306, 315 (2d Cir. 1951) (Frank, J., dissenting), *aff’d*, 343 U.S. 747 (1952)).

liberty” might no longer be so sizeable, for the Court, in diminishing the warrant mandate, can no longer assure citizens that outsiders cannot easily get to them in their homes.

Instead of adhering to its traditional purpose of preserving the Fourth Amendment privacy of the home, the *Fernandez* Court has assumed the new role of champion for the extroverted and gregarious homeowner. *Fernandez* declared, “The owner of a home has a right to allow others to enter and examine the premises, and there is no reason why the owner should not be permitted to extend this same privilege to police officers if that is the owner’s choice.”¹⁷⁴ For a Court that worried about the textual basis of the warrant requirement,¹⁷⁵ it is curious that *Fernandez* created this new right in the absence of any supporting language in the Fourth Amendment, or any other authority for that matter.¹⁷⁶ Despite this failing, the Court expanded on its novel Fourth Amendment right by intoning, “[T]he lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent.”¹⁷⁷ This new right-to-invite became the driving force behind *Fernandez*’s ruling, for the Court closed its opinion by emotionally affirming, “Denying someone in Rojas’ position the right to allow the police to enter *her* home would also show disrespect for her independence.”¹⁷⁸ The Court’s emphasis of the word “her” highlighted Rojas’ individual property right as a lawful tenant in rightful possession to ask others to enter. *Fernandez*’s worry about “tramp[ing]” on this new right, along with its reference to respect and independence,¹⁷⁹ betrayed strong feelings, perhaps due to the domestic violence aspect of the case.

Earlier, in *Randolph*, the Court had anticipated the special concerns raised in domestic violence cases.¹⁸⁰ *Randolph* refused to allow the “established policy of Fourth Amendment law [to] be undermined by [a] claim that it shields spousal abusers and other

174. *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014).

175. *Fernandez* carefully noted that “the text of the Fourth Amendment does not specify when a search warrant must be obtained.” *Id.* (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)).

176. *Fernandez* cited no authority for its ruling that “[t]he owner of a home has a right to allow others to enter.” *Id.*

177. *Id.* at 1137.

178. *Id.*

179. *Id.*

180. *Georgia v. Randolph*, 547 U.S. 103, 118-19 (2006).

violent co-tenants who will refuse to allow the police to enter a dwelling when their victims ask the police for help.”¹⁸¹ The Court clearly declared, “[T]his case has no bearing on the capacity of the police to protect domestic victims,” because there was no question “about the authority of the police to enter a dwelling to protect a resident from domestic violence.”¹⁸² “[S]o long as [officers] ha[d] good reason to believe such a threat exist[ed], it would be silly to suggest that the police would commit a tort by entering” to determine if violence or a threat of violence existed, or to help a victim to collect her belongings in order to safely leave.¹⁸³ Here, the “emergency nature” of the situation enabled police not only to enter to “provide any protection,” but also to “seize any evidence in plain view or take further action supported by any consequent probable cause.”¹⁸⁴ *Randolph* concluded its discussion of this issue by simply stating that “[t]he undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the [consent] question in th[e] case.”¹⁸⁵

Furthermore, however good the Court’s intentions, *Fernandez*’s right-to-invite lacked a basis in Fourth Amendment law. *Randolph* anticipated this problem when tying up one of its “loose ends.”¹⁸⁶ *Randolph* had cautioned that a co-inhabitant’s “right to permit the inspection in his own right” was “not an enduring and enforceable ownership right” of property law but only “the authority recognized by customary social usage.”¹⁸⁷ Such social usage was relevant in interpreting “Fourth Amendment reasonableness in specific circumstances.”¹⁸⁸ This discussion of common authority came from *Matlock*, which specified that “[c]ommon authority is, of course, not to be implied from the mere property interest a third party has in the property” because third-party consent authority did “not rest upon the law of property, with its attendant historical and legal refinements.”¹⁸⁹ Instead, common authority rested “on mutual use of the property by persons generally having joint access or control for

181. *Id.* at 117.

182. *Id.* at 118.

183. *Id.*

184. *Id.*

185. *Id.* at 118-19.

186. *Id.* at 120.

187. *Id.* at 120-21 (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

188. *Id.* at 121.

189. *Matlock*, 415 U.S. at 171 n.7.

most purposes.”¹⁹⁰ With such mutual use, it was reasonable to expect other tenants to allow inspections, and therefore occupants “assumed the risk that one of their number might permit the common area to be searched.”¹⁹¹ This discussion of customary social usage was merely meant to assess what an occupant could expect regarding his or her fellow residents. As such, it was a far cry from requiring the Court to defend the right of “controlling access” against others’ Fourth Amendment privacy interests.¹⁹²

Finally, *Fernandez*’s application of its right-to-invite rule failed to accurately assess the realities of people living together. The Court felt it “obvious” that a visitor would alter his or her decision about entry depending on whether or not an “objecting tenant” was “standing at the door.”¹⁹³ *Fernandez* reasoned that “[w]hen the objecting occupant is standing at the threshold saying ‘stay out,’ a friend or visitor invited to enter by another occupant can expect at best an uncomfortable scene and at worst violence if he or she tries to brush past the objector.”¹⁹⁴ In contrast, with the objector safely away from the scene, “the friend or visitor is much more likely to accept the invitation to enter.”¹⁹⁵ As noted by the dissent, “‘Only in a Hobbesian world,’ however, ‘would one person’s social obligations to another be limited to what the other[, because of his presence,] is . . . able to enforce.’”¹⁹⁶ In *Fernandez*’s social world, commitments are enforced by intimidation or violence only while a person is on the scene. Since force is the motivator in these relationships, once the bully is gone, the persons around him will causally forsake honesty or agreements by sneaking in whomever they wish. Unlike *Randolph*, which recognized that “when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority,”¹⁹⁷ in *Fernandez*, there is no discussion with cotenants and no search for compromise. Moreover, a visitor in *Fernandez* will happily enter in the objector’s absence, heedless of any potential

190. *Id.*

191. *Id.*

192. *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014).

193. *Id.* at 1135.

194. *Id.*

195. *Id.*

196. *Id.* at 1140 (Ginsburg, J., dissenting) (alteration in original) (quoting *United States v. Henderson*, 536 F.3d 776, 787 (7th Cir. 2008) (Rovner, J., dissenting)).

197. *Georgia v. Randolph*, 547 U.S. 103, 113-14 (2006).

violence that might befall the person who gave the invitation should the objector somehow find out about the secret entry. In *Fernandez*'s world, home life, while not "solitary," could be "poore, nasty, brutish, and short."¹⁹⁸

Perhaps *Fernandez*'s view of social relationships as based on authority backed by force explains the Court's curious equation of private and official visitors. As noted in the dissent, the Court's

conjectures about social behavior, at any rate, shed little light on the constitutionality of this warrantless home search, given the marked distinctions between private interactions and police investigations. Police, after all, have power no private person enjoys. They can, as this case illustrates, put a tenant in handcuffs and remove him from the premises.¹⁹⁹

The *Fernandez* Court seemed to miss this point entirely. When it warned against showing "disrespect" for Rojas' "independence,"²⁰⁰ the Court was oblivious to the arm-twisting officers used to get Rojas to consent to their entry. Even if one were to discount that police questioned Rojas' four-year-old child or threatened to take him away from his mother, the trial judge, who was present at the testimony and therefore best able to assess the facts, agreed that Rojas "may have felt pressured."²⁰¹ *Fernandez*, in exalting Rojas' right to control "access" to her home, might not so much have given Rojas independence but placed her between a violent cohabitant and coercive police.²⁰² In creating its right-to-invite for owners or occupants, the Court believed it was vindicating the rights of Rojas—the resident—to allow anyone she wished into her home. In reality, Rojas found herself in an impossible bind where police were questioning her four-year-old son about a hidden weapon while she feared that the "defendant would be very upset if he knew she was talking to the police."²⁰³ Such a situation hardly promoted the autonomy of a domestic violence victim.

198. THOMAS HOBBS, *LEVIATHAN* 84 (A. R. Waller ed., Cambridge Univ. Press 1904) (1651).

199. *Fernandez*, 134 S. Ct. at 1140 (Ginsburg, J., dissenting).

200. *Id.* at 1137 (majority opinion).

201. *Id.* at 1143 n.5 (Ginsburg, J., dissenting) (quoting Joint Appendix, *supra* note 99, at 152).

202. *Id.* at 1137 (majority opinion).

203. *People v. Fernandez*, 145 Cal. Rptr. 3d 51, 54 (Ct. App. 2012), *aff'd*, 134 S. Ct. 1126 (2014).

B. *Fernandez*'s Reasoning Invited Police to Sculpt Their Environment in a Way to Assure They Obtain Consent

The *Fernandez* Court remarked that it faced a “very different situation in this case” than did the *Randolph* Court, which was confronted with a physically present, objecting occupant.²⁰⁴ This difference, of course, was due entirely to police behavior. The police in *Randolph* did not physically remove Scott Randolph from the scene after he objected to entry.²⁰⁵ In contrast, officers in *Fernandez* arrested Walter Fernandez, took him to the station for booking, and returned an hour later to seek consent to search.²⁰⁶ Thus, *Fernandez* placed the ability to gain valid consent, and therefore avoid the inconvenience of obtaining a warrant, within police control so long as they followed a certain protocol.

Indeed, much of the language in *Fernandez* can be read as a manual for officers on how to sculpt the facts to steer a case away from *Randolph* and toward *Fernandez*. First, in *Fernandez*, the Court found its case differed from *Randolph* because “consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.”²⁰⁷ The domestic violence nature of the offense influenced the Fourth Amendment inquiry. Not only was Rojas “an abused woman,”²⁰⁸ but the threat inherent in domestic violence also gave police “reasonable grounds for removing” an abuser from the premises so that the “victim of domestic violence,” outside of her tormentor’s “intimidating presence,” would be able to speak with police.²⁰⁹ Next, *Fernandez*'s statement distinguishing *Randolph* provided a clue to timing; consent should be sought “well after” the objecting party has been removed, which in *Fernandez* was “[a]pproximately one hour.”²¹⁰ Thus, police reading *Fernandez* will learn that another tenant will become eligible to provide consent an hour after the removal of the objecting occupant. Police could use this hour to obtain a warrant, or, following *Fernandez*, they could forgo the hassle of seeking a magistrate’s approval by simply returning to the home to ask for consent. Seeking consent might be a more certain option for officers;

204. *Fernandez*, 134 S. Ct. at 1130.

205. *Georgia v. Randolph*, 547 U.S. 103, 107 (2006).

206. *Fernandez*, 134 S. Ct. at 1130.

207. *Id.*

208. *Id.*

209. *Id.* at 1134.

210. *Id.* at 1130.

while magistrates, being “neutral and detached”²¹¹ officials, are hardened against being influenced, residents might be “‘pressured’” without “amount[ing] to ‘duress or coercion.’”²¹²

Fernandez found in its consent precedent other ways to evade the warrant requirement. The Court explained that the police in *Matlock* never sought consent from the defendant.²¹³ Instead, officers arrested Matlock in the front yard of his home and then placed him in their squad car.²¹⁴ Only then did the officers knock on the door of his home to seek consent from Mrs. Graff.²¹⁵ Therefore, police reading *Fernandez* could learn from this that the simplest way to make a warrantless entry into a home could be to arrest the most likely objector and seek out those least likely to refuse consent.²¹⁶ The Court, in its review of *Rodriguez*, also provided guidance in settings where the most likely objector is present but not yet contacted. Here the key is to let sleeping objectors lie. *Fernandez* explained that in *Rodriguez*, Gayle Fischer, who appeared to be recently beaten, told police that Rodriguez was “asleep in the apartment.”²¹⁷ The officers in *Rodriguez* “could have knocked on the door and awakened Rodriguez” but chose not to do so, instead mistakenly relying on Fischer’s apparent common authority to consent to search.²¹⁸ Since the government was ultimately able to enter the evidence then found

211. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

212. *Fernandez*, 134 S. Ct. at 1143 n.5 (Ginsburg, J., dissenting) (quoting Joint Appendix, *supra* note 99, at 152).

213. *Id.* at 1132 (majority opinion).

214. *Id.*

215. *Id.*

216. Police, of course, need probable cause that a person has committed a crime to lawfully arrest. However, there is still great discretion in exercising the decision to arrest. First, an officer may arrest for a whole host of minor crimes. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”). Second, “[i]n practice, when enforcing the law, the police exercise enormous discretion to arrest. Field observation studies of police decisions to arrest demonstrate this point: in one such study, the police released roughly one half of the persons they suspected of committing crimes.” Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 MICH. L. REV. 2215, 2233 (1991) (quoting A.J. Reiss, Jr., *Discretionary Justice in the United States*, 2 INT’L J. CRIMINOLOGY & PENOLOGY 183, 190-91 (1974)). Thus, faced with an objection to consent, police might wish to exercise their broad discretion in arresting the objector for even a minor crime so as to remove him from the scene.

217. *Fernandez*, 134 S. Ct. at 1133.

218. *Id.*

in the home against Rodriguez, even though they turned out to be wrong about Fischer's common authority to provide consent, the lesson to police here was to forgo knocking on the door and risk waking a resident when consent to enter has already been obtained from someone else.

Fernandez extracted from *Randolph* still other tips for obtaining useful consent. *Fernandez* gleaned from *Randolph* that ““a physically present inhabitant’s express refusal of consent . . . is dispositive as to him.””²¹⁹ In emphasizing the words “physically present inhabitant,” the Court signaled that the only refusals of consent the officers had to worry about, and therefore to avoid, were those coming from residents who were physically present. The lesson to police here was to seek out ways to ensure that potential objecting occupants were *not* present. *Fernandez* offered two different strategies. If officers had probable cause for it, an arrest effectively removed the likely objecting party whether he had already objected or not. If he had not yet been consulted, then police could use the *Matlock* scenario to then seek consent in the arrestee’s absence. If he had already objected, then police could wait *Fernandez*’s one hour to be “well after” the removal before asking for permission to enter.²²⁰ If police lacked probable cause to arrest, police should seek out “reasonable grounds for removing” the potential objector.²²¹ Besides the domestic violence reason offered earlier, police could remove a likely objector on the grounds that officers had to separate the parties to ensure that each person did not distort the other’s version of events or to avoid the breakout of a physical fight due to heightened tension between occupants. Removal in this situation need not be for a significant distance and certainly not to the police station; *Matlock* was in a squad car in front of his home²²² while Rodriguez was asleep upstairs.²²³ The key here for officers evading the warrant requirement would be to move the potential objecting party beyond earshot so that he or she is not aware that police are seeking consent from another person.

Finally, *Fernandez*’s reasoning suggests that it would be best for officers who have an “improper motive” for a removal to simply not share it with others.²²⁴ So long as an officer acts objectively

219. *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 122 (2006)).

220. *Id.* at 1130.

221. *Id.* at 1134.

222. *Id.* at 1132.

223. *Id.* at 1133.

224. *Id.* at 1134.

reasonably in removing a person, no “inquiry into the subjective intent of officers who detain or arrest a potential objector” is required.²²⁵ Officers who can point to a valid reason for removal and are discrete about any other motives will have their consent searches upheld. Thus, *Fernandez* has presented a protocol, considering both outwardly reasonable acts and inwardly suspect thoughts, for officers pursuing consent to follow. Police will quickly learn that employing this procedure can avoid the “burden” of pursuing a warrant.²²⁶

C. *Fernandez* Eroded the Warrant Requirement While Undermining the Credibility of Its Rationales by Offering a Series of Irrelevant Hypothetical Situations

Near the outset of its Fourth Amendment analysis, *Fernandez* made a series of general assertions about consent to search a home that were true as far as they went. In answering the question presented, however, these statements hardly went far. The Court, for instance, declared, “It would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search.”²²⁷ The absurdity of this hypothetical situation was heightened by the fact that it contributed little to the issue of the proper police response to the competing rights of occupants disagreeing about permitting officers to enter. *Fernandez* continued with its hypothetical single occupant, noting that he or she had the right to allow others, including police, to enter and examine the premises.²²⁸ The Court then embellished its hypothetical scenario by implanting into the single owner’s mind a fear “that he or she is under suspicion.”²²⁹ Further, *Fernandez* imagined an owner being in a bind because “the owner has a strong interest in the apprehension of the perpetrator of a crime and believes that the suspicions of the police are deflecting the course of their investigation.”²³⁰ Perhaps the Court should have gone one step further and imagined that the home contained a map marking the place where police could find the true perpetrator. *Fernandez* even envisioned an occupant who wanted police to enter

225. *Id.*

226. *Id.* at 1137.

227. *Id.* at 1132.

228. *Id.*

229. *Id.*

230. *Id.*

and was frustrated by the warrant requirement and inconvenienced by the execution of a warrant.²³¹

Such scenarios seemingly cried out for a new Fourth Amendment right *against* a warrant and the attendant bureaucracy of the warrant process. Not only does “the text of the Fourth Amendment”²³² make no reference to such protection against warrants, but such a “right” to be exposed to the discretion of the officer in the field creates its own absurdity in light of a wealth of Fourth Amendment precedent. In *Delaware v. Prouse*, the Court held “that persons in automobiles on public roadways” should not “have their travel and privacy interfered with at the unbridled discretion of police officers.”²³³ In the search incident to arrest case, *Arizona v. Gant*, the Court worried “about giving police officers unbridled discretion to rummage at will among a person’s private effects.”²³⁴ In *Samson v. California*, where an officer searched a state prison parolee, one of a class of persons who have severely limited privacy rights, the Court again concerned itself with the officer’s “unbridled discretion to conduct searches.”²³⁵ Finally, in *Skinner v. Railway Labor Executives’ Ass’n*, which involved collecting biological samples from railroad employees, the Court aimed to avoid the “unbridled discretion” of a “supervisor in the field.”²³⁶ Thus, the result of *Fernandez*’s fruitless travels through hypothetical scenarios about the consent of a single owner—facts that were not before the Court—was not only unhelpful, but also contrary to the Court’s own precedent.

Fernandez’s fancy was not limited to the creation of hypothetical scenarios; the Court also participated in counter-factual conjectures.²³⁷ In relating the facts in *Rodriguez*, *Fernandez* noted that, although the officers in *Rodriguez* did not do so, “[T]he officers could have knocked on the door and awakened Rodriguez.”²³⁸ *Fernandez* further imagined that, once awake, “Rodriguez might well have surrendered at the door and objected to the officers’ entry.”²³⁹ While it is true that such events could have occurred, it is

231. *Id.*

232. *Id.* (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)).

233. 440 U.S. 648, 663 (1979).

234. 556 U.S. 332, 345 (2009).

235. 547 U.S. 843, 846-47, 856 (2006).

236. 489 U.S. 602, 609, 622 n.6 (1989).

237. *Fernandez*, 134 S. Ct. at 1132.

238. *Id.* at 1133.

239. *Id.*

also true that since they did not occur, they have no bearing on the case. After all, it was also true that the officers, armed with probable cause that Rodriguez had committed a violent crime, could have obtained an arrest warrant for the defendant. This scenario, while offering police a solid option for good police work, is equally useless to the holding reached in *Fernandez*.

Finally, *Fernandez* envisioned “a plethora of practical problems” should the Court adopt the defendant’s rule.²⁴⁰ The Court imagined a wife being thwarted in allowing police into her home a decade after her husband had objected to entry even though he was absent serving a “15-year prison term.”²⁴¹ Additionally, *Fernandez* pondered what would happen should the objector stop paying rent.²⁴² To counter such conjectures, Justice Ginsburg simply offered her own regarding the Court’s newly minted rule.²⁴³ She wondered whether the “occupant’s refusal to consent lose[s] force as soon as she absents herself from the doorstep,” say to “answer the phone, use the bathroom,” or to take a nap.²⁴⁴ Justice Ginsburg concluded, “Hypothesized practical considerations, in short, provide no cause for today’s drastic reduction of *Randolph*’s holding and attendant disregard for the warrant requirement.”²⁴⁵

In crafting hypothetical scenarios and speculating about facts not before it, *Fernandez* seemed to forget the basic lesson that a court “must deal with the facts before it and not engage in speculation.”²⁴⁶ Whether they like it or not, courts are “limited to the facts of the case and cannot speculate beyond the record provided.”²⁴⁷ Therefore, courts should “remain faithful to the principle that a court can adjudicate only the case before it, not the case it wishes were before it.”²⁴⁸ The focus on situations and settings

240. *Id.* at 1135.

241. *Id.* at 1135-36.

242. *Id.* at 1136.

243. *Id.* at 1141 (Ginsburg, J., dissenting).

244. *Id.*

245. *Id.*

246. *Touriac v. Chenevert*, No. 6:12-cv-01785, 2012 U.S. Dist. LEXIS 141905, at *10 (W.D. La. Sept. 26, 2012); *Fontenot v. Johnson & Johnson*, No. 10-162, 2010 U.S. Dist. LEXIS 60163, at *24 (W.D. La. Apr. 30, 2010).

247. *Quesada v. State*, Nos. 04-07-00687-CR & 04-07-00688-CR, 2009 Tex. App. LEXIS 1843, at *4 (Mar. 18, 2009).

248. *Lima v. NLRB*, 819 F.2d 300, 303 n.3 (D.C. Cir. 1987); see also Myron T. Steele & J.W. Verret, *Delaware’s Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 194 n.20 (2007) (“[C]ourts must decide only the cases before them” (quoting E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from*

not before the Court might betray a lack of comfort in the actual facts *Fernandez* had to work within “its zeal to diminish *Randolph*.”²⁴⁹ All the more unfortunate, *Fernandez*’s speculations could erode the warrant requirement by creating yet another exception to it, here in the name of freeing residents from the supposed burdens of bureaucracy.

CONCLUSION

Our lives are finite, so our time is precious. The Court has found in the Fourth Amendment a right to protect our time from the meticulous bureaucrats who test our patience gathering probable cause, writing out a warrant, reviewing the validity of affidavits, and issuing limits on the power to search our homes.²⁵⁰ If not for this right, *Fernandez* noted, “[a]n owner may want the police to search even where they lack probable cause, and if a warrant were always required, this could not be done.”²⁵¹ Further, even if police did indeed possess probable cause, “requiring a warrant despite the owner’s consent would needlessly inconvenience everyone involved—not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed.”²⁵² *Fernandez* thus meant to free everyone concerned from such an “unmerited burden” as a warrant, which inevitably “entails delay.”²⁵³ *Fernandez* freed occupants of such constraints on freedom by empowering one tenant to consent to search when his or her cotenant, who had objected to the search, is no longer present.²⁵⁴

While *Fernandez*’s rule might indeed save us time—certainly that of officers and magistrates—which has become increasingly precious in our ever-faster moving lives, is it a legitimate right under the Fourth Amendment? No such right-to-invite in order to avoid the warrant process is mentioned in the text of the Fourth Amendment. Moreover, in curbing *Randolph*, the *Fernandez* Court diminished the Fourth Amendment’s warrant requirement and exposed the home,

1992-2004? *A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1413 (2005)).

249. *Fernandez*, 134 S. Ct. at 1141 (Ginsburg, J., dissenting).

250. *Id.* at 1131-32 (majority opinion).

251. *Id.* at 1132.

252. *Id.*

253. *Id.* at 1137.

254. *Id.* at 1129-30.

recently reaffirmed as the ““very core”” of the Amendment, to warrantless police intrusions.²⁵⁵ Curiously, much of the *Fernandez* opinion seemed written to instruct police in finding ways to gain consent in order to evade the warrant requirement. Moreover, *Fernandez* was prone to flights of fancy where conjectures played a bigger part than facts in forming conclusions. In attempting to free homeowners of the burdens of warrant bureaucracy, the *Fernandez* Court denied residents the security and privacy of the home. Curiously, *Fernandez* transformed the Fourth Amendment, once a bulwark of privacy, into a right to open the home to official scrutiny.

255. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

