# THE FINEST OF FINE LINES: *RANDOLPH*, *FERNANDEZ*, AND WHAT REMAINS OF THE FOURTH AMENDMENT WHEN A ROOMMATE CONSENTS TO A SEARCH

*by*
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*On February 25, 2014, the Supreme Court decided* Fernandez v. California, *holding that an occupant's consent to a warrantless search after a physically present and objecting cotenant is removed by police is valid against the objecting cotenant. In so deciding, the Court found an occupant's absence due to police action should be treated the same as absence for any other reason. Narrowing the precedent set in* Georgia v. Randolph, *which held that a physically present tenant's express refusal to consent to search was dispositive as to that person despite a contemporaneously consenting cotenant, the Court further elevated the consent exception to a general rule and substantially diluted the constitutional right to be free from unreasonable searches and seizures in the process. In its impulsive effort to protect victims of domestic abuse and ensure police have unhindered authority to elicit consent to search for evidence without a warrant, the Court missed an opportunity to deter police misconduct, respect the right to object or consent to a search, better protect victims while providing for more effective law enforcement, and safeguard the Fourth Amendment.*

*This Note proposes an alternative rule that addresses these concerns. The proposed rule requires police to stop actively seeking consent once a physically present occupant objects to a warrantless search, yet allows a cotenant to invite police to search when the objecting occupant is absent. Under this proposed rule, police have no incentive to skirt the Fourth Amendment by removing an objecting tenant for the primary purpose of eliciting consent from another tenant. The proposed rule respects an occupant's express objection to a warrantless search while supporting a cotenant's interest in seeking police help to discover and remove illegal and potentially dangerous materials. Victims of domestic abuse are better protected by the proposed rule, and law enforcement prerogatives are better served by it, because it eliminates the objector's motivation to remain at the residence to continually register an objection, freeing the cotenant to invite police to search in the objector's absence. Finally, unlike* Fernandez*'s actual rule, the proposed rule accomplishes these objectives while preserving Fourth Amendment rights.*

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"How about a clear answer? Get a warrant."
–Supreme Court Justice Sonia Sotomayor[1]

## INTRODUCTION

On February 25, 2014, the Supreme Court decided the case of *Fernandez v. California* out of the California Court of Appeal, Second District, Division Four.[2] The case involved a variation on the Supreme Court's holding in *Georgia v. Randolph*,[3] and inquired how law enforcement

[1] Transcript of Oral Argument at 45, Fernandez v. California, 134 S. Ct. 1126 (2014) (No. 12-7822).

[2] 134 S. Ct. 1126, *aff'g* People v. Fernandez, 208 Cal. App. 4th 100 (2012).

[3] 547 U.S. 103 (2006).

should treat an occupant's[4] consent to search a shared residence after a physically present and objecting cotenant is arrested and removed from the residence.[5] The Supreme Court affirmed the California Appellate Court, holding that police may conduct a warrantless search for evidence in the absence of an objecting occupant when his cotenant consents, even when the absence is the result of police action.[6]

The Fourth Amendment states:

> 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.[7]

Historically, a warrantless search of a home was presumptively unreasonable.[8] Yet during the last century, narrow exceptions to this presumption began to slowly dilute the Fourth Amendment's protections, even within the home, that most sacred—and previously guarded—space.[9]

The Supreme Court first found warrantless searches based on consent reasonable and thus constitutional in *Zap v. United States*.[10] Since *Zap*, the consent "exception" has expanded exponentially, in both law and law enforcement, to the point that "[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."[11] *Randolph*, decided in 2006, announced a limit on consent searches when the Court found that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant," and reiterated that searches based on consent are indeed an exception to the general rule requiring a

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[4] Like the Supreme Court, this Note uses the terms (co-)occupant, resident, (co)tenant, and housemate "interchangeably to refer to persons having 'common authority' over premises within the meaning of [*United States v.*] *Matlock*." *Fernandez*, 134 S. Ct. at 1129 n.1 (citing United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)).

[5] *Fernandez*, 134 S. Ct. at 1134–36; *see also Matlock*, 415 U.S. at 170–71 (holding that a warrantless search based on one occupant's consent is valid as against another occupant).

[6] *Fernandez*, 134 S. Ct. at 1134, 1137.

[7] U.S. CONST. amend. IV.

[8] Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477–78 (1971))).

[9] *E.g.*, *Coolidge*, 403 U.S. at 466 (plain view); Ker v. California, 374 U.S. 23, 39–41 (1963) (opinion of Clark, J.) (exigent circumstances); Hester v. United States, 265 U.S. 57, 59 (1924) (open fields).

[10] 328 U.S. 624, 628–29 (1946); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 216 & n.12 (2001).

[11] Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005).

warrant.[12] However, the *Fernandez* opinion illustrates that the current Court views *Randolph* not as a restatement of the general rule that a warrantless search of the home is presumptively unreasonable, but rather as a "narrow exception" to its general rule of consent.[13] This fundamentally alters the protection of the Fourth Amendment for joint tenants because the refusal to allow a search is no longer supported by the Constitution—indeed an invocation of the Fourth Amendment right against unreasonable searches and seizures[14]—but is rather an exception to consent, and the only requirement of consent to a search is that it be "voluntary," an inquiry that is itself fraught with ambiguity.[15]

This Note has four parts. Part I discusses the opinion of the California Court of Appeal in *Fernandez v. California* as well as the relevant case law, specifically *Randolph* and the Ninth Circuit's *United States v. Murphy*, which had facts nearly identical to *Fernandez* but held that a search based on the consent of a cotenant after a physically present occupant objects is invalid as to the objecting tenant.[16] Part II then reviews the Supreme Court's majority and dissenting opinions in *Fernandez*. Part III proposes a rule that addresses the concerns of both the majority and dissent while still protecting the objector's Fourth Amendment rights: once a physically present occupant objects to a search of his residence, the police may only rely on the consent exception to the Fourth Amendment if invited by a cotenant when no physically present resident objects. Finally, Part IV concludes by briefly analyzing the Court's 2012–2013 term Fourth Amendment opinions and considering the continuing dilution of Fourth Amendment protections and its potential to affect the lives of everyday Americans.

## I. BACKGROUND

### *A. Facts and Procedural Posture*

In October 2009, a Los Angeles police officer and a detective knocked on defendant Walter Fernandez's apartment door after a man was robbed and attacked in the same neighborhood.[17] Fernandez's live-in

[12] Georgia v. Randolph, 547 U.S. 103, 109, 122–23 (2006) (describing its holding as a "straightforward application" of the quoted "rule").

[13] Fernandez v. California, 134 S. Ct. 1126, 1129 (2014).

[14] The Supreme Court does not equate consent to search with the waiver of a constitutional right in *Schneckloth v. Bustamonte*, 412 U.S. 218, 235, 245 (1973); however, it has described refusing to consent to search as invoking a constitutional right. *See* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011) (describing consent as "choos[ing] not to stand on [one's] constitutional rights"); *Schneckloth*, 412 U.S. at 235 (identifying consent to a search as "fail[ing] to invoke a constitutional protection").

[15] *See generally* Strauss, *supra* note 10.

[16] *Compare Fernandez*, 134 S. Ct. at 1130–31, *with* United States v. Murphy, 516 F.3d 1117, 1119–20, 1125 (9th Cir. 2008).

[17] *Fernandez*, 134 S. Ct. at 1130.

girlfriend, Roxanne Rojas, opened the door, appearing injured and upset and holding a baby.[18] After engaging in a brief dialogue, the officer asked Rojas to exit the apartment so he could conduct a protective sweep.[19] At that point, Fernandez, dressed only in boxer shorts, stepped forward and said, "You don't have any right to come in here. I know my rights."[20] In response, the officer removed Fernandez and took him into custody.[21] Approximately one hour later and without securing a warrant,[22] the detective returned to the apartment, informed Rojas that Fernandez had been arrested, and asked for her consent to search their shared apartment.[23] Rojas consented orally and in writing.[24] During the ensuing search of the apartment, officers found gang paraphernalia, a butterfly knife, a sawed-off shotgun, and ammunition.[25]

Fernandez was charged with robbery[26] and infliction of corporal injury on a spouse, cohabitant, or child's parent[27] with enhancements based on the use of a dangerous weapon[28] and affiliation with a criminal street gang.[29] Fernandez also pled *nolo contendere* to possession of a firearm by a felon,[30] short-barreled shotgun or rifle activity,[31] and possession of ammunition.[32] Fernandez moved to suppress all of the evidence seized during the warrantless search of his apartment.[33] The trial court denied his suppression motion, which Fernandez appealed after a jury convicted him on both counts.[34]

On appeal, Fernandez argued that the trial court erred by denying his motion to suppress because a physically present Fernandez objected to the officers' search, satisfying the rule from *Georgia v. Randolph*, which held that a warrantless search for evidence based on the consent of one tenant is unreasonable when another physically present tenant objects to

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[18] *See id.*

[19] *Id.*

[20] *Id.* (internal quotation marks omitted).

[21] *See id.* The constitutionality of the arrest was not at issue in the case.

[22] *Id.* at 1139 (Ginsburg, J., dissenting).

[23] *Id.* at 1130 (majority opinion). Although Rojas herself testified that she felt pressured into giving consent, the trial court found her consent to be voluntarily given and neither the California Appellate Court nor the Supreme Court majority questioned that finding. *See id.* at 1143 n.5 (Ginsburg, J., dissenting).

[24] *Id.* at 1130 (majority opinion).

[25] *Id.* at 1130–31.

[26] CAL. PENAL CODE § 211 (West 2014).

[27] CAL. PENAL CODE § 273.5 (West 2008) (amended 2011).

[28] CAL. PENAL CODE § 12022(b)(1) (West 2012).

[29] CAL. PENAL CODE § 186.22 (West 2009) (amended 2011); People v. Fernandez, 208 Cal. App. 4th 100, 104 (2012).

[30] CAL. PENAL CODE § 12021(a)(1) (West 2009) (repealed 2010).

[31] *Id.* § 12020(a)(1) (West 2009) (repealed 2010).

[32] *Id.* § 12316(b)(1) (West 2009) (repealed 2010).

[33] Fernandez v. California, 134 S. Ct. 1126, 1131 (2014).

[34] *Id.* Fernandez's appeal comprised several other arguments, none of which are relevant to the warrantless search. *Fernandez*, 208 Cal. App. 4th at 104.

the search.[35] Because the officers did not obtain a search warrant and Fernandez was physically present when he objected, he argued that the search was therefore unreasonable.[36] The government replied that the search was constitutionally valid based on Rojas's consent in Fernandez's absence.[37] The appellate court discussed *Randolph*, as well as *United States v. Murphy* and subsequent case law, before ultimately concluding that "Rojas's consent to a search of the apartment she shared with defendant was valid, and thus the trial court did not err in denying defendant's motion to exclude."[38]

### *B. Relevant Fourth Amendment Case Law*

#### *1.* Georgia v. Randolph

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[39] One "'jealously and carefully drawn' exception [to the warrant requirement] recognizes the validity of searches [of the home] with the voluntary consent of an individual possessing authority."[40] Although "carefully drawn," the Court has upheld the validity of warrantless searches when consented to by a person with authority who is the subject of the search,[41] a housemate who shares authority over the space,[42] and even a person without authority but "whom the police reasonably, but erroneously, believe to possess shared authority as an occupant."[43] In *Randolph*, the Supreme Court addressed the question of dueling occupants, one of whom consents to search while another expressly objects.[44]

In that case, the Randolphs were involved in a bitter separation when Janet Randolph, who had just returned from a several week stay with her son at her parents' house in Canada, called the local police to their home.[45] She complained not only that her husband, Scott Randolph, had taken their son away after a dispute but also that he habitually used cocaine.[46] Scott arrived soon after the police, explaining that he took their son to a neighbor's house to ensure Janet did not take him to her par-

[35] Georgia v. Randolph, 547 U.S. 103, 120 (2006); *Fernandez*, 208 Cal. App. 4th at 112.

[36] *Fernandez*, 208 Cal. App. 4th at 112.

[37] *Id.*

[38] *Id.* at 112–22.

[39] Payton v. New York, 445 U.S. 573, 586 (1980) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477–78 (1971)) (internal quotation marks omitted).

[40] *Randolph*, 547 U.S. at 109 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)); Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

[41] Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

[42] United States v. Matlock, 415 U.S. 164, 170–71 (1974).

[43] *Randolph*, 547 U.S. at 109 (citing *Rodriguez*, 497 U.S. at 186).

[44] *Id.* at 106.

[45] *Id.* at 106–07.

[46] *Id.* at 107.

ents' house again. Scott also denied that he used cocaine and alleged that it was Janet who abused drugs and alcohol.[47] An officer accompanied Janet to the neighbor's house to collect the son and, upon their return, Janet again accused Scott of drug use and also volunteered that there was evidence to prove it in the house.[48] A sergeant, one of the officers on the scene, asked Scott for his consent to search the house, but Scott "unequivocally refused."[49] In the face of Scott's refusal, the sergeant asked Janet for her consent to search.[50] Janet readily consented, then led the officers upstairs to a room she described as Scott's bedroom, where the sergeant noticed what appeared to be a drinking straw with a powdery residue he believed to be cocaine.[51] After the district attorney's office told the sergeant to stop the search, he obtained a search warrant and seized additional evidence.[52] Scott Randolph was then indicted for possession of cocaine and moved to suppress the evidence as products of an unreasonable, warrantless search because his express refusal invalidated Janet's consent.[53] The trial court denied the motion, finding Janet's consent valid because she had common authority over the dwelling.[54] The Georgia Court of Appeals reversed and both the Georgia Supreme Court and the United States Supreme Court affirmed that reversal.[55]

In its majority opinion, written by Justice Souter, the Supreme Court began by referring to *United States v. Matlock*, which held 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."[56] In *Matlock*, one of the defendant's housemates consented to a search after the defendant was arrested and detained in a police car outside their home.[57] The *Matlock* Court based its decision not on property law but on the widely shared social expectations that allow cotenants joint access and control of their residence for most purposes, including the "right" to consent to a search.[58] It stated that the other tenants, in cohabitating, have assumed the risk that a cotenant may allow a stranger, including the police, into their shared premises.[59]

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* The opinion is unclear on the path of the powdery straw; Sergeant Murray "noticed" the straw, then "left the house to get an evidence bag," then was instructed to stop the search, then "took the straw to the police station." *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 107–08.

[55] *Id.* at 108, 123.

[56] 415 U.S. 164, 170 (1974); *Randolph*, 547 U.S at 106.

[57] *Matlock*, 415 U.S. at 166.

[58] *Id.* at 171 & n.7.

[59] *Id.*

The *Randolph* Court elaborated on this social expectation theory, noting that "it is 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.'"[60] The Court ultimately held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."[61] In other words, as between two physically present residents, one who consents and one who objects, the tie goes to the objector.

The Court qualified its holding in several ways. First, it noted that a refusal to consent would not nullify another exception to the warrant requirement, such as a protective sweep[62] or exigent circumstances.[63] It next recognized the importance of the public's interest in "bringing criminal activity to light" and the effect its holding might have on that interest.[64] But, because the cotenant could assist the police in obtaining a warrant, the Court determined that this public interest could still be served.[65] Finally, the Court clarified that it was not creating an affirmative duty for police to gather the consent of everyone living in a particular residence: "[I]t would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting cotenant before acting on the permission they had already received."[66] Reasonableness does, however, prevent the police from conducting a warrantless search based on consent when a physically present occupant objects.

*2.* United States v. Murphy

The Ninth Circuit addressed a situation nearly identical to the one in *Fernandez* in the 2008 case *United States v. Murphy*.[67] In *Murphy*, police observed two individuals purchase precursor ingredients used to manufacture methamphetamine and then drive to a storage facility.[68] One of the officers knew defendant Murphy was living there and suspected he was a drug dealer.[69] After the individuals left the storage unit, one officer knocked on the door, which Murphy opened holding a ten-inch piece of metal pipe.[70] While at the door, the officer observed an operating meth-

[60] *Randolph*, 547 U.S. at 113.
[61] *Id.* at 120.
[62] *E.g.*, Maryland v. Buie, 494 U.S. 325, 327 (1990).
[63] *See Randolph*, 547 U.S. at 116 n.6.
[64] *Id.* at 115–16.
[65] *Id.* at 116.
[66] *Id.* at 122.
[67] 516 F.3d 1117 (9th Cir. 2008).
[68] *Id.* at 1119.
[69] *See id.*
[70] *Id.*

amphetamine lab inside Murphy's storage unit, and proceeded to arrest Murphy.[71] The officer asked for Murphy's consent to search, but Murphy refused.[72] After a short protective sweep of Murphy's unit, the officer left to obtain a warrant while Murphy was transported to jail.[73]

Later that same day, Dennis Roper, who was renting the unit to Murphy, arrived at the storage facility, and officers arrested him on outstanding warrants.[74] Roper then consented in writing to a search of the storage units, during which police seized the methamphetamine lab.[75]

Murphy challenged both the protective sweep and the subsequent search for evidence.[76] The district court denied Murphy's motion to suppress, finding the protective sweep to be valid because Murphy was holding a metal pipe, and finding the subsequent search valid based on the plain view doctrine.[77] The Ninth Circuit affirmed the district court's allowance of the protective sweep, but based its reasoning on the officer's testimony that he believed there might be another person in the storage unit and not on Murphy's holding the metal pipe.[78] But it reversed the district court's holding regarding the search that resulted in the seizure of the methamphetamine lab.[79]

Initially, the Ninth Circuit explained that "the plain view doctrine is not an exception to the warrant requirement. . . . '[E]ven [when] contraband plainly can be seen and identified from outside the premises, a warrantless entry into those premises to seize the contraband would not be justified absent exigent circumstances.'"[80] But the government also argued that the second warrantless search was justified by Roper's consent.[81] Murphy replied that based on *Georgia v. Randolph*, Roper's consent could not support a warrantless search over his own physically present objection.[82] The Ninth Circuit agreed with Murphy and reversed the district

[71] *Id.*

[72] *Id.* at 1119–20.

[73] *Id.* at 1120.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 1119–21. Murphy then entered a conditional guilty plea and reserved his right to appeal that denial. *Id.* at 1120.

[78] *Id.* at 1120–21. In order to be valid, a protective sweep "must be supported by 'specific and articulable facts supporting [the] belief that other dangerous persons may be in the building or elsewhere on the premises.'" *Id.* at 1120 (alteration in original) (quoting United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1298 (9th Cir. 1988)).

[79] *Id.* at 1121, 1125.

[80] *Id.* at 1121 (second alteration in original) (quoting G & G Jewelry, Inc. v. City of Oakland, 989 F.2d 1093, 1101 (9th Cir. 1993)).

[81] *Id.*

[82] *Id.*

court's ruling on this search, concluding that "the second search violated Murphy's Fourth Amendment rights."[83]

Regarding the consent argument, the Ninth Circuit first established that both Roper and Murphy had authority to grant or withhold consent because they each had sufficient control over the storage units.[84] The Ninth Circuit then dismissed the government's arguments that (1) Roper had more authority over the storage unit because he paid the rent and (2) *Randolph* did not apply because the unit was not a residence.[85] Finally, the Ninth Circuit stated that *Randolph* did in fact apply because there was no reason that Murphy's absence—by arrest or otherwise—should invalidate his objection.[86] The Ninth Circuit acknowledged that the Supreme Court in *Randolph* stated that "third party consent to a search is valid only '[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.'"[87] Based on that dicta, the Ninth Circuit reasoned that "[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made."[88] As a result, the Ninth Circuit held that "when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant."[89]

*3. Subsequent Case Law:* United States v. Hudspeth *and* United States v. Henderson

The *Fernandez* appellate opinion also discussed *United States v. Hudspeth*[90] and *United States v. Henderson*,[91] two circuit court cases that the California Court of Appeal claimed rejected the Ninth Circuit's analysis in *Murphy*.[92] *Hudspeth* involved a defendant, arrested at his workplace, who refused to consent to a search of his home computer, which police later searched based on his wife's permission.[93] The Eighth Circuit determined that *Randolph* did not apply because Hudspeth "was not at the door and

[83] *Id.* at 1122.

[84] *Id.* at 1122–23.

[85] *Id.* at 1124.

[86] *Id.*

[87] *Id.* (alteration in original) (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)).

[88] *Id.* at 1124–25.

[89] *Id.* at 1124.

[90] 518 F.3d 954 (8th Cir. 2008).

[91] 536 F.3d 776 (7th Cir. 2008).

[92] People v. Fernandez, 208 Cal. App. 4th 100, 117–22 (2012). Though the California Court of Appeal wrote that *Henderson* and *Hudspeth* "rejected the Ninth Circuit's analysis in *Murphy*," the majority opinion in *Hudspeth* does not mention *Murphy*. *Id.* at 117; *see Hudspeth*, 518 F.3d at 954–61.

[93] *Fernandez*, 208 Cal. App. 4th at 117 (citing *Hudspeth*, 518 F.3d at 955–56).

objecting."[94] In *Henderson*, the police went to the defendant's home to investigate a report of domestic abuse.[95] The defendant's wife and son let the police in but the defendant ordered them out.[96] Once the police arrested the defendant for domestic battery, his wife consented in writing to a search.[97] The Seventh Circuit followed *Hudspeth* and expressly rejected the *Murphy* decision, categorizing it as an extension of *Randolph*.[98] The court thus read *Randolph* to require "*contemporaneous* presence of the objecting and consenting cotenants."[99]

### *C.* Fernandez v. California*, California Court of Appeal, Second District, Division 4: Analysis*

After laying out the relevant case law, the California Court of Appeal, Second District, Division 4 in *Fernandez* followed the Seventh and Eighth Circuits and concluded that *Randolph* did not apply.[100] It stated, "While the defendant in *Randolph* was present and continued to object to a search of his home, in the present case defendant had been arrested and removed from the apartment before Rojas consented to a search."[101]

In a rather perfunctory analysis section, the court first discussed "[d]efendant's absence from the home when Rojas consented to a search of the apartment," which it considered dispositive.[102] Because Fernandez was not present at the time Rojas consented to the search, the court determined *Randolph* did not apply, and instead applied *United States v. Matlock*[103] and *Illinois v. Rodriguez*[104] in which the Supreme Court accepted the validity of a warrantless search where defendants "were nearby when each cotenant's consent was secured."[105]

The appellate court also cited policy objectives supporting its decision. It noted that its rule requiring contemporaneous presence "preserves the 'simple clarity of complementary rules'" by "distinguishing between cases in which a defendant is present and objecting to a search,

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[94] *Id.* at 118 (quoting *Hudspeth*, 518 F.3d at 960–61) (internal quotation marks omitted).

[95] *Id.* at 118–19 (citing *Henderson*, 536 F.3d at 777).

[96] *Id.* at 119 (citing *Henderson*, 536 F.3d at 777).

[97] *Id.* (citing *Henderson*, 536 F.3d at 777).

[98] *Id.* at 118–19 (citing *Henderson*, 536 F.3d at 783–84).

[99] *Id.* at 119 (emphasis added) (quoting *Henderson*, 536 F.3d at 783) (internal quotation marks omitted). The appellate opinion cited opinions from four other courts that followed the reasoning in *Hudspeth* and *Henderson*: *United States v. Shrader*, 675 F.3d 300, 307 (4th Cir. 2012); *United States v. Cooke*, 674 F.3d 491, 499 (5th Cir. 2012); *People v. Strimple*, 267 P.3d 1219, 1221–26 (Colo. 2012); and *State v. St. Martin*, 800 N.W.2d 858, 866–68 (Wis. 2011). *Fernandez*, 208 Cal. App. 4th at 121.

[100] *Fernandez*, Cal. App. 4th at 121.

[101] *Id.*

[102] *Id.*

[103] 415 U.S. 164 (1974).

[104] 497 U.S. 177 (1990).

[105] *Fernandez*, 208 Cal. App. 4th at 121.

and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence."[106] Next, the court cited law enforcement prerogatives; applying *Randolph*, the court explained, would limit police officers' ability to respond to opportunities in the field, "requiring officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant."[107] Additionally, the court expressed concern that the rule in *Murphy*, proposed by defendant, would permit "'a one-time objection' by one cotenant to 'permanently disable the other [cotenant] from *ever* validly consenting to a search of their shared premises.'"[108] Finally, social expectations do not, the court noted, dictate that a third party would not feel free to enter when the resident who objects to his entry is no longer present.[109]

## II. THE SUPREME COURT AFFIRMS THE CALIFORNIA COURT OF APPEAL

The United States Supreme Court granted certiorari in *Fernandez v. California* and on February 25, 2014, affirmed the California Court of Appeal, Second District, Division 4, holding that police may conduct a warrantless search for evidence in the absence of an objecting occupant when his cotenant consents, even when the absence is the result of police action.[110] Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer joined.[111] Justices Scalia and Thomas filed concurring opinions, while Justice Ginsburg filed a dissent, in which Justices Sotomayor and Kagan joined.[112]

### *A. Police Removal Is Irrelevant*

After laying out the facts and the relevant Fourth Amendment case law, including *Matlock*, *Rodriguez*, and *Randolph*, the Court addressed Fernandez's "argument that the presence of the objecting occupant is not necessary when the police are responsible for his absence."[113] This argument was based on dicta in *Randolph*, and endorsed in *Murphy*, which stated that a warrantless search based on consent by one resident might not be sufficient if "there is . . . evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoid-

[106] *Id.* at 122 (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)).

[107] *Id.*

[108] *Id.* (alteration in original) (quoting United States v. Henderson, 536 F.3d 776, 783 (7th Cir. 2008)).

[109] *Id.*

[110] 134 S. Ct. 1126, 1131, 1134, 1137 (2014).

[111] *Id.* at 1129.

[112] *Id.*

[113] *Id.* at 1134.

ing a possible objection."[114] The Court dismissed the argument because "our Fourth Amendment cases 'have repeatedly rejected' a subjective approach,"[115] explaining that the *Randolph* Court was not suggesting an inquiry into the subjective intent of the officers who remove a potential objector, but was instead "refer[ring] to situations in which the removal of the potential objector is not objectively reasonable."[116] Applying this reasoning to *Fernandez*, the Court noted that there were two seizures:[117] defendant's removal from the apartment and his later arrest. Removing Fernandez from the apartment was objectively reasonable because the police suspected domestic abuse based on Rojas's upset and injured appearance and wanted to question her outside of Fernandez's "potentially intimidating presence."[118] And the arrest was so objectively reasonable that Fernandez did "not even contest the existence of probable cause to place him under arrest."[119] Because both the removal and ultimate arrest were objectively reasonable, and because the Court read the *Randolph* dicta to describe only situations where the officers' removal of the potential objector was objectively *unreasonable*, the Court was not persuaded by this argument.[120]

The dissent addressed the majority's position on police removal primarily by noting that *Randolph* did not suggest that an express objection by a physically present joint occupant "could be ignored if the police reappeared post the objector's arrest."[121] *Randolph*'s focus, according to the dissent, was "on whether a joint occupant had conveyed an objection to a visitor's entry," and Fernandez conveyed such an objection here.[122] Thus, the dissent stated, "This case calls for a straightforward application of *Randolph*."[123]

### *B. Social Expectations Control and Practical Complications Arise with Alternative Rule*

Fernandez's second argument was 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."[124] The ma-

[114] Georgia v. Randolph, 547 U.S. 103, 121 (2006); *see* United States v. Murphy, 516 F.3d 1117, 1124 (9th Cir. 2008).

[115] *Fernandez*, 134 S. Ct. at 1134 (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006)).

[116] *Id.*

[117] Although it treats them as such, the Court does not explicitly describe these acts by the police as "seizures" but rather as removals, detentions, and arrests. *See id.*

[118] *Id.* at 1130, 1134.

[119] *Id.* at 1134.

[120] *Id.*

[121] *Id.* at 1140 (Ginsburg, J., dissenting).

[122] *Id.*

[123] *Id.* at 1139.

[124] *Id.* at 1135 (majority opinion).

jority found this argument inconsistent with *Randolph* for two reasons. First, the Court stated that the argument "cannot be squared with the 'widely shared social expectations' or 'customary social usage' upon which the *Randolph* holding was based."[125] While a hypothetical caller would not feel confident entering a dwelling when a tenant stood at the door saying "stay out," once that tenant "is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter."[126] The fact that the police forcibly removed the objector was irrelevant here; thus, the Court concluded that "petitioner's argument is inconsistent with *Randolph*'s reasoning."[127]

Second, the Court said that petitioner's proposed rule "would create the very sort of practical complications that *Randolph* sought to avoid."[128] For instance, the Court disagreed with petitioner's proposed rule "that an objection, once made, should last until it is withdrawn by the objector," and refused "to hold that an objection lasts for a 'reasonable' time."[129] A permanent objection would be unreasonable because, the Court said, Rojas would not be able to consent to a search of the house even after Fernandez had been in prison for ten years.[130] As for a "reasonable" time, the Court first declared, "'[I]t is certainly unusual for this Court to set forth precise time limits governing police action,'"[131] then questioned, "[W]hat interval of time would be reasonable in this context?"[132] The Court identified three more complications: whether an objector still maintains common authority over the premises if, as in the above example, he was incarcerated, or if he stopped paying rent; how to "register a continuing objection"; and which officers would be bound by such an objection.[133]

The dissent dismissed the majority's "practical problems" with a single sentiment, that the police should get a warrant: "Warrant in police hands, the Court's practical problems disappear."[134] Furthermore, the dissent posed its own hypothetical practical problems with the majority's rule:

> Does an occupant's refusal to consent lose force as soon as she absents herself from the doorstep, even if only for a moment? Are the police free to enter the instant after the objector leaves

[125] *Id.* (quoting Georgia v. Randolph, 547 U.S. 103, 111, 121 (2006)).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1135–36.

[130] *Id.*

[131] *Id.* at 1136 (alteration in original) (quoting Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010)).

[132] *Id.*

[133] *Id.*

[134] *Id.* at 1141 (Ginsburg, J., dissenting).

> the door to retire for a nap, answer the phone, use the bathroom, or speak to another officer outside?[135]

The drastic reduction of *Randolph*, the dissent cautioned, is not supported by hypothesized practical considerations.[136] And while social expectations helped to resolve the question in *Randolph*, they were less relevant here: "[C]onjectures about social behavior . . . 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."[137] As the dissent explained, because the police have power no private person enjoys, specifically the ability to remove the objecting occupant, it was impossible to conceive a hypothetical caller-at-the-door situation here, much less the common, sensible, expected response.[138]

### *C. A Cotenant Has the Right to Consent*

The final section in the majority opinion discussed the "right to invite the police to enter the dwelling and conduct a search."[139] It stated, "A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant," and framed *Randolph* as an exception to that general rule.[140] A person might want the police to search her house in order to "dispel 'suspicion raised by sharing quarters with a criminal'" or to remove dangerous contraband.[141] The opinion concluded,

> Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence. Having beaten Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power.[142]

The dissent took issue with the majority's characterization of consent searches and *Randolph*, noting that "consent searches themselves are a jealously and carefully drawn exception to the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*."[143] The dissent also considered Rojas's autonomy, and rec-

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 1140.

[138] *Id.* at 1140–41.

[139] *Id.* at 1137 (majority opinion).

[140] *Id.*

[141] *Id.* (quoting Georgia v. Randolph, 547 U.S. 103, 116 (2006)).

[142] *Id.*

[143] *Id.* at 1141 (Ginsburg, J., dissenting) (quoting *Randolph*, 547 U.S. at 109) (internal quotation marks omitted).

ognized that while domestic abuse is a serious problem, it "hardly necessitates the diminution of the Fourth Amendment rights at stake here."[144]

## III. THE SUPREME COURT MISSED AN OPPORTUNITY TO PROTECT LAW ENFORCEMENT PREROGATIVES, VICTIMS OF DOMESTIC VIOLENCE, AND THE FOURTH AMENDMENT

In its zeal to protect victims of domestic abuse and promote efficient law enforcement, the Supreme Court chipped *Randolph* almost completely away from Fourth Amendment jurisprudence by finding the warrantless search here reasonable. Yet it could have protected those interests as well as the Fourth Amendment with a rule that requires the police to stop *seeking* consent when a physically present occupant objects to a search, yet allows a cotenant to invite the police to her residence in the absence of the objecting occupant. According to this proposed rule, victims are protected, efficient law enforcement is promoted, and the Fourth Amendment remains effective.

As the dissent noted, "This case calls for a straightforward application of *Randolph*,"[145] and indeed, robotically applying the *Randolph* holding to the facts in *Fernandez* would result in an unconstitutional search. *Randolph* held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."[146] All of those factors were present here: a warrantless search for evidence, a shared dwelling, the express refusal of consent by a physically present resident, and consent given to the police by another resident. Although the Court "refuse[d] to extend *Randolph*" to apply here,[147] these facts technically meet all of the factors the Court expressly included in its *Randolph* holding, and applying *Randolph* to find the search unconstitutional is not, on its face, an extension at all.

### *A. The Timing of the Physical Presence and the Proposed Rule*

The Court's decisions in both *Randolph* and *Fernandez* hinge on the objector's physical presence; however, *Randolph* did not explicitly define when or for what the objector needs to be physically present. The *Fernandez* decision lists references to physical presence from the *Randolph* decision, stating, "The Court's opinion [in *Randolph*] went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present."[148] Yet the language in *Randolph*, and quoted by

[144] *Id.* at 1143–44.
[145] *Id.* at 1139.
[146] *Randolph*, 547 U.S. at 120.
[147] *Fernandez*, 134 S. Ct. at 1130.
[148] *Id.* at 1133.

the majority in *Fernandez*, does not make clear *when* exactly the objector must be physically present.

Clearly, the objector must be physically present at his residence—specifically at or near the door of his residence—during the objection. In *Randolph*, the Court posed the issue as whether an evidentiary seizure is "lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present *at the scene* and expressly refuses to consent."[149] The Court also referred to the objecting tenant being "at the door" several times,[150] and likewise mentioned the "entrance" of the residence.[151]

The *Fernandez* majority read this to mean that the physically present objection must occur *at the time of the consent*, which were the facts in *Randolph*. Here, Fernandez was physically present at the door when he objected to the search (unlike the defendant in *Hudspeth*),[152] but had been removed by the police when they secured his cotenant's consent. But *Randolph* did not explicitly require that the occupant objecting to a search be physically present *at the time of the cotenant's consent*. So the facts in *Fernandez* actually present an issue of *timing*: What happens when the consent and objection do not occur simultaneously? And when must the objector be physically present?

There are five possible timing scenarios with respect to police seeking consent from multiple residents.[153] First, a warrantless search for evidence is reasonable if a resident consents and no cotenant objects.[154] Furthermore, *Matlock*, *Rodriguez*, and *Randolph* combine to state that the police have no duty to search out potential objectors in order to act on an occupant's consent.[155] In other words, once a resident with apparent authority voluntarily consents,[156] a search based on that consent is reasonable unless a physically present occupant readily objects. The onus is on the occupant to object, not the police to seek out an objection. A second clear scenario arises when a resident objects and no cotenant consents. Under these facts, a search is only reasonable if supported by a

[149] *Randolph*, 547 U.S. at 106 (emphasis added).

[150] *Id.* at 113, 119, 121.

[151] *Id.* at 121.

[152] United States v. Hudspeth, 518 F.3d 954, 955–56 (8th Cir. 2008).

[153] For ease of analysis and because it is the most common situation presented in the cases cited herein, this discussion limits the residents to two.

[154] *See, e.g.*, Davis v. United States, 328 U.S. 582, 593–94 (1946) (warrantless search based on voluntary consent is reasonable under the Fourth Amendment).

[155] *See Randolph*, 547 U.S. at 121–22 ("[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.").

[156] *E.g.*, Ohio v. Robinette, 519 U.S. 33, 40 (1996) (test for valid consent is voluntariness); Illinois v. Rodriguez, 497 U.S. 177, 181, 185–89 (1990) (apparent but not actual authority is valid if reasonable).

warrant or one of the other carefully drawn exceptions to the warrant requirement.

*Randolph* presented a situation in which the refusal and consent to search were expressed nearly simultaneously: when Scott refused, the police turned to Janet.[157] The Court held that Scott's objection to the search vitiated Janet's consent, and the police could not rely on such consent in order to search for evidence.[158]

The fourth possibility occurs when a party consents but that party or another with apparent authority later objects. If the search is already over, the objection does not affect the reasonableness of the search.[159] However, if the party objects while the search is still in progress, there is reason to believe the consent is withdrawn and the search must halt.[160] In other words, consent to search may be revoked.

*Fernandez* presents the fifth and final timing scenario: a physically present occupant objects to a search, after which—and in the objector's absence—a cotenant consents. The Court's holding here says that if the objector is no longer present when the cotenant consents, then a warrantless search for evidence is nevertheless reasonable as against the objector.[161] Fernandez and the dissent argued for a rule that requires the police to get a warrant once a physically present occupant objects, regardless of the consent of a cotenant,[162] which the Court outright rejected.[163] Yet, there is a middle ground, a practicable rule that respects both occupants, consenting and objecting, and addresses both the majority's

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[157] *Randolph*, 547 U.S. at 107.

[158] *Id.* at 123.

[159] *See id.* at 106 (emphasis added) ("The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority of the area in common with a co-occupant who *later* objects to the use of evidence so obtained.").

[160] *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"); Walter v. United States, 447 U.S. 649, 656 (1980) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization."). The Supreme Court has not addressed whether an occupant may "revoke" the consent of his cotenant; however, the Fifth Circuit, for example, has so held. Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 426 (5th Cir. 2008) ("[A] physically present co-occupant may revoke or withdraw the consent given by another occupant.").

[161] Fernandez v. California, 134 S. Ct. 1126, 1134 (2014).

[162] *See id.* at 1141 (Ginsburg, J., dissenting) ("Warrant in police hands, the Court's practical problems disappear."). Fernandez also argued that the objection "remains in effect until officers learn that *the objector* no longer wishes to keep the police out of his home." Brief for Petitioner at 8, *Fernandez* 134 S. Ct. 1126 (No. 12-7822). The Court also rejected this proposed rule. *Fernandez*, 134 S. Ct. at 1135–36.

[163] *See Fernandez*, 134 S. Ct. at 1137 ("A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant.").

and dissent's concerns: when a physically present occupant objects to a search, the police may not *seek out* a cotenant's consent; if, however, the cotenant invites the police in to search, the police may enter and conduct a search in the absence of the objecting occupant.

### *B. The Proposed Rule Addresses the Court's Concerns While Respecting the Fourth Amendment*

A rule that permits police to search a residence in the absence of the objecting occupant when invited by an occupant who has common authority over the premises fully addresses each of the majority's concerns while better protecting the objector's Fourth Amendment rights.

#### *1. Absence Is Absence: The Proposed Rule Also Treats Police Removal as Irrelevant*

Although the Court begins with it, its treatment of the police removal issue is not entirely consistent with *Randolph*. While the *Randolph* Court did not state the result if there is "evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection,"[164] it implied that a search based on the co-occupant's consent might not be considered reasonable under those circumstances. The majority in *Fernandez* separated the removal from the search, saying that if the removal is not objectively reasonable, neither is the search based on the consent of a cotenant after the removal.[165] However, one aspect the *Fernandez* Court ignored is that the concern in *Randolph*'s dicta is for a *potential* objecting tenant and a *possible* objection.[166] Fernandez unequivocally expressed his objection. That express objection to search, indeed the invocation of a constitutional right, must have *some* effect, and the proposed rule gives it an effect.

Furthermore, like the Court's rule, the proposed rule treats the reason for the absence as irrelevant. Once a resident registers an actual, unequivocal objection to search, even if he is no longer present, the police may not seek out consent to search. But when a resident invites the police into her residence in the absence of the objector, the police may enter regardless of the reason for the absence. In other words, "[A]n 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."[167]

#### *2. Social Expectations Do Not Resolve the Issue and the Proposed Rule Eliminates the Court's Named Practical Problems*

The majority rejected petitioner's proposed rule based in part on social expectations and practical problems.[168] Widely shared social expecta-

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[164] *Randolph*, 547 U.S. at 121.
[165] *See Fernandez*, 134 S. Ct. at 1134.
[166] *Randolph*, 547 U.S. at 121.
[167] *Fernandez*, 134 S. Ct. at 1134.
[168] *Id.* at 1135–36.

tions dictate, the majority said, that once the objector was no longer present, a visitor would be "much more likely to accept the invitation to enter."[169] Yet the dissent disagreed, noting that because police "have power no private person enjoys," conjectures about social behavior "shed little light on the constitutionality of this warrantless home search."[170]

The very fact that the three dissenting justices disagreed about what to expect when faced with this social situation demonstrates that the social expectations are not necessarily "widely shared" and are thus not definitive. Moreover, other justices who joined in the majority opinion in *Fernandez* have elsewhere criticized the entire social expectations premise and its relevance to Fourth Amendment jurisprudence. In *Randolph*, Chief Justice Roberts wrote a dissenting opinion in which he questioned not only how widely shared the social expectations are but also the application of social expectations to Fourth Amendment case law entirely.[171] He wrote: "The possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away. Such shifting expectations are not a promising foundation on which to ground a constitutional rule . . . ."[172] Justice Thomas also disagreed with the application of social expectations to the issue in his concurrence in *Fernandez*: "I find no support for that novel analytical approach in the Fourth Amendment's text or history, or in this Court's jurisprudence."[173] Hence the precise social expectations in this situation do not clearly resolve the question one way or another and are therefore not relevant here, if they ever were.

The majority identified numerous practical complications that arise from petitioner's proposed rule, namely duration of the objection, authority over the premises after passage of time, registering a continuing objection, and who is bound by an objection.[174] The dissent's solution to those practical problems is that the police should get a warrant: "Warrant in police hands, the Court's practical problems disappear."[175] Yet the proposed rule addresses these practical complications while preserving the Supreme Court's recent findings disfavoring a reliance on the ease of obtaining a warrant.[176]

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[169] *Id.* at 1135.

[170] *Id.* at 1140 (Ginsburg, J., dissenting).

[171] *See Randolph*, 547 U.S. at 129–31 (Roberts, C.J., dissenting).

[172] *Id.* at 130.

[173] *Fernandez*, 134 S. Ct. at 1138 (Thomas, J., concurring).

[174] *Id.* at 1135–36 (majority opinion).

[175] *Id.* at 1141 (Ginsburg, J., dissenting).

[176] *See* Kentucky v. King, 131 S. Ct. 1849, 1860–61 (2011) ("We have said that '[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause.' Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." (alteration in original) (citations omitted) (quoting Hoffa v. United States, 385 U.S. 293, 310 (1966))).

The duration of an objection is a question that neither the majority nor the dissent answered satisfactorily. According to the majority's rule, refusing to consent to a search has virtually no effect when a roommate consents because, while the police may not have probable cause to arrest an objecting occupant, the police will nearly always be able to control the scene, physically removing the objecting occupant from the doorway.[177] And although the dissent's suggestion that the police get a warrant is constitutionally supported, it is not particularly practicable when a cotenant is inviting police in and no physically present occupant is objecting.[178]

First, the majority's concern about a "permanent" objection is excessive because, in the absence of a cotenant, an objection is essentially permanent in that it prevents the police from relying on the consent exception to the warrant requirement. The objection of a person living alone does not prevent a search indefinitely, but a search is reasonable only if it is made pursuant to a warrant or another valid exception to the warrant requirement, such as exigent circumstances. As *Randolph* seemed to indicate, the addition of a consenting housemate should not affect that rule: "[T]here is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another . . . ."[179]

Second, as noted above, the majority opinion explained that it is unusual for the Court to set forth time limits governing police action and thus refuses to hold that an objection lasts for a "reasonable" time.[180] Yet a "reasonable" time could be a perfectly workable rule. In fact, in the 2012 case *United States v. Jones*,[181] Justice Alito—who wrote the majority opinion in *Fernandez*—wrote a concurring opinion in which he advocated for just such a rule.[182] In *Jones*, the question involved "whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the mean-

[177] Brief for Petitioner, *supra* note 162, at 24.

[178] The dissent also recognizes that an objection would not be permanent. *See Fernandez*, 134 S. Ct. at 1141 (Ginsburg, J., dissenting) ("For instance, the Court asks, must a cotenant's objection, once registered, be respected indefinitely? Yet it blinks reality to suppose that Fernandez, by withholding consent, could stop police in their tracks eternally. To mount the prosecution eventuating in a conviction, of course, the State would first need to obtain incriminating evidence, and could get it easily simply by applying for a warrant." (citation omitted)).

[179] Georgia v. Randolph, 547 U.S. 103, 114 (2006). The *Randolph* opinion does not specify how long the objection endures.

[180] *Fernandez*, 134 S. Ct. at 1136. The Court's syntax is slightly unclear; if the Court were to hold that the objection lasts a reasonable time and, for instance, this was not reasonable, it would need to address the approximate duration of a reasonable objection in subsequent cases.

[181] 132 S. Ct. 945 (2012).

[182] *Id.* at 957–64 (Alito, J., concurring); *see* Orin Kerr, *Five Thoughts on* Fernandez v. California, SCOTUSBLOG (Feb. 26, 2014), http://www.scotusblog.com/2014/02/five-thoughts-on-fernandez-v-california/.

ing of the Fourth Amendment."[183] While the majority found a search based on the Government's physical occupation of private property for the purpose of obtaining information,[184] Justice Alito suggested that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[185] Justice Alito did not specify when monitoring exceeds "relatively short-term" and becomes the unreasonable "longer term" monitoring.[186] In fact, he stated that the Court "*need not identify with precision* the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark."[187] Indeed, Justice Alito's ambiguous test was not part of the holding of the case and was actually criticized by the majority:

> The concurrence posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses*" is no good. . . . [I]t remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist?[188]

If Justice Alito was writing for the majority in *Jones*, he may have proposed a more concrete test. It is odd, however, that a little over two years after recommending an imprecise Fourth Amendment test that hinged on the reasonableness of the length of time elapsed, Justice Alito disparaged that same approach in *Fernandez*.

While the objection to search need not be considered permanent, the police need to recognize and comply with it for some period of time, and here, they did not. Once Fernandez objected, he was removed and the police sought the consent of Rojas. The proposed rule would prevent the police from seeking that consent once a physically present occupant registered an objection. If, on the other hand, Rojas summoned the police and welcomed them into the shared home, and Fernandez was absent for any reason, the police could rely on her consent in order to conduct a search.

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[183] *Jones*, 132 S. Ct. at 948 (majority opinion).

[184] *Id.* at 949.

[185] *Id.* at 964 (Alito, J., concurring) (citation omitted).

[186] *Id.*

[187] *Id.* (emphasis added); *see also* Georgia v. Randolph, 547 U.S. 103, 125 (Breyer, J., concurring) ("[T]he Fourth Amendment does not insist upon bright-line rules.").

[188] *Jones*, 132 S. Ct. at 954 (alteration in original) (citation omitted) (quoting *id.* at 964 (Alito, J., concurring)).

To respect the force of a physically present occupant's objection, once that objection is made, the police should not seek out a cotenant's consent. The *Randolph* Court stated that "it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received."[189] Presumably if the Court *had* required the police to take those affirmative steps, then they would be bound to abide by the objecting cotenant's refusal to consent, which is why the capacity to respond to ostensibly legitimate opportunities would be needlessly limited. So when a physically present occupant already refuses to consent to a search, the police should be bound to abide by that objection and should not seek the consent of cotenants. The inverse of not requiring the police to take affirmative steps to find a potentially objecting cotenant after having obtained consent is that the police must accept objections when they are made. This means refraining from asking a cotenant for consent to search once a physically present occupant objects.

Furthermore, the proposed rule would prevent questions about whether the cotenant's consent was truly voluntarily given. "The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'"[190] Here, there was some question whether Rojas's consent was truly voluntarily given; although the trial court tentatively concluded the consent was voluntary, it acknowledged that it was "pressured."[191] The proposed rule would eliminate nearly any question of the voluntariness of the cotenant's consent; once an occupant objects to search, in order to rely on the consent exception to the warrant requirement, the cotenant would need to summon the police. It would be an unusual situation to find that summons to be coerced, pressured, or involuntary.[192]

Using the proposed rule, the remaining practical complications also disappear. Authority over the premises would not be at issue; unless the police are invited to the residence, or have some new information upon which to apply for a warrant, the authority is irrelevant and the objection intact. In addition, there would be no need to "register a continuing objection" because the objection would automatically continue in the absence of an invitation, warrant, or other exception to the warrant re-

[189] *Randolph*, 547 U.S. at 122.

[190] Ohio v. Robinette, 519 U.S. 33, 40 (1996) (alteration in original) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973)).

[191] Fernandez v. California, 134 S. Ct. 1126, 1143 n.5 (2014) (Ginsburg, J., dissenting) (internal quotation marks omitted).

[192] The proposed rule does not foreclose the possibility of such an argument, but a defendant would face an uphill battle to argue successfully that an express invitation was involuntary.

quirement. And, barring some intervening facts, all officers of the department would be bound by the objection.

*3. The Proposed Rule Respects the Right to Consent as well as the Right to Refuse*

The *Fernandez* majority concluded with the notion of one's "right to invite the police to enter the dwelling and conduct a search."[193] The dissent considered this right, but noted that even "the specter of domestic abuse hardly necessitates the diminution of the Fourth Amendment rights at stake here."[194]

First, the Fourth Amendment's concern is with "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[195] not with the right of the people to consent to warrantless searches. Second, the proposed rule respects both the right to be secure against unreasonable searches as well as the right to invite the police to enter one's dwelling and conduct a search. Once the objector is no longer present, the cotenant may invite the police to search in order to dispel suspicion, remove dangerous contraband, or for whatever reason. The rule merely prevents the police from seeking that consent once the objection is made, which is fully consistent with the spirit of the Fourth Amendment. Finally, the rule created in *Fernandez* could actually harm victims of domestic violence.

If an abuser must remain physically present in order to negate his live-in victim's consent, he is not likely to leave the premises or his victim. The rule thus ties the victim to her abuser. On the other hand, if an abuser may "register" his objection with the police while on the premises and be secure in the knowledge that the police will not seek out his live-in victim's consent in his absence, he is more likely to leave. Under the proposed rule, the victim may still invite the police in for any reason in the objecting abuser's absence, but the abuser does not feel the need to remain at the house to continue registering his objection with the police. Regardless of whether the rule crafted by *Fernandez* helps law enforcement search more efficiently, it does not help victims of domestic abuse as much as it appears at first glance. In contrast, the proposed rule frees the live-in victim from her abuser, respects her right to invite police to search, and respects the objection.

## IV. CONCLUSION AND IMPLICATIONS

The *Fernandez* decision reflects the Supreme Court's recent watering down of the Fourth Amendment. During the 2012–2013 Term, the Court

[193] *Fernandez*, 134 S. Ct. at 1137.

[194] *Id.* at 1144 (Ginsburg, J., dissenting).

[195] U.S. CONST. amend. IV.

decided the merits of four warrantless search cases.[196] Although two of those decisions ultimately concluded that the searches at issue were unconstitutional, the opinions hedged in their protection of individual Fourth Amendment rights. *Florida v. Jardines* involved the employment of a drug-sniffing dog that alerted on defendant's front porch, and the Court found the search unconstitutional based on property law: the dog and its police officer master occupied space in the curtilage of the house.[197] The fractured opinion of *Missouri v. McNeely* ultimately found that "the natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."[198] In addition, a review of Supreme Court opinions from 1990 to 2012 reveals that "individual rights have overcome government interests in just 20% of cases where the Court balanced these interests. . . . [T]he stated need for effective law enforcement seems to persuade the Court more often than any other interest and was invoked in over half of cases since 1990."[199]

This demonstrates that Fourth Amendment jurisprudence has gotten away from protecting "the right of the people" and has become more about ensuring law enforcement's unfettered access to criminals. Yet criminals are not the only ones affected by the dilution of the Fourth Amendment; the rest of us simply do not have recourse when the police come away empty handed after searching our persons, houses, papers and effects.[200] In *Fernandez*, the Court had an opportunity to protect both the rights of the people and effective law enforcement. Unfortunately, the need for effective law enforcement won out once again, and our civil rights continue to suffer.

[196] Maryland v. King, 133 S. Ct. 1958 (2013); Missouri v. McNeely, 133 S. Ct. 1552 (2013); Florida v. Jardines, 133 S. Ct. 1409 (2013); Florida v. Harris, 133 S. Ct. 1050 (2013).

[197] 133 S. Ct. at 1414.

[198] 133 S. Ct. at 1556.

[199] Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 15–16 (2013).

[200] *See id.* at 56–57.