**A note about this problem:** ST-24-01 takes place in the criminal procedure context. As this is a criminal procedure problem, students on the "P" side are assigned to represent the defendant below and students on the "R" side are assigned to represent the government. The defendant below is an alleged member of an extremist white nationalist organization who is accused of involvement in a bombing that killed and injured many people. Although the legal questions students will consider are criminal procedure questions that do not deal directly with the nature of the crime itself or this background, we want to remind students of this factual context.

Additionally, as with many legal issues, the cases you read as part of your research may involve facts or legal issues that are uncomfortable, upsetting, or difficult. Not every student will find the same cases difficult to engage with; remember that each student’s lived experience may impact how they engage with different cases. Please be mindful of these differences when engaging with your colleagues on these issues. Remember to do what you need to do to grapple with these issues while taking care of your own well-being.

**UNITED STATES COURT OF APPEALS   
FOR THE FOURTEENTH CIRCUIT**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

)

UNITED STATES of America, )

Appellee, )

)

v. ) No. ST-24-01

)

Dylann JOHNSTON, )

Appellant. )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

Before CROZIER, DAHL, and KHAN, Circuit Judges

DAHL, Circuit Judge

Appellant Dylann Johnston was arrested and indicted for federal hate crimes and violations of the Anti-Terrorism Act for planting and detonating a bomb that killed twenty people and injured thirty more. Prior to trial, Johnston timely filed a motion to suppress all evidence from an online forum as well as evidence discovered and seized during the execution of a warrant on his home, arguing that this evidence was obtained in violation of his First Amendment and Fourth Amendment rights. The United States District Court for the Southern District of Stone denied the motion to suppress on both grounds. Johnston was convicted following a jury trial and sentenced to the death penalty. Johnston timely appealed his conviction to this Court on the grounds that the district court improperly denied his motion to suppress.

For the reasons discussed below, this Court AFFIRMS the district court’s decision denying the Johnston’s motion to suppress and AFFIRMS Johnston’s conviction.

**Facts and Proceedings Below**

The following facts are derived from the testimony and evidence filed with Johnston’s motion and the government’s opposition and presented during the hearing on the motion before the district court.

1. The Bombing

On June 19, 2022, a bomb was detonated in the city of Brigham, in the state of Stone, at a public library during a Juneteenth celebration. The resulting blast killed twenty people, including four children, and injured thirty more. The majority of the victims identified as Black, although there were some white victims and victims who identified as members of other racial groups. The Federal Bureau of Investigations (“FBI”) quickly took interest in the case, given the apparent circumstances of the blast, which led agents to believe that the explosion was an act of domestic terrorism. Analysis of the crime scene and the blast radius suggested that the bomb had been placed inside of a potted plant on the first floor of the library. On June 21, 2022, Agents obtained all surveillance footage of the library from June 19 back to May 21 (the retention period was only thirty days). After careful review of the footage, agents were unable to identify any persons that manipulated the pot during the period of available time. Short on leads, federal investigators began looking towards known white supremacist organizations in the hopes of discovering a fresh lead.

1. The National Front Coalition Against Non-Aryans[[1]](#footnote-1)

The National Front Coalition Against Non-Aryans (“National Front”) is a highly selective and secretive white nationalist organization that was started in the city of Brigham, Stone, over twenty years ago. The organization has no ties to national organizations, like the Ku Klux Klan or the Atomwaffen Division, but several presumed individual members are known to have ties to these other national organizations. Prior to the events of this case, Johnston was not known to federal authorities as a member of the National Front or any other relevant national organization.. At all times relevant to Johnston’s alleged crimes, the National Front was estimated to have around thirty members; several members of local law enforcement were rumored to be members but federal authorities had been unable to confirm this. Federal authorities were aware of the organization’s existence, as the National Front had held rallies in downtown Brigham one to three times a year for several years prior to these events. Additionally, the organization clashed with protestors in the summer of 2020, following the murder of George Floyd. Aside from these clashes with protestors in 2020, however, the group’s rallies were non-violent, and the group had not engaged in any other activities that had drawn large scale attention or scrutiny prior to the events in this case. Members who attend National Front rallies always wear masks to hide their faces and identities. The masks, now recognized in Brigham as a symbol of the group, are all black with a white skull overlay.

Becoming a member of the National Front is a multi-step process. Preliminarily, the group is only open to white, United States citizens who were born in the United States. An individual seeking membership needs referrals from three current members. Prospective members are required to have previous military experience or law enforcement experience. Although current active service military or law enforcement involvement is not favored, given the increased likelihood of drawing undue attention, the selection committee has been known to accept members who are currently in the military or in law enforcement when the individual holds a high position in their field. Following the referrals and confirmation of these requirements, the prospective member is interviewed by the three “cadres”[[2]](#footnote-2) of the organization. After this interview, if the prospective member is selected for membership they enter a six-month probationary period. At the end of the probationary period, the prospective member must endure a physical assault by five other members of the organization.[[3]](#footnote-3) If the prospective member goes through with this final test and does not report the assault or cooperate with law enforcement, they are inducted as a full member.

The National Front has maximum capacity of fifty members at any given time. Meetings are held bi-monthly, with special meetings being called on an as-needed basis. Unlike the Klan, members do not wear a “uniform” per se to identify their association with National Front. As noted above, when attending protests or counter-protesting, members wear masks to obscure their identities and clothing that covers any distinctive tattoos or markings that they may have. Former National Front members have noted that members will often offer financial support to others in the organization when the need arises. These former members have been unable or unwilling to identify any current members of the National Front.

1. James Wittenhouse

James Wittenhouse, a Brigham resident, is a known member of National Front and beginning in 2018 became known locally as an outspoken voice in the white nationalist movement. In 2020, Wittenhouse was involved in a fight at a bar with two Black men, which resulted in one man being hospitalized with brain damage and the other suffering a non-fatal stabbing wound through the hand. Wittenhouse was arrested and charged in federal district court with two counts of committing hate crimes involving an attempt to kill under 18 U.S.C. § 249(a)(1)(B)(ii). Seeking evidence to bolster their theory that the crime was racially motivated, federal agents executed search warrants on Wittenhouse’s apartment and storage locker.

Among the items obtained from that search were Wittenhouse’s laptop computer, found in his storage locker. Subsequent warrants were executed for the search of the laptop, and agents were able to find a series of text documents and other files that catalogued Wittenhouse’s racist and extremist viewpoints. Of note was a forum page, accessed through a Tor browser, that appeared to be populated by members of National Front.[[4]](#footnote-4) At the time of access, agents utilized Wittenhouse’s login information, kept in a text file, to gain entry onto the webpage. Additionally, an email in his personal email, from an unknown sender, contained the onion link to access the page directly.

Wittenhouse was tried in federal district court beginning in December 2020, with the trial concluding in January 2021. The defense theory at trial was one of self-defense, focusing on the fact that two men were fighting Wittenhouse and that video footage from the bar showed those two men initiating the argument and throwing the first punch after the parties stepped outside. This trial strategy was ultimately successful, and Wittenhouse was acquitted by a jury on both counts. Upon his release from federal prison, he requested the return of his personal effects, which had been held in federal custody before and through the course of his trial. Prior to returning Wittenhouse’s laptop, however, federal agents installed spyware on the laptop, designed to record and track Wittenhouse’s online activity.

1. The National Front Forum

In August 2022, federal investigators began combing back through the content gained from Wittenhouse’s computer. At this point, the spyware had been running consistently for roughly a year and a half, and agents were maintaining a separate hard drive, backed up to a server, that contained all the information gathered whenever the computer was working. As agents began going through the files (located on what was referred to as the “dummy drive”), they quickly focused in on content from the National Front forum. While going through the historical activity from the forum, they found a thread dated May 17, 2022. The thread contained the following message posted by username “whitesi1entfury”:

“JUNETEENTH THIS YEAR WILL BE SOMETHING TO REMEMBER. THEY’VE FINALLY GONE TOO FAR AND IT’S OUR TURN TO BEGIN TAKING BACK OUR COUNTRY. THESE MONKEYS NEED TO KNOW THEIR PLACE AND BELIEVE ME, THEY WILL SOON.”

Federal agents were unable to get an accurate IP address for the posting because of the way that Tor browsers function. However, they discovered an email address posted later in the forum in another post by whitesi1entfury, directed to another user to continue the conversation by email. This email address was “bkillstreak1022@gmail.com.” Agents sought and obtained an order pursuant to 18 U.S.C. § 2703(d) to obtain the subscriber information for the email account, which revealed an IP address[[5]](#footnote-5) and a subscriber name, “John Landy.”[[6]](#footnote-6)

Agents traced the IP address to a computer located in a home in the suburbs of Brigham. The home was a one-story house with a basement located at 8568 Gunpowder Lane, roughly twenty miles from downtown Brigham, where the Juneteenth bombing occurred. Agents checked the address in the Registry of Deeds to learn who the homeowner was. The deed and title to the home came back as registered to a Mark and Gina Johnston.

1. The Search for the Suspect

After obtaining this address, agents relied on the May 17 “whitesi1entfury” posting on the National Front forum as the basis for probable cause to obtain a federal search warrant on the Johnston’s home. A federal magistrate granted the warrant, authorizing a full search of the one-story home and basement and seizure of any electronic devices, physical evidence that could reasonably be used in the construction of a bomb or other incendiary device, and all papers that might identify all occupants located at the home. The warrant was set to be executed on July 6, 2022. Understanding that the suspect was presently considered armed and dangerous, the federal magistrate authorized a “no-knock” warrant to breach the location.[[7]](#footnote-7) At 6:00 a.m. on July 6, agents battered in the door at 8568 Gunpowder Lane, and a team of twenty federal agents began searching and documenting the contents of the home. Within the home, agents seized the following items: a single laptop; roughly twenty pounds of fertilizer; six cell phones (“burner phones”); receipts from hardware and electronic stores for the fertilizer and a series of additional electronic components, respectively; a black backpack with the brand labels removed; flyers from a rally from National Front; and a copy of an airline ticket dated June 18, 2022, for a flight to London with the passenger name of Dylann Johnston. A workbench littered with electronic components, including a cell phone detonation device, was located in the basement. Photos of the workbench and the contents on it were taken by agents.

Upon discovery of the ticket, the lead prosecutor called their contacts in the United Kingdom, who put out an All-Points Bulletin to locate Johnston. An international manhunt ensued, and after three weeks, Johnson was located on a farm in Northern Ireland. At the time of his arrest, he was in possession of the following: 20,000 euros; a duffle bag contained three sets of black pants and white shirts; an ID under the name “John Landy;” and a library card for the Brigham public library.[[8]](#footnote-8) Irish officials detained him in Ireland and had him brought back to the England for preparations to be made. Pursuant to an extradition treaty between the United States and the United Kingdom, he was transported back to Stone, where federal agents met him at the airport and brought him immediately into custody. Agents attempted to interview Johnston, but he invoked his Miranda rights as soon as they were read to him. Additionally, he was silent during the flight and transport to Stone Metropolitan Detention Center.

Agents obtained and executed additional search warrants on the laptop and safe seized from the Johnston’s home. Regarding the laptop, as soon as the password was brute forced to gain entry onto the device, software triggered that wiped the hard drive and broke the BIOS system in the laptop.[[9]](#footnote-9) Attempts to recover the files were unsuccessful, and the 250 GBs of data contained on the device were permanently lost. Agents were able to break into the safe, which contained another cell phone that had been wired as a detonation device and papers belonging to Johnston’s parents.

1. Dylann Johnston

At the time of his arrest, Dylann Johnston was a twenty-four-year-old native of Stone. He grew up in the suburbs surrounding Brigham and moved out at eighteen when he enlisted in the Air Force. His parents both died in 2022, and he inherited a modest will, including money and the home upon their passing. He did not put the home through probate to transfer title, so he was not listed as the owner at the time of the bombing. He was still living at the location prior to his arrest. Friends and neighbors described him largely as someone who keeps to himself and did not have a large social circle.

Johnston served five years in the United States Air Force (“USAF”). While in the USAF, Johnston worked primarily in Explosive Ordnance Disposal (“EOD”); he completed two tours in Iraq between 2019 and 2020.[[10]](#footnote-10) He was honorably discharged in early 2021, after he was diagnosed with Post-Traumatic Stress Disorder following an explosion that killed a member of his unit and left him unable to hear out of one ear. Since his discharge, he had largely been working freelance online and odd jobs for some various local businesses.

1. The Case Against Johnston

Johnston was charged under federal indictment for bombing of a place of public use under 18 U.S.C. § 2332f and use of a weapon of mass destruction under 18 U.S.C. § 2332a, both as an act of domestic terrorism under 18 U.S.C. § 2331(5), and for fifty counts of willfully causing bodily injury under 18 U.S.C. § 249(a)(1)[[11]](#footnote-11) for the bombing and the resulting deaths and injuries. Federal prosecutors filed a notice to seek the death penalty, believing that the racial animus and indiscriminate nature of the attack justified such punishment. Johnston filed a timely motion to suppress challenging the warrantless installation of spyware on Wittenhouse’s computer and the resultant mass observation of the online activities of the individuals active on the National Front forum.

Specifically, Johnston moved to suppress the National Front forum posts attributed to “whitesi1entfury,” as well as all evidence seized from the search of his home, because probable cause for that search warrant rested on the forum posts. Additionally, Johnston argued that the installation of spyware in Wittenhouse’s laptop, which the government concedes was done without a warrant, violated Johnston’s Fourth Amendment rights. Thus, Johnston argues that on both First and Fourth Amendment grounds, the warrant to search his home and all evidence seized pursuant to that warrant are fruits of an initial illegal search and must be excluded. The government concedes that it would not have obtained probable cause for the warrant to search Johnston’s home without access to the relevant posts in the National Front forum, and that it would not have been able to access those posts without installing the spyware on Wittenhouse’s computer. The government concedes that if the government’s actions violated Johnston’s constitutional rights, the exclusionary rule would bar admission of the evidence seized pursuant to the warrant for the search of Johnston’s home and effects.[[12]](#footnote-12)

The government contends, however, and the district court agreed, that Johnston lacks standing to raise a Fourth Amendment challenge to the search, through the installation of spyware, on Wittenhouse’s computer. With respect to the First Amendment challenge, the district court had not heard this issue raised on a motion to suppress before and denied the motion on the grounds that the First Amendment does not provide procedural grounds to challenge a search on a motion to suppress.

Johnston was subsequently tried and convicted on all counts by a jury. During the trial, counsel for Johnston objected to the introduction of the National Front forum posts attributed “whitesi1entfury” and to all evidence derived from the search of Wittenhouse’s computer, including all evidence seized from Johnston’s home. The objection was overruled. Defense counsel elicited testimony from federal agents that the information was obtained from a third party, but the nature of the intrusion was kept from the jury because of relevance, again over defense counsel’s objection. Following Johnston’s sentencing, he timely appealed his conviction to this Court, on the grounds that his motion to suppress was improperly denied on both grounds. This Court heard arguments on June 17, 2024.

**Standard of Review**

This Court reviews a district court’s denial of a motion to suppress de novo. See, e.g., United States v. Washington, 340 F.3d 222, 226 (5th Cir. 2003). With respect to the Fourth Amendment issue, because the government conducted the challenged search without a warrant, it bears the burden of proving by a preponderance of the evidence that an exception to the warrant requirement applies. See, e.g., Nix v. Williams, 467 U.S. 431, 444 n.5 (1984).

**Discussion**

1. First Amendment Challenge

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. “The First Amendment prohibits government from ‘abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’” Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 605-06 (2021) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)). “We have said time and time again that ‘public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’” Matal v. Tam, 528 U.S. 218, 244 (2017) (quoting Street v. New York, 394 U.S. 576, 592 (1969)); see also Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds that idea itself offensive or disagreeable”). Thus, “[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.” R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (internal citations omitted).

Speech can be restricted, however, when it is “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” Id. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Of some relevance here is the limitation on what was previously termed “fighting words,” but now is recognized under the doctrine of “true threats.” Chaplinsky, 315 U.S. at 572; see also Virginia v. Black, 538 U.S. 343, 359-60 (2003). Under the true threats doctrine, “a State may punish those words ‘which by their very utterance inflict injury or tent [sic] to incite an immediate breach of the peace.’” Black, 538 U.S. at 359 (quoting Chaplinsky, 315 U.S. at 572). True threats include those “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). “The speaker need not actually intend to carry out the threat” for the government to punish it. Id.

The digital landscape also directly impacts the true threat analysis. “The risk of overcriminalizing upsetting or frightening speech has only been increased by the internet.” Counterman v. Colorado, 600 U.S. 66, 88 (2023) (Sotomayor, J., concurrence). Modern communication primarily takes place in the “vast democratic forums of the internet,” especially on social media. Packingham v. North Carolina, 582 U.S. 98, 104 (2017). Shifts in technology and communication rapidly change “what society accepts as proper behavior.” Ontario v. Quan, 560 U.S. 746, 759 (2010). Currently, “different corners of the internet have considerably different norms around appropriate speech.” Counterman, 600 U.S. at 88 (Sotomayor, J., concurring).

The First Amendment also protects an individual’s freedom of association, which entitles a person to be free from state intrusion on their ability to associate and congregate with others who share their beliefs or viewpoints. See, e.g., Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-35 (1925); Roberts, 468 U.S. at 618. In creating associational rights, this Court stressed that “individuals draw much of their emotional enrichment from close ties with others.” Roberts, 468 U.S. at 618. These rights allow individuals to “define one’s identity that is central to any concept of liberty.” Id. Freedom of association protections do not, however, automatically apply to all organizational groups; certain objective characteristics need to be evaluated before First Amendment protections apply. Protected associations are those akin to familial relationships, which involve “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” Id. at 620. Protected groups typically share “such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” Id. Groups that lack these attributes fall outside First Amendment protection from government scrutiny and infringement on their associations. Id.. at 631.

Before we consider the application of the First Amendment to this case, we note that the constitutional contours of the First Amendment apply differently in the criminal context. Because the Fourth Amendment protects individuals from intrusion by the government broadly, in the motion to suppress context, application of the Fourth Amendment often swallows any analysis of First Amendment rights. See Roaden v. Kentucky, 413 U.S. 496, 504 (1973) (imposing a more stringent application of Fourth Amendment test “in light of the values of freedom of expression”). The First Amendment has more typically been raised in challenges to criminal indictments or sentences. See, e.g., R.A.V., 505 U.S at 380, 414 (White, J., concurring in part) (striking down as unconstitutionally overbroad a local ordinance that made it a crime to place “a burning cross” or other symbols if the person placing the symbol would know or reasonably believe that the symbol would raise anger or alarm in another based on a protected class); Elonis v. United States, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part) (observing that the Court’s opinion left open the question of whether punishing true threats under a recklessness (rather than intentional) mens rea standard violates the First Amendment, a question resolved in Counterman v. Colorado, 600 U.S. 66 (2023)); Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993) (rejecting the argument that a “penalty-enhancement statute is invalid because it punishes the defendant’s discriminatory motive” because “bias-inspired conduct” is not protected and the First Amendment “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent”); Virginia v. Black, 538 U.S. 343, 348, 363-65 (2003) (upholding a statutory provision that made it a felony to burn a cross with the intent to intimidate a person, but finding unconstitutional a provision that allowed the act of burning a cross to serve as prima facie evidence of intent, because that provision “blurs the line between” whether cross burning is intended as unprotected intimidation or protected political speech).

Here, Johnston contends that the government violated his First Amendment rights when it engaged in mass monitoring of the National Front forum and used his post in that forum as the basis for probable cause to support a search warrant for his home. Thus, he asks this Court to hold that all fruits of that search have been suppressed and to vacate his conviction. The government contends, however, that First Amendment freedom of association protections cannot be used as a basis to find a search unconstitutional, especially here, and that the speech on which the government relied for probable cause was not protected speech.

At the outset, we note that the question before this court is a novel one. If we agree with Johnston, we will be recognizing a new procedural vehicle in the motion to suppress context. And we recognize, as Johnston asserts, that the First Amendment is intended to protect speech and expression, regardless of how unsavory the ideas being shared might be. See R.A.V, 505 U.S. at 382. These principles apply with equal force to the freedom of association. See Griswold v. Connecticut, 381 U.S. 479, 483 (1965). Johnston argues that just as overbroad criminal statutes risk chilling speech, broadly monitoring all communications of a particular group on a private forum can deter the speech and association of the members of that group. See United States v. Williams, 553 U.S. 285, 292 (2008). The government, in contrast, contends that the First Amendment is inapposite in the context of determining when the government can or cannot conduct a search, as those government actions fall squarely under the Fourth Amendment, which already adequately protects First Amendment interests in the context of government intrusions. See Maryland v. Macon, 472 U.S. 463, 468 (1985).

We need not decide whether the First Amendment can ever be the appropriate constitutional vehicle for challenging a search, however; there may well be cases in which it is. This is not one of them. Johnston’s association with other National Front members is not protected, as the “size, purpose, policies, selectivity, congeniality, and other characteristics” of the group demonstrate that freedom of association protections do not apply. Roberts, 468 U.S. at 620. To the extent the group is selective, it is only selective based on race. There is no evidence that its events are exclusive or closed to the public, or that the masks members don are expressive as opposed to simply privacy-protecting. Cf. Tillman v. Wheaton-Haven Recreation Ass’n, Inc., 410 U.S. 431, 438 (1973); Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 206 (2d Cir. 2004). Moreover, just as true threats are not protected because they are “of such slight social value,” association in a group like the National Front is not protected. Finally, even if concerns about chilling association rose to the level Johnston claims, those concerns are speculative and unrelated to the individualized harm required to find a search unconstitutional. Cf. Laird v. Tatum, 408 U.S. 1, 11 (1972).

As a final matter, even if government’s actions violated Johnston’s First Amendment rights, we remain unconvinced that exclusion would be the appropriate remedy. Certainly, exclusion is appropriate when the deterrent benefit of exclusion outweighs the costs of exclusion. Hudson v. Michigan, 547 U.S. 586, 591 (2006). Although the forum posts and the evidence seized during the execution of the warrant to search his home would be “fruits of the poisonous tree” in the sense that the evidence would not be available but for the original constitutional violation, here, we find that exclusion would only have an incremental deterrent effect and need not be a necessary consequence of a violation. Herring v. United States, 555 U.S. 135, 140 (2009). Additionally, “evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional.’” Id. at 143 (quoting Illinois v. Krull, 480 U.S. 340, 348-349 (1987)). Despite Johnston’s assertions to the contrary, we are not convinced that this is the case here.

For these reasons, we hold that Johnston’s First Amendment challenge must fail.

1. Fourth Amendment Challenge

The Fourth Amendment provides “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The original conceptualization of the Fourth Amendment’s search doctrine was rooted in “’common-law trespass’ and focused on whether the Government ‘obtains information by physically intruding on a constitutionally protected area.’” Carpenter v. United States, 585 U.S. 296, 304 (2018) (quoting United States v. Jones, 565 U.S. 400, 405, 406, n.3 (2012)). The Supreme Court later established, however, that “the Fourth Amendment protects people, not places.” Katz v. United States, 389 U.S. 347, 351 (1967). Consequently, the Court expanded our conception of the Amendment to protect certain expectations of privacy as well. See generally Smith v. Maryland, 442 U.S. 735, 741 (1979). Thus, the Fourth Amendment is implicated when an individual seeks to preserve something as private, and his expectation of privacy is “one that society is prepared to recognize as reasonable.” Katz, 389 U.S. at 361 (Harlan, J., concurring).

A defendant cannot raise a Fourth Amendment challenge to a search, however, unless they can establish that they have standing. Standing in the civil context is established generally through Article III of the Constitution. See, e.g., Singleton v. Wulff, 428 U.S. 106, 112 (1976). In the criminal context, standing to challenge governmental action, most often through a motion to suppress, derives from caselaw. Just as a plaintiff must establish that they have incurred some harm to have standing in a civil case, “it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he . . . establish, that he himself was the victim of an invasion of privacy.” United States v. Salvucci, 448 U.S. 83, 86 (1980); see also Powers v. Ohio, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”). The standing doctrine has come before the Supreme Court in different ways, most relevantly here through the concept of “target” standing.

Target standing is the theory that a defendant can assert a constitutional violation on behalf of a third person, one who is not party to the criminal proceedings. The phrase uses “target” to identify the defendant, who is challenging the search, as the actual target of the search, rather than the third party who was directly subject to the search. The last time the Supreme Court considered the question of target standing, it rejected it, holding that “a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.” Rakas v. Illinois, 439 U.S. 128, 134 (1978). The Court in Rakas expressly recognized, however, that its holding did not impact the traditional conception of standing, which is a two-part inquiry: “first, whether the proponent of a particular legal right has alleged ‘injury in fact,’ and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.” Id. at 139-40. Furthermore, the Court’s recognition of Fourth Amendment rights as “personal in nature has already answered many of these traditional standing inquiries, and . . . those rights [are] more properly placed within the purview of substantive Fourth Amendment law than within that of standing.” Id. at 139-40.

As Johnston points out, Rakas was decided almost fifty years ago. Since then, the landscape of police action and places that can be searched has changed significantly. See generally Carpenter, 585 U.S. 296. Rakas held that the petitioners, who were passengers in the automobile and not the owner nor the owners of the items that had been seized, lacked standing to challenge the government’s search and seizure of the vehicle. See id. at 129. Johnston argues that Rakas’s reasoning is outdated and irrelevant, as the Fourth Amendment’s protection in the digital space is largely like its heightened protection in the home, and not like the reduced protection for a vehicle. Cf. Groh v. Ramirez, 540 U.S. 551, 557 (2004). He further points out that digital content is largely interconnected and accessing information belonging to one person can often implicate other individual’s privacy interests. See generally, e.g., United States v. Brown, No. 22-4564, 2024 WL 3838738 (4th Cir. Aug. 16, 2024).

We agree in large part with Johnston’s critique of Rakas. Fourth Amendment jurisprudence is properly focused on privacy rights, not property. Katz, 389 U.S. at 351-52; Carpenter, 585 U.S. at 316-17. Because of this, the Court’s focus on the lack petitioners’ possessory interest in the vehicle in Rakas does render this case somewhat distinguishable. See 439 U.S. at 140. Nonetheless, we are of course bound by Rakas, and more broadly, we do not find that Johnston had any reasonable expectation of privacy here. Individuals do not have an objectively reasonable privacy interest in the belongings of others. See 439 U.S. at 130-32.[[13]](#footnote-13) Although the spyware allowed law enforcement to “see” beyond Wittenhouse’s laptop, the “location” it allowed them to search was the internet, not some private space. Johnston posted his messages online for all to see, and although he took steps to mask his identity online, these steps do not sufficiently give rise to an expectation of privacy in his digital footprint. Cf. Tlapanco v. Elges, 969 F.3d 638, 656-57 (6th Cir. 2020).

Although we need not go further here, we do note that the government asserts that even if Johnston had standing under the Fourth Amendment to challenge the installation of spyware on Wittenhouse’s computer, that exceptions to the warrant requirement would still permit that search. Exigent circumstances can permit a warrantless search when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.” Lange v. California, 594 U.S. 295, 301 (2021) (quoting Kentucky v. King, 563 U.S. 452, 460 (2011)). This exception exists to enable “law enforcement officers to handle ‘emergenc[ies]’ – situations presenting a ‘compelling need for official action and no time to secure a warrant.’” Id. (quoting Riley v. California, 573 U.S. 373, 402 (2014). Only a limited number of exigencies are recognized, however, including the “emergency aid” exception, the “hot pursuit” exception, and the need “to prevent the imminent destruction of evidence.” See Michigan v. Fisher, 558 U.S. 45, 49 (2009) (per curiam) (emergency aid); United States v. Santana, 427 U.S. 38, 42-43 (1976) (hot pursuit); Georgia v. Randolph, 547 U.S. 103, 116, n.6 (2006) (destruction of evidence). We are not convinced that any would apply here.

The government also asserts that the search would be permitted because under the third-party doctrine, “an individual has a reduced expectation of privacy in information knowingly shared with another.” Carpenter, 585 U.S. at 314. When an individual voluntarily shares information with a third-party, the government can obtain this information absent a warrant. See United States v. Miller, 425 U.S. 435, 442 (1976) (no warrant required to obtain bank records that were prepared in the regular course of business); see Smith v. Maryland, 442 U.S. 735, 742 (1979) (no warrant required to install a pen register to track numbers dialed as company would normally do this in the course of business). Johnston asserts that the third-party doctrine is inapplicable here for the same reasons it was inapplicable in Carpenter, because accessing the online forum through the use of spyware gave the government potential access to a broad swath of personal information. See 585 U.S. at 314 (“In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.”). We disagree with Johnston’s framing of an online forum as deeply personal and revealing like historical CSLI. Regardless, we need not examine whether the doctrine applies in this case, though we assume it would.

For these reasons, we hold that Johnston’s Fourth Amendment challenge must fail.

**Conclusion**

Appellant Dylann Johnston’s First Amendment challenge to the government’s monitoring of the National Front forum must fail, and he lacks standing to raise a Fourth Amendment challenge to the installation of spyware on another individual’s computer. The district court therefore properly denied suppression. For the forgoing reasons, this Court AFFIRMS Johnston’s conviction.

Decided and Filed: July 22, 2024

**SUPREME COURT OF THE UNITED STATES**

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)

Dylann JOHNSTON, )

Petitioner, )

)

v. ) No. ST-24-01

)

UNITED STATES of America, )

Respondent. )

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**OPINION**

Petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit granted. The Court will consider all issues raised in the court below.

September 26, 2024

1. All information regarding the National Front came from statements of former members. Due to fear of reprisal, all of these statements were made on conditions of anonymity and these members have refused to testify. [↑](#footnote-ref-1)
2. “Cadres” in the National Front are members who have been active for over fifteen years. Although federal investigators have not confirmed the identities of any cadres, several individuals who are suspected of being cadres are also suspected of involvement in a series of four home invasions and three presumably related disappearances that took place in Brigham over five years ago. Three of the homes belonged to Chinese immigrants and the fourth home belonged to Latine immigrants from Brazil. Three families disappeared from Brigham on the nights of the invasions and were never located; the fourth family moved away three days after their home was invaded. The Brigham Police Department considers the investigation still “active,” but no new leads have been uncovered in over three years. [↑](#footnote-ref-2)
3. This is like other gang membership initiations. See, e.g., James Vigil, Street Baptism: Chicano Gang Initiation, 55 Human Organization 149 (1996). Presumed prospective National Front members often suffer non-fatal injuries following the initiation, and a few individuals have had to receive medical treatment following what local law enforcement has assumed are these initiation assaults. Criminal charges typically do not arise from these incidents, as individuals typically refuse to cooperate with law enforcement. [↑](#footnote-ref-3)
4. A Tor (short for The Onion Routing Project) browser uses a series of layered nodes to hide IP addresses, explained later, online data, and browsing history. The purpose of using Tor is to anonymize activity and communication online. To access sites on the browser, the URLs are specific to the browser and often contain a series of values. E.g., <http://zqktlwiuavvvqqt4ybvgvi7tyo4hjl5xgfuvpdf6otjiycgwqbym2qad.onion/>. Without a Tor browser, and an active link specific to that browser, access to webpages is effectively impossible. [↑](#footnote-ref-4)
5. An internet protocol address is a uniquely identifying string of numbers that gets assigned to each device that accesses the internet. If the internet is conceptualized as a door with a combination lock, the IP address is the specific combination assigned to each device that goes through the door. [↑](#footnote-ref-5)
6. Ultimately, prosecutors posit that this alias was based on “John” being a placeholder first name, much like “John Doe,” and “Landy” is an anagram for “Dylann,” with the additional “n” being removed. [↑](#footnote-ref-6)
7. A “no-knock” warrant authorizes law enforcement to enter a home without announcing themselves as members of law enforcement prior to entry. The rationale justifying such warrants is, effectively, to catch the targets by surprise, ideally preventing them from being able to arm themselves prior to law enforcement entry into the location. Additionally, these warrants are often issued if law enforcement is concerned about potential destruction of evidence. [↑](#footnote-ref-7)
8. Johnston has raised no challenge to the search incident to arrest. Therefore, any challenge to these recovered items has been procedurally defaulted and will not be considered by this Court. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000). Furthermore, this search has no bearing on the search at issue in this Court’s decision. [↑](#footnote-ref-8)
9. BIOS stands for Basic Input/Output System. It is the firmware embedded into the motherboard of a computer. It serves as the bridge between the hardware and operating system of the computer and dictates the essential functions of the computer. Absent a functioning BIOS system, the computer is not able to function. [↑](#footnote-ref-9)
10. EOD is the incendiary and explosive device arm of the Air Force. Members specialize in bomb defusal and other tasks. [↑](#footnote-ref-10)
11. Federal prosecutors in Stone chose not to seek additional charges. Instead, the focus was on proving the most egregious acts, rather than needing to prove every charge that could have been brought. [↑](#footnote-ref-11)
12. The government asserts no defense, such as inevitable discovery, that would remove the taint from the poisonous fruit. [↑](#footnote-ref-12)
13. The government concedes that if Johnston had standing here, he would have a subjective expectation of privacy in the forum. [↑](#footnote-ref-13)