NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

MATTHEW PATRICK LANGENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Heather Quick
FEDERAL PUBLIC DEFENDER'S OFFICE
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
(319) 363-9540

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether an employer has "apparent authority" to consent to a complete search, including a forensic examination, of an employee's cell phone based upon access to the cell phone and a claim of ownership?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Langenberg, 3:21-cr-000325-001 (S.D. Iowa) (criminal proceedings), judgment entered December 23, 2021.

United States v. Langenberg, 22-1071 (8th Cir.) (direct criminal appeal), judgment and opinion entered November 4, 2022.

United States v. Langenberg, 22-1071 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered December 9, 2022.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Langenberg respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 52 F.4th 755 (8th Cir. 2022) and is reproduced in the appendix to this petition at Pet. App. p. 14. The district court's ruling from the bench denying the motion to suppress is reproduced at Pet. App. p. 3.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on November 4, 2022, Pet. App. p. 12, and denied Mr. Langenberg's petition for rehearing en banc on December 9, 2022. Pet. App. p. 17. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

Law enforcement engaged in multiple warrantless searches of Mr. Langenberg's cell phone, including a forensic examination. The searches revealed child pornography. Mr. Langenberg was indicted in the Southern District of Iowa on one count of receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2), 2252(b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2). R. Doc. 27.[1]

A. District Court Proceedings

Mr. Langenberg filed a motion to suppress evidence. R. Doc. 38. He argued that *Riley v. California*, 573 U.S. 373 (2014), required law enforcement to obtain a warrant before searching his cell phone, and no exception applied. *Id*.; Tr. p. 34.

The prosecution resisted. R. Doc. 42. First, the prosecution argued that Mr. Langenberg lacked standing to challenge the search of the cell phone, because he did "not have a reasonable expectation of privacy in a private employer-issued cell phone." *Id*. Alternatively, as relevant to this petition, the prosecution argued that the warrantless searches of Mr. Langenberg's cell phone were valid because the employer consented to the search. *Id*. The court set the motion for a hearing.

[1] In this petition, the following abbreviations will be used:
"R. Doc." - district court clerk's record, followed by docket entry and page number, where noted;
"Tr." – Suppression hearing transcript, followed by page number;
"Gov't Ex." – Government suppression hearing exhibit, followed by number;
"Def. Ex." – Defense suppression hearing exhibit, followed by letter;
"Pet. App." – Petitioner's Appendix, followed by page number.

Bachmeier Carpet One ("BCO") provided Mr. Langenberg with a cell phone when he was hired in 2014. Tr. pp. 4-5. BCO went through a change in ownership in 2016, when Scott Storck and his brother purchased the business. Tr. p. 4. As Mr. Storck was not the owner when Mr. Langenberg was initially hired, he could not testify to how Mr. Langenberg was provided with the phone. Tr. p. 5. Besides Mr. Langenberg, BCO provided the co-owners with cell phones, as well as the warehouse position. Tr. p. 4. All other BCO employees had to obtain their own cell phone but received monthly reimbursement for their cell phone service. Tr. p. 5.

At the hearing, the parties hotly contested who maintained ultimate ownership of the cell phone. Tr. pp. 9-10. However, there was no real dispute that Mr. Langenberg was allowed to use the phone as his personal cell phone, and that he had the ability to exclude others from access, including his employer. BCO provided no limitations on where Mr. Langenberg could take his phone, and Mr. Langenberg could take his phone home with him. Tr. p. 17. Mr. Langenberg transferred his personal cell phone number to his company-purchased phone, as he was explicitly allowed to do. Tr. p. 10. Mr. Storck assumed that the phone provided by BCO was Mr. Langenberg's only cell phone. Supp. Tr. p. 17. Mr. Langenberg's cell phone was password protected, and before this incident, Mr. Storck did not know the passcode to the phone. Supp. Tr. p. 16.

On August 14, 2020, a BCO employee filed a sexual harassment complaint against Mr. Langenberg. Tr. p. 10. The employee believed Mr. Langenberg was

recording her with his cell phone. Tr. p. 11. Mr. Storck called Mr. Langenberg into a conference room and told him of the complaint. Tr. p. 11. Mr. Langenberg said "I am sorry; I screwed up." Tr. p. 11. Mr. Storck then told Mr. Langenberg that he would need to see his phone and go through it. Tr. p. 11. Mr. Langenberg unlocked the phone and provided the phone to Mr. Storck as ordered. Tr. p. 11. Mr. Langenberg also provided Mr. Storck with his passcode. Tr. p. 11. Mr. Storck did not know Mr. Langenberg's passcode before this. Tr. p. 16.

Mr. Storck looked through Mr. Langenberg's phone, specifically his photo gallery, and saw what he believed to be child pornography. Tr. p. 12. Mr. Storck contacted law enforcement. Tr. p. 12. Mr. Storck met with an officer from the Coralville Police Department and provided them with Mr. Langenberg's phone and the passcode. Tr. p. 13.

Later, Mr. Storck spoke with Sergeant Kyle Nicholson. Tr. p. 13. Mr. Storck provided Sergeant Nicholson with the passcode to the cell phone. Tr. p. 13. Mr. Storck then provided consent to search Mr. Langenberg's cell phone. Tr. pp. 13-14. Mr. Langenberg did not consent to a search of the cell phone. Tr. p. 27.

Sergeant Nicholson did not testify as to the date the search occurred. He did not testify as to what steps he took, if any, to ensure that Mr. Storck had the ability to consent to a search of the cell phone.

Sergeant Nicholson then searched the phone, while on the phone with Mr. Storck. Tr. p. 26. In the "photos section of the phone," he found what he believed to

be child pornography. Tr. p. 26. After this search, Sergeant Nicholson turned the phone over for a forensic analysis. Tr. p. 26. No search warrant was ever obtained for the cell phone. Tr. p. 26.

After BCO took Mr. Langenberg's cell phone, the company purchased Mr. Langenberg a pre-paid cell phone for him to use. Tr. p. 18. On August 20, 2020, Mr. Langenberg's attorney sent Mr. Storck a letter, requesting the return of his cell phone. Tr. p. 14; R. Doc. 63, Def. Ex. A. The attorney noted that BCO took Mr. Langenberg's cell phone, and that "[t]his phone was Mr. Langenberg's personal property and should be immediately returned to Mr. Langenberg." R. Doc. 63, Def. Ex. A. The attorney requested that, in the interim, no one should be permitted access to his cell phone. R. Doc. 63, Def. Ex. A. BCO's attorney responded to Mr. Langenberg's attorney by letter, claiming ownership of the cell phone. R. Doc. 88, Gov't Ex. 3.

Over a month later, on October 1, 2020, Mr. Storck provided Sergeant Nicholson confirmation that an iPhone 6s plus was purchased on BCO's account on October 7, 2015. R. Doc. 63, Def. Ex. B. The confirmation stated the device IMEI # was 35328607415601. R. Doc. 63, Def. Ex. B. This IMEI# was not the same IMEI# on the phone provided to Sergeant Nicholson, indicating the phone referenced in the confirmation was not the phone Sergeant Nicholson searched. Tr. pp. 28, 33. Mr. Storck testified that it was possible BCO bought Mr. Langenberg another cell phone between 2015 and 2020, but he was "not sure." Tr. p. 30.

The district court denied the motion to suppress from the bench. Pet. App. 3. The court mistakenly stated that it was not disputed that BCO owned the phone. Pet. App. 2. The court then stated that Mr. Storck provided consent to law enforcement to search the phone but did not discuss whether the consent was valid. Pet. App. 2.

Mr. Langenberg entered a conditional guilty plea to the receipt count, pursuant to a plea agreement. R. Doc. 54. Mr. Langenberg preserved the right to challenge the denial of his motion to suppress on appeal. R. Doc. 54, pp. 12-13. Mr. Langenberg was ultimately sentenced to 60 months of imprisonment.

B. Proceedings on Appeal

Mr. Langenberg appealed, maintaining his challenge to the denial of the motion to suppress. The Eighth Circuit Court of Appeals affirmed. *United States v. Langenberg*, 52 F.4th 755 (8th Cir. 2022); Pet. App. 14. The Circuit found that Mr. Storck had apparent authority to consent to the searches of the cell phone. Pet. App. 15. The Circuit held that "[w]hen officers searched the phone, they knew that Mr. Storck had possession of the phone, had access to its contents, had claimed ownership over it, and had searched the phone himself. It thus appeared that Mr. Storck had either joint access to the phone or control over it." Pet. App. 15. Finally, the Court determined law enforcement had no duty to investigate whether Mr. Storck had authority to consent to the search, when Mr. Storck seemed to have "both possession and ownership . . . as well as access to and use of the phone's content." Pet. App. 15.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's decision minimizes the significant privacy interests implicated in the warrantless search of a cell phone, as detailed in *Riley v. California*, 573 U.S. 373 (2014).

In recent years, this Court has been more scrupulous when applying the reasonableness-balancing test to the warrantless searches of cell phones. Cell phones are a unique "effect," as "[p]rior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day." *Riley v. California*, 573 U.S. 373, 394 (2014). Cell phones, unlike your typical physical object, "place vast quantities of personal information literally in the hands of individuals." *Id.* at 386. As circuit courts have recognized "under *Riley*, the nature of the electronic device greatly increases the potential privacy interests at stake, adding weight to one side of the scale while the other remains the same." *United States v. Lichtenberger*, 786 F.3d 478, 488 (6th Cir. 2015) (citing *Riley*, 573 U.S. at 392-93); *United States v. Fletcher*, 978 F.3d 1009, 1013 (6th Cir. 2020) ("[T]he revolution in digital capacity of cell phones has shifted the balance between individual privacy and governmental interests"). Therefore, "when privacy-related concerns are weighty enough[,] a search [of a cell phone] may require a warrant, notwithstanding the diminished expectations of privacy . . . ." *Riley*, 573 U.S. at 392.

Below, the Eighth Circuit held an employer claiming ownership and having access to an employee's cell phone establishes apparent authority to consent to a full search of that phone, including a forensic examination. This Court should grant the

petition for writ of certiorari because this decision has significant implications in today's technological and employment landscape. Under this opinion, an employer can provide a cell phone to law enforcement, simply state that they have legal ownership of the employee's phone and can access it, and officers are allowed to take this information at face value and conduct a warrantless search. This is especially troubling, as employees often use devices both for personal and work-related reasons, sometimes with the express permission and expectation from their employer, as was the case for Mr. Langenberg. *See* Bryan R. Lemons, *Public Privacy: Warrantless Workplace Searches of Public Employees*, 7 U. Pa. J. Lab. & Emp. L. 1, 5 (Fall 2004). This Court should grant the petition for writ of certiorari to address this significant issue.

II. The Eighth Circuit's decision conflicts with this Court's precedent. The decision treats access and ownership as sufficient for apparent authority, which this Court has repeatedly rejected.

Under this Court's precedent, consent may be given by "a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Common authority "rests ... on mutual use of the property by persons generally having joint access or control for most purposes." *Id.* at 171 n.7. In *Illinois v. Rodriguez*, 497 U.S. 177, 185–86, (1990), this Court expanded upon third-party consent, finding that consent is valid if law enforcement reasonably believed a third-party had apparent authority to consent to search of the premises or effect. Apparent

authority exists when "the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. at 188.

The Eighth Circuit's decision lowers the apparent authority bar in a manner that is inconsistent with this Court's precedent. Apparent authority still requires officers to use "reasonable caution." And there was no indication that Mr. Langenberg's employer used the phone beyond the fact that they had access to it. There was no claim or evidence that Mr. Storck told law enforcement he used this cell phone or had any kind of control on the information inside of the cell phone. He simply provided the phone of another individual but claimed ownership and access. This is insufficient.

This Court's decisions support that apparent authority is lacking in such circumstances. For example, a homeowner does not have apparent authority to consent to a law enforcement search of a residence occupied by a renter, regardless of ownership. *Chapman v. United States*, 365 U.S. 610, 779–80 (1961). A hotel owner also does not have the authority to consent to a search of an occupied hotel room—even if they own the building and have a key to the room. *Stoner v. California*, 376 U.S. 483, 489 (1964). Considering this Court has acknowledged that a search of a cell phone is more intrusive than the search of a residence, *Riley*, 573 U.S. at 396–97, an employer's claim of ownership and access should not suffice for apparent authority to consent to a cell phone.

Under these circumstances, *Riley* requires more. "The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). It is unreasonable to believe an employer can consent to a comprehensive search of an individual's cell phone based upon an unsupported claim of ownership and access.

CONCLUSION

Mr. Langenberg respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick
Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER