

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

No. 2009 – H20

UNITED STATES OF AMERICA, *Petitioner*

v.

STARTESTS, INC. and the COLONIAL FOOTBALL LEAGUE, *Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

- I. Does the Colonial Football League have standing as an association to challenge the Federal Bureau of Investigation's decision to physically seize several computers from StarTests, Inc., containing its customers' data including confidential drug test results taken by the League's players from the previous five years?
- II. Does the plain view exception apply to the Federal Bureau of Investigation's warrantless seizure of all Colonial Football League results when the warrant failed the particularity requirement, the result entries were not immediately incriminating, and the Federal Bureau of Investigation had no right to access the results for all StarTests clients?
- III. Does the lack of Fourth Amendment protections in computer searches require this Court to adopt new procedures for computer searches when those procedures are the only mechanism to ensure individual privacy rights are protected?

OPINIONS BELOW

The Colonial Football League (CFL) challenged the FBI's search on behalf of its players in the United States District Court for the District of Wythe. (R. at 3.) That court concluded the CFL had standing as an association to bring a claim on behalf of its players because "each player certainly would have the right to seek the return of his own drug testing records." (R. at 3.) Further, the court concluded the players' contract with the CFL made their privacy interests part of the CFL's organizational purpose and the return of the confidential drug test results did not require the players' individual participation. (R. at 3.) At the trial, the FBI conceded the warrant did not authorize it to seize information relating to all of the CFL's players. (R. at 4.) The FBI also admitted it lacked probable cause for this retrieval and retention. (R. at 4.) Still, the district court concluded the FBI's search was lawful because the encrypted files that were hidden on the various drives in the different computers were in plain view. (R. at 5.)

On appeal, the United States Circuit Court of Appeals for the Fourteenth Circuit affirmed the district court's holding that the CFL had standing as an association to challenge the lawfulness of the FBI's search and seizure. (R. at 10.) That court overturned the district court's conclusion that the drug test results were in plain view. (R. at 15.) Instead, the court determined the computers were too susceptible to improper searches and ordered the government to "forswear the use of plain view doctrine . . . and submit any intermingled digital files that need to be separated upon seizure to a court-supervised independent third party." (R. at 16.) The court also set out four guidelines for future searches involving digital evidence. (R. at 17.) First, trained computer analysts who "must not communicate any information outside the scope of the warrant . . . without separate court approval" should conduct the search. (R. at 17.) Second, the government must inform the magistrate about its prior efforts to seize the information and the

actual risk of destruction. (R. at 17.) Third, the search must be limited to that data for which the government has probable cause. (R. at 17.) Finally, the government must destroy the non-responsive data or return it. (R. at 17.) The appellate court then granted CFL's motion for the return of the seized drug test results under Federal Rule of Criminal Procedure 41(g). (R. at 17.) In support, the court stated the FBI's behavior showed a "callous disregard" for CFL's constitutional rights, the damage caused by the seizure would be irreparable if the FBI did not return the test results, and return of the data was the only appropriate remedy available. (R. at 16.) Judges Whitney and Oneida dissented to the majority's new procedures for computer searches. (R. at 17.) They argued the plain view exception should remain as an option for the government to seize evidence without a warrant. (R. at 18.) The dissent concluded the rules were arbitrary. (R. at 19.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. U.S. Const. art. III, § 2.

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a party”

II. U.S. Const. amend. IV.

“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 person or things to be seized.”

III. Fed. R. Crim. P. 41(g).

“A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.”

STATEMENT OF THE CASE

As a result of the FBI's seizure of all confidential drug test results at StarTests' Wythe facilities, the FBI procured information beyond the five named players in the warrant issued by Judge Leon in order to prosecute as many members of the CFL as possible. (R. at 2.) In 2005, the CFL began requiring its players to take drug tests as part of its efforts to comply with state and federal laws and to address the use of steroids. (R. at 1.) To improve its efforts, the CFL assured its players their identities would remain strictly confidential and only the percentage of positive results would be released to the CFL and the public. (R. at 1.) The CFL would continue testing as long as five percent or more of its players tested positive. (R. at 1.) The CFL hired StarTests, Inc., to administer the tests and store the results on its computers. (R. at 1.) StarTests is an independent business specializing in drug testing. (R. at 1.) Its customers include corporations, sports organizations, and school districts. (R. at 1.) To ensure confidentiality, StarTests assigned the players personal identification numbers and arranged to store their identities, health statistics, and test results on separate computers. (R. at 2.) It also encrypted the files on H- and S- drives to prevent a StarTests employee or a third party from hacking the computers to disclose the players' identities and results to the public. (R. at 2.) StarTests repeated this computer-hopping procedure for each year it conducted the tests. (R. at 2.)

Several years later, in response to intense media pressure, the FBI began investigating illegal steroid use among all professional sports players. (R. at 7.) After months of investigating, the FBI obtained some eyewitness reports and taped conversations implicating five CFL players for illegal steroid use. (R. at 7.) To supplement its case, the FBI sought a search warrant for the players' drug test results. (R. at 8.) The FBI requested a warrant to seize all computer equipment and files for later review of the five players because of the amount of data

and the chance it might be mislabeled or encrypted. (R. at 8.) Based on the FBI's representations, Magistrate Judge Leon issued a warrant authorizing the FBI to search all computer equipment and storage devices. (R. at 2.)

Judge Leon placed few limitations on the FBI's authority to seize confidential test results. First, Judge Leon limited the search to information "reasonably related to the investigation into the five named players' illegal steroid use." (R. at 2.) The FBI did not have the authority to seize the computers and data unless an on-site search would be impracticable. (R. at 2.) Finally, Judge Leon limited the decision to seize and later review computers to agents and analysts with specialized computer training. (R. at 2.)

The FBI raided the StarTests facility on November 1, 2008. (R. at 2.) StarTests personnel informed the agents about its procedure to maintain confidentiality and how the results were separated into different databases and stored separately in different computers. (R. at 2.) The agent in charge "ordered all computer equipment to be either seized or copied, depending on the equipment's ease of movement." (R. at 2.) Over the next several weeks, FBI agents trained in computer forensics trolled through the seized data. (R. at 2.) They matched other players not named in the warrant to illegal steroid use and then matched CFL players to other illegal drug use besides steroids. (R. at 2.) Based on this information, the FBI expanded the scope of its investigation beyond illegal steroid use in sports to concentrate on illegal drug use in professional football. (R. at 2.) Finally, the FBI copied the test results and returned the computers to StarTests. (R. at 2.)

SUMMARY OF THE ARGUMENT

The Colonial Football League has standing on behalf of its players to challenge the Federal Bureau of Investigation's decision to seize and later search several computers from StarTests, Inc., because the Fourth Amendment protects the players from unreasonable searches and seizures. The Colonial Football League can raise its players' claims as an association because the government's decision injured its players' Fourth Amendment rights. The government directed its search beyond the illegal steroid use of the five players named in the warrant because it seized computers containing every football players' drug test results, which it later searched for evidence of any drug use. The Colonial Football League can seek the return of the seized confidential drug tests because Federal Rule of Criminal Procedure 41(g) allows the victim of an unlawful search and seizure to ask a federal court to order the government to return property seized during an unlawful search and seizure.

The Fourth Amendment requires a neutral magistrate to issue a warrant setting forth what the government has the authority to search and seize. The narrow exception provided by the plain view doctrine is only available when the government is legally present, the item's incriminating character is immediately apparent, and the government has a lawful right to access the item. The government's blanket seizure of all CFL results does not meet this exception. The FBI did not lawfully search the CFL results because the warrant lacked particularity. The incriminating character of the CFL results was not apparent because the FBI had to search multiple databases to match results to players. Lastly, the FBI did not have a right to access all CFL results because it violated the search procedures mandated by the warrant.

This Court should set forth new procedures for computer searches to restore the constitutional balance between the government's interest in investigating crimes and the Fourth

Amendment's protection against unreasonable searches and seizures. Computers present a new challenge because they threaten to make the plain view exception the new rule. To protect the Fourth Amendment, it is necessary for this Court to limit the availability of the plain view exception during computer searches and set out new procedures that restores the role of the neutral magistrate.

ARGUMENT

I. THE COLONIAL FOOTBALL LEAGUE HAS STANDING TO SUE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 41(g) FOR THE RETURN OF CONFIDENTIAL DRUG TEST RESULTS SEIZED BY THE FEDERAL BUREAU OF INVESTIGATION.

The Colonial Football League (CFL) has standing as an association to seek the return of confidential drug test results seized by the Federal Bureau of Investigation (FBI). Under Federal Rule of Civil Procedure 41(g), a person aggrieved by an unlawful search and seizure has standing to seek the return of the unlawfully seized property. Standing refers to the mix of constitutional requirements and prudential concerns all plaintiffs must satisfy to access the federal courts. Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). Article III of the Constitution delegates judicial power to the federal courts to decide cases or controversies. U.S. Const. art. III, § 2. Without a case or controversy, the courts are exercising power beyond that delegated by the Constitution. Flast v. Cohen, 392 U.S. 83, 97 (1968). This Court identifies the constitutional case or controversy requirement with the proper role the Framers expected federal courts to have in a democratic society. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006). This role is limited to hearing those cases where the plaintiff has alleged an actual or imminent injury that is concrete and particularized, fairly traceable to the defendant, and which a favorable judicial decision can remedy. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). An association has standing to assert a claim on behalf of its members when the interest it is protecting is germane to its purpose, the members' individual participation is not required, and the members have standing in their own right under Article III. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342 (1977).

Besides the three irreducible constitutional minimums – injury, causation, and

redressability – this Court has also set forth prudential limitations on the availability of federal courts. These include a reluctance to allow litigants to “assert[] the rights or legal interests of others in order to obtain relief from injury to themselves.” Warth v. Seldin, 422 U.S. 490, 510 (1975). Unlike constitutional requirements, this Court or Congress may set aside prudential concerns. See Warth, 422 U.S. at 500 (citing Barrows v. Jackson, 346 U.S. 249 (1953)). Finally, when confronting a challenge to standing, the Court’s analysis construes all material allegations as true in favor of the plaintiff. Id. at 501; see also Pennell v. City of San Jose, 485 U.S. 1, 7 (1988). Here, the FBI seized the confidential drug test results of every CFL player based on a warrant that named five well-known players the FBI suspected of illegal steroid use. This injury to the players’ reasonable expectation of privacy in the test results can be remedied by a court order under Federal Rule of Criminal Procedure 41(g) to return the seized test results.

A. The CFL Can Challenge the Lawfulness of the FBI’s Search and Seizure Because Its Players Suffered an Actual, Concrete and Particularized Injury.

The CFL has standing on behalf of its players to challenge the FBI’s search and seizure as a violation of their Fourth Amendment right to privacy. An association is a body that represents its members’ collective views and protects its collective interest. Hunt, 432 U.S. at 344-45. For standing purposes, this Court has accepted a wide variety of organizations as an association. Id. (finding a state agency an association even though membership was involuntary); see also, Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., 528 U.S. 167 (2000) (finding an organization dedicated to the environment an association).

Whether an actual or imminent injury exists depends on the legally protected interest underlying the claim. To bring a claim on behalf of its members, an association has to show how its members suffered an actual or imminent injury. Hunt, 432 U.S. at 343. For example, a

plaintiff with a “spiritual stake in First Amendment values” has standing to raise a claim under the Establishment Clause if the government caused her to suffer “unwelcome religious exercises or [was] forced to assume special burdens to avoid them.” Valley Forge, 454 U.S. at 487 n.2 (citing Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970)). This spiritual stake fails to provide an injury in other contexts, such as those involving harm to the environment. In that context, a plaintiff can show she was injured if she “use[s] the affected area and [is a] person ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” Laidlaw, 528 U.S. at 183 (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)); see also Lujan, 504 U.S. at 562-63 (stating “purely aesthetic purposes[] is undeniably a cognizable interest for purposes of standing”).

Similarly, when federal courts analyze standing to challenge a search and seizure as unlawful they look at whether the search violated the plaintiff’s reasonable expectation of privacy because that is the legal interest protected by the Fourth Amendment. See Katz v. United States, 389 U.S. 347 (1967); Rakas v. Illinois, 439 U.S. 128 (1978). As a constitutional matter, a criminal defendant cannot assert the Fourth Amendment to exclude evidence unless he was the one against whom the search was directed. See Alderman v. United States, 394 U.S. 165, 174 (1969) (stating Fourth Amendment rights are personal and cannot be asserted vicariously); Warth, 422 U.S. at 510. Otherwise, “vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials.” Rakas, 439 U.S. at 137. This concern is not present when an association seeks the return of seized property under Federal Rule of Criminal Procedure 41(g). The crucial distinction between the exclusionary rule and a motion to return unlawfully seized property is the court’s ability to attach reasonable conditions to the returned property to preserve access for later proceedings.

Fed. R. Crim. Pro. 41(g). This makes Rule 41(g) more flexible and broader than the exclusionary rule. See United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 1001 (9th Cir. 2009). Further, an association is not asserting a vicarious claim when it asserts a claim on behalf of its members. Instead, it is asserting its own claim on behalf of its members. See Hunt, 432 U.S. at 345.

The CFL can assert a claim on behalf of its players because the FBI's search and seizure directly affected every player. In addition to being actual or imminent, the injury must also be particular to the plaintiff. Lujan, 504 U.S. at 560 (defining particularized as a personal and individual injury). Generally, an association can particularize an injury by naming the affected members. See Warth, 422 U.S. at 504-05. However, an association does not need to name its members to particularize an injury when the injury affected all of its members equally. NAACP v. Alabama, 357 U.S. 449 (1958). When Alabama tried to make the NAACP disclose its membership lists under the state's foreign corporation law, this Court found the NAACP had standing to challenge the law without naming any of its members because Alabama's action affected all of the members equally. Id. at 459-60. Further, the Court added that to require the NAACP to disclose its confidential membership list in such a case would "result in nullification of the right at the very moment of its assertion" because disclosure would effectively accomplish the very law the NAACP was challenging. Id. at 459.

The CFL can represent its players in federal court because it is an association. The government has not challenged this status. As the courts below concluded, the CFL is an association because it is contractually obligated to protect its players' interests, particularly on "a matter as important as the content of the players' bodily fluids." (R. at 10.) Nor has the government challenged whether the CFL's challenge is germane to its purpose. The district

court concluded the CFL's claim is especially relevant to its organizational purpose considering its players' "privacy was intruded upon under the CFL's prerogative." (R. at 3.) Finally, the CFL is a professional football league trying to address the use of illegal steroids among its players. (R. at 1.) The CFL can challenge any action that interferes with its ability to manage its players and how these employees perform their job on the field.

The CFL has standing as an association to assert the Fourth Amendment when its players are subjected to a search and seizure because the CFL represents the players' reasonable expectation of privacy. Unlike in Alderman and Rakas, this Court's constitutional concern about the exclusionary rule's availability to criminal defendants during criminal trials is absent when an association seeks the return of property seized from its members. The appellate court below noted the CFL is not a criminal defendant. (R. at 15.) More importantly, the CFL is not trying to exclude the tests results, but only seeking their return subject to the courts' reasonable conditions. Rather, they are property owners seeking the return of their property. (R. at 2-3.) Finally, the reasonable conditions a court can attach to the returned property provide a sufficient safeguard to preserve the property for future use.

The CFL has standing to challenge the FBI's search and seizure because the FBI directed its search at the CFL's players and the seizure of all confidential drug test results affected every CFL player's Fourth Amendment rights. Construing the material allegations in favor of the CFL, the courts below concluded, "[e]ach player certainly would have the right to seek the return of his own drug testing records" because an unlawful search and seizure would injure their reasonable expectation of privacy under the Fourth Amendment. (R. at 3.) When the FBI raided the StarTests facility, its warrant authorized a search limited to illegal steroid use by five specifically named players. (R. at 2.) Instead, the FBI expanded the search by seizing all of the

computers. (R. at 2.) This redirected the FBI's search beyond the five named players to every CFL player because each one had his results stored in the seized computers. After its computer forensics analysts trolled through all of the data at headquarters, the FBI decided to expand the search beyond illegal steroid use by the five named players to all illegal drug use by every CFL player. (R. at 2.) Similar to Alabama's efforts to force the NAACP to disclose its confidential membership lists, the FBI's decision to expand its investigation affected all of the CFL players equally as a class because every CFL player submitted to the drug tests. The federal courts are justified to hear the CFL's claim on behalf of its players that the FBI's decision to go beyond its warrant and seize every players' confidential drug test result was unconstitutional.

B. The CFL Can Seek the Return of the Confidential Drug Test Results Under Federal Rule of Criminal Procedure 41(g) Because it Provides an Appropriate Judicial Remedy to Redress Injuries Caused by an Unlawful Search and Seizure.

The CFL can challenge the FBI's search and seizure because Federal Rule of Criminal Procedure 41(g) provides an appropriate remedy when the government violates the Fourth Amendment. In addition to an actual, concrete and particularized injury, a plaintiff must show the injury is fairly traceable to the defendant and a favorable judicial decision would redress the injury. Lujan, 504 U.S. at 560-61. An association's ability on behalf of its members to bring a claim on behalf of its member "depends in substantial measure on the nature of the relief sought." Warth, 422 U.S. at 515. Here, Federal Rule of Criminal Procedure 41(g) provides an appropriate judicial remedy to plaintiffs who can show an unlawful search and seizure violated their Fourth Amendment expectation of privacy. See United States v. Taketa, 923 F.2d 665 (9th Cir. 1991).

A plaintiff must show his or her injury would be redressed by a favorable judicial decision. An association's capacity to sue on behalf of its members "depends in substantial

measure on the nature of the relief sought.” Warth, 422 U.S at 515. An association cannot usually pursue monetary damages because that often requires the individual participation of its members, but an injunction is an appropriate remedy because it redresses the members injury without requiring their individual participation. Id. at 515-16 (finding an association could not seek monetary damages without an individualized assessment of the members); but see Laidlaw, 528 U.S. at 185-86 (finding monetary damages appropriate as civil penalties because of their deterrent effect). Like an injunction, Federal Rule of Criminal Procedure 41(g) provides an appropriate remedy to an unlawful search and seizure because it can redress the association’s members equally as a class without their individual participation.

When a search is unlawful, Federal Rule of Criminal Procedure 41(g) allows the victim to ask the court to order the government to return the unlawfully seized property subject to certain reasonable conditions. Causation is undisputed. The record makes clear the FBI searched StarTests’ computers and this action is the basis of the CFL’s claim. (R. at 2-3.) The probability of a ruling in CFL’s favor is not the issue; rather, the issue is the probability a favorable judicial decision would redress the injury suffered by the CFL’s players. Unlike the Homebuilder’s Association in Warth, the CFL is not seeking monetary damages that require the individual participation of its players, but rather the return of the same confidential drug tests taken by every CFL player. (R. at 2-3.) The prudential concerns against allowing a plaintiff to assert a vicarious claim are absent. The CFL is not asserting a vicarious claim as defined by this Court. In that sense, a true vicarious claim would involve a claim raised by the defendant who sold the illegal drugs to the CFL’s players because that person is not a member of the CFL. Here, the CFL is asserting its players’ collective claim against the government. (R. at 2-3.) Prudentially, it is more reasonable to permit the CFL to assert a single claim that does not require

its players' individual participation than it is to have a myriad number of players asserting the same claim, on the same facts, for the same relief across the federal courts.

II. THE PLAIN VIEW EXCEPTION DOES NOT APPLY TO THE FBI'S WARRANTLESS SEIZURE OF ALL CFL RESULTS BECAUSE THE FBI WAS NOT LEGALLY PRESENT AT STARTESTS, LACKED PROBABLE CAUSE TO SEIZE THE RESULTS, AND EXCEEDED THE SCOPE OF THE WARRANT.

The Fourth Amendment protects the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. In pertinent part it states: "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." Id. The warrant requirement ensures a neutral magistrate stands between the government's interest in investigating crime and the individual's right against unreasonable searches and seizures. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). Furthermore, the requirement for particularity ensures against the "general warrant," which was a hated instrument of British colonial rule. Id. The general warrant allowed for a "general, exploratory rummaging in a person's belongings." Id. Therefore, absent certain exceptions, the warrantless search and seizure on a suspect's premises is "per se unreasonable." Id. at 475.

The government may make a warrantless seizure of an item if it is in "plain view." Id. at 465. Typically, the plain view exception involves a "situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." Id. However, the plain view exception does not permit the government to use a valid warrant as a pretext to "extend a general exploratory search from one object to another until something incriminating at last emerges." Id. at 466. This Court uses a three-part test to determine if the plain view exception excuses a warrantless seizure: 1) the officer was lawfully present in a place where the item may be seen, 2) the incriminating

character of the item was immediately apparent, and 3) the officer had a lawful right of access to the object. Horton v. California, 496 U.S. 128, 136-37 (1990).

Here, the plain view exception does not justify the FBI's blanket seizure of all CFL Test results. First, Judge Leon's warrant lacked particularity by leaving ultimate discretion to the investigating agents. Second, the incriminating character of the individual results was not apparent because the FBI lacked probable cause to suspect all CFL players were abusing illegal narcotics. Lastly, the agents exceeded the scope of the warrant when they broadened the search to all CFL results. Therefore, this Court should uphold the ruling of the Circuit Court of Appeals for the Fourteenth Circuit, finding the plain view exception does not apply to the blanket seizure of all CFL test results.

A. The FBI Was Not Lawfully Present at StarTests Because the Warrant Was Invalid for Lack of Particularity.

The plain view exception requires clean hands. The government cannot invoke the plain view exception when it violates the Fourth Amendment. See Horton, 496 U.S. at 136. Under the Fourth Amendment, a warrant that fails to particularly describe the things to be seized is invalid. See Groh v. Ramirez, 540 U.S. 551, 558 (2004). Particularity makes general searches "impossible and prevents the seizure of one thing under a warrant describing another." Marron v. United States, 275 U.S. 192, 196 (1927). The magistrate's neutral and detached review enforces the particularity requirement. Horton, 496 U.S. at 138.

The test for particularity is whether the search and seizure authorized by the warrant is reasonable under the circumstances. Groh, 550 U.S. at 559-60. A warrant is reasonably particular when it describes the items subject to seizure in terms specific enough for an officer to identify the items. United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986). The specificity requirement is dependent on the circumstances and whether a more exact definition is possible.

Id. The warrant must provide objective standards for officers to identify seizeable items and describe the items with as much specificity as practicable. Id.

A warrant lacking in particularity renders a search unconstitutional despite any reasonableness in the actual search itself. Groh, 540 U.S. at 558. In Groh, the warrant affidavit included a detailed description of the place to be searched and the items to be seized, but, the warrant itself failed to include any list of items to be seized. Id. at 554. Importantly, the warrant did not contain any reference or incorporation of the detailed affidavit. Id. at 554-55. The Court rejected the government's argument that the lack of specificity was cured by an objectively reasonable search. Id. at 588. The Court emphasized the magistrate's role in determining whether there is probable cause to seize the items listed in the warrant. Id. at 560-61. The fact the warrant was issued did not establish that there was probable cause for the officers to seize all the items listed in the warrant application. Id. at 561. The magistrate's neutral judgment imposes restraint on the officers; the officer's own judgment is not a substitute. See id.; see also Trupiano v. United States, 345 U.S. 699, 705 (1948) (stating zeal of police to ferret out crime makes them poorly suited to determine constitutionality of seizure of personal property).

When particularity is not practicable, the government must provide a factual basis to justify why the blanket seizure of computer hardware is reasonable given the circumstances. See United States v. Hill, 459 F.3d 966, 975 (9th Cir. 2006). The government may not simply "seize the haystack to look for the needle." Id. In Hill, police obtained a warrant to seize and search a suspect's computer and any all digital storage devices related to the suspect. Id. at 968. The court accepted some circumstances may justify the blanket seizure of a computer and digital storage devices, but, this possibility cannot justify every seizure. Id. at 973; see also United States v. Giberson, 527 F.3d 882, 889 (9th Cir. 2008) (highlighting ability of criminals to conceal

contents of digital files via tampering). In Hill, the affidavit did not specifically explain why a blanket seizure was required or that a more detailed definition was impracticable. Hill, 459 F.3d at 973. But see United States v. Upham, 168 F.3d 532, 535 (1st Cir. 1999) (holding blanket seizure valid where more detailed description was impracticable). The warrant was invalid because it did not provide documentation to a neutral magistrate to justify the blanket seizure of all computers and related storage devices owned by the suspect. Id. at 977.

A warrant authorizing the blanket seizure of all data must be bound by the specific crimes under investigation. A warrant must manifest judicial control over the extent of the seizure. See United States v. Fleet Mgmt. Ltd., 521 F. Supp.2d 436, 441 (E.D. Pa. 2007). In Fleet Mgmt., federal officers investigated a shipping company's violation of pollution regulations from illegal waste discharge. Id. at 438. A federal magistrate issued a warrant authorizing the search and seizure of certain computer hard drives and "any and all data." Id. at 439. The court found the warrant unconstitutional because it "placed absolutely no limitation on the data to be seized and vested the executing officers with unbridled discretion to conduct an exploratory rummaging through defendant's papers in search of criminal evidence." Id. at 443. Moreover, the government could have provided more specific terms to limit the seizure to items related to the crimes under investigation, or, a specific time frame. Id. at 444. The warrant must manifest judicial control over what may be seized; the warrant cannot effectively provide for the blanket seizure of all data. See id. at 447.

The warrant must specify the relationship between the digital files subject to seizure and the underlying crime. United States v. Wong, 334 F.3d 831, 837 (9th Cir. 2003). In Wong, police obtained a warrant to search a suspect's computer and seize specific items as evidence in the murder of his girlfriend. Id. at 838. Specifically, the warrant authorized the seizure of digital

maps of the area where the victim was found, documents that originated from the county where the victim was found, and gang paraphernalia related to evidence found at the murder scene. Id. at 838. The court held that these descriptions were sufficiently particular and the warrant was not overbroad. Id.

Items seized outside the valid search parameters must be reasonably related to underlying activity under investigation. In Raney, police seized images of legal, homemade, adult pornography while searching for evidence related to child exploitation and pornography. United States v. Raney, 342 F.3d 551, 554 (7th Cir. 2003). Prior to his arrest, the suspect described his desire to perform and photograph various sexual acts to an undercover police officer posing a child. Id. After his arrest, he consented to a search for items “in the nature of child abuse, child exploitation, and child erotica.” Id. During the search, police seized images taken by the man of him and his ex-wife engaging in various sexual acts. Id. The court held the seizure was reasonable even though it was not specifically evidence of child abuse, child exploitation, or child erotica. Id. at 557-58. The homemade nature of the adult pornography was deemed as being within the nature of homemade child erotica. Id. at 557.

Judge Leon’s warrant vested the FBI with unchecked discretion to seize all of the CFL players’ confidential test results. The warrant limited the search to any results deemed “reasonably related to the investigation into the five named player’s illegal steroid use.” (R. at 2.) Although the warrant referenced the five specific players, it did not manifest the magistrate’s neutral judgment as to what was reasonably related to the investigation of the five players. (R. at 2.) The warrant did not indicate whether Judge Leon thought other results were reasonably related to the investigation of the five players. Regardless of whether the blanket seizure was objectively reasonable, it was unconstitutional. As this Court held in Groh, no amount of

reasonableness on the part of the agents will cure an invalid warrant. Additionally, like Fleet Mgmt., a warrant that authorizes the blanket seizure of data is invalid because it lacks particularity.

The affidavit failed to demonstrate why on-site review and segregation of the results was impracticable. The supporting affidavit included a general allegation stating the CFL result data was massive. (R. at 2.) Furthermore, the agents made generalized allegations that the data may be deliberately misnamed or require sophisticated encryption software to decode the results. (R. at 2.) However, the warrant did not specify why StarTests, a legitimate business, would engage in deceptive activity normally associated with criminals like Raney, Hill, or Wong. Moreover, the site manager explained StarTests' confidentiality and data storage procedures to the agents. (R. at 8.) Here, like Hill, the circumstances do not justify the blanket seizure.

Finally, the items seized were not reasonably related to those authorized by the warrant. The warrant authorized the seizure of test results of the five named players. (R. at 2.) The government's probable cause for the warrant originated with non-specific media reports on steroid use in the sports. (R. at 7.) Additionally, there were transactions between illegal and legal suppliers. (R. at 7.) After several months of investigation, however, the agents had information that indicated five players might have a motive to use performance-enhancing drugs. (R. at 7.) Unlike Wong and Raney, the additional results seized were not related to the same person, types of drugs, or CFL teams. Rather, the agents combined the three databases and expanded their search to a general investigation that swept in all CFL teams, players, and illicit drug use.

B. The Incriminating Character of the CFL Test Results Was Not Apparent Because the FBI Lacked Probable Cause of Narcotics Use by All CFL Players.

The plain view test is only satisfied when the item's incriminating nature is immediately apparent. Coolidge, 403 U.S. at 466. The plain view exception is the extension of the government's power to seize weapons and contraband in public. See Arizona v. Hicks, 480 U.S. 321, 327 (1987). While a warrantless seizure is per se unreasonable, the government may seize an item if there is probable cause to believe the item is incriminating. Id. The exception permits the government to seize an item left in plain view without the personal danger and possible loss of evidence that may occur while obtaining a second warrant. Id. This justification does not permit the government to conduct a search unrelated to the lawful right that brought it there because doing so produces a new invasion of privacy unjustified by fears for personal safety. Id. at 325.

The government's suspicion of additional criminal activity cannot justify extending a lawful search. Id. at 327. In Hicks, police entered a suspect's apartment while investigating a shooting in the building. Id. at 323. The police seized weapons and other contraband, and one officer moved stereo equipment he thought might be stolen to copy the serial number. Id. at 323. The officer relayed the serial numbers to his station and found the equipment was stolen. Id. The Court held the government must show probable cause to believe the item is of an incriminating character; a reasonable suspicion is insufficient. See id. at 327-28. The plain view exception dispenses with the need for a warrant; it does not excuse a lower level of proof for an item may be seized. Id. at 327. Furthermore, the Court recognized this standard necessarily "insulates the criminality of a few in order to protect the privacy of us all." Id. at 329. The Constitution requires the Court to err on the side of the protection of individual rights. Id.

Therefore, probable cause is required before police may search and seize an item unrelated to the original justification for the invasion of privacy. Id.

The government cannot seize an item unless its incriminating character is immediately apparent. In Dichiarinte, federal agents with a valid warrant arrested a suspect for sale of narcotics. United States v. Dichiarinte, 445 F.2d 126, 128 (7th Cir. 1971). The suspect consented to a search of his home for evidence related to the sale of narcotics. Id. During the consensual search, the agents seized documents pertaining to currency transfers, life insurance policies, and property title under the plain view exception. Id. at 126-27. The court rejected the government's assertion of the plain view exception. The suspect's consent limited the agent's search to certain areas similar to the limits a warrant would impose. Id. at 130 n.3. Therefore, incriminating nature of the documents was not immediately apparent and agents lacked the authority to read and seize them while looking for narcotics. Id. at 130; but see Wong, 334 F.3d at 838 (finding plain view exception applied where illegality of child pornography was immediately apparent and warrant authorized agents to open image files for evidence of murder conspiracy).

The incriminating nature of the CFL's confidential test results was not immediately apparent. StarTests implemented a complex data storage protocol to protect the anonymity of its clients. (R. at 2.) Based on the "computer-hopping" procedure, agents viewing the results database could only see there had been some positive results for drug tests conduct on CFL. (R. at 2.) Moreover, StarTests stored results for hundreds of CFL players and related health and personal information. (R. at 2.) Upon first inspection, the agents could not determine whose results they were viewing or when the test was conducted. The record does not show the FBI had probable cause to suspect other players were abusing steroids or any other narcotics, only the

five players in the warrant. (R. at 2.) Rather, like Hicks and Dichiarinte, the agents had a generalized suspicion of additional narcotics use. Unlike Wong, the agents did not have a warrant that permitted them to search all the files seized pursuant to the warrant, only those results reasonably related to the five named players. (R. at 2.) Therefore, the FBI's action does meet the second prong of the plain view test. Otherwise, the circumstances in this case would set a very low bar for a very large invasion of privacy.

C. The FBI Illegally Accessed All CFL Test Results Because the Warrant Bounded the FBI's Search to Results for the Five Named Players.

Once the government is lawfully present where an object is in plain view, the government must have a lawful right of access to the object itself. Horton, 496 U.S. at 137. The plain view exception permits the government to seize items without a warrant during a search circumscribed by a valid warrant; it does not permit a new warrantless search. See Texas v. Brown, 460 U.S. 730, 739 (1983). The lawful right to access ends when the government begins a new search beyond the original justification. See Hicks, 480 U.S. at 324-28 (stating plain view exception did not apply where officers expanded search of premises without probable cause). The extension cannot expand the initial warrant to justify a general exploratory search. See Coolidge, 403 U.S. at 466. For digital searches, computer files in plain view may be seized while the officer is conducting a legitimate search. See United States v. Carey, 172 F.3d 1268, 1272-74 (10th Cir. 1999). However, once the officer departs from the original search that search is expanded into a general exploratory search of the computer. Id.

In Carey, police obtained a valid arrest warrant for a suspected drug dealer. Id. at 1270. During the arrest, he consented to a search of his home leading the police to seize his computer. Id. Later, police obtained a warrant to search the computer for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution

of controlled substances.” Id. During the search, a detective found an image of child pornography in a directory of similar images. Id. at 1271. The officer stopped looking for the items listed in the warrant and began searching for more child pornography in the computer and computer disks. Id. Additionally, the officer admitted he intended to begin a new search for child pornography. Id. The court declared the search invalid because the detective had abandoned his original search and initiated a new search for child pornography unsupported by a warrant. Id. at 1272. The court reiterated that the plain view exception to seizures does not apply to a new search. Id.

Blanket seizures are a radical option and should only be used when it is the government’s only practicable option. The search and seizure of intermingled documents requires special procedures to avoid Fourth Amendment violations. United States v. Tamura, 694 F.2d 591, 595 (9th Cir. 1982). Intermingled documents can be a pretext for a blanket seizure, which quickly turns to an investigatory dragnet inimical to the Fourth Amendment. Id. at 594-95. The agents had to combine records in a three-step process to find the information authorized by the warrant. Id. at 594. The corporation’s staff refused to help the agents locate the listed documents. Id. at 595. The agents seized all of the corporation’s accounting records because, in their opinion, the on-site search became too time consuming. Id. at 595. The court held the blanket seizure of items not in the warrant was unreasonable. Id. at 597. Blanket seizures should be limited to those instances where the documents are so intermingled that it is the only practicable option, however, convenience is not a substitute for reasonableness. See id. at 565-66. The court implemented the procedures outlined in the ALI’s Model Code of Pre-Arrest Procedure. Id. at 596. These procedures ensure a concession to the practicalities of searching intermingled documents does not remove the magistrate’s neutral judgment altogether. See id. at 596 n.4.

The government must strictly adhere to any procedures accompanying a judicial authorization to make a blanket seizure of intermingled documents, such as a computer hard drive. The problem of intermingled documents is it encourages blanket seizures of computers and storage media, after which the entire content therein may be seized under the plain view doctrine. See Comprehensive Drug Testing, 579 F.3d. at 997-98; see also Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (warning government may eventually be able to seize any document despite efforts to protect it from view). Limited circumstances may justify blanket seizures, however, the neutral magistrate should limit the intrusion with special procedures. See id. at 995. In Comprehensive Drug Testing, federal agents obtained a warrant to search the drug testing records of ten professional baseball players. Id. The warrant required an on-site evaluation by computer technicians to determine if a blanket seizure was necessary. Id. at 995-96. Additionally, these technicians were to designate any data not covered by the warrant for return to CDT. Id. at 996. Instead, the investigating agents copied the test results for hundreds of baseball players and other individuals. Id. at 993. The court held the government's actions were well outside the scope of the warrant and demonstrated a callous disregard for the rights of others whose records were intermingled with the ten named players. Id. at 997.

The FBI instigated a new warrantless seizure of results when it combined the data to produce results from all CFL players. The original warrant authorized a search and seizure related to the five named players in the warrant. (R. at 2.) The agents expanded their search when the database showed illicit drug use by unknown players. (R. at 2.) Although the agents suspected there was additional drug use in the CFL, the warrant did not permit a search of all CFL results for any possible narcotics use. (R. at 7.) Here, like Carey, the agents suspected

additional criminal activity and instigated a new search for evidence not authorized by the warrant. (R. at 7.) The results merely showed other CFL players had tested positive for some narcotics use sometime between 2003 and 2008. (R. at 1.) Therefore, like Hicks, the agents could only match the players to the results by combining databases in a new search. (R. at 2.) Illicit drug use by individual players in the CFL was not clear until the results from the drug-testing database were combined with the player index and the final database containing the health information. (R. at 2.) Therefore, the FBI agents conducted a new and general search not authorized by the original warrant.

Additionally, the government has not shown the blanket seizure was the only practicable option. StarTests maintained results for CFL drug tests going back five years and segregated the data in different databases to maintain confidentiality. (R. at 2.) A StarTests manager explained the system to the computer technicians, unlike Tamura, were the agents received no help from corporate staff. (R. at 8.) Based on the complexity of the storage, agents seized or copied all of StarTests' computers at the facility and copied the hard drives of those computers the agents could not physically move. (R. at 8.) Complex, however, does not mean impracticable. The agents failed to investigate whether it was possible to extract the information on-site with the aid of StarTests' technicians. Furthermore, like CDT, StarTests is a legitimate business. The record makes no mention of any criminal activity on the part of StarTests. Therefore, the circumstances do not show the blanket seizure was the only practicable option.

Furthermore, the circumstances in this case required additional procedural steps to protect the Fourth Amendment. First, StarTests maintained results for every CFL players over a five-year period. (R. at 1.) Second, CFL players submitted to the tests based on a promise of anonymity. (R. at 1.) Moreover, StarTests conducted drug screenings for other sports

organizations, corporations, and school districts. (R. at 1.) These results were intermingled and potentially subject to searches and seizures by the FBI. (R. at 2.) Here, like Tamura, the intermingled documents represent a heightened possibility of Fourth Amendment violations. Thus, Judge Leon's procedures were a necessary check against the government's understandable zeal to investigate crime.

The FBI violated the terms of the warrant and the Fourth Amendment. The warrant required computer personnel to evaluate StarTests' computers and databases to determine if it was impractical to conduct the search on-site. (R. at 2.) Subsequently, trained personnel were to review the data and designate any data not related to the five players for return. (R. at 2.) Instead, the trial court stated the head agent ordered the seizure of all computers and data once the details of the storage procedures were explained. (R. at 2.) Once the data were seized, the FBI began its search and expanded to a general investigation of the CFL. (R. at 2.) Here, like Comprehensive Drug Testing, the agents ignored the procedures in a manner showing callous disregard for the Fourth Amendment rights of other StarTests clients. Therefore, the FBI did not have a lawful right to access the other test results. Therefore, this court should uphold the decision of the Fourteenth Circuit because the plain view exception does not apply to the FBI's seizure of all CFL results.

III. WARRANTS AUTHORIZING THE SEARCH OF A COMPUTER REQUIRE NEW PROCEDURAL PROTECTIONS TO PREVENT VALID FOURTH AMENDMENT SEARCHES FROM BECOMING GENERAL SEARCHES.

A warrant authorizing the search of a computer requires heightened procedural protections because computers are especially vulnerable to general searches. Under the Fourth Amendment, the search and seizure of property requires a warrant issued by a neutral magistrate. U.S. Const. amend. IV. The magistrate's neutral judgment balances the government's need to

investigate crimes and the individual's reasonable expectation of privacy under the Fourth Amendment. Coolidge, 403 U.S. at 467. In most cases, warrantless searches are "per se unreasonable." Id. at 475. One narrow exception allows police to seize property without a warrant when it is left in plain view. Id. at 466. While plain view justifies some warrantless seizures, it does not allow the government to "extend a general exploratory search from one object to another until something incriminating at last emerges." Id. at 466. Unless the officer was lawfully present in a place where the item may be seen, the item's incriminating nature was immediately apparent, and the officer had a lawful right to access the object, the plain view exception is unavailable. Horton, 496 U.S. at 136-37. Searches of computers, however, present a challenge to the plain view doctrine's limited exception to the Fourth Amendment.

At present, the government cannot help but put sealed files into plain view when searching a computer. First, a warrant that permits the seizure of a "computer and all available disks" will normally meet the requirements for particularity and breadth. See Upham, 168 F.3d at 535 (rejecting overbreadth challenge to warrant allowing blanket seizure of computer and diskettes). Second, the government may make a preemptory seizure of all computers and storage media and then search for the digital files specified in the warrant. See Giberson, 527 F.3d at 889-90 (holding valid warrant gave access to all documents because file names and extensions may be disguised); see also Raney, 342 F.3d at 559 (holding broad consent form gave police right to search and seize adult pornography images under plain view doctrine). Lastly, the government will inspect every digital file to determine if it is covered by the warrant, so the files are searched regardless of the warrant. Wong, 334 F.3d at 838 (holding plain view applied to child pornography found during search of suspect's entire computer for evidence of murder).

In a digital search, the plain view exception threatens to swallow the Fourth Amendment. As the Ninth Circuit observed, “[c]omputers are simultaneously file cabinets (with millions of files) and locked desk drawers” that may contain evidence of a crime but also “innocent and deeply personal information.” United States v. Adjani, 452 F.3d 1140, 1152 (9th Cir. 2006). Once seized, the government will open computer files until it locates the evidence listed in the warrant. U.S. Department of Justice, Office of Legal Education Executive Officer for United States Attorneys, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, 73 (2009). This process of elimination puts every opened file in plain view and turns an otherwise focused search into a “general, exploratory rummaging” of the computer until something incriminating is uncovered. See, e.g., Coolidge, 403 U.S. at 467; United States v. Turner, 169 F.3d 84 (1st Cir. 1999) (holding computer images were not in plain view while searching for assault suspect); Carey, 172 F.3d at 1274 (holding computer images were not in plain view where officer admitted to starting new search). Even under the most particular warrant, the government cannot help but engage in a general search because most courts have yet to set forth a new procedure restoring the traditional balance between the government’s investigatory power and the individual’s right to be free from unreasonable searches and seizures. See, e.g., Comprehensive Drug Testing, 579 F.3d at 998 (finding everything the government seizes will automatically come into plain view if it has to open every computer file to locate the items listed in the warrant).

Some courts have confronted this challenge by setting out new procedural requirements designed to restore the traditional balance between the government’s investigatory powers and the individual’s Fourth Amendment rights. While searches of intermingled documents are not new, blanket seizures were relatively rare before computers appeared. Tamura, 694 F.2d at 595-

96. But, as the Ninth Circuit has observed, “over-seizing is an inherent part of the electronic search process and . . . when it comes to the seizure of electronic records, this will be far more common than in the days of paper records.” Comprehensive Drug Testing, 579 F.3d at 1006. In Comprehensive Drug Testing, the government had a warrant that allowed it to search the drug test results of ten professional athletes for whom it had probable cause to believe used illegal steroids. Id. at 993. Instead the government seized the company’s computers and reviewed the drug test results of “hundreds of players in Major League Baseball (and a great many other people)” when it executed the warrant. Id.

In response, the court eliminated the plain view doctrine from computer searches and set out four guidelines designed to help the government conduct searches of computers within the bounds of the Fourth Amendment. Id. at 1006. First, specialized personnel or an independent third party must segregate and redact the information from the computer. Id. If this task is done by government employees, they must not disclose any information to the investigators that is not listed in the warrant. Id. Second, the warrant should disclose “the actual risks of destruction of information as well prior efforts to seize that information in other judicial fora.” Id. at 1006. Third, the search should be “designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.” Id. Finally, the government should destroy the seized data or return it if the owner can lawfully possess it. Id. Additionally, the government should inform the magistrate, who issued the warrant, about its decision to make a blanket seizure. Id.

New procedures are necessary to provide the government with the guidance it needs when searching a computer. This case highlights the problem the government faces when it has a warrant allowing it to search for evidence of a specific crime relating to five specific persons in

a computer containing a mass of data and involving several years of data for countless other individuals, all of which is located in different computers. (R. at 1-2.) When the FBI's computer forensics agents searched the seized computers, they eventually matched the five players named in the warrant to their test results. (R. at 2.) Inevitably, they uncovered other data during their search of the computers suggesting other CFL players, whom the FBI had no cause to suspect of wrongdoing, had tested positive for illegal steroids and other illegal substances. (R. at 2.) Like the search in Comprehensive Drug Testing, this search highlights the problem with the plain view doctrine and computer searches: inevitably a focused search becomes a general search as the government opens every file to locate evidence of the crime listed in the warrant. The four guidelines set out by the Ninth and Fourteenth Circuits restore the traditional balance between the government's interest in investigating crime and the Fourth Amendment's protections. Under these guidelines, the FBI would retain the results of the five players for whom it had probable cause but they also would protect the Fourth Amendment rights of countless other individuals whose records were seized and whom the FBI had no reason to suspect of wrongdoing.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit to return the confidential drug test results.

Respectfully Submitted,

Team 8

Attorneys for Respondents