No. 24-0211

IN THE

United States Court of Appeals
For the Ames Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

HENRIK KAREN,
Defendant-Appellant.

ON APPEAL FROM A FINAL JUDGEMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

REPLY BRIEF FOR DEFENDANT-APPELLANT

The Honorable Judge
J. Skelly Wright Memorial Team

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Oral Argument

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"Every well-functioning government has obligations to its people." Brief for Appellee (Br-) 1. In Mr. Karen's case, the government shirked two fundamental obligations: to refrain from unreasonable searches and to treat its citizens equally under the law. Condoning the government's actions would grant it unfettered power at the cost of individual liberty, violating deep-rooted constitutional principles. This Court should reverse.

I. The district court erred in denying Mr. Karen's motion to suppress.

The government asks this Court to sanction the suspicionless forensic search of Mr. Karen's cellphone—and thereby authorize similarly invasive searches of any of the "400 million passengers" who arrive at ports of entry each year. *See* Br-11. The government's position relies on a "mechanical" interpretation of the border search exception that would leave travelers "at the mercy of advancing technology." *See Kyllo v. United States*, 533 U.S. 27, 35 (2001).

A. The government's suspicionless forensic search was unreasonable.

Mr. Karen and the government agree that this case turns on the "Fourth Amendment's balance of reasonableness." Br-10. But the government puts its thumb on the scale: it minimizes the "magnitude of the privacy invasion" caused by forensic cellphone searches and exaggerates the "relatively weak governmental interest" in conducting

these searches without suspicion. *See United States v. Smith*, 673 F.Supp.3d 381, 394–95 (S.D.N.Y. 2023).

1. Suspicionless forensic searches undermine individual privacy interests.

The government concedes that "cellphones involve heightened privacy interests." Br-10. But the government makes three flawed arguments in its attempt to downplay the invasiveness of forensic cellphone searches.

First, the government claims that cellphones "should be treated exactly as property always has been at the border." Br-8. This position resuscitates an approach that *Riley v. California* rejected. 573 U.S. 373, 393 (2014) (recognizing that cellphones "implicate privacy concerns far beyond" other physical property).[1] Cellphone searches reveal far more information than routine border searches of other property: the search of a suitcase exposes only the items that a traveler has packed, not "everywhere the suitcase had been taken, everything that had [ever] been packed within it," and "when each item last had been worn." *United States v. Saboonchi*, 990 F. Supp. 2d 536, 567 (D. Md. 2014).

[1] The government argues that "*Riley* is not readily transferable" to other contexts. Br-12 (quoting *United States v. Wood*, 16 F.4th 529, 533 (7th Cir. 2021)). But *Riley* is useful not because it binds this Court by fiat, but because "*Riley* is illustrative" of how "technological advancements may alter the contours of Fourth Amendment doctrine," as the government's own cited authority recognizes. *Wood*, 16 F.4th at 534.

Second, the government attempts to manufacture a person-property distinction by suggesting that reasonable suspicion is required only for certain "body searches." Br-19. The government's position relies on an overly restrictive reading of border precedent. Neither *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), nor *United States v. Flores-Montano*, 541 U.S. 149 (2004) held that the government has "plenary authority to conduct suspicionless border searches of property." *Contra* Br-10. Rather, the Court distinguished between a reasonable search of a gas tank and an unreasonable body cavity search by weighing the "dignity and privacy interests" involved. *See Flores-Montano*, 541 U.S. at 152; *see also United States v. Kolsuz*, 890 F.3d 133, 144–145 (4th Cir. 2018) (reading this precedent as turning on privacy intrusion—not bodily invasion); *United States v. Cano*, 934 F.3d 1002, 1020 (9th Cir. 2019) (same). Adopting the government's person-property distinction would unmoor border doctrine from broader Fourth Amendment precedent, which considers not only the physical intrusiveness of a search, but also the volume of personal information exposed. *See, e.g.*, *Birchfield v. North Dakota*, 579 U.S. 438, 462–63 (2016).

Third, the government contends that suspicionless forensic cellphone searches are reasonable because they "may often be less invasive than manual inspections." Br-21. This position is undermined

by its own cited authority, which underscored that cellphone searches, "whether conducted manually or forensically, represent an extraordinary invasion of a traveler's privacy." *See United States v. Sultanov*, 742 F. Supp. 3d 258, 286 (E.D.N.Y. 2024) (requiring warrants for all cellphone searches at the border). Even the least intrusive forensic search that the government could identify involved the use of advanced software to analyze and catalogue "pictures and videos" for two hours. *See* Br-21 (citing *United States v. Feiten*, No. 15-20631, 2016 WL 894452, at *2 (E.D. Mich. Mar. 9, 2016). And even if this Court does not adopt a categorical reasonable suspicion requirement for forensic searches, the search in Mr. Karen's case was still unreasonably intrusive. *Contra* Br-25–26. CBP conducted an hour-long "extensive" and "specialized search" that downloaded "electronic files" and "metadata" that "would not have been apparent from [a] manual search of the cellphone." JA-3, 11.

2. Suspicionless forensic searches do not meaningfully advance border interests.

First, the government insists that suspicionless forensic cellphone searches are necessary to "secure[] the government's sovereign interest in seizing contraband." Br-10. But as the government's evidence shows, child sexual abuse material (CSAM) primarily spreads via online

distribution—not physical smuggling at the border.[2] *See* Br-14 ("number of URLs containing child pornography more than doubled" between 2019 and 2023); *Alasaad v. Nielsen*, No. 17 CV-11730-DJC, 2018 WL 2170323, at *19 (D. Mass. May 9, 2018) (questioning the "prevalence of physical transfers of illicit digital contraband across the U.S. borders"). Border searches must serve border interests, not a "general interest in crime control" like stopping online dissemination of CSAM. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

Second, the government suggests that a reasonable suspicion requirement would create a "sanctuary at the border" for digital contraband. Br-2. But CBP policy has required reasonable suspicion for forensic searches since 2018. Customs and Border Prot., CBP Directive No. 3340– 049A, *Border Search of Electronic Devices* (2018). CBP's self-imposed policy suggests that a reasonable suspicion requirement does "not interfere unduly with the agency's protective mission at the border." *Kolsuz*, 890 F.3d at 146. The government fails to produce evidence that CBP's policy has spawned a pervasive CSAM smuggling problem at the border. *See* Br-14. The government's cited authority reveals that less intrusive searches can interdict contraband or produce reasonable suspicion for subsequent forensic searches. *See* Br-13 (citing

[2] In sequential paragraphs, the government argues both that online CSAM distribution is growing rapidly and that CSAM is difficult to distribute online. *See* Br-14–15.

United States v. Mendez, 103 F.4th 1303, 1305 (7th Cir. 2024), *cert. denied*, 2025 WL 76441 (2025) (manual search identified CSAM)).

In light of the "limited extent to which [forensic searches] actually further the government's interest in border security" and "the extraordinary privacy intrusion" these searches impose, *see Sultanov*, 742 F. Supp. 3d at 291, this Court should require reasonable suspicion for all forensic cellphone searches at the border.

3. Suspicionless forensic searches are not rooted in history.

The government twice misreads history to argue that "suspicionless border searches are grounded in Founding Era principles." Br-8.

First, the government implies that the Founders sanctioned searches of personal papers, invoking historical inspections of "vessel[] documentation" and ship manifests. Br-9–10 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 583 (1983); Act of August 4, 1790, ch. 35 § 31, 1 Stat. 145, 170 (1790)). These administrative records were not the kind of *personal* papers that the Founders sought to protect, nor are they analogous to the private information stored on cellphones today. *See* Appellant's Br-20–21.

Second, the government asserts that the section of the Act of 1789 cited by Mr. Karen "was replaced the next year by a statute that imposed no particularized suspicion requirement." Br-9. But the Act of 1790

reinstated verbatim the reasonable suspicion requirement from the Act of 1789. *Compare* Act of 1790 § 48 (requiring "reason to suspect" concealed goods to search), *with* Act of July 31, 1789, ch. 5 § 24, 1 Stat. 29, 43 (1789) (same).

B. The government's agents did not act in good faith.

The government neither contests that its search lacked suspicion nor proves that binding precedent authorized its agents' actions. *See* Br-27–29. Accordingly, the district court should have applied the exclusionary rule. *See Davis v. United States*, 564 U.S. 229, 232 (2011).

The government claims that CBP's agents acted in good faith reliance on "the rationale underpinning" the Supreme Court's border precedent. Br-27 (quoting *United States v. Katzin*, 769 F.3d 163, 173 (3d Cir. 2014)). But *United States v. Katzin* authorized application of the good faith exception to government conduct that "clearly f[ell] well within rationale espoused in binding appellate precedent [that] authorize[d] nearly identical conduct." 769 F.3d at 173. A forensic search of a cellphone is not "nearly identical" to the routine property searches authorized by precedent. *See supra* I.A.1. The good faith exception does not "excuse mistaken efforts to *extend* controlling precedents." *United States v. Rivera*, 817 F.3d 339, 346 (7th Cir. 2016) (Hamilton, J., concurring) (emphasis in original). It cannot rescue the government's unlawful search.

II. The district court erred in denying Mr. Karen's *Batson* objection.

Batson and its progeny make clear that citizens "have a right to nondiscriminatory jury selection procedures." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140–141 (1994); *see Batson v. Kentucky*, 476 U.S. 79, 99 (1986). At Mr. Karen's trial, the district court erred in allowing the discriminatory exclusion of a religious juror.

A. *Batson* should protect religious jurors.

The government misconstrues *Batson*'s equal protection principles in its attempt to justify religious-based strikes.

1. Equal protection principles prohibit peremptory strikes based on religious affiliation.

The government claims that *Batson*'s equal protection framework extends only to groups with a "history of wholesale exclusion from the jury box." Br-31. Adopting this position would amount to a "doctrinal overhaul[]." *Contra* Br-2. The Equal Protection Clause protects against state-sanctioned discrimination based on suspect classifications. *See Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). Regardless of whether a group was "categorically barred from jury service," *contra* Br-32, courts have consistently applied equal protection principles to prohibit peremptory strikes based on "invidious, archaic, and overbroad [group] stereotypes." *See J.E.B.*, 511 U.S. at 130–31 (prohibiting strikes of *male* jurors); *see also United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (recognizing *Batson* extends to ethnicity-based strikes);

SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 484 (9th Cir. 2014) (barring strikes based on sexual orientation).

Since religion is a suspect classification, *see Friedman v. Rogers,* 440 U.S. 1, 17 (1979), the intentional exclusion of religious jurors betrays equal protection principles, *see United States v. Brown*, 352 F.3d 654, 667–69 (2d Cir. 2003). This Court should not allow the government to strike a juror for "being a Catholic, a Jew, [or] a Muslim." *See United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998).

2. Equal protection principles prohibit peremptory strikes based on religious beliefs.

According to the government, the exclusion of jurors because of their religious beliefs does "not implicate the Equal Protection Clause." Br-34. This position relies on three misguided contentions.

First, the government asserts that "peremptory strikes motivated by religious beliefs do not discriminate on the basis of religion." Br-40. However, because religious beliefs are intimately tied to religious identities, belief-based strikes can constitute discrimination on the basis of affiliation. For instance, striking a Sikh juror because he wears a *dastār* (turban) in accordance with his beliefs would effectively exclude him because of his religion. *Cf. United States v. Heron*, 721 F. 3d 896, 902 (7th Cir. 2013) (indicating it would be "illusory" to distinguish between strikes based on one's devotional practices and one's affiliation). Indeed, the Supreme Court has consistently prevented

state-sanctioned discrimination "targeting" citizens because of "religious beliefs." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (leveraging equal protection principles to adjudicate Free Exercise claims).[3]

Second, the government makes a blanket assertion that strikes based on religious beliefs are permissible because beliefs "directly bear" on a juror's partiality. Br-39. But many beliefs—such as commitments to fasting for Lent or Ramadan—are irrelevant to juror bias. The government alternatively contends that prosecutors are permitted to exercise peremptory strikes rooted in "dubious" inferences about jurors' articulated religious beliefs. Br-40 (quoting *Brown*, 352 F.3d at 671).[4] But singling out jurors because of their faith on the basis of a "hunch[]," Br-39 (internal citation omitted), is unconstitutional discrimination. *Cf. J.E.B.*, 511 U.S. at 143 (emphasizing gender should not be a "proxy for bias").

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[3] The government contends that "nothing about a person's views" receives "heightened scrutiny under the Equal Protection Clause," Br-35 (quoting *State v. Bolton*, 896 P.2d 830, 842 (Ariz. 1995)). But *State v. Bolton* did not involve religion: it addressed jurors' political "views on the death penalty." 896 P.2d at 842.

[4] The government repeatedly misrepresents that *United States v. Brown* endorsed the exclusion of a juror because of her religious beliefs. *See* Br-36, 40, 52–53. But the *Brown* court underscored that the juror was struck because of her "activism" rather than her religious "belief or affiliation." 352 F.3d at 669.

Third, the government claims that belief-based strikes "do not single out religious jurors for unequal treatment" because both religious and secular jurors can be struck for their beliefs. Br-37. But the government elides the difference between disparate impact and intentional discrimination. Mr. Karen agrees that strikes that incidentally impact religious citizens are permissible. *See* Br-37. However, the intentional exclusion of jurors based *only* on the religious nature of their beliefs would be religiously-motivated discrimination—not disparate impact. *Cf. Emp't Div.*, *Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877, 886 n.3 (1992) (distinguishing between facially neutral laws that disparately impact religious citizens and impermissible laws that target religious beliefs or affiliations).

3. Applying *Batson* to religious-based peremptory strikes is administrable.

The government errs in suggesting that applying *Batson* to prohibit faith-based strikes would "cripple" the peremptory strike system. Br-41 (internal citation omitted). The government claims that "if *Batson* covers religious beliefs," it must also cover "other First Amendment rights, such as political speech and association." Br-42. Not so. Unlike religious beliefs, political beliefs do not underlie a group classification deemed suspect under the Equal Protection Clause. *See Rogers,* 440 U.S. at 17. The government also protests that applying *Batson* to religion will "expand[] the number of *Batson* objections,"

Br-41, and "deter litigants from exercising peremptory challenges," Br-43. But the Supreme Court squarely rejected analogous fears about extending *Batson* to gender. *See J.E.B.*, 511 U.S. at 143.

B. The district court improperly applied *Batson*'s framework.

At Mr. Karen's trial, the prosecutor made his motivations clear: he sought to strike Juror 17 because of the "venireperson's religious beliefs." JA-13. By overlooking the prosecutor's discriminatory rationale, the district court did not "properly proceed[] through *Batson*'s three steps." *Contra* Br-6.

First, the district court improperly denied Mr. Karen's *Batson* challenge for failing to "establish[] a *prima facie* case of discrimination." JA-13. The government disregards its prosecutor's religiously-motivated questioning about Juror 17's church attendance and "religious identity as a Christian." *Compare* Br-46–47, *with* JA-12. But this identity-related questioning during *voir dire* raises "an inference of discriminatory purpose" sufficient for a *prima facie* case. *See Batson*, 476 U.S. at 97. Regardless of the strength of Mr. Karen's *prima facie* case, the district court should have evaluated the prosecutor's subsequent discriminatory explanation for its strike before rendering a final *Batson* ruling. *See United States v. Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989).

Second, though the government asserts that its prosecutor's explanation was "identity-neutral," Br-49, the prosecutor singled out the juror's "religious beliefs" about "sin." JA-13. Contrary to the government's claim that the prosecutor merely took Juror 17 "at his word," Br-48, the prosecutor expressly ignored the juror's affirmation that he "could be fair" and "might dislike the sin, but that's as far as it goes." JA-12. Misrepresenting the juror's *voir dire* statements can provide evidence of discriminatory animus. *See Miller-El v. Dretke,* 545 U.S. 231, 244, 266 (2005); *see also Porter v. Coyne-Fague*, 35 F.4th 68, 81 (1st Cir. 2022).[5]

Third, in denying the *Batson* objection, the district court never evaluated "all of the relevant circumstances" bearing on the question of discrimination. *Flowers*, 588 U.S. at 302. The government contends that courts need not "mechanically run through a checklist," Br-52, but the government's own authorities demonstrate that courts must at least meaningfully engage with a *Batson* objection. *See* Br-51–52 (citing *United States v. Shanshan Du*, 570 F. App'x 490, 497 (6th Cir. 2014) (lower court allowed the defendant to respond to the prosecution's

[5] Contrary to the government's mischaracterization, Br-52–53, Mr. Karen never claimed that comparing strikes between secular and religious jurors is the only way to show discriminatory intent. *See* Appellant's Br-35–36. Religiously-motivated explanations for a strike may also demonstrate discrimination. *Id.* (citing *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019)).

explanation for its strike); *United States v. Alvarez-Ulloa*, 784 F.3d 558, 563–64, 566 (9th Cir. 2015) (lower court advanced detailed reasoning)). That did not happen here. The government misleadingly suggests that the court "considered the [prosecutor's] explanation credible," Br-52, and "found" that Juror 17 "was permissibly struck for beliefs" that "could hinder his ability to sit in judgment." Br-6. However, the court not only expressed "disagreement" with the prosecutor's explanation, *contra* Br-51, but also made a specific finding that the juror was impartial. JA-13. Nonetheless, the court ignored its own finding, conducted no meaningful analysis of the record, and allowed the discriminatory strike to stand. *See* JA-13.

This "improper denial" of Mr. Karen's *Batson* objection "trigger[s] automatic reversal" because it "affect[s] the entire conduct of the trial." *United States v. Mahbub*, 818 F.3d 213, 223 (6th Cir. 2016) (internal citations omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the order and judgment of the district court, vacate Mr. Karen's sentence, and remand for further proceedings.

March 3, 2025 Respectfully submitted,

The Honorable Judge J. Skelly Wright Memorial Team

/s/ Daibik Chakraborty

/s/ Justin Curtis

/s/ Sara Holston

/s/ Noah Kest

/s/ Sydney Malin

/s/ Justin Xu

Counsel for Defendant-Appellant

APPENDIX

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 persons or things to be seized.

U.S. Const. amend. XIV § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act of 1789, Sec. 24

> And be it further enacted, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed;

and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.

Act of 1790, Sec. 31

And be it further enacted, That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters herein after mentioned, to go on board of ships or vessels in any part of the United States, whether in or out of their respective districts, for the purpose of demanding the manifests aforesaid, and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel: and if any box, trunk, chest, cask, or other package, shall be found in the cabin, steerage or forecastle of such ship or vessel, or in any other place separate from the residue of the cargo, it shall be the duty of the

said officer to take a particular account of every such box, trunk, cask or package, and the marks, if any there be, and a description thereof; and if he shall judge proper to put a seal or seals on every such box, chest, trunk, cask or package; and such account and description shall be by him forwarded to the collector of the district to which such ship or vessel is bound. And if upon her arrival at the port of her entry, the boxes, trunks, chests, casks or packages so described, or any of them shall be missing, or if the seals put thereon be broken, the master or commander of such ship or vessel shall forfeit and pay for every such box, trunk, chest, cask or package so missing, or of which the seals shall be broken, two hundred dollars. And it shall also be lawful for the inspectors who may be put on board of any ship or vessel, to secure after sunset in each evening, the hatches and other communications with the hold of such ship or vessel, with locks or other proper fastenings, which fastenings shall not be opened, broken or removed, until the morning following, or after the rising of the sun, and in presence of the inspector or inspectors by whom the same shall have been affixed, except by special license from the chief officer of the port. And if the said locks or other fastenings or any of them, shall be broken or removed during the night, or before the said rising of the sun, or without the presence

of the said inspectors or inspectors, the master or person having the charge or command of such ship or vessel, shall forfeit and pay the sum of two hundred dollars.

Act of 1790, Sec. 48

And be it further enacted, That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed: and therein to search for, seize and secure any such goods, wares or merchandise. And if they shall have cause to suspect a concealment thereof in any particular dwelling-house, store, building or other place, they or either of them shall, upon application on oath to any justice of the peace, be entitled to a warrant to enter such house, store or other place (in the daytime only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial: and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.

18 U.S.C. § 2251(a)

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.