

— BORDER SEARCH EXCEPTION • CHILD SEXUAL ABUSE MATERIAL • PRETEXTUAL SUSPICION • BORROWED URGENCY • CREDIBILITY
DEPLETION • ELECTRONIC DEVICE SEARCH • CUSTOMS AND BORDER PROTECTION • UNPREDICATED SUSPICION • THIRD PARTY
HARM • STANDING • SUPPRESSION REMEDY • CHILD PROTECTION ENFORCEMENT

The Skeleton Key

*Borrowed urgency, unpredicated child exploitation suspicion, and the cost no plaintiff
can recover*

The officers did not need a reason. When an officer possesses unlimited authority and nevertheless articulates a rationale, the rationale is doing work the authority does not require.

THE REASON WAS SURPLUS, AND THAT IS THE POINT

When an officer possesses unlimited authority and nevertheless articulates a rationale, the rationale is doing work the authority does not require.

It is managing the traveler, the bystanders, the eventual reader of the report, and the eventual reviewing court. The question is what that surplus rationale costs when it is chosen from the category of allegations nobody is willing to interrogate.

An officer who invokes child sexual exploitation converts a request into a moral emergency. The traveler who objects appears to be objecting to the protection of children. The bystander who films appears to be obstructing it. And the reviewing court, examining a search that needed no justification, encounters a justification it will decline to scrutinize.

SOURCES Indictment, *United States v. Tunick*, No. 1:25-cr-00499-ELR-CCB (N.D. Ga. filed Nov. 13, 2025) (ECF No. 1); Motion to Suppress Evidence and Statements, *id.* (filed Mar. 17, 2026) (ECF No. 21), at 4, 7–8; *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018); *Whren v. United States*, 517 U.S. 806, 813 (1996).

WHO PAYS

A harm to children, caused by an act of government, in a case where children are nowhere near the facts.

Assertions of this kind operate on a shared stock of credibility that belongs to everyone who will ever have to make the assertion truthfully. Each unpredicated invocation draws that stock down. All of these people will be heard against a public that has learned, from repetition, that the phrase can mean an officer wants access to something.

The forensic examiner
who has a predicate

The prosecutor building a
case

The mandated reporter

The parent

The survivor testifying
decades after the fact

| *The population that bears the cost has no case, no caption, and no notice that it was injured.*

II

The Border Search Regime and Its Internal Floor

The agency requires of itself what the circuit does not

That asymmetry is the most useful fact in this area of law.

THE CONSTITUTIONAL BASELINE

The line the Court has drawn runs along the dignity interest of the person, which is precisely the distinction electronic devices make untenable.

Routine at the border

Reasonable by virtue of where it occurs. The authority to inspect persons and property entering the country is longstanding and statutory, and the rule does not turn on the traveler's citizenship. A returning citizen is subject to it.

Where suspicion is required

A prolonged detention of a traveler suspected of internal smuggling requires reasonable suspicion. The disassembly of a vehicle's fuel tank does not.

What the phone changed

Riley recognized that a modern phone is categorically different from other effects a person carries, holding that the search incident to arrest exception does not extend to its contents. It did not travel to the border, and the circuits have divided over how much of its reasoning does.

SOURCES 19 U.S.C. §§ 1581, 1582; 8 U.S.C. § 1357; 19 C.F.R. § 162.6 (2026); *United States v. Ramsey*, 431 U.S. 606, 616, 619–20 (1977); *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985); *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004); *Riley v. California*, 573 U.S. 373, 393–95 (2014).

THE SPLIT, AND WHERE THIS CASE SITS

A traveler landing at Hartsfield-Jackson arrives where a device is most exposed and the Fourth Amendment is thinnest.

Ninth	A forensic border search of a device requires reasonable suspicion and must be limited to a search for digital contraband.
Fourth	A warrantless border search of a device must bear a nexus to the sovereign interests that justify the exception, and may not be deployed to gather evidence of ordinary domestic crime.
First	Basic searches are routine and require no suspicion; advanced searches require neither a warrant nor probable cause; and the exception reaches evidence of contraband or of a border related offense rather than contraband alone. It imposed no constitutional suspicion requirement on advanced searches, observing that agency policy already supplies one.
Eleventh	No suspicion whatsoever is required for a forensic search of an electronic device at the border, reasoning that property searches at the border have never required suspicion and that the Court's dignity based exceptions do not reach property.

Empirical work cuts against the assumption that travelers understand this. In survey data, ordinary people rate a search of their devices as approaching a strip or body cavity search in intrusiveness, and an overwhelming majority believe no such search may occur without individualized suspicion, which means the doctrine operates largely by surprise. Commentators have accordingly argued that it cannot survive the Court's data privacy turn intact.

SOURCES *United States v. Cano*, 934 F.3d 1002, 1016–18 (9th Cir. 2019); *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019); *Alasaad v. Wolf*, 988 F.3d 8, 16–21 (1st Cir. 2021); *United States v. Touse*, 890 F.3d 1227, 1233–34 (11th Cir. 2018); Kugler (2014); Pryby, *Michigan Law Review*, 118, 507 (2019); Gershowitz (2008).

THE FLOOR THE AGENCY IMPOSED ON ITSELF

The agency requires of the copying step a predicate the Eleventh Circuit holds the Constitution does not require at all.

BASIC SEARCH

An officer may conduct it without suspicion.

ADVANCED SEARCH

External equipment is connected to the device to review, copy, or analyze its contents. It requires reasonable suspicion of unlawful activity or a national security concern, together with supervisory approval at the GS-14 level or higher. The same directive acknowledges that a traveler is not obliged to supply a passcode, while preserving the agency's authority to detain the device.

An agency that has already conceded, in its own operating rules, that the extraction of a traveler's data warrants a predicate and a supervisor's signature has conceded the premise of the reform proposed here.

III

The Pretext, and Why It Is the One Chosen

*It opens any lock, leaves no mark, and cannot be traced back to
the hand that turned it*

Maximally persuasive, and entirely unreviewable.

WHAT THE RECORD SHOWS

A serious allegation about the sexual exploitation of children was asserted by federal officers, and their own contemporaneous documentation supplies nothing to support it.

No basis supplied

The officers never provided any details as to why they purportedly suspected the traveler was harboring such material. By the account in the filing, they opened by saying they were looking for people who are pedophiles, and thereafter justified the demand for his passcode by the asserted need to confirm whether he possessed child pornography.

The reports say something else

The government's own reports record no such suspicion at all. They record instead that the purpose of the detention and seizure was to investigate the traveler's ties to a political movement.

Not a chance selection

A joint terrorism task force officer and an FBI special agent coordinated with Customs and Border Protection in advance of the arrival, and the charging instrument identifies the seizing officer as a supervisory officer of the Tactical Terrorism Response Team.

Whether that record entitles the traveler to suppression is for the district court. The premise here is narrower and does not depend on the outcome.

WHY THIS ALLEGATION AND NOT ANOTHER

A customs rationale invites a customs answer. A narcotics rationale invites a question about what was seen. A national security rationale attracts oversight.

No observation required

The offense is by nature concealed, and the officer can characterize the search as the very means of confirming or dispelling the concern.

Unrebuttable in the moment

The traveler's denial is what a guilty traveler would also say.

It reverses the social posture

The traveler who asserts a right appears to be shielding something, and the bystander who objects appears complicit.

Treated as unreviewable

Whren is read to foreclose inquiry into actual motivation once the action is objectively authorized, a principle later applied to reject inquiry into the subjective purposes behind an otherwise valid seizure.

This is the profile of a skeleton key. It opens any lock, leaves no mark, and cannot be traced back to the hand that turned it.

IV

The Uncounted Cost

Three mechanisms: perception, policy, and arithmetic

The government produced the citation itself, in a case that has nothing to do with children.

TWO OF THE THREE MECHANISMS

The pretext does not merely deplete credibility. It manufactures a citation for the opposition to a category of regulation whose beneficiaries are children.

CREDIBILITY IS A SHARED STOCK

An allegation of child sexual exploitation carries authority because the public assumes it is not made lightly. That assumption is an asset held in common. Where a class of allegation acquires a reputation for tactical deployment, investigating institutions begin treating incoming reports in that class as presumptively suspect, and valid cases are discarded before they are assessed.

This is not a claim about any individual's willingness to believe. It is a claim about the base rate a listener carries into the next hearing.

THE ENFORCEMENT ARGUMENT HANDED OVER

Firms subject to child protection obligations have a standing interest in characterizing those obligations as surveillance authority in disguise. That characterization is ordinarily weak, because it requires the audience to believe a protective rationale is being used for an unrelated purpose.

An officially documented instance of exactly that supplies the evidence the argument has always lacked. The government produced that citation itself.

THE ARITHMETIC OF SERIOUSNESS

The seriousness is not being allocated where the rationale claims it lives.

THE RATIONALE INVOKED

5 years, the statutory maximum facing the traveler who resisted. The conduct alleged is that he supplied a passcode that caused his own device to erase its own contents.

THE CONDUCT THE RATIONALE NAMES

6 months served. In the same period, the founder of one of the largest churches in the United States pleaded guilty to five felony counts of lewd or indecent acts with a child, received a ten year sentence with all but six months suspended, served six months in a county jail, and was released.

These two dispositions arise under different sovereigns, different statutes, and different procedural histories, and no direct doctrinal inference runs between them. The comparison measures what the system treats as urgent when the urgency is borrowed against what it treats as urgent when the underlying conduct is proved.

SOURCES 18 U.S.C. § 2232(a); CBS News (2025), *Robert Morris, Gateway Church founding pastor, pleads guilty in Oklahoma child sexual abuse case*; NBC DFW (2026), *Gateway Church founder released from prison after guilty plea in child sex abuse case*.



Why the Doctrine Cannot Reach It

Standing, remedy, and a barrier that is a practice rather than a holding

The rationale operates as a nullity in law while doing substantial work in fact.

THREE BARRIERS

The person injured is a future complainant, a future prosecutor, a future child. None of them was present.

Standing runs to the searched

Injunctive relief is foreclosed absent a showing that this plaintiff faces a real and immediate threat of the same injury. A diffuse and probabilistic injury distributed across a population defined only by future circumstance is the paradigm case of an injury no Article III plaintiff can carry.

Suppression compensates the wrong party

Even a complete defense victory produces exclusion, which restores the searched traveler and transfers nothing to the population that bore the second cost. The remedy is calibrated to marginal deterrence weighed against the cost of excluding probative evidence.

Pretext doctrine declines the inquiry

Treated as settled, and it is not. *Whren* says subjective intentions play no role in ordinary, probable-cause analysis, and in the same passage reserved searches conducted in the absence of probable cause, naming inventory searches and administrative inspections. A suspicionless border search of a device sits on the reserved side of that line.

Two circuits have already conducted a version of the inquiry *Whren* is said to foreclose. The Fourth requires that a nonroutine forensic border search rest on suspicion of an offense bearing a nexus to the purposes of the exception, and holds the Government may not invoke it on behalf of a generalized interest in combatting crime. That is an inquiry into what the search was for, and the Ninth's contraband limitation does comparable work. So the barrier is not a holding. It is a practice.

SOURCES *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983); *Herring v. United States*, 555 U.S. 135, 141 (2009); *Whren v. United States*, 517 U.S. 806, 811–13 (1996); *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019); *United States v. Cano*, 934 F.3d 1002, 1016–18 (9th Cir. 2019).

VI

A Contemporaneous Articulation Requirement

Attached to the assertion rather than to the search

An officer with a genuine basis loses nothing but the time it takes to write a sentence.

THE PROPOSAL

Where a federal officer asserts child sexual exploitation as the basis for a border search of an electronic device, the officer should be required to record, contemporaneously and in writing, the articulable facts supporting that assertion, with supervisory review at the same grade the agency already requires for an advanced search.

It attaches to the assertion

Not to the search, so it does not disturb the border search exception or the Eleventh Circuit's holding.

Articulation, not sufficiency

An officer with a thin but real basis is not deterred.

Administrative enforcement

So it does not turn on the vagaries of suppression practice or require any court to revisit *Whren*.

WHY THE AGENCY HAS ALREADY CONCEDED THE PREMISE

The controlling case supplies the model, written by the very court that held no predicate was necessary.

The directive already does this

Reasonable suspicion and GS-14 approval are required before data may be copied off a device. The agency therefore accepts that some steps in a border encounter warrant a recorded predicate and a second signature even though the Constitution, as the Eleventh Circuit reads it, requires neither.

Courts already lean on it

When the First Circuit declined to impose a constitutional suspicion requirement on advanced searches, it did so having noted that the agency's own policy already requires one. An internal directive is already doing work in federal appellate reasoning about what the Fourth Amendment needs to require.

What a predicate looks like

Touset was itself a child exploitation prosecution. Having held that no suspicion was required, the court held in the alternative that reasonable suspicion existed, resting on specific facts: money transfers to a country associated with child exploitation and a connection to an email account previously flagged for child pornography.

The proposal asks for no more than the record *Touset* itself contains: the same treatment of an assertion that is at least as consequential as the extraction it may be used to justify, and considerably more consequential to people who are not in the room.

SOURCES U.S. Customs & Border Prot., Directive No. 3340-049A § 5.1.4 (Jan. 4, 2018); *Alasaad v. Wolf*, 988 F.3d 8, 19 (1st Cir. 2021); *United States v. Touset*, 890 F.3d 1227, 1237-38 (11th Cir. 2018).

WHAT IT COSTS ENFORCEMENT, AND WHAT REMAINS

Agencies that pursue these offenses in earnest gain the thing they most need and are currently losing: a public that still believes the phrase when it is used correctly.

The traveler's case will be decided on grounds this paper has set aside. He will win or lose on custody, on voluntariness, on whether the statute reaches a wipe executed by the officer's own keystroke, and on whether a circuit that requires no suspicion will find anything to suppress. The finding survives either outcome.

A federal agency asserted the sexual exploitation of children as a reason to open a citizen's phone, its own records supply no basis for the assertion, and the record indicates the officers wanted something else entirely.

The traveler has a remedy for what was done to him. The children in whose name it was done have none, were never notified, and will pay in a currency that does not appear on any docket. A doctrine that treats the officer's stated reason as legally irrelevant has, without intending to, made that reason free to spend.

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