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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Respondent,

v.

BRIAN POWELL,

Petitioner

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

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QUESTION PRESENTED

Whether the First Circuit erred when it relied upon the private search doctrine as delineated by this Court in *United States v. Jacobsen*, 466 U.S. 109 (1984) to affirm the district court's denial of petitioner's Motion to Suppress.

PARTIES TO THE PROCEEDING

The parties to the proceeding below in the United States Court of Appeals for the First Circuit were Brian Powell and the United States. Brian Powell is the Petitioner.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit in *United States v. Brian Powell*, No. 17-1683 (1st Cir. July 16, 2018).

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 2018. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. V:

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

STATEMENT

Petitioner Brian Powell pleaded guilty to a one-count information charging him with knowingly employing, using, persuading, inducing, enticing, and coercing any minor female to engage in sexually explicit conduct to produce visual depictions that would be transmitted in interstate commerce in violation of 18 U.S.C. §2251(a). Powell filed a *pro se* Motion to Withdraw Plea of Guilty and a *pro se* Motion to Dismiss and Suppress. The United States District Court for the District of New Hampshire conducted an evidentiary hearing on the motions, ruled from the bench, and denied Powell's *pro se* Motions.

The court disavowed Powell's claim that evidence was seized in violation of the Fourth Amendment and determined that Powell's averment concerning counsel's failure to file a motion to assert the claim did not constitute ineffective assistance of counsel. Therefore, the court concluded that Powell's request to withdraw his guilty plea was unfounded. Accordingly, Powell was sentenced and the judgment was appealed. The United States Court of Appeals for the First Circuit affirmed. The facts giving rise to Powell's arrest and conviction follow.

"Omegle" is a free internet chat website which Powell used to initiate sexually explicit video chats with minor females. The chats were recorded as they appeared on Powell's computer screen. Screenshots of the chat sessions were automatically recorded by Omegle and reviewed by a team of Omegle

moderators. The images and user IP address (representing the user connecting to Omegle) were forwarded to The National Center for Missing and Exploited Children (NCMEC) which "is statutorily obliged to maintain an electronic tipline for ISPs to use to report possible Internet child sexual exploitation violations to the government." *United States v. Ackerman*, 831 F.3d 1292, 1296 (10th Cir. 2016). It "receives an annual grant from Congress to perform various functions related to preventing the exploitation of children." *United States v. Cameron*, 699 F.3d 621, 628 (1st Cir. 2012).

Accessing a public database, NCMEC determined which geographical region the IP address originated from and forwarded its findings to the New Hampshire Internet Crimes Against Children Task Force (ICAC). NCMEC's action resulted in the State of New Hampshire issuing a Grand Jury subpoena to Comcast, Powell's internet service provider. His Comcast subscriber information led investigating law enforcement officers to Mr. Powell's home. A brief interrogation occurred there and pursuant to a search warrant electronic devices containing evidence of his internet activities were seized.

REASON FOR GRANTING THE PETITION

The lines between private and government action have blurred in the digital era. The instant case provides the Court with an opportunity to clarify the private search doctrine. The expectation of privacy in digital information extends beyond traditional boundaries. Therefore, the reevaluation of the

private search doctrine that was delineated prior to the digital era in *United States v. Jacobsen*, 466 U.S. 109 (1984) is warranted.

The First Circuit erred when it relied upon the private search doctrine as delineated by this Court in *United States v. Jacobsen*, 466 U.S. 109 (1984) to affirm the district court's denial of petitioner's Motion to Suppress.

The plethora of confidential data contained by internet and other communication service providers creates a privacy dilemma that has been acknowledged in *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (questioning the viability of third party doctrine), *Riley v. California*, 134 S. Ct. 2473 (2014) (acknowledging that data and digital communication is property and effects necessitating Fourth Amendment protection) and *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (recognizing that a reasonable expectation of privacy attaches to data shared with third parties).

These cases have eroded the viability of the third party doctrine as delineated by this Court in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979). "[T]he third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records." *Carpenter* at 2216-2217. Similarities between the third party doctrine and the private search

doctrine are substantial.

United States v. Jacobsen, 466 U.S. 109, 113 (1984) states that the Constitution "proscribes only governmental action". its protections do not apply "to search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with participation or knowledge of any governmental official" quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)). Holdings based on pre-digital reality may transfer poorly to the problems that society faces in a digital era. The private search doctrine is closely related to the third party doctrine and suffers from similar infirmities. Private action is now often closely correlated to government action and may effectuate a constitutional deprivation if it is "fairly attributable to the State." *Lugar v Edmondson*, 457 U.S. 922, 937 (1982).

This Court has explicitly recognized that safeguarding personal information held by private providers from government intrusion requires the robust implementation of the warrant requirement. Private party searches of digital data and the ease with which government may access the results of these searches generates issues of constitutional dimension similar to those that arise within the context of third party sharing of information with governmental entities. The functions of state entity and private-party now coalesce more easily.

The mandate pursuant to 18 U.S.C. §2258 requiring reporting of all illegal internet activity to NCMEC is akin to the 24 hour law enforcement

surveillance dragnet noted in *United States v. Knotts*, 460 U.S. 276, 283, 284 (1983). Omegle would have suffered a penalty if it did not adhere to the 18 U.S.C. § 2258 reporting requirement. Its close relationship with NCMEC made it a willful partner with the entity and together they searched for and identified unlawful online content.

Omegle's conduct may be attributed to the "nonobvious involvement of the State." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). The character of Omegle as "a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001). Safeguarding the personal information held by private providers from government intrusion requires the robust implementation of the warrant requirement.

The protections afforded by the Fourth Amendment have diminished with the creep of technology. Aided by the private search exception to the warrant, government's access to confidential information has expanded greatly. The instant case offers the Court an opportunity to revisit and revise the private search doctrine so that it is consistent with the Court's most recent Fourth Amendment jurisprudence.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Dated: October 15, 2018

Respectfully Submitted,

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