No. 19-618

In the Supreme Court of the United States

JON ERIC SHAFFER,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR *AMICUS CURIAE* PROFESSOR BEN A. MCJUNKIN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Ben A. McJunkin is an Associate Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University.[1] He teaches and writes on criminal procedure, with a particular focus on Fourth Amendment searches. He has studied the historical development of the so-called "private-search doctrine" for nearly a decade. Last year, he published an article in the Wisconsin Law Review that represents the most comprehensive academic examination to date of the issues presented in this case. *See* Ben A. McJunkin, *The Private-Search Doctrine Does Not Exist*, 2018 Wis. L. Rev. 971 (2018). Professor McJunkin writes to share his views about why the Court should grant review in this case to ensure the sound and coherent development of Fourth Amendment law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For nearly four decades, lower courts have invoked the "private-search doctrine" to allow police to replicate, without a warrant, a search performed by a private third party. But to call it a doctrine suggests more consistency in its application than there actually is. Courts disagree about when the doctrine applies and over the scope of the searches it allows. They disagree about how the doctrine applies to searches

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[1] Counsel for *amicus* notified counsel of record for all parties of *amicus*'s intent to file this brief more than ten days before filing. Counsel for petitioner and respondent consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

within a home and, as the petition for certiorari shows, how it applies to searches of digital devices.

All of this confusion arises out of a single foundational mistake: interpreting this Court's cases as creating a "private-search doctrine" in the first place. This Court has never announced a private-search doctrine. The one fashioned by lower courts rests on a misreading of two of this Court's cases (the entire body of precedent supposedly establishing the doctrine). This case presents an ideal vehicle for this Court to clarify the proper interpretation of its cases, to confirm the scope of Fourth Amendment protections following a private search, and to settle protracted disputes in lower courts over how to adjudicate private-search cases.

The conventional account of the private-search doctrine rests on two cases, *Walter v. United States*, 447 U.S. 649 (1980), and *United States v. Jacobsen*, 466 U.S. 109 (1984). This Court suggested in those cases that, under some circumstances, the government may not need a warrant to duplicate a search previously performed by a private citizen. But from the narrow holdings of those cases lower courts have extrapolated a broader principle that a person's privacy interest in a piece of property or information is entirely extinguished by any exposure to third parties. Neither *Walter* nor *Jacobsen* expressly created such a broad exception to the Fourth Amendment's warrant requirement, and they should not be read as implicitly endorsing anything of the sort.

The best reading of *Walter* and *Jacobsen* is not that they created a new, standalone "private-search doctrine." Instead, they applied the "single-purpose con-

tainer doctrine"—a version of the Fourth Amendment's plain-view exception—to a novel fact pattern involving an earlier private search. But since then, lower courts have misread those two cases as announcing a broad exception to the warrant requirement, and this Court has never returned to the subject to clarify its prior opinions.

Correcting the lower courts' misreading of *Walter* and *Jacobsen* is imperative. For one thing, the private-search doctrine has grown into a broad end-run around the Fourth Amendment's warrant requirement. But neither *Walter* nor *Jacobsen* ever intended or entailed anything like that. For another, the underlying logic of the private-search doctrine is inconsistent with this Court's recent Fourth Amendment jurisprudence, including last Term's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In *Carpenter*, this Court explained that a person's reasonable expectation of privacy can survive third-party exposure when that exposure is not sufficiently voluntary. 138 S. Ct. at 2220. But the contemporary private-search doctrine fails to recognize any privacy interest following involuntary private searches. Without clear instruction from this Court, lower courts have floundered in their attempts to interpret and apply a broad private-search doctrine unmoored from traditional Fourth Amendment principles.

In addition, granting certiorari in this case can resolve at least three different circuit splits. First, there is a clear and well-recognized circuit split over how the private-search doctrine applies to digital devices like computers or cell phones. The Fifth and Seventh Circuits have held that a private search of any of a digital device's contents—as little as a single file—exposes

the entire device to a warrantless government search. By contrast, the Sixth and Eleventh Circuits have held that the government may only view the specific files already viewed by the private party. The second split, although not directly presented by this case, is over whether the private-search doctrine should apply to searches of homes.

Both of those circuit splits would be resolved by correctly reading *Walter* and *Jacobsen* as applying the single-purpose-container doctrine. The single-purpose container doctrine permits a warrantless search only when the full contents of a container are already rendered obvious by context. As the *Jacobsen* opinion explained, police may replicate a prior search when they are "virtually certain" they would "learn nothing that had not previously been learned during the private search." 466 U.S. at 119, 120. Given the amount of sensitive private information stored on digital devices or in a home, it will be an exceedingly rare case where officers can be "virtually certain" about everything they would find inside.

Third, lower courts have long disagreed over whether the single-purpose container doctrine allows consideration of contextual information other than the intrinsic characteristics of the container being searched. By confirming that *Walter* and *Jacobsen* are single-purpose container cases, this Court can also resolve this split. In those cases, the "virtual certainty" comes from information provided to officers by private searches, not just the containers themselves.

Because this case allows the Court to address nearly four decades of confusion over the private-search doctrine and resolve at least three deep circuit splits, the Court should grant certiorari.

ARGUMENT

The private-search doctrine is "one of the most convoluted and misunderstood corners to the Fourth Amendment." McJunkin, *supra*, at 972. That confusion can be traced to lower courts' decades-long misreading of this Court's decisions in *Walter* and *Jacobsen*. Contrary to the conventional wisdom, those cases did not create a private-search exception to the Fourth Amendment's warrant requirement. Instead, they applied a version of the plain-view exception that permits warrantless searches of "single-purpose" containers when the circumstances leave no doubt that the containers hold contraband and nothing else.

This Court should grant certiorari to correct the lower courts' misunderstanding of *Walter* and *Jacobsen*. Doing so will clarify a notoriously obscure area of law, resolve multiple circuit splits, and clarify the application of Fourth Amendment doctrine to modern technology. *Accord Carpenter*, 138 S. Ct. 2206; *Riley v. California*, 134 S. Ct. 2473 (2014).

I. The private-search doctrine rests on a misunderstanding of this Court's precedent

The standard story of the private-search doctrine goes like this: In *Walter* and *Jacobsen*, this Court held that an individual's privacy interest in information is extinguished the moment that information is exposed to a third party. Other courts have implemented that holding by creating the private-search doctrine, a free-standing exception to the Fourth Amendment's warrant requirement that allows police to replicate an earlier search conducted by a private party.

But that standard story is wrong. *Walter* and *Jacobsen* have been misunderstood since they were decided. Although neither decision is a model of clarity, a close reading of both cases shows that they did *not* create a new, standalone private-search doctrine as it is commonly understood. Instead, they were based on familiar principles of plain-view searches.

1.a. Conventional wisdom holds that this Court first announced the private-search doctrine in *Walter*. The defendants there accidentally mailed cardboard boxes of pornographic films to an unwitting business. *See United States v. Sanders*, 592 F.2d 788, 790 (5th Cir. 1979). The business's employees opened the boxes and discovered the films, which were labeled with suggestive drawings and explicit descriptions, *Walter*, 447 U.S. at 651–52 (plurality opinion), and one employee tried unsuccessfully to view the films, *Sanders*, 592 F.2d at 790. The films were turned over to FBI agents, who watched them with a projector. *Id.* The defendants were convicted for the interstate shipment of obscene material. *Id.* at 789–90.

The defendants appealed their convictions up to this Court, where the central question presented was whether the FBI agents' warrantless projection of the films was an unconstitutional search. The Court held that it was, but it divided in its reasoning. Justice Stevens wrote the plurality opinion for himself and Justice Stewart. *Id.* at 651. The plurality first noted that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent they had already been examined by third parties." *Id.* at 656. But because the employees hadn't viewed the films, the FBI's act of screening the films improperly "exceed[ed] the scope

of the private search." *Id.* at 657–59. Justices White and Brennan concurred, concluding that the films should not have been viewed without a warrant because their contents, unlike their packaging, were not within the agents' plain view. *Id*. at 660–61 (White, J., concurring). Justice Marshall concurred in the judgment without joining an opinion. *Id*. at 660

b. Four years later, the Court decided *Jacobsen*. The container in *Jacobsen*, a cardboard box wrapped in plain brown paper, was damaged in transit. 466 U.S. at 111. Federal Express employees completely unpacked the box, which contained a bag of drugs stuffed in a tube and covered by newspaper. *Id.* After discovering the drugs, the FedEx employees alerted a federal agent, but repacked the box before the agents arrived. *Id*. Without getting a warrant, the agent reopened the box and discovered the drugs. *Id.* at 111–12.

This Court upheld the agent's search. The Court, in an opinion by Justice Stevens, applied the same standard as the *Walter* plurality: After a private search, "additional invasions of . . . privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115. According to the Court, this "standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities." *Id*. at 117. Once a private party reveals such information, "the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *Id*. The Fourth Amendment applies "only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id*. Critically, the Court explained that, because of

what had been communicated by the FedEx employees, the federal agent's search of the box did not give him any information he did not already know. *Id.*

2. To be sure, some language in *Walter* and *Jacobsen*, taken in isolation, appears to support a private-search doctrine as it is commonly understood. Many lower courts have latched onto this language, often uncritically. But other key language, inconsistent with a private-search doctrine, has too often been overlooked or marginalized. The crux of each case was not merely that a private party had previously searched the container. What mattered was what the government *learned* from the earlier private search, a rule which can be seen by a superficial comparison of *Walter* and *Jacobsen* themselves. In *Walter*, the private parties had not fully ascertained the contents of the pornographic films, and so could not give the agents certainty about what screening the films might reveal. 447 U.S. at 651. That fact rendered the agents' warrantless screening of the films unconstitutional. *Id.* at 657–59. In *Jacobsen*, by contrast, the private search revealed everything there was to know about the box's contents, and the FedEx employees communicated that information to the government. 466 U.S. at 117. As the Court explained, by the time the government agent opened the box, "it was virtually certain that it contained nothing but contraband." *Id.* at 120 n.17.

That focus on the agents' certainty about the box's contents links *Jacobsen* to a "variation" of the Fourth Amendment's plain-view exception known as the single-purpose container doctrine. *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979), abrogated on other grounds by *Californa v. Acevedo*, 500 U.S. 565 (1991).

Under that doctrine, some containers, like "a kit of burglar tools or a gun case," "cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Id.* The *Jacobsen* Court expressly compared the box of drugs to "the hypothetical gun case in . . . *Sanders*" because, after the FedEx employees' search revealed its contents, it "could no longer support any expectation of privacy." 466 U.S. at 121.

Jacobsen also cited *Texas v. Brown*, 460 U.S. 730 (1983), another case related to the single-purpose container doctrine. *Jacobsen*, 466 U.S. at 121. The container in *Brown* was an opaque party balloon, knotted at the tip, which was a known way to package narcotics. *Brown*, 460 U.S. at 733–34, 743–44 (plurality opinion). The plurality in *Brown* held that police had probable cause to seize the balloon because "the distinctive character of the balloon itself spoke volumes as to its contents." *Id.* at 743. Justice Stevens, just one year before he authored the majority opinion in *Jacobsen*, argued separately that police could also have *searched* the balloon without a warrant if it was "one of those rare single-purpose containers" that "could have given the officer a degree of certainty that is equivalent to the plain view of the heroin itself." *Id.* at 750–51 (Stevens, J., concurring). He argued that "in evaluating whether a person's privacy interests are infringed, 'virtual certainty' is a more meaningful indicator than visibility." *Id.* at 751 n.5.

In reaching its holding, the *Jacobsen* majority adopted the "virtual certainty" language from Justice Stevens's *Brown* concurrence. The Court repeatedly tied its holding to the fact that, because of what the

private searchers communicated to the officer, the officer was "virtually certain" of the box's contents. 466 U.S. at 120 n.17, 125; *see also id.* at 119 ("[T]here was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell [the agent] anything more than he already had been told."). So it was the federal agent's *certainty about what he would find*—not the mere fact that an earlier private search had occurred—that justified his warrantless search.

Jacobsen is best understood, then, as an extension of the single-purpose container doctrine to a new context. The certainty in *Jacobsen* came not from the container itself—an ordinary cardboard box—but from the reports of private citizens who had already opened it. *Id.* at 121. It is the certainty that matters in the single-purpose container doctrine, not its source. *See Brown*, 460 U.S. at 751 n.5 (Stevens, J., concurring) ("'virtual certainty' is a more meaningful indicator than visibility"). Because the agent was certain of the box's contents, it was "just like" a single-purpose container. *Id.*

II. Correctly interpreting *Walter* and *Jacobsen* would provide much needed doctrinal clarity and resolve three circuit splits

This case is certworthy because it gives the Court the opportunity to correct lower courts' misunderstanding of *Walter* and *Jacobsen*. The petition ably demonstrates the headaches that the private-search doctrine has caused lower courts. Pet. 24–28. In large part, this is because the theory of Fourth Amendment privacy entailed by the private-search doctrine is untenable and conflicts with this Court's recent case law.

Eliminating that confusion would be reason enough to grant the petition.

But it is not the only reason. This case implicates two clear circuit splits related to the private-search doctrine: the circuits are sharply divided about how it applies to digital devices, and they have long disagreed about how it applies to homes. This case also implicates a deep and protracted split about the single-purpose container doctrine. This Court can resolve all three splits by granting certiorari. It should do so.

A. The Court can clarify doctrinal uncertainty that has plagued lower courts

1. As the petition explains, courts are all over the map in how they apply the private search doctrine to digital devices. *E.g.*, Pet. 25. As one circuit judge acknowledged, "this area of the law is cloudy." *United States v. Chapman-Sexton*, 758 F. App'x 437, 454 n.9 (6th Cir. 2018) (Bush, J., concurring). This case therefore presents "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

a. The uncertainty is due in part to "the lack of definitive guidance from the Supreme Court." *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001). Consider how odd it is that the private-search doctrine—supposedly a generalized, standalone exception to the Fourth Amendment—has never actually been acknowledged by this Court. Every other comparable exception to the warrant requirement (exigency, consent, good faith, etc.) has a substantial body of this Court's case law to its name. The private-search doctrine has only two obscure cases, which, as explained

above, don't even say what the lower courts have assumed they do.

Because this Court has never mentioned the private-search doctrine by name, nobody really knows what the correct legal standard is. Commentators have long recognized *Jacobsen*'s lack of clarity. Shortly after the case was decided, the leading treatise posed private-search hypotheticals where "the private searcher had simply left the container unwrapped" or "had first opened (or reopened) the container while the police were standing by." Wayne R. LaFave, 1 Search & Seizure § 1.8(b) (5th ed. 2012). "[I]t would seems strange," LaFave remarked, if the constitution required "a different result because the private person happened to do some repackaging before the appearance of the police." *Id.*

Fair enough. But LaFave also questioned just how far the rationale could take the doctrine:

> it is to be doubted that if a private person searched the premises of another and then reported to police what he had found (instead of removing the evidence and handing it over to the police), that the police could then make a warrantless entry of those premises and seize the named evidence.

Id. But, as explained below, at least one circuit has held just that.

As a result, the doctrine has snowballed into an undertheorized end-run around the Fourth Amendment's warrant requirement. The correct reading of *Walter* and *Jacobsen* is, therefore, "an important question of federal law that has not been, but should be,

settled by this Court," S. Ct. R. 10(c), which is reason enough to grant certiorari.

B. The Court can resolve a split over how the private-search doctrine applies to digital devices

1. Modern private-search cases overwhelmingly involve digital devices that the *Walter* and *Jacobsen* Courts could not have imagined. But while storage devices have evolved from cardboard boxes to computers and cell phones, the doctrine has not evolved with them. That disconnect has only compounded the existing confusion over the private search doctrine's validity and scope.

In recent cases, this Court has taken steps to clarify how some traditional Fourth Amendment doctrines apply to modern technologies. *Carpenter*, 138 S. Ct. at 2216–20; *Riley*, 573 U.S. at 392–98. The entire logic of the private-search doctrine, as developed by lower courts, conflicts with those cases. The private-search doctrine assumes that the involuntary disclosure of any information, including digital data, to third parties results in a complete loss of privacy. But in *Carpenter*, the Court held that a person does not lose his privacy interest in cell-site data when it is exposed to a third party. 138 S. Ct. at 2216–20.

2. Cases involving private searches of digital devices are common, and they have produced a "clear split" over how the private-search doctrine applies to digital devices. Orin S. Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, Wash. Post: The Volokh Conspiracy (May 20, 2015), https://wapo.st/33O1Vwu; *see* McJunkin, *supra*, at 984–86. The question over which courts have split is

this: When a private citizen reviews some of the data on someone else's digital device, does that eliminate the owner's privacy interest in *all* the data in the entire device, or just the data reviewed by the private party? More concretely, if a private citizen reviews a single file on a computer, can the government then conduct a warrantless search of *all* the files on the entire computer?

a. The Fifth and Seventh Circuits have held that the government can do just that. Under their broad approach, a person's privacy interest in a digital device disappears entirely whenever a private citizen searches any part of the device. The government thus does not exceed the scope of the private search by reviewing more files within the device than the private party did.

The Fifth Circuit announced its rule in *Runyan*, 275 F.3d 449. There, the defendant's ex-wife broke into his home to retrieve some personal belongings. *Id.* at 453. The woman discovered a duffel bag containing pornography, a camera, Polaroid photographs, and various digital media. *Id*. She took the duffel bag and later returned to the home with a friend to retrieve a computer and assorted CDs, floppy disks, and ZIP disks. *Id*. The friend viewed a number of the CDs and floppy disks, which contained child pornography. *Id*. The defendant's ex-wife then gave the disks to law enforcement agencies, who searched them thoroughly and viewed images that neither the woman nor her friend had. *Id*. at 454. The Fifth Circuit nevertheless approved the search, holding that the police did not exceed the scope of the private search by viewing more files on the disks than the private searchers had. *Id*. at 465.

The Seventh Circuit adopted *Runyan*'s holding in *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012). In *Rann,* the defendant argued that his trial attorney committed ineffective assistance by failing to move to suppress evidence discovered during warrantless searches of a zip drive and camera memory card that contained images of the defendant sexually abusing his daughter. *Id.* at 834–35. The victim and her mother had turned the storage devices over to the police, and the defendant argued that the police had exceeded the victim's and mother's private searches by viewing all the images on the file. *Id.* at 836. The Seventh Circuit disagreed, holding that even if the police had viewed more images than the victim or her mother, that did not exceed the scope of the private search under *Runyan*. *Id.* at 838. A "search of *any* material on a computer disk is valid," the court held, "if the private party who conducted the initial search had viewed at least one file on the disk." *Id.* at 836 (emphasis added).

b. The Sixth and Eleventh Circuits disagree with that broad approach. Their narrow approach limits the government's search to the precise scope of the earlier private one.

The Sixth Circuit justified its approach by reference to "the extensive privacy interests at stake in a modern electronic device." *United States v. Lichtenberger*, 786 F.3d 478, 485 (6th Cir. 2015). In *Lichtenberger*, the defendant's girlfriend hacked into his computer and discovered images of child pornography. *Id.* at 479–80. She notified the police, who sent officers to her house to view the evidence. *Id*. At the officers' instruction, the woman again accessed the computer and clicked on random thumbnail images to show the

officers what she had found. *Id.* at 480. She could not confirm, however, that she had shown the officers the same images she had previously viewed. *Id.* at 481. The Sixth Circuit excluded the evidence discovered during the government search, finding that the officers had exceeded the scope of the woman's search. *Id.* at 491. Given "the extent of information that can be stored on a laptop computer," the officer's overbroad search was too likely to discover materials that were "private, legal, and unrelated to the allegations prompting the search." *Id.* at 488–89.

The Eleventh Circuit reached the same conclusion in *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015). There, the defendants left their cell phone at a Walmart, where employees searched it and discovered images of child pornography. *Id.* at 1330–31. The employees turned the phone over to a police officer, who watched one video that the employees had not previously seen. *Id.* at 1331–32. The Eleventh Circuit, while affirming the denial of the defendants' motion to suppress, nonetheless found that the officer improperly exceeded the scope of the private search by viewing the video. *Id.* at 1336. Citing this Court's decision in *Riley*, the court held that a private search of part of a cell phone does not permit a warrantless government search of "every part of the information contained in the cell phone." *Id.*

c. State courts are also divided on the private-search doctrine's applicability to digital devices. *Compare State v. Terrell*, 831 S.E.2d 17, 24–25 (N.C. 2019) (rejecting *Runyan* and *Rann*), *and People v. Michael E.*, 178 Cal. Rptr. 3d 467, 478–80 (Cal. Ct. App. 2014) (holding *Runyan* does not apply to computer hard drives), *with State v. Curtis*, 2014 WL 1319513, at *5

(Ariz. Ct. App. Apr. 1, 2014) (adopting *Runyan*), *and People v. Emerson*, 766 N.Y.S. 2d 482, 487–89 (N.Y. Sup. Ct. 2003) (same).

3. Properly interpreting *Walter* and *Jacobsen* as single-purpose container cases eliminates this split. As applied in *Jacobsen*, the single-purpose container doctrine would permit a warrantless search *only* where the nature of the container, paired with information gained through a private search, leaves law enforcement "virtually certain that [the container] contain[s] nothing but contraband." *Jacobsen*, 466 U.S. at 120 n.17. That makes the lower courts' focus on the scope of the prior search misplaced. Instead, the proper inquiry is whether the government can be certain that the portion of the device they are searching holds exclusively contraband.

On this view, the Sixth and Eleventh Circuits are closer to right than the Fifth and Seventh Circuits. The Fifth and Seventh Circuits' approach requires analogizing digital devices to the physical containers involved in *Walter* and *Jacobsen*. *Rann*, 689 F.3d at 836–37; *Runyan*, 275 F.3d at 464–65. But as this Court has recently noted, digital devices implicate greater privacy concerns than traditional physical containers. *Carpenter*, 138 S. Ct. at 2216–20; *Riley*, 573 U.S. at 392–98. Cell phones—and by extension computers—"differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Riley*, 573 U.S. at 393. Digital devices' "immense storage capacity," *id.*, means they contain vastly more private information than could ever be stored in a cardboard box, no matter how big, *Lichtenberger*, 768 F.3d at 488–89; Orin S. Kerr,

Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531, 556 (2005).

Because of those differences, the single-purpose container doctrine's "virtual certainty" approach applies differently to digital devices than to physical containers. When a private party views only some data on a digital device, that limited search will almost never provide a law-enforcement officer virtual certainty that the entire device "contain[s] nothing but contraband." *Jacobsen*, 466 U.S. at 120 n.17. To the contrary, it is highly likely that the device *will* contain "private, legal" data in addition to contraband. *Lichtenberger*, 768 F.3d at 488–89. In most cases, the most an officer can be certain about are the contents of specific files a private party has reviewed, identified, and described.

In some rare instances, even the Sixth and Eleventh Circuits' approach may allow searches that are too broad. Consider a case in which a private party thoroughly searches a digital device but does not tell the government about everything she found. In that case, the Sixth and Eleventh Circuits would still allow the government to duplicate the private party's full search, including the files the private party did not describe to the government. Under the single-purpose container doctrine, in contrast, the government would be limited to the files it was told about, since those are the only files about which it would have "virtual certainty." Properly understanding *Walter* and *Jacobsen* requires a focus on what government knows, not the mere fact that a third party has seen the information before.

Reading *Walter* and *Jacobsen* this way confirms that the Sixth and Eleventh Circuits have the better of the split, except for narrow circumstances that

rarely occur. It also ensures a coherent concept of Fourth Amendment privacy in a world where digital information is increasingly shared, sometimes involuntarily, with third parties. This Court's decisions in *Carpenter* and *Riley* have thoroughly explained why doctrines initially developed for physical containers do not apply in the same way to digital devices and data. *Carpenter*, 138 S. Ct. at 2216–20; *Riley*, 573 U.S. at 392–98. The same reasons apply equally to the private-search doctrine.

C. The Court can also resolve a split over how the private-search doctrine applies to homes

The courts of appeals are also divided over whether and how the private-search doctrine applies to the search of a residence. Although the facts of this case do not directly implicate this dispute, confirming the correct interpretation of *Walter* and *Jacobsen* cases would nonetheless resolve it once and for all.

1. This Court has long treated homes as uniquely private spaces requiring special Fourth Amendment protection. *E.g.*, *Florida v. Jardines*, 569 U.S. 1, 6–7 (2013); *Georgia v. Randolph*, 547 U.S. 103, 115 (2006); *Kyllo v. United States*, 533 U.S. 27, 37 (2001). The dispute is over how, if at all, that constrains the private-search doctrine's application to the home.

The Sixth and Ninth Circuits take the strongest approach, holding that the private-search doctrine can never apply to residential searches. In other words, in those circuits, the government may not search a home merely because the home was previously searched by a private citizen. *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009); *United States v. Williams*,

354 F.3d 497, 510 (6th Cir. 2003); *United States v. Allen*, 106 F.3d 695, 698–99 (6th Cir. 1997). The Eighth Circuit falls on the other extreme, holding that the private-search doctrine applies with full force to searches of a home. *United States v. Miller*, 152 F.3d 813, 816 (8th Cir. 1998).

The Fifth Circuit splits the difference. It takes a middle-ground approach, under which police cannot replicate a private search of a home unless the private search was reasonably foreseeable to the home's occupants. *United States v. Oliver*, 630 F.3d 397, 406–07 (5th Cir. 2011); *United States v. Paige*, 136 F.3d 1012, 1020 (5th Cir. 1998).

2. Correctly resolving the circuit split regarding digital devices will also eliminate this split. As *Walter* and *Jacobsen* demonstrate, replicating a prior private search without a warrant is only justified by virtual certainty of what the government will find. Here, the Sixth and Ninth Circuits' position is substantially correct. As with digital devices, law enforcement can essentially never be "virtually certain" that a home—which potentially holds huge amounts of personal property and information—"contain[s] nothing but contraband." *Jacobsen*, 466 U.S. at 120 n.17.

The contrary rule—allowing the government to search a home just because a private citizen has been there before—would violate the "widely shared social expectations" that drive this Court's home-search cases. *Randolph*, 547 U.S. at 111. No one expects that inviting one person into their home will open the door to nonconsensual entry by the public at large. If you invite a friend over for dinner one night, finding a stranger in your dining room the next night would still "inspire most of us to—well, call the police." *Jardines*,

569 U.S. at 9. The Sixth and Ninth Circuits' approach thus reflects both social expectations and Fourth Amendment principles in a way that the Eighth and even Fifth Circuits' approaches do not.

D. The Court can also resolve a split over how to apply the single-purpose container doctrine

Finally, the single-purpose container doctrine itself has long divided courts of appeals. Some circuits hold that the searching officer's certainty must turn solely on the container's inherent characteristics, while others hold that extrinsic information—in particular, the training and experience of the searching officer—may also be relevant. Once again, if *Walter* and *Jacobsen* are correctly understood as applying the single-purpose container exception, rather than announcing a separate private-search doctrine, this split disappears entirely.

1. The Fifth, Ninth, and Tenth Circuits have long held that a single-purpose container must be identifiable as such by an objectively reasonable layperson, without considering extrinsic information. *E.g.*, *United States v. Gust*, 405 F.3d 797, 803–04 (9th Cir. 2005); *United States v. Donnes*, 947 F.2d 1430, 1438 (10th Cir. 1991); *United States v. Villareal*, 963 F.2d 770, 776 (5th Cir. 1992).

The Fourth and Seventh Circuits, by contrast, have held that a single-purpose container should be identified from the viewpoint of the searching officer, taking into consideration all available facts and circumstances. *United States v. Davis*, 690 F.3d 226, 233–39 (4th Cir. 2012); *United States v. Cardona-Rivera*, 904 F.2d 1149, 1155 (7th Cir. 1990). The Fourth

Circuit has held that "the circumstances under which an officer finds the container may add to the apparent nature of its contents." *United States v. Williams*, 41 F.3d 192, 196–97 (4th Cir. 1994). Those circumstances include the training and experience of the searching officer. *Id.* at 197–98. And the Seventh Circuit has held that the single-purpose container inquiry involves assessing "the shape or other characteristics of the container, taken together with the circumstances in which it is seized." *Cardona-Rivera*, 904 F.2d at 1155.

2. Properly understood, *Jacobsen* vindicates the Fourth and Seventh Circuits' approach. The container in *Jacobsen* was "an ordinary cardboard box wrapped in brown paper," which on its own revealed nothing about its contents. *Jacobsen*, 466 U.S. at 111. But the Court held that the box could be searched without a warrant because *other* information—most importantly, what private parties had told federal agents about the box's contents—left no doubt that it contained nothing but drugs. *Jacobsen*, 466 U.S. at 120 & n.17.

As extended by *Jacobsen*, the single-purpose container doctrine allows for the consideration of extrinsic information other than the container's characteristics. That is the right result because "'virtual certainty' is a more meaningful indicator than visibility." *Brown*, 460 U.S. at 1515 n.5 (Stevens, J., concurring).

CONCLUSION

Because lower courts have developed a private-search doctrine that is inconsistent with the Fourth Amendment and not supported by this Court's case law, the Court should grant the petition for certiorari.

Respectfully submitted,

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