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

REPLY IN SUPPORT OF CERTIORARI

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The BIO's resort to evading the issues described in the petition—not even citing any of the conflicting cases or then-Judge Gorsuch's trespass analysis—only confirms the decision below warrants review.

1. The BIO evades the threshold issue of whether *Jacobsen* authorizes constitutionally-exempt searches of digital devices. *See* Pet. 14-21; Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 1, 10-12 (3rd ed. 2009) (advising that *Jacobsen* provides the requisite authority for "Searching and Seizing Computers Without a Warrant").[1] As the petition explained (pp. 14-15), this Court has repeatedly recognized the importance of revisiting its pre-digital

[1] *Available at* https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

Fourth Amendment precedent when lower courts resort to "mechanical application," *Riley v. California*, 573 U.S. 373, 386 (2014), or "uncritically extend" it to the digital era, *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018). The same attention is due where lower courts mechanically apply a 35-year-old precedent about a cardboard box to sanction government-directed, warrantless searches of digital devices. The BIO offers no reason why the analogy from cardboard box to digital device is any less "strained" and, indeed, is not one that "crumbles entirely" when one accounts for the capabilities of modern devices. *Riley*, 573 U.S. at 397; Pet. 15-17.

The BIO does not dispute the lower court conflict over the threshold question of whether *Jacobsen* sanctions warrantless device searches. It does not dispute that the North Carolina Supreme Court declined to extend *Jacobsen* to even a flash drive because "an officer cannot proceed with 'virtual certainty that nothing else of significance' is in the device" and, in contrast to a cardboard box, "there remains the potential for officers to learn any number and all manner of things 'that had not previously been learned during the private search.'" *State v. Terrell*, 831 S.E.2d 17, 25 (N.C. 2019) (quoting *Jacobsen*, 466 U.S. at 119-20). And the BIO does not dispute that several federal circuits have, like the majority below, applied *Jacobsen* to sustain digital searches by "[a]nalogizing digital media storage devices to containers." *Rann v. Atchison*, 689 F.3d 832, 836 (7th Cir. 2012) (endorsing *United States v. Runyan*, 275 F.3d 449 (5th Cir.

2001)). Indeed, Respondent never cites *any* of these cases.[2]

The conflict here is acknowledged. *See Terrell*, 831 S.E.2d at 24-25 (rejecting "the 'container approach'" applied in federal circuits); *id.* at 29, 35 (Newby J., dissenting) (arguing the majority should have adopted the federal circuits' "container analogy" instead of interpreting the "virtual certainty" requirement in a manner that "eliminates the private-search doctrine for electronic storage devices"). At least some judges have attributed the conflict to disagreement over the "pivotal test in *Jacobsen*"—namely, whether the requirement that law enforcement have an ex ante "virtual certainty" of what they will see precludes its application to modern digital devices, or whether the intrusion on digital devices is overlooked as a "search" provided the government shows ex post that it never "exceeded the scope of the private search." *Id.* at 28; *see also United States v. Chapman-Sexton*, 758 F. App'x 437, 453-54 & n.9 (6th Cir. 2018) (Bush, J., concurring) (concluding "the law is cloudy" because "courts have disagreed" over whether *Jacobsen* "requires an ex ante or an ex post analysis, or some combination of both").

Without any basis to dispute the conflict itself, the BIO spends its words on the underlying facts in *Chapman-Sexton*, wherein Judge Bush acknowledged *Jacobsen* leaves lower courts with conflicting guidance,

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[2] Just two weeks after Respondent filed its BIO, another circuit uncritically extended *Jacobsen* to permit the search of a cell phone provided there was an ex post showing that "the government intrusion goes no further than the private search." *United States v. Suellentrop*, No. 19-1002, __ F.3d __, 2020 WL 1467216, at *2 (8th Cir. Mar. 26, 2020).

but neither he nor the majority even applied the private search doctrine. *See* BIO 8-9.[3] The BIO then focuses on the various *second-order* conflicts that this Court would have to confront only if it affirms *Jacobsen*'s application to digital devices and ongoing validity more generally, and the BIO argues that this case does not present the opportunity to resolve *those* conflicts. BIO 10-11; *see* Pet. 26-28 (describing second-order disagreements that have arisen in applying *Jacobsen* to digital devices, including determination of the analogous "container," its application to different types of digital storage and cloud computing, and the precautions which must be taken in administering such searches); *see generally* Br. of Prof. McJunkin 11-19, 21-22 (describing splits in the lower courts, which would become moot if the Court resolves the threshold questions here in Petitioner's favor).[4] The BIO's sudden silence on the threshold conflict is particularly deafening given that Respondent explicitly invoked *Rann*, *Runyan*, and *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015), in asking the Pennsylvania Supreme Court to extend the private-search doctrine to "digital containers." *See* Br. of Appellee 18-19 (acknowledging that "the Supreme Court has not addressed the private search doctrine with respect to

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[3] The BIO itself describes *Chapman-Sexton* as "one of the cases that Shaffer references throughout his petition," BIO 8, apparently recognizing that it cherrypicked a case that was not implicated in the conflict, but merely noted the conflicting interpretations of *Jacobsen*.

[4] The BIO is correct that this case does not require the Court to resolve the litany of questions that have arisen upon extending *Jacobsen* to digital devices; it presents only the threshold questions presented in the petition.

digital containers" and urging the court to follow these circuits).

The BIO ignores that *Jacobsen* involved an ordinary cardboard box (never once mentioning that) and relied on the "virtual certainty" one can have upon reopening an analog box (never once mentioning that either). When it comes time to address the merits, Respondent says the private-search doctrine is "easily met" based on a one-sentence explanation: "The state supreme court concluded that police did not exceed the review conducted by CompuGig." BIO 8, 16. Fine, but the Court should grant review to determine whether that is the test that controls.

2. The BIO also provides no explanation why the Court should not clarify "the uncertain status of *Jacobsen* after *Jones*," *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016), never even acknowledging that the lower courts' dismissal of the property approach as "inapposite," "not responsive," and "inapplicable" to reasonable-expectations analysis conflicts with this Court's caselaw, Pet. 21-24 (explaining that *Jacobsen* "was explicitly and exclusively grounded in the reasonable-expectations test," which was "'*added to, not substituted for*,' the traditional property based understanding of the Fourth Amendment" (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013))). Perhaps most telling, Respondent does not even cite, let alone meaningfully distinguish, then-Judge Gorsuch's contrary opinion in *Ackerman*.

Respondent does not dispute that the government-directed search in this case required physical intrusion—its own witnesses recounted the technician "clicking around" on Petitioner's laptop at the officer's request. Pet. 22 (quoting Pet. App. 4a, R83A, R79A).

Yet the BIO gives the property-based approach the same back-of-the-hand treatment it received below, dismissing the argument as "unpersuasive" in a single sentence. *See* BIO 9-10 (echoing the Pennsylvania Supreme Court's observation that the government search in *Jones* did not involve an earlier search "conducted by a private individual" (quoting Pet. App. 38a n.14)).

As the petition noted, this Court has multiple times faulted parties for failing to preserve their rights under the property-based approach. Pet. 30. Here, it is undisputed Petitioner asserted the argument at every stage, urging courts to recognize both distinct tests, only to have the trespass approach twice dismissed as irrelevant in a footnote. The trial court, the one court that did consider the argument, acknowledged that failing to find a trespass on these facts directly conflicted with then-Judge Gorsuch's view in *Ackerman*. Pet. App. 100a.[5]

3. The BIO does not dispute that governments and courts resort to the private-search doctrine as a fallback with "somewhat surprising frequency," Andrew MacKie-Mason, *The Private Search Doctrine After Jones*, 126 YALE L.J. FORUM 326, 326 (2017), and, as DOJ advises, the circumstance in which "an individual leaves his computer with a repair technician" is the "common scenario" in which the government

[5] As noted, this case presents an even simpler record than *Ackerman* because it involves a physical intrusion, rather than a wholly virtual intrusion. *See Ackerman*, 831 F.3d at 1307 (confronting that additional complexity and concluding that even a virtual intrusion "pretty clearly" qualifies "as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment"); Pet. 29 n.23.

uses it. Department of Justice, *supra*, at 1, 11. As the amicus from civil liberties groups notes, this "common scenario" in which private persons are potentially exposing their devices to constitutionally exempt government intrusions is one that occurs on a staggering scale. *See* Br. of DKT Liberty Project et al. 11 (describing data from one device manufacturer that services 50,000 people per day, or 18 million per year).

Petitioner is not aware of any other general exception to the Fourth Amendment that has never actually been acknowledged as such by this Court. *See* Br. of Prof. McJunkin 11 (also noting "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"). Particularly given the numerous ad hoc limitations and complex second-order questions that have arisen in lower courts, *see* Pet. 25-28, as well as courts' repeated observation that they are left without "definitive guidance from the Supreme Court," *Runyan*, 275 F.3d at 461, this Court's attention is required.

4. Respondents do not contest that both issues have been preserved for review, that the court below ruled on both issues, or that the private-search doctrine was the sole basis for the decision below. Pet. 28-29.

The BIO also accepts the essential facts. It concedes that following the technician's initial private search during the repair, "Officer Maloney directed the CompuGig employee to open the computer files and display the images that [he] had discovered," BIO 3, thus presenting the question of whether the government had lawful authority to order the warrantless search of Petitioner's laptop. And the BIO accepts that

this government-directed search required the physical intrusion of clicking around on Petitioner's computer, presenting the question of whether the trespass approach has continuing vitality in this context. Pet. 22.

The BIO makes two vehicle arguments and neither is persuasive. First, it repeats its alternative justification that Petitioner abandoned any expectation of privacy by consenting to the repair of his laptop. BIO 15-16. This argument was rejected in all forms by all but one judge below, *see* Pet. 10, and Respondent does not suggest that the issue satisfies the criteria for certiorari so as to warrant this Court's consideration. It thus poses no meaningful impediment to review, nor do the usual alternative arguments of harmless error or good faith, neither of which were ever asserted or addressed below.

Second, the BIO says this case has "significant vehicle problems" because the Pennsylvania Supreme Court accepted Respondent's private-search argument even though Respondent had not advanced it earlier in the litigation. BIO 12. Respondent faults *Petitioner* for "not rais[ing]" the government's private-search justification sooner, BIO i, and resorts to the *dissenting* criticism that the majority was too quick to apply the private-search doctrine when "the record was not developed to address" it, BIO 1, 7, 14-15. Setting aside the irony of this argument, it is a complete red herring. Irrespective of dissenting views that this record did not support application of the private-search doctrine, Respondents successfully persuaded a majority of the Pennsylvania Supreme Court to disagree and hold that the private-search doctrine "easily" applied to the search of Petitioner's laptop. Pet.

App. 32a. That is the decision under review. Moreover, uncritical resort to the private-search doctrine to uphold otherwise unconstitutional searches is part of the problem, not a basis to insulate from review.

Aside from a vague assertion that this case has "vehicle problems," Respondent never specifies what additional factual development would be needed to review the majority's holding that *Jacobsen* applies to digital devices and that the trespass test is inapplicable. BIO 15. In fact, Respondent belies its own argument just one page later when it claims that the Court can conclude "[t]he private search doctrine was met" based on a single fact—that "[t]he state supreme court concluded that police did not exceed the review conducted by CompuGig." BIO 16-17. Petitioner does not challenge the state supreme court's finding regarding the scope of the search, but Respondents' analysis confirms that this case squarely presents the question of whether that test governs.

The arguments on both sides of these issues have been fully aired in multiple fractured decisions, including *Terrell* and the 72-page split-decision below, *see* Pet App. 1a-72a, as well as by then-Judge Gorsuch's opinion in *Ackerman*. In fact, the questions presented have even given rise to a large body of scholarship. *See* Pet. v-vi (collecting law review articles and other authorities).[6] Moreover, as the petition explained, this Court has already recognized *Jacobsen*'s

[6] Upon *Terrell*'s creation of the threshold conflict, one leading scholar expressed his view that this Court "may take on this issue soon" and he would not "be surprised" if it granted that case to address *Jacobsen*'s scope and the validity of then-Judge Gorsuch's views in *Ackerman*. Orin S. Kerr, *North Carolina Court*

invalidity, in part, under the trespass approach. *See* Pet. 30-31.

The Court should intervene and provide lower courts with definitive guidance on these two important questions.

CONCLUSION

For these reasons and those in the petition, the Court should grant certiorari.

Respectfully submitted,

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Deepens Split on Private Searches of Digital Evidence, THE VOLOKH CONSPIRACY, Aug. 23, 2019, https://reason.com/2019/08/23/north-carolina-court-deepens-split-on-private-searches-of-digital-evidence/. No certiorari petition was filed in *Terrell*, and this case presents a more suitable vehicle because the court below considered and rejected application of the Fourth Amendment under both tests. *See* Pet. 28-29.