No. 20-____

IN THE
Supreme Court of the United States

WILLIAM J. MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Applying the Fourth Amendment's reasonable-expectations test, this Court has held that when a private actor searches someone's property, the Government can then do it too. *See United States v. Jacobsen*, 466 U.S. 109 (1984). The Court reasoned that the private actor's earlier intrusion means the Government "infringe[s] no legitimate expectation of privacy" by taking its own look. *Id*. at 120.

That reasonable-expectations approach is one way to determine if a "search" has occurred. It was "'*added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (emphasis in original) (quoting *United States v. Jones*, 565 U.S. 400, 406 (2012)). Under the property-based approach, a search "has undoubtedly occurred" if "the Government obtains information by physically intruding on persons, houses, papers, or effects." *Id*.

Here, Google ran a proprietary algorithm that flagged possible contraband in petitioner's Gmail account. Under federal law, Google was compelled to send petitioner's private correspondence for examination by the Government. Upon receiving the files compelled from petitioner's private email account, law enforcement opened them without a warrant. The question is:

Whether *Jacobsen*'s reasonable-expectations conclusion "does not permit" courts to consider the traditional property approach, Pet. App. 35a, or whether the property-based approach applies and the government "conducted a 'search' when it opened and examined" petitioner's email attachments, *United States v. Ackerman*, 831 F.3d 1292, 1308 (10th Cir. 2016).

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William J. Miller petitions for a writ of certiorari to review the Sixth Circuit's judgment in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-51a) is published at 982 F.3d 412. The district court's opinion (Pet. App. 52a-72a) is unpublished, but available at 2017 WL 2705963. The magistrate judge's opinion (Pet. App. 73a-106a) is unpublished, but available at 2017 WL 9325815.

JURISDICTION

The Sixth Circuit's judgment was entered on December 3, 2020. This Court's March 19, 2020 order extended the time to file a petition for certiorari to 150 days, making this petition due on May 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> 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. IV.

INTRODUCTION

Nearly a decade ago, this Court reinvigorated the property-based understanding of the Fourth Amendment. The Court made clear the reasonable-expectations test is just one way to determine whether a government's intrusion is a "search." *United States v. Jones*, 565 U.S. 400, 409 (2012). That test was "*added to*, not *substituted for*, the common-law trespassory test." *Id.*

To ensure that revival of the trespass test remains a source of protection, not a source of constitutional confusion, it falls on this Court to explain its impact on certain pre-existing precedent. The Court has recognized one important "virtue" of its doing so: the trespass test "keeps easy cases easy." *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

This is one of those times. Email is one of the predominant methods of private correspondence today, and the government's warrantless search of it poses "exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment." *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016). While in parts of this country that trespass "cannot" be ignored, *id.*, in other parts the trespass is simply "[n]o matter," Pet. App. 36a. By the very terms of the decision below, the court did not feel free to afford petitioner the full extent of his constitutional right. Instead, the bottom line of reasonable-expection precedent "d[id] not permit [it] to consider" whether petitioner's Fourth Amendment rights were violated under the trespass approach. Pet. App. 35a.

This case thus presents an important opportunity to provide guidance about how the trespass approach applies to virtual correspondence. Given the ubiquity of private email communication in every day life, permitting the government to compel and then search it without a warrant is intolerable and merits urgent attention.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. Google uses a proprietary "hashing" algorithm to scan emails and other documents stored in its cloud services. Pet. App. 53a. The hashing technology works by searching for information that Google believes may be contraband by using a "digital fingerprint." *Id*. Provided that "at least one Google Employee" has viewed an image and flagged it as contraband, Google assigns the image a unique digital fingerprint ("hash") that is then used to detect if someone uploads a similar image to Google's services. Pet. App. 53a-54a. Google does this by comparing the hash for images flagged as contraband with images uploaded to its services. If the hash value of a received or emailed file matches one that a Google employee has previously flagged, Google considers it to be apparent child pornography. Google then forwards the file to National Center for Missing and Exploited Children (NCMEC), as it is statutorily required to do, and NCMEC forwards it to law enforcement, as it is statutorily required to do. Pet. App. 54a; *see* 18 U.S.C. § 2258A(a), (c).

On July 9, 2015, an individual using the Gmail account miller694u@gmail.com uploaded two images to an email that were flagged by Google's proprietary algorithm, matching the hash values of images that a

Google employee had previously categorized as child pornography. Pet. App. 52a-53a. Without reviewing the images, Google generated an "automatic" report to NCMEC. Pet. App. 54a. The report included the two image files, the file names, the email address used, and the user's IP address. *Id.*

When NCMEC received Google's report, it did not open the images. *Id.* Instead, it attempted to locate the geographic location of the user by searching for publicly-available social media profiles associated with the email address and by using the user's IP address. Pet. App. 54a-55a. NCMEC determined the IP address was associated with a Time Warner Cable account "having a potential geographic location" of Fort Mitchell, Kentucky. Pet. App. 55a. Based on this information, NCMEC forwarded the report and files to both the Kentucky State Police and the Kenton County Police Department. *Id.*; 18 U.S.C. § 2258A(c).

Kenton County Police Detective Aaron Schihl received the report and opened the files without a warrant. Pet. App. 55a. He confirmed the images to be child pornography, and subsequently obtained a search warrant for the contents of the email account in question. *Id.* After reviewing the contents of the account, the detective obtained search warrants for petitioner's home and electronic devices. *Id.*

Petitioner was indicted for knowingly receiving, distributing, or possessing child pornography, in violation of 18 U.S.C. §§ 2252(a)(2), 2252(a)(4)(B). Pet. App. 10a.

2. Petitioner moved to suppress the contents of the email account and attachments. Pet. App. 55a. In his motion, petitioner argued that law enforcement's

opening of his private email attachments constituted "a search pursuant to traditional trespass doctrine," and thus that the police had conducted an unwarranted search. Pet. App. 56a, 70a.

The district court denied petitioner's motion. It rejected petitioner's argument "that Detective Schihl's search 'was illegal when viewed through the lens of the traditional trespass test.'" Pet. App. 70a. The court concluded that its earlier analysis under *Jacobsen* controlled: no search occurred "because the matching hash values indicate that Google has previously viewed them." *Id.* According to the district court, "the 'traditional trespass' test does not apply when the government action is within the scope of a previous private search." Pet. App. 71a.

Petitioner was convicted and sentenced to 12.5 years in prison.

3. On appeal, petitioner again pressed both *Jacobsen*'s reasonable-expectations test and the traditional property-based approach. Pet. App. 21a. As to the latter theory, he argued that "[t]he Fourth Amendment provides the same protection against governmental invasions that the common law did at the time of the founding," and that "Detective Schihl's actions constituted a search because his opening of the email attachments involved a 'physical intrusion (a trespass) on a constitutionally protected space or thing ("persons, houses, papers, and effect") for the purpose of obtaining information.'" Appellant's Opening Br. 10-11. Petitioner explained that "[i]mportantly, the private search doctrine is a limitation on [the reasonable-expectations theory], not the traditional trespass inquiry." *Id.* at 11-12. Thus, "regardless of how [the

Sixth Circuit] views the [government's] argument regarding the private search doctrine, [petitioner's] motion to suppress should have been granted." *Id.* at 12; *see also* Appellant's Reply Br. 2 ("One of the foundational arguments asserted in [petitioner's] opening brief was that the traditional trespass inquiry is not limited by the private search doctrine.").

The Sixth Circuit affirmed. The court first applied the reasonable-expectations approach in *Jacobsen*. It concluded that "*Jacobsen* controls this case" because the government's opening of petitioner's email attachments did not exceed the scope of Google's search. Pet. App. 23a-32a.

Turning to trespass, the court acknowledged that "the invasion of a 'reasonable expectation of privacy' is not the only way to define a Fourth Amendment 'search.'" Pet. App. 32a. The court recognized that petitioner had explicitly advanced the property-based approach as an "alternative theory." *Id.*

The court posited that "[p]erhaps *Jacobsen* should not control," noting the "obvious analogy" between the search of email attachments and trespass to chattels at the founding. Pet. App. 32a-33a. It concluded, however, that it did not "matter how this case should be resolved under a trespass approach" because the bottom line of *Jacobsen* controlled even if it was grounded exclusively in the reasonable-expectations approach. Pet. App. 36a. In the Sixth Circuit's view, "*Jacobsen* does not permit [courts] to consider this subject further" and so they "must follow *Jacobsen*'s legal rule." Pet. App. 35a-36a; Pet. App. 4a (concluding that the Court "need not resolve this debate" because it was "bound by *Jacobsen* no matter how this emerging line of authority would resolve things").

REASONS FOR GRANTING THE PETITION

I. This Court Should Summarily Reverse, Directing The Sixth Circuit To Consider The Full Scope Of Petitioner's Fourth Amendment Right.

This Court unambiguously instructed courts that the property-based approach is an independent basis for determining whether a "search" has occurred. The Court has emphasized: the "reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (emphasis in original) (quoting *United States v. Jones*, 565 U.S. 400, 409 (2012)). Therefore, "Fourth Amendment rights do not rise or fall with the [reasonable-expectations] formulation." *Jones*, 565 U.S. at 405-06; *see also United States v. Jones*, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (noting that the Supreme Court has "thoroughly explained" it "has not retreated from the principle that the Fourth Amendment also protects property interests").

The decision below flouts that "thoroughly explained" mandate. The Sixth Circuit recognized that *Jacobsen* was premised exclusively on the reasonable-expectations test—that this Court held "the agent's conduct 'infringed no legitimate expectation of privacy.'" Pet. App. 24a; *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (considering only whether the government's conduct infringed "an expectation of privacy that society is prepared to consider reasonable"). And the Sixth Circuit also acknowledged that the reasonable-expectations ap-

proach "is not the only way to define a Fourth Amendment 'search.'" Pet. App. 32a. It even posed the relevant question: "How might *Jones*'s property-based approach apply here?" Pet. App. 33a. Yet when it came time to actually answer that question, the court refused, concluding it was "not permit[ted]" to do so and was bound to "follow *Jacobsen*'s legal rule." Pet. App. 35a-36a. This conclusion that the reasonable-expectations analysis forecloses consideration of petitioner's trespass argument directly contradicts this Court's unequivocal instruction that the tests provide independent bases for determining whether a "search" has occurred.

On other occasions, this Court has held petitioners accountable when they have failed to preserve the property-based test as an independent theory. *E.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1526-27 (2018); *see also Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) (explaining litigants have had "fair notice since at least [2012] that arguments like these may vindicate Fourth Amendment interests even where [reasonable-expectation] arguments do not," yet "forfeited [them] by failing to preserve them"). When defendants repeatedly assert the full extent of their constitutional right under the trespass test, and lower courts refuse to afford it any significance, this Court ought to hold courts accountable too. As Justice Gorsuch observed, it does "not serve the development of a sound or fully protective Fourth Amendment jurisprudence" when trespass arguments are left unmade by litigants. *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting). The same can be said when trespass test arguments are made at

length to lower courts, but then discarded in light of reasonable-expectations precedent.

Petitioner was entitled to have the court consider the full scope of his Fourth Amendment right to be free from unlawful searches, not some subset of it. The Court should thus summarily reverse, instructing the lower court to consider and resolve petitioner's trespass argument.

II. Alternatively, The Court Should Grant Review To Resolve The "Uncertain Status Of *Jacobsen* After *Jones*."

A. The Sixth Circuit Was Wrong.

As set forth above, the Sixth Circuit's decision conflicts with this Court's caselaw by declining to consider petitioner's trespass argument. It was insufficient for the Sixth Circuit to muse that petitioner's trespass argument was "obvious" but could "encounter[] trouble," and then to simply decline to answer the question based on *Jacobsen*'s reasonable-expectations analysis. Pet. App. 33a-36a.

This is a perfect example in which the trespass approach "keeps easy cases easy." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). Then-Judge Gorsuch made this clear when confronted with a very similar case in *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016). There, the government invoked the private-search doctrine after searching the defendant's email and attachments, arguing that a private actor (AOL) had already searched the defendant's email and one of the attachments. Then-Judge Gorsuch, writing for a unanimous panel, explained both the relationship between *Jones* and *Jacobsen*, and the application of

Jones to email searches. In contrast to the Sixth Circuit's view that "*Jacobsen* does not permit" consideration of the whole Fourth Amendment inquiry, Pet. App. 35a, the Tenth Circuit said it "cannot see how [it] might ignore *Jones*'s potential impact," *Ackerman*, 831 F.3d at 1307.

The Tenth Circuit explained first that *Jacobsen*'s reasonable-expectations analysis "is but one way to determine if a constitutionally qualifying 'search' has taken place." *Id.* Because *Jacobsen* considered only the reasonable-expectations test, the Tenth Circuit concluded it was "at least possible [this] Court today would find that a 'search' *did* take place" in that case under the trespass approach. *Id.*

Then-Judge Gorsuch went on to confront the question presented here. He explained that "the warrantless opening and examination of (presumptively) private correspondence" is conduct that "pretty clearly" qualified "as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment." *Id.* (citing 19th century authorities). Moreover, although "the framers were concerned with the protection of physical rather than virtual correspondence," it was "hard to imagine" a "more obvious analogy from principle to new technology." *Id.* at 1308 (collecting cases that "have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications"). Thus, viewed "through the lens of the traditional trespass test suggested by *Jones*," the warrantless opening of emails and attachments was a "search." *Id.*

The Sixth Circuit was mistaken when it expressed that the "property-based approach encounters trouble when we consider *who* committed any trespass." Pet.

App. 34a. Whether Google "engaged in [a] trespass" is beside the point: It was never a defense to common-law trespass to say that *someone else* had trespassed too. *See* Andrew MacKie-Mason, *The Private Search Doctrine After Jones*, 126 YALE L.J. FORUM 326, 327 (2017) ("A prior private search may destroy a person's expectation of privacy, but it does not change whether the police trespassed on a constitutionally protected area in order to obtain information.").

The Sixth Circuit was wrong to disregard the property-based approach, and to look past its "obvious" application, Pet. App. 33a, which "keeps easy cases easy." *Jardines*, 569 U.S. at 11.

B. This Issue Is Of Urgent Importance.

The warrantless government search of emails is an urgent issue. While the analogy from electronic communications to written ones is "obvious," it is also true that modern day email is used to store private information at a scale that could never have been imagined. Google, for instance, offers any customer 15 gigabytes of storage for free, and *terabytes* of storage for a relatively small cost—communications that, if written, would fit not in a mail box but a skyscraper.[1] *See Riley v. California*, 573 U.S. 373, 394 (2014) (observing that "[s]ixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos."). On top of that, many modern email services, including Google, default to archival, not deletion, of

[1] *Storage FAQs*, GOOGLE ONE, https://one.google.com/faq/storage.

email, such that they store not just a few pieces of correspondence or even just recent correspondence, but a user's full history of private correspondence.[2]

This particular context reveals the massive scale of warrantless email searches. NCMEC alone received more than 16.9 million CyberTipline reports in 2019 containing 69.1 million files.[3]

Moreover, no principle limits the government's authority to trespass on emails to child pornography. Under the government's theory, it can compel any private correspondence from a service provider and, provided the service provider looks at the file before sending it (even just algorithmically), the government is free to examine the private correspondence, too. Google, for instance, uses digital fingerprint hashing to identify other kinds of content on its services, such as copyright violations.[4] Could the government compel Google to send private emails containing copyrighted news articles, images, or videos to the government for examination and prosecution? *See* 17 U.S.C. § 506(a) (criminal copyright infringement). Could the government compel Google to forward any emails containing pictures of a firearm to law enforcement for warrantless examination, too? According to the decision below, yes. Provided the government could point

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[2] *Archive or mute Gmail messages*, GMAIL, https://support.google.com/mail/answer/6576.

[3] *Exploited Children Statistics*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, https://www.missingkids.org/footer/media/keyfacts
#exploitedchildrenstatistics.

[4] *How Content ID works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en.

to Google or any other private person who had previously looked at the email, even algorithmically, the government can compel the email and take a look without even implicating the Fourth Amendment.[5]

C. There Are No Vehicle Issues.

Petitioner urged the trespass approach at every stage. *See supra*. Both the district court and Sixth Circuit acknowledged his argument, but refused to consider it based on *Jacobsen*'s reasonable-expectations rationale. *See* Pet. App. 71a (holding that "the 'traditional trespass' test does not apply when the government action is within the scope of a previous private search"); Pet. App. 4a, 32a (acknowledging petitioner "asks us to find that Detective Schihl engaged in a search under [the trespass] theory," but concluding it did "no[t] matter how this emerging line of authority would resolve things" in light of *Jacobsen*).

The government did not advance any alternative bases for affirmance in the Sixth Circuit; it argued only *Jacobsen* and no trespass. Appellee Br. 13-22. It

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[5] That *Jacobsen*, a 1984 case about looking in a cardboard box, would sustain mass warrantless email searches is itself concerning, particularly as *Jacobsen* never addressed the trespass question at issue here. Indeed, even on its own terms, *Jacobsen*'s constitutional analysis has been described as "less than perfect" by the leading Fourth Amendment treatise, which also "doubt[s] whether *Jacobsen* was rightly decided" in the first place. Wayne R. LaFave, 1 SEARCH & SEIZURE § 1.8(b) (6th ed. 2020). Other scholars accuse *Jacobsen* of creating "one of the most convoluted" areas of Fourth Amendment law. Ben A. McJunkin, *The Private-Search Doctrine Does Not Exist*, 2018 WIS. L. REV. 971, 972-73 (2018).

did not assert any other justification for the warrantless opening of petitioner's files, nor did it assert the good-faith doctrine.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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