No. 20-1202

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

REPLY IN SUPPORT OF CERTIORARI

ERIC G. ECKES
PINALES STACHLER YOUNG
& BURRELL
455 Delta Ave., Ste. 105
Cincinnati, Ohio

AMIR H. ALI
Counsel of Record
DAMILOLA G. AROWOLAJU
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

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
United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF CERTIORARI

Well, we have confirmed this one is important. According to the Federal Government, any time it compels emails that a provider has at some point seen in its systems, even just with "digital eyes," the Fourth Amendment—and therefore courts—have *no role to play* when the Government wants to take its own look at the emails. That is a sweeping encroachment on the Constitution and judicial review.

The BIO all but concedes summary reversal is appropriate, never addressing—let alone justifying—the Sixth Circuit's holding that there was no search "*[n]o matter how this case should be resolved under a trespass approach*." Pet. App. 36 (emphasis added). And the Government's challenge to plenary review relies principally on assertion of the good-faith exception—which was neither addressed nor raised in the Sixth Circuit and is frequently rejected as a vehicle issue.

I. The Government All But Confirms Summary Reversal Is Appropriate.

The petition argued summarily reversal is proper because the Sixth Circuit refused to adjudicate the merits of petitioner's property-based argument. Pet. 8-10. The Sixth Circuit's conclusion that it could affirm "*[n]o matter how this case should be resolved under a trespass approach*," Pet. App. 36a (emphasis added), conflicts with this Court's clear instruction that the trespass approach is an independent basis to determine whether a "search" occurred, *United States v. Jones*, 565 U.S. 400, 409 (2012).

The Government does not dispute that summary reversal is appropriate if the Sixth Circuit, in fact, refused to adjudicate the trespass approach. The Government's sole argument against summary reversal is that the Sixth Circuit *did* resolve the application of the property-based approach. BIO 14; *see also* BIO 6 (representing that the Sixth Circuit "determined that the officer's review of the images would not be an unlawful 'search' under a 'trespass approach'"). In support, the Government points to the part of the Sixth Circuit's opinion where it asks, "How might *Jones*'s property-based approach apply here?" and lays out potential arguments on both sides—*i.e.*, the reasons why it seems "obvious" the property-based approach is satisfied and ways the property-based approach "encounters trouble." Pet. App. 33a-35a; BIO 14. In that summary, the Sixth Circuit observes that the exclusion private conduct from the Fourth Amendment "precedes the expectation-of-privacy test applied in *Jacobsen* by decades" and this was consistent with "the earlier common-law trespass approach." Pet. App. 34a-35a. According to the court, one could somehow build

from that premise to argue that "the government's later review" of the previously trespassed property "might not be considered a search." Pet. App. 35a.

The Government's suggestion that the Sixth Circuit thereby resolved the merits of the trespass approach not pass the straight-face test. *The very next paragraph* following this summary of the arguments on both sides begins: "At day's end, *Jacobsen does not permit us to consider this subject further*." *Id.* (emphasis added). The Government does not attempt to reconcile this language with its position. It never even cites the language, even though it is right in the QP. Pet. i.

If one still had any doubt whether the Sixth Circuit "determined" the application of the trespass test, BIO 6, the Sixth Circuit tells you again just a few sentences later: Its ruling is taking place "*[n]o matter how this case should be resolved under a trespass approach*." Pet. App. 36 (emphasis added). The Government apparently forgot to reconcile its position with that language, too, even though it is quoted right in the petition's introduction. Pet. 3.

Still think the Sixth Circuit actually resolved application of the trespass approach? Go back to the top of the opinion, where it forewarns that it "need not resolve" whether a "search" occurred under that approach. Pet. App. 4a. And once more: "We find ourselves bound by *Jacobsen no matter how this emerging line of authority would resolve things*." *Id*. (emphasis added).

The Government does not dispute that petitioner asserted the property-based test at every stage. *See*

Pet. 5-7. He was entitled to have the judiciary adjudicate the full scope of the Fourth Amendment right, not some subset of it. If the Court does not grant plenary review, it should summarily reverse for resolution of the trespass test.

II. The Court Should Grant Certiorari.

A. The Sixth Circuit Was Wrong.

Tellingly, when it comes time for the BIO's argument on the merits, it does not even attempt to argue that *Jacobsen* determined the application of the trespass approach (*i.e.*, it does not go near the view that it attributes to the court of appeals). BIO 10-11. That is because *Jacobsen* explicitly held only that the search in question "infringed no legitimate expectation of privacy." *United States v. Jacobsen*, 466 U.S. 109, 120 (1984). The Government also never defends the Sixth Circuit's hypothesis that "Google might be the one that engaged in the trespass" and this somehow means that "the government's later review * * * might not be considered a search." Pet. App. 35a; *see* Pet. 11-12 (explaining why this reasoning makes little sense); Amicus Br. of Restore the Fourth 4-5 (same).

The Government raises two other unconvincing arguments. First, it says that *Jones* sets forth a "*physical*-trespass analysis" that offers no protection to email. BIO 10-11 (emphasis in original). But why? If the Fourth Amendment's protection can be applied to the undercarriage of a Jeep (which did not exist when the Fourth Amendment was adopted),[1] to a thermal

[1] *Jones*, 565 U.S. 400.

heat imager (also did not exist),[2] and to cell-site location information (also did not exist),[3] then it is utterly unremarkable to analogize ordinary mail, *Ex parte Jackson*, 96 U.S. 727, 732-33 (1877), to electronic mail. "[A] more obvious analogy from principle to new technology is hard to imagine." *United States v. Ackerman*, 831 F.3d 1292, 1308 (10th Cir. 2016).

Second, the Government says that compelling and opening petitioner's files was not a trespass because *Google* had authority to search for and "send the files to NCMEC" and *NCMEC* had "authority to send the files to the police." BIO 11. According to the Government, this means petitioner never had a property interest in his private emails in the first place. That is very wrong. Entrusting property to someone else has never been understood to provide the Government a license to compel and search the property too. In *Ex parte Jackson*, for instance, this Court held that sealed letters entrusted to the post office are "as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." 96 U.S. at 733. And there, the letters were not entrusted to just *any* third party, they were entrusted directly to *the government*. The Court nonetheless held that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." *Id.*; *see also* Amicus Br. of Restore the Fourth 5-7. This is not rocket science: One can entrust a

---

[2] *Kyllo v. United States*, 533 U.S. 27 (2001).

[3] *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

friend with the authority to drive, store, search, and even sell his car; that does not grant the Government a free pass to compel and search the car too.

Indeed, it is quite contrived for the Government to suggest that Google and NCMEC simply exercised some delegated authority to send petitioner's files over to law enforcement. The Government does not dispute that Google was *compelled* to send the files, facing penalties of up to $300,000 per violation, 18 U.S.C. § 2258A(e) (2008), the Government even granted it civil immunity from petitioner for doing so, *id*. § 2258B(a) (2008). And NCMEC is statutorily required to forward any files it receives to law enforcement. *Id*. § 2258A(c) (2008).

The Tenth Circuit was correct when it said it "cannot see how [one] might ignore *Jones*'s potential impact." *Ackerman*, 831 F.3d at 1307. The "warrantless opening and examination of (presumptively) private correspondence" is an act 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*.

The Government attempts to nullify the Tenth Circuit's trespass analysis in the same way the Sixth Circuit did. It says that the Tenth Circuit would not have found trespass if the officers had replicated the service provider's search "without exceeding its scope." BIO 13-14; *see also* Pet. App. 36a. To be sure, the Tenth Circuit found that law enforcement violated even *Jacobsen*'s reasonable-expectations-based test because it had exceeded the scope of the private search. *Ackerman*, 831 F.3d at 1305-06. But the Court also then separately held that a "search" occurred "through the lens of the traditional trespass test suggested by

Jones." *Id*. at 1308. That analysis never depended on, or even mentioned, the scope of the earlier private search (and that would make no sense). *Id*. at 1307-08. Indeed, if the Tenth Circuit's trespass conclusion turned on whether law enforcement exceeded the scope of the provider's search, it would render the Court's trespass analysis meaningless and completely redundant of its earlier *Jacobsen* analysis (which turns on that same test). That makes a mockery of the court's statement that it "cannot" ignore the impact of the trespass test on *Jacobsen*. *Id*. at 1307.[4]

B. This Issue Is Of Urgent Importance.

The BIO only reinforces the urgency of this case. The petition explained the vast scale of private email correspondence, both in terms of its ubiquity in everyday personal and business communication and the immense archival of emails by modern email providers. Pet. 12-13. This is a magnitude that the Framers, writing with quill pens, truly could not have imagined. Amicus Br. of DKT Liberty Project et al. 6-11 (describing the essential nature of email correspondence and its incredible magnitude in comparison to written mail).

The BIO does not contest this. It also does not dispute that no principle would limit its compelled, warrantless email searches to child pornography. By its own terms, the Federal Government believes that any

---

[4] The Government does not contest that *Ackerman*'s trespass analysis is binding Tenth Circuit precedent. *See, e.g., Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008) ("Alternative rationales such as this, providing as they do further grounds for the Court's disposition, ordinarily cannot be written off as *dicta*.").

time it compels information that an email service provider has previously searched for in its systems—even just with "digital eyes"—the Fourth Amendment has *nothing* to say when the Government wants to take its own look. BIO 5-6, 9-11.

That is a grand assumption of power. For instance, according to that theory, the government could compel an email provider to forward to the Government all emails with pictures, music, or video that are "apparent" violations of federal copyright law. Or the Government could compel an email provider to forward all emails detected to contain other categories of images deemed to be of interest to the Government (ex. someone holding a firearm). Private email providers might monitor and search correspondence in their systems for all sorts of purposes, including for violations of their terms of service, to improve their platform, or to produce targeted advertisements. The idea that these algorithms expose all that correspondence to warrantless Government inspection is draconian.

C. The Government's Vehicle Issue Is Weak And Commonly Rejected.

The Government does not contest that petitioner argued the trespass approach at every stage. Pet. 5-7. And the Government does not contest that each court below acknowledged and rejected petitioner's trespass argument, relying on *Jacobsen*. Pet. 6-7, 14. The question presented is squarely presented.

The only vehicle issue the Government throws out there is weak and frequently rejected. The Government claims it will ultimately succeed in arguing the good-faith exception to the exclusionary rule. BIO 15. This is a vehicle problem, it says, because appellate

courts "have discretion to affirm on any ground." *Id.* Very underwhelming.

The Government does not contest that the court of appeals never addressed the good-faith exception (the district court did not either). Indeed, the Government concedes it *never even raised the issue of the exclusionary rule or the good-faith exception* to the Sixth Circuit. *See* Pet. 14-15; BIO 15. The notion that the QP is hindered by an argument that was neither addressed nor even raised in the court below is silly.

To be sure, no one doubts that a motion to suppress the fruits of a search implicates three questions: Proving the Fourth Amendment violation requires a court to ask (i) whether there was a "search," (ii) whether that search was "unreasonable." U.S. CONST. amend IV. And even if the Fourth Amendment was violated, courts still ask (iii) whether the violation warrants exclusion. *E.g.*, *Herring v. United States*, 555 U.S. 135, 140-41 (2009). But this Court frequently grants certiorari to review only the threshold question of whether a "search" occurred. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018) ("This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements."); *Florida v. Jardines*, 569 U.S. 1, 3 (2013) ("We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment."); *United States v. Jones*, 565 U.S. 400, 402 (2012) ("We decide whether the attachment of a Global–Positioning–System (GPS) tracking device to

an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment."); *Kyllo v. United States*, 533 U.S. 27, 29 (2001) ("This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment.").

And the Court grants certiorari even when government BIOs assert alternative arguments about reasonableness or the exclusionary rule. In fact, the Government tried to invoke the same exception as here (good faith) to defeat certiorari in the last major case considering whether use of technology was a "search," and the Court did not buy it. *See* BIO 10, *Carpenter*, 138 S. Ct. 2206 (2018) (No. 16-402), 2017 WL 411305 (contending the case would be "an unsuitable vehicle" because the district court and a circuit judge concluded that the good-faith exception applied), *cert. granted* 137 S. Ct. 2211 (2017).

Even when the Government has a convincing good-faith argument available, it is not a reason to deny certiorari. If it did, the Government's compelled, warrantless search of emails would effectively be insulated from appellate review. *Cf. Davis v. United States*, 564 U.S. 229, 247 (2011) ("[T]he good-faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents."); *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2010) ("The doctrine of good-faith reliance should not be a perpetual shield against the consequences of constitutional violations," and give the Government

"*carte blanche* to violate constitutionally protected privacy rights"). Several of the Court's recent cases resolved Fourth Amendment issues and left it for lower courts to adjudicate the good-faith exception, including successful invocations of that exception. *E.g.*, *United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019) (considering and applying good-faith exception following remand on remand from this Court); *Collins v. Virginia*, 824 S.E.2d 485, 496 (Va. 2019) (same); *United States v. Rodriguez*, 799 F.3d 1222, 1223-24 (8th Cir. 2015) (same).

In any event, it is not surprising the Government never asserted this good-faith argument before the court of appeal. It's a bad argument. The good-faith exception applies when an officer conducts a search while relying on some independent authority later discovered to be unlawful or inaccurate, such as a "subsequently invalidated search warrant," "a statute later declared unconstitutional," "a mistake made by a judicial employee," or some, but not all, "recordkeeping errors by the police." *Herring*, 555 U.S. at 142, 146. It is undisputed that law enforcement had no warrant when it opened petitioner's computer files and that no statute purported to authorize warrantless search of the files. Accordingly, the Government's good-faith argument depends on a strained and novel theory: It says that when state courts *later* issued search warrants based on the contents of the files, law enforcement could *retroactively* "rely on those judicial determinations" for his good faith. BIO 16. That's far-fetched, not something this Court has ever endorsed, and certainly not a sound basis to deny certiorari on

the Fourth Amendment issue that was actually decided below.[5]

CONCLUSION

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

Respectfully submitted,

ERIC G. ECKES
PINALES STACHLER YOUNG
& BURRELL
455 Delta Ave., Ste. 105
Cincinnati, Ohio

AMIR H. ALI
Counsel of Record
DAMILOLA G. AROWOLAJU
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

JUNE 2021

[5] More telling than the Government's assertion of the good-faith exception to exclusion is that it could not come up with an argument under the second inquiry (reasonableness of the search). The Government appears to accept that if there was a "search," it violated the Constitution.