No. 20-1204

IN THE
Supreme Court of the United States

MARK RINGLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF CERTIORARI

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The United States does not contest it conscripts email service providers to forward private emails to the government if they detect correspondence that is an "apparent violation" of federal law, or even "any facts or circumstances which *indicate* a violation" might happen in the future. 18 U.S.C. § 2258A(a)(2) (emphasis added). The United States also does not contest this causes a vast transfer of private email correspondence from email providers to the government. Here alone, thousands of petitioner's emails were sent to the government, only 0.33% to 2% of which had been flagged by an algorithm as "apparent" violations, and law enforcement looked at over 500 of them.

But the most striking aspect of the United States' position is that the Fourth Amendment and the judi-

ciary have no role whatsoever in this surveillance operation. Why? Because if an email provider's internal monitoring has flagged the "apparent" or possible future violation of the law, then the provider has "seen" the correspondence. If the private email provider has seen the correspondence, the United States says, then it cannot be a trespass for the government to compel and see it too. That is an awesome power that has no foundation in law.

The United States' arguments against review of its warrantless email search program are unconvincing for the reasons explained by the petitioner in *Miller v. United States*, No. 20-1202 (filed Feb. 25, 2021). The United States' arguments in each case only reinforce how much it is stretching.

In both cases, for instance, the United States accepts that summary reversal would be appropriate if the court of appeals actually disregarded the trespass approach. In this one, the United States says we can assume the Eighth Circuit adjudicated the trespass test even though the court never mentioned it. BIO 16. That is dubious to start, and confirmed to be when you look to *Miller*. There, the court of appeals explicitly disclaimed adjudication of the trespass approach, *see* Pet. for Cert. 7, *Miller*, No. 12-1202, and the United States still just pretends that never happened, BIO 14-15, *Miller*, No. 12-1202. Let's be honest about what is happening: The United States is attempting to reduce the Fourth Amendment to its "preferred authority—*Jacobsen* and *Katz*." *United States v. Ackerman*, 831 F.3d 1292, 1308 (10th Cir. 2016).

The Court should grant this petition, which it may wish to consolidate with *Miller*, No. 20-1202. At a minimum, it should summarily reverse for adjudication of the trespass approach.

I. Only This Court Can Require Courts Of Appeal To Independently Consider The Property-Based Test.

The United States does not dispute that the court of appeals was silent as to whether a "search" occurred under the trespass approach—it acted as if that part of the Fourth Amendment inquiry did not exist. The United States says not to worry, however, because the court of appeals applied *Jacobsen* and "this Court was well aware of the trespass-based approach when it decided *Jacobsen*." BIO 16.

This is unsatisfying. As the petition explained, and the United States does not meaningfully contest, *Jacobsen* explicitly and exclusively grounded its conclusion on the reasonable-expectations test. The Court specifically limited its inquiry to whether "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And then it applied that inquiry, concluding that the agent "infringed no legitimate expectation of privacy." *Id.* at 120; *see also id.* at 126 ("In sum, the federal agents did not infringe any constitutionally protected privacy interest[.]"). The *Jacobsen* Court did not mention the traditional trespass approach that would be revived roughly 30 years later, as an independent test, in *Jones*. The Eighth Circuit recognized that *Jacobsen* was grounded in the reasonable-expectations test, never suggesting that it viewed *Jacobsen* as controlling the trespass inquiry. Pet. App.

10a (recognizing that *Jacobsen* is premised on the rationale that an earlier actor "already frustrated the person's legitimate expectation of privacy").

That the United States is attempting to reduce the Fourth Amendment to its preferred reasonable-expectations test, and pretend the trespass test is null, is clear from the remainder of its brief. For instance, it pretends that the Sixth Circuit in *Miller* actually adjudicated the trespass test, completely ignoring the numerous statements that the court was applying *Jacobsen* "[n]o matter how th[e] case should be resolved under a trespass approach." *United States v. Miller*, 982 F.3d 412, 433 (6th Cir. 2020). *See* BIO 14. Similarly, it claims that *United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018), supports the United States' position, even though the defendant there never raised the trespass approach. *See Miller*, 982 F.3d at 432 (recognizing that the *Reddick* defendant never even raised the trespass approach).

The decision below, and the BIO's defense of it, blatantly contradict the Court's instruction that the reasonable-expectations test is "but one way to determine if a constitutionally qualifying 'search' has taken place." *Ackerman*, 831 F.3d at 1307 (citing *United States v. Jones*, 565 U.S. 400, 409 (2012)); *see also Florida v. Jardines*, 569 U.S. 1, 11 (2013) (reiterating that the reasonable-expectations test was "'*added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment").

II. This Question Is Important.

The United States does not dispute the broad import of this case. It cannot dispute the ubiquity of

email, including Google's own 1.2 billion email subscribers. Pet. 10-12.

According to the United States, it is free to compel and conduct a warrantless search of any of that correspondence, provided that the correspondence has previously been seen by the provider, including when it was "seen" only by a computer algorithm. In this case alone, *thousands* of files were sent to law enforcement, which looked at hundreds of them without a warrant (even though less than 30 of the files were flagged as "apparent" violations). Pet. 3-4. The United States' position is not just drastic, it is a tautology: a provider necessarily must have "seen" correspondence to think it is an "apparent" violation of the law. So the United States' theory allows it to compel any "apparent" violations of the law in private correspondence and, by definition, conduct a warrantless search of it. And, in the United States' view, that surveillance would not even engage the Fourth Amendment, and is therefore beyond judicial review.

If we are to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," the Court should grant certiorari and reject the United States' nullification of the trespass test. *United States v. Jones*, 565 U.S. 400, 406 (2012).

III. This Case Is An Excellent Vehicle.

The United States does not contest that petitioner fully preserved his argument before the district court. *See* Pet. 12 (citing Doc. 48 at 6-7; Doc. 70 at 1, 24, 26; Doc. 75 at ¶ 11). It contends that although petitioner renewed his trespass argument on appeal, he did not argue that law enforcement committed a search under

the trespass test; instead, he advanced the test "solely in service of his separate argument . . . that Google and NCMEC were governmental actors." BIO 10.

The idea that petitioner invoked the trespass test on appeal only as to Google and NCMEC, and was unconcerned with trespass by the government itself, is meritless. The very first page of petitioner's brief made clear he was challenging all three actors in the surveillance scheme: "The warrantless review of his emails by Google, NCMEC, *and law enforcement* infringed upon Mr. Ringland's reasonable expectations of privacy" and "the warrantless opening and examination of private correspondence *by the government, government entities, and government agents constituted a trespass to chattels in violation of the Fourth Amendment*." Opening Br. i (emphasis added). So too the opening sentences of his legal argument:

> The district court erred by failing to suppress the fruits of the illegal warrantless searches of Mark Ringland's emails by Google (a government agent), NCMEC (a government entity), *and law enforcement (the actual government). Not only did these entities impinge upon areas in which Mark Ringland maintained a reasonable expectation of privacy*, *the warrantless search of Mr. Ringland's personal effects constituted a trespass to chattels in violation of the Fourth Amendment*.

Opening Br. 31 (emphasis added). To be sure, petitioner's brief also tried to argue that Google and NCMEC were government agents who trespassed on his emails, but none of that forswore his far more straightforward challenge to "the actual government," as he put it. *Id*.

The court of appeals' obviously understood petitioner to be arguing that law enforcement (not just Google and NCMEC) conducted a search. Its dispositive reasoning in the case was that no search occurred because "Investigator Alberico searched only the same files that Google searched" and therefore "the government did not expand the search beyond Google's private party search." Pet. App. 13a. If, in fact, petitioner limited his challenge to whether Google and NCMEC conducted a search, that analysis would make no sense.

The United States' invocation of the good-faith exception to the exclusionary rule is not an obstacle to review. It is undisputed the court of appeals never reached the good-faith exception and resolved the case exclusively on the ground that no "search" occurred. BIO 6. No one disputes that in the event this Court reverses, the United States will be free to have the Eighth Circuit consider its exclusionary rule argument in the first instance. *Cf.* BIO 11 ("This Court is 'a court of review, not of first view.'" (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992))).[1]

IV. It Is Clear That Summary Reversal Would Be Appropriate In The Alternative.

The United States does not dispute that summary reversal is the appropriate course if the Eighth Circuit failed to consider and resolve the trespass approach. Aside from its strained preservation argument, *see supra*, the best the United States comes up with is that

[1] The United States makes no challenge to preservation in *Miller*, and there it never even advanced its good-faith argument on appeal. The Court may wish to grant and consolidate the two cases for argument.

"this Court was well aware of the trespass-based approach when it decided *Jacobsen*." BIO 16. For the reasons stated in Part I, this argument is unconvincing: *Jacobsen* is unambiguously premised on the reasonable-expectations inquiry and the Eighth Circuit understood it so. The Court should summarily reverse for consideration of its trespass test.

CONCLUSION

For the reasons here and in the petition, certiorari should be granted.

Respectfully submitted,

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