No. _____

In the
Supreme Court of the United States

Daren W. Phillips,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for a Writ of Certiorari

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Question Presented

An unwarranted governmental intrusion into a constitutionally protected area violates the Fourth Amendment's proscription of unreasonable searches if it either (1) infringes on an individual's reasonable expectation of privacy, *Katz v. United States*, 389 U.S. 347 (1967), or (2) amounts to a physical trespass onto an individual's property to obtain information, *United States v. Jones*, 565 U.S. 400 (2012).

The question presented is whether a wholly privacy-based exception to the Fourth Amendment's search warrant requirement, premised on the notion that an initial private search of a person's effect can fully frustrate his expectation of privacy such that a subsequent government search of the same effect does not infringe any legitimate privacy interest, can apply to exempt the government's search when it is accomplished by physical trespass.

Related Proceedings

This case arises from the following proceedings:

- *United States v. Phillips*, No. 20-10304, Dkt. No. 39 (9th Cir. April 29, 2022) (affirming denial of motion to suppress evidence); and
- *United States v. Phillips*, No. 3:18-cr-00101, Dkt. No. 64 (D. Nev. May 10, 2019) (order denying motion to suppress evidence).

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Petition for a Writ of Certiorari

Petitioner Daren Phillips respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the Ninth Circuit is published at 32 F.4th 865. App. 1a–22a. The relevant district court order is unpublished. App. 23a–40a.

Jurisdiction

The Ninth Circuit's opinion issued on April 29, 2022. The court denied a timely petition for rehearing on July 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Constitutional Provision

The Fourth Amendment provides in relevant part: "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. . . ." U.S. Const. amend. IV.

Introduction

The Fourth Amendment guards against unreasonable government intrusions into constitutionally protected areas harboring either property-based interests, *United States v. Jones*, 565 U.S. 400 (2012), or privacy-based interests, *Katz v. United States*, 389 U.S. 347 (1967). The Fourth Amendment's property-based protection provides "the degree of protection [the Amendment] afforded when it was adopted," *Jones*, 565 U.S. at 411, prohibiting the government from committing physical trespass to obtain information, *id.* at 406 n.3. The Fourth Amendment's privacy-based protection was later "added to" this initial "common-law trespassory test," prohibiting the government from infringing an individual's reasonable expectation of privacy. *Id.* at 409 (emphasis omitted).

Although an individual can sometimes hold both interests in the same area, the inquiry into whether a violation of either protected interest has occurred is analytically distinct. *Byrd v. United States*, 138 S. Ct. 1518, 1526–27 (2018); *Florida v. Jardines*, 569 U.S. 1, 12–16 (2013) (Kagan, J., concurring). That is because privacy protections do not supplant property protections. Accordingly, "exclusive[]" application of the reasonable-expectation-of-privacy test is impermissible when doing so "eliminates rights that previously existed." *Jones*, 565 U.S. at 411 (emphasis omitted).

Here, the Ninth Circuit flouted this Court's clear mandate and held a search that infringes no legitimate expectation of privacy does not offend the Fourth Amendment, even if the government physically intruded on the defendant's property to effectuate the search. The Ninth Circuit's opinion not only directly

conflicts with this Court's binding precedent, but also creates a new intra-Circuit split and contributes to an existing lopsided inter-Circuit split concerning the relationship between *Katz* and *Jones*. The Circuits require this Court's correction and guidance on this important constitutional issue.

This Court should grant certiorari.

Statement of the Case

I. Legal Background

A. Founding to 1967—shifting Fourth Amendment protections from property-based to privacy-based analyses

The Fourth Amendment guarantees the people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In framing this Amendment's prohibition on unreasonable searches and seizures, our Founding Fathers kept the "sacred" truism in mind that "[t]he great end for which men entered into society was to secure their property." *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (quoting *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)). The drafters' intent to craft the protection with a "close connection to property" is "reflect[ed]" in the Fourth Amendment's text, "since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *United States v. Jones*, 565 U.S. 400, 405 (2012).

As "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," *Carroll v. United*

States, 267 U.S. 132, 149 (1925), this Court's "Fourth Amendment jurisprudence was tied to common-law trespass" for "well into the 20th century," *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *see, e.g., Goldman v. United States*, 316 U.S. 129, 134–36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928). "[W]ithout trespass upon any property of the defendants," government action did not offend the Fourth Amendment. *Olmstead*, 277 U.S. at 457, 464.

Subsequently, however, this Court "deviated from that exclusively property-based approach," *Jones*, 565 U.S. at 405, "decoupl[ing] violation of a person's Fourth Amendment rights from trespassory violation of his property," *Kyllo*, 533 U.S. at 32. In 1967, this Court decided *Katz v. United States*, 389 U.S. 347, 351 (1967), concluding "the Fourth Amendment protects people, not places." "*Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). The Court thus "abandoned the trespass test in favor of a two-part inquiry into expectations of privacy introduced in Justice Harlan's concurring opinion in *Katz*." Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup. Ct. Rev. 67, 67–68 (2012). That is, whether a person "exhibited an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J. concurring). Under a privacy-based test, *Katz* held the Fourth Amendment's reach "clear[ly]" could not "turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

This wholly privacy-based framework became the "lodestar" for evaluating Fourth Amendment claims. *Smith v. Maryland*, 442 U.S. 735, 739 (1979). While property rights did not fall out of the Fourth Amendment equation entirely, they became "but one element in determining whether expectations of privacy are legitimate." *Oliver v. United States*, 466 U.S. 170, 183 (1984); *United States v. Salvucci*, 448 U.S. 83, 91–92 (1980). Thus, following *Katz*, "property rights [were] neither the beginning nor the end of this Court's inquiry," *Salvucci*, 448 U.S. at 91, and "an actual trespass [was] neither necessary nor sufficient to establish a constitutional violation," *United States v. Karo*, 468 U.S. 705, 713 (1984).

B. 1967 to 2012—singularly privacy-based doctrine development

"From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the 'reasonableness' of your expectations or privacy. It was tied to the law." *Carpenter v. United States*, 138 S. Ct. 2206, 2267 (2018) (Gorsuch, J., dissenting). But having done "away with the old approach," this Court's post-*Katz* decisions looked solely to "whether the conduct at issue 'violated the privacy upon which [the defendant] justifiably relied." *Jones*, 565 U.S. at 422–23 (Alito, J., concurring, joined by Ginsburg, Breyer, and Kagan, JJ.) (alteration in original).

In *Katz*'s wake, this Court recognized and delimited Fourth Amendment privacy-based protections and exceptions thereto. The private search doctrine is

one such rule recognized during this period.[1] In *United States v. Jacobsen*, 466 U.S. 109, 116–20 (1984), this Court built upon the plurality opinion in *Walter v. United States*, 447 U.S. 649 (1980), and held that under certain circumstances, an individual may frustrate another's privacy interest in an otherwise constitutionally protected area or effect such that a subsequent governmental search of the same area does not offend the Fourth Amendment.

The Fourth Amendment has always operated "as a restraint" only on governmental conduct. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971), *holding modified by Horton v. California*, 496 U.S. 128 (1990). Thus, similar to the third-party doctrine,[2] the private search doctrine rests on the premise that nongovernmental actors may learn information and upon conveyance of such information to authorities, extinguish any privacy expectation in the information (or area from which it was obtained). *See generally Jacobsen*, 466 U.S. at 113–26.

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[1] Some lower courts have coined the term "private search doctrine," *see, e.g., United States v. Wilson*, 13 F.4th 961, 967 (9th Cir. 2021), though it does not appear this Court has yet adopted any particular appellation for the doctrine.

[2] The third-party doctrine provides "that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976) (no privacy interest in financial records held by third-party bank); *Smith v. Maryland*, 442 U.S. 735, 744–75 (1979) (no privacy interest in records of dialed phone numbers conveyed to telephone company).

Jacobsen's reasoning "turn[ed] entirely on the reasonable expectation of privacy test, which, when the case was decided, was the sole test to determine whether a government action was a search." Andrew MacKie-Mason, *The Private Search Doctrine After Jones*, 126 Yale L.J. Forum 326, 330 (2017). Indeed, just a few years before *Jacobsen*, this Court reiterated its "emphatic[] reject[ion]" of "the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." *Rawlings v. Kentucky*, 448 U.S. 98, 105, (1980) (quoting *Rakas*, 439 U.S. at 149–50 & 149 n.17); *Oliver*, 466 U.S. at 183 n.15 (Although "[t]he law of trespass recognizes the interest in possession and control of one's property . . . it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment."). Consistent with this understanding, *Jacobsen* considered property rights only to the extent such interests "[l]egitimat[ed] expectations of privacy." *Jacobsen*, 466 U.S. at 122 n.22; *id.* at 124 n.24. Accordingly, *Jacobsen*'s ultimate conclusion rested entirely on an evaluation of privacy interests: "The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117.

Jacobsen's holding faithfully adhered to *Katz*'s reasonable-expectation-of-privacy test, in which "the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment." *Oliver*, 466 U.S. at 183–84 (discussing open fields). *Katz*'s privacy-based framework would remain the primary test to determine the existence of a Fourth Amendment violation for the next forty-five years.

C. 2012 to present—recognition of dual Fourth Amendment protections, based on property and privacy interests

In 2012, this Court issued *Jones*, "restor[ing] the logic and language of trespass that had been missing from Fourth Amendment doctrine since *Katz*." MacKie-Mason, *supra* at 330. In *Jones*, the petitioner challenged law enforcement's placement of a GPS tracking device on the underbody of his car as an unreasonable search. 565 U.S. 402–04. In response, the government contended that the action was not a "search" at all because it infringed no legitimate expectation of privacy. *Id.* at 406. Rejecting the government's argument, *Jones* clarified "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test," 565 U.S. at 409, and therefore, "Fourth Amendment rights do not rise or fall with the *Katz* formulation" exclusively, *id.* at 406. Rather, "at a minimum," a search "undoubtedly occur[s]" when "the Government obtains information by physically intruding on a constitutionally protected area." *Id.* at 406 n.3 (emphasis omitted). There is "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* at 404–05.

Jones's revitalization of property-based Fourth Amendment protection serves as a "baseline" that "keeps easy cases easy." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). *Katz*'s additional reasonable-expectation-of-privacy test only "supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (quoting *Jardines*, 569 U.S. at 11). Thus, while "*Katz* may add to the baseline, it does not

subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.'" *Id.* at 5 (alteration in original) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

Because *Katz*'s privacy framework augments the Fourth Amendment's protections, courts must not "exclusively" apply the reasonable-expectation-of-privacy test, at least when doing so "eliminates rights that previously existed" when the Amendment was adopted. *Jones*, 565 U.S. at 411 (emphasis omitted). Yet that is precisely what the Ninth Circuit did here.

II. Facts and Procedural Background

In early 2018, while Petitioner Daren Phillips was away from home at a residential alcohol treatment program, his former fiancée Amanda Windes went through his private laptop computer. App. 4a. The computer was password protected and Windes did not know the password. App. 4a. Windes launched the computer's "forgot your password" function, and after successfully guessing the security question answers, used her own email account to reset the computer's password. App. 4a–5a. Having gained access to the computer, Windes browsed through the device's contents. App. 5a. Windes clicked into a folder labeled "phone" and discovered suspected contraband images. App. 5a. Windes decided to contact law enforcement. App. 5a.

Because Windes worked at a university, she first took the computer to campus police. App. 5a. Campus police directed her to the Washoe County Sheriff's Office, in Reno, Nevada, where Windes met with Detective Arick Dickson. App. 5a.

During a lengthy interview, Windes told Dickson how she accessed Phillips's computer and described the images she found. App. 5a. Dickson brought in Detective Gregory Sawyer, who instructed Windes to recreate her computer search while he watched. App. 6a. Windes complied, navigating the computer to mimic her original search. App. 6a. Observing Windes enter the "phone" folder, Sawyer determined the contents contained child pornography. App. 6a. Sawyer seized the computer, subsequently applying for and obtaining a search warrant largely based on his joint search with Windes at the sheriff's office. App. 6a.

Phillips was indicted by a federal grand jury for one count of transportation of child pornography under 18 U.S.C. § 2252A(a)(1) (Count One), and one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) (Count Two). App. 6a. Phillips moved to suppress the evidence found on the computer[3] as the fruit of an unlawful search at the sheriff's office. The district court denied the motion, finding Windes's prior private search had already frustrated Phillips's expectation of privacy in the device. App. 29a–38a. Thus, the district court applied the private party search doctrine announced in *United States v. Jacobsen*, 466 U.S. 109 (1984), to hold the subsequent joint computer search with Sawyer did not infringe any legitimate remaining privacy interest in the computer. App. 29a–38a. Following the suppression denial, Phillips entered a conditional guilty plea to Count

[3] Phillips also moved to suppress evidence found on a cell phone pursuant to a second search warrant premised on evidence obtained from the computer. *See* App. 38a.

One, reserving his right to challenge the denial, and Count Two was dismissed. App. 6a.

Phillips appealed the suppression denial to the Ninth Circuit. He argued in relevant part that even if Windes's initial search of his computer frustrated his expectation of privacy in the device under *Jacobsen*, the search Sawyer directed at the sheriff's office amounted to a governmental physical trespass into Phillips's constitutionally protected effect. Because this second search enabled Sawyer to learn information about the computer's contents, it was—absent a warrant or warrant exception—an unreasonable search under *Jones*.

The Ninth Circuit affirmed. Assuming Windes's search of Phillips's computer amounted to a trespass attributable to the government, the court held *Jones*'s common-law trespassory test did not bring the search within the Fourth Amendment's ambit. App. 18a. Rather, because Windes previously searched the computer at home without government involvement, the Ninth Circuit found the private search doctrine applied to the subsequent government search at the sheriff's office. App. 18a–21a. "*Jones* did not involve any aspect of the private search exception," the Ninth Circuit explained, "nor did it reference *Jacobsen*." App. 19a. Finding itself bound by *Jacobsen*'s discussion of privacy interests, the Ninth Circuit denied relief. App. 19a.

Reasons for Granting the Petition

I. The Ninth Circuit erroneously extended a privacy-based analysis to resolve a property-based Fourth Amendment violation.

This case concerns a simple yet exceptionally consequential application of Fourth Amendment law—whether wholly privacy-based Fourth Amendment doctrine can remove from constitutional protection a search accomplished through physical trespass. On this point, the Ninth Circuit made sweeping conclusions unmoored from doctrinal underpinnings, directly conflicting with this Court's precedent.

Phillips's case presents an ideal vehicle for resolving this important issue. The issue is squarely presented, having been fully considered and decided below. Further, the issue involves a straightforward application of Fourth Amendment jurisprudence and does not require this Court to wade prematurely into questions of the applicability of longstanding doctrine—developed with respect to tangible places and objects—to electronic analogs. That Officer Sawyer physically intruded on Phillips's computer to learn information establishes a search within the meaning of the Fourth Amendment occurred. Additional privacy interests—existing or not—cannot subtract from this "irreducible constitutional minimum." *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring).

This Court should grant certiorari to correct the Ninth Circuit's misguided analysis and provide much-needed guidance to the lower courts.

A. The Ninth Circuit's opinion conflicts with this Court's precedent and eliminates rights existing at the Nation's founding.

This Court unambiguously instructs that when "[t]he [g]overnment physically occupie[s] private property for the purpose of obtaining information," that "physical intrusion" amounts to a "'search' within the [original] meaning of the Fourth Amendment." *Jones*, 565 U.S. at 404–05. While *Katz v. United States*, 389 U.S. 347 (1967), solidified the principle that an invasion of privacy *also* violates the Fourth Amendment, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409. Thus, when a search under *Jones* occurs, courts need not proceed to determine whether the intrusion separately infringed any privacy interests; a physical trespass on private "property to gather evidence is enough to establish that a search occurred." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). "Though now often lost in *Katz*'s shadow, this traditional understanding persists." *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting).

Accordingly, "several recent decisions" of this Court "declined to apply the *Katz* test" where the trespass test revealed an unreasonable search "because it threatened to narrow the original scope of the Fourth Amendment." *Carpenter*, 138 S. Ct. at 2246 (Thomas, J., dissenting) (citing *Grady v. North Carolina*, 575 U.S. 306 (2015) (per curiam); *Jardines*, 569 U.S. 1; and *Jones*, 565 U.S. 400).

Jones's property rubric also easily resolves Phillips's case. Officer Sawyer directed Windes to search Phillips's computer at the sheriff's office while he observed, requiring her to open the laptop, click with the mouse, and type on the

keypad. Acting pursuant to Sawyer's instruction as a government agent, *see Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 614 (1989), Windes physically manipulated the computer, enabling Sawyer to view the screen and learn of the device's contents. As in *Jones* and *Jardines*, that Sawyer "learned what [he] learned only by physically intruding on [Phillips's] property to gather evidence is enough to establish that a search occurred." *Jardines*, 569 U.S. at 11.

Despite this Court's clear mandate, the Ninth Circuit explicitly declined to consider Phillips's property-based protection in his computer, finding that an absence of privacy expectations removed the search entirely from Fourth Amendment protections. App. 18a–21a. The Ninth Circuit acknowledged *Jones*, but because "*Jones* did not involve any aspect of the private search exception, nor did it reference *Jacobsen*," App. 19a, the court resorted "to the usual *Katz* handwaving," *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting), and relied on *Jacobsen*'s discussion of frustrated privacy interests to reject Phillips's Fourth Amendment property-based claim. App. 19a. And in any event, the Ninth Circuit reasoned, "*Jacobsen*, too, involved a trespass of the defendant's property." App. 18a.

The Ninth Circuit's opinion fundamentally misreads both *Jacobsen* and *Jones* (and neglects to acknowledge *Jardines* altogether). No authority supports the Ninth Circuit's decision to erroneously discard *Jones*'s property-based mandate in favor of exclusively applying *Jacobsen*'s privacy-based exception.

When this Court decided *Jacobsen*, it did so solely under the *Katz* privacy framework, *supra*, pp. 5–7, holding "[t]he Fourth Amendment is implicated *only* if the authorities use information with respect to which the expectation of privacy has

not already been frustrated." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (emphasis added). Thus, regardless of whether *Jacobsen*'s facts involved a technical trespass,[4] this Court did not "squarely address[]" whether a privacy-based private search exception to the Fourth Amendment's warrant requirement applied to excuse a property-based violation, leaving later courts "free to address the issue on the merits." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see State v. Terrell*, 372 N.C. 657, 672 n.5 (2019) ("The Court in *Jacobsen* did not address the trespassory test. . . ."). Of course, given *Katz*'s then-dominant reign, *Jacobsen* had no occasion to consider such a claim.

Decades later in *Jones* this Court clarified a separate but equally important property framework independently persists. 565 U.S. at 411–12; *supra*, pp. 8–9. Neither framework is "exclusive," *Jones* explained, and government conduct not amounting to a search under one test "remain[s] subject to" the other. 565 U.S. at 411 (emphasis omitted). *Jacobsen* and *Jones* do not conflict, but simply address

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[4] In *Jacobsen*, FedEx employees examined the contents of a damaged shipping package, finding a tube with plastic bags of white powder. 466 U.S. at 111. The employees notified authorities, who looked inside the package and conducted a field test of the powder, confirming it was cocaine. *Id*. at 111–12. The *Jacobsen* Court did not consider whether authorities' actions constituted a physical trespass under the Fourth Amendment, an inquiry that may, in fact, be quite involved. *See Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) (questioning "what kind of legal interest is sufficient to make something *yours*?"); *Byrd*, 138 S. Ct. at 1531 (Thomas, J., dissenting).

The Ninth Circuit's reliance on *Jacobsen* for propositions this Court never considered improperly creates a "rule" this Court neither evaluated nor endorsed, eliding relevant Fourth Amendment inquiries that would have been necessary to such a holding in *Jacobsen*.

different Fourth Amendment inquiries under this Court's separate Fourth Amendment rubrics.[5] Accordingly, "both cases must be read together." *Lane v. Franks*, 573 U.S. 228, 245 (2014).

If *Jones* left any lingering doubt about Fourth Amendment's dual protections, this Court quickly cleared up the confusion the following year in *Jardines*, 569 U.S. 1. In *Jardines*, the defendant challenged law enforcement's use of a drug-sniffing dog within the curtilage of his home as a Fourth Amendment search. 569 U.S. at 3–5. In opposition, "[t]he State argue[d] that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest," citing this Court's decision in *Jacobsen*, among others, for support. *Id.* at 10. But, *Jardines* explained, the government's reliance on such cases was misplaced, as the Court had no need to "decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*." *Id.* at 11. "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence [was] enough to establish that a search occurred." *Id.*

The "Fourth Amendment's property-rights baseline" clarified in *Jones* and concreted in *Jardines* "keeps [Phillips's] easy case[] easy." *Jardines*, 569 U.S. at 11. But by "apply[ing] exclusively *Katz*'s reasonable-expectation-of-privacy test," the Ninth Circuit's opinion impermissibly "eliminates rights that previously existed."

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[5] The Ninth Circuit, too, has recognized "the focus in a Fourth Amendment inquiry should be on 'the traditional property-based understanding of the Fourth Amendment.'" *United States v. Norris*, 942 F.3d 902, 906 (9th Cir. 2019) (quoting *Jardines*, 569 U.S. at 11). If "a search has occurred" under this traditional understanding, "no further inquiry is required." *Id.*

Jones, 565 U.S. at 411. "[T]he Fourth Amendment's attendant protection of privacy does not justify [the court's] elevation of privacy as the *sine qua non* of the Amendment." *Carpenter*, 138 S. Ct. at 2240 (Thomas, J., dissenting).

The Ninth Circuit lacked authority to discard wholesale the Fourth Amendment's property-based protections. In nevertheless expressly doing so, the court perceived tension among this Court's decisions where there was none and issued a published decision in direct conflict with *Jones* and *Jardines*.

B. The Ninth Circuit's misplaced reliance on the private search doctrine untethered the rule from its underlying justification.

Extension of the privacy analysis to excuse a physical trespass lacks doctrinal support. *Jacobsen*'s rule that a search does not implicate the Fourth Amendment's protection extends only as far as its underlying justification. When "part of the reason ceases, according to a maxim of law and reason, so much of the rule ceases." *Matthews v. Zane*, 20 U.S. 164, 180 (1822); *see United States v. Gonzalez–Lopez*, 548 U.S. 140, 145 (2006) (rejecting "a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right'"). The private search doctrine, premised wholly on *Katz*'s reasonable-expectation-of-privacy test, thus reaches only as far as the *Katz* privacy rationale permits. By extending the private search doctrine beyond the privacy context, the Ninth Circuit impermissibly "untether[ed] the rule from the justifications underlying the [*Jacobsen*] exception." *Riley v. California*, 573 U.S. 373, 386 (2014) (citation omitted).

C. The Circuits have created both intra and inter-Circuit conflicts, requiring this Court's guidance.

In accordance with *Jones*, nearly all federal circuit courts agree that a government search can violate the Fourth Amendment "under either" a property or privacy-based test. *United States v. Dixon*, 984 F.3d 814, 820 (9th Cir. 2020); *accord United States v. Lewis*, 38 F.4th 527, 533–36 (7th Cir. 2022); *United States v. McKenzie*, 13 F.4th 223, 231 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2766 (2022); *United States v. Trice*, 966 F.3d 506, 514 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1395 (2021); *United States v. Richmond*, 915 F.3d 352, 355–59 (5th Cir. 2019); *United States v. Lewis*, 864 F.3d 937, 941 & 941 n.2 (8th Cir. 2017); *United States v. Bain*, 874 F.3d 1, 11–12 (1st Cir. 2017); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016); *United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013); *Free Speech Coal., Inc. v. Att'y Gen. of U.S.*, 677 F.3d 519, 543 (3d Cir. 2012); *accord N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1264 (D.C. Cir. 2020).[6]

Yet now the Ninth Circuit has joined the Sixth Circuit to hold under *Jacobson* that the private search doctrine applies to remove a government trespass from Fourth Amendment protection based solely on a lack of privacy expectations. App. 18a–21a; *United States v. Miller*, 982 F.3d 412, 433–34 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2797 (2021). Both *Phillips* and *Miller* place the Ninth and Sixth Circuits in tension not only with their own prior precedent, *see Dixon*, 984 F.3d at

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[6] The Eleventh Circuit has not yet reached the merits of this issue, finding governmental physical trespass occurring prior to *Jones* reasonable under the good faith reliance doctrine. *United States v. Holt*, 777 F.3d 1234, 1258–59 (11th Cir. 2015).

820; *Trice*, 966 F.3d at 514; but with the remaining Circuits recognizing pursuant to *Jones* and *Jardines* that a property-based violation does not depend upon the existence of privacy interests. Fundamentally, both cannot be true.

Explicitly declining to apply *Jones*'s mandate, the Ninth and Sixth Circuits' analytical "omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence." *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting). This Court should grant certiorari to resolve the intra and inter-circuit splits, or at a minimum, clarify the "the uncertain status of *Jacobsen* after *Jones*." *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (observing "the warrantless opening and examination of (presumptively) private correspondence . . . seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment").

II. This case is an ideal vehicle for review.

This case is an excellent vehicle for review, as it squarely presents a single question of law that was fully considered and preserved below. *Cf. Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting) (observing petitioners had "[u]nfortunately . . . forfeited Fourth Amendment arguments based on positive law by failing to preserve them"). There was no dispute among the parties that Phillips's computer constituted his protected effect under the Fourth Amendment. And as the government did not dispute Windes acted as a government agent when physically searching the computer at the sheriff's office, the Ninth Circuit "assume[d] that this was a government search." App. 8a. Thus, this case presents this Court with a purely legal issue—whether a prior private search can exempt a subsequent

governmental search from the Fourth Amendment when the government accomplished the search by physically trespassing on the defendant's property.

This case also avoids complications arising in recent similar petitions seeking this Court's review. For example, the petition for certiorari arising from the Sixth Circuit's decision in *Miller* required this Court to determine whether electronic communications constitute Fourth Amendment "papers" and if so, whether opening and viewing electronic email attachments amounts to a "trespass." Petition for a Writ of Certiorari, *Miller v. United States*, No. 20-1202 (filed Feb. 25, 2021), *cert. denied*, 141 S. Ct. 2797 (2021); *see also Ringland v. United States*, No. 19-2331 (filed Feb. 25, 2021), *cert. denied*, 141 S. Ct. 2797 (2021); *Reddick v. United States*, No. 18-6734 (filed Nov. 14, 2018), *cert. denied*, 139 S. Ct. 1617 (2019). Unlike these recent petitions, this straightforward case does not require the Court to wade into issues implicating the Fourth Amendment's property framework by analogy.

III. Correcting the Ninth Circuit's opinion is particularly important.

The Ninth Circuit's opinion does not merely misapply a correctly-expressed rule of law, but adopts an erroneous, novel rule in conflict with this Court's binding precedent. Fourth Amendment search and seizure issues "are frequently litigated," Brian Erickson, *Second Amendment Federalism*, 73 Stan. L. Rev. 727, 740 & 740 n.62 (2021), rendering consistency among the decisions in this area particularly important.

Conclusion

This Court should grant certiorari.

Dated this October 21, 2022.

Respectfully submitted,

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