

No. _____

In the Supreme Court of the United States

BRIAN MATTHEW MORTON,

Petitioner,

v.

UNITED STATES OF AMERICA ,

Respondent,

PETITIONER’S APPLICATION FOR EXTENSION
OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit.

Pursuant to Title 28, United States Code, Section 2101(c) and Supreme Court Rule 13.5, Petitioner Brian Matthew Morton respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for 14 days, to and including Monday, December 5, 2022.

Basis for Jurisdiction

The district court had original jurisdiction over this criminal action pursuant to 18 U.S.C. §3231. Mr. Morton entered a conditional plea of guilty to an indictment alleging violation of 18 U.S.C. §2252(a)(2). The Fifth Circuit had jurisdiction over the direct appeal under 18 U.S.C. §3742(a) and 28 U.S.C. §1291. A panel of the Fifth Circuit reversed the conviction in a published opinion on January 5, 2021. *See United States v. Morton*, 984 F.3d 421 (5th Cir. 2021), *vacated* 996 F.3d 754 (May 18, 2021), *different results reached en banc* 46 F.4th 331 (5th Cir. August 22, 2022); App. 24a–38a. The *en banc* court granted the government’s petition for rehearing *en banc*, vacated the panel opinion, and affirmed the conviction and sentence in a

published opinion filed on August 22, 2022. *See United States v. Morton*, 46 F.4th 331 (5th Cir. August 22, 2022); App. 1a–23a. This Court has the power to grant or deny this motion pursuant to 28 U.S.C. §2101(c), and it will have jurisdiction to review the Fifth Circuit’s judgment under 28 U.S.C. §1254(1).

Judgment to be Reviewed and Opinion Below

The Fifth Circuit’s en banc opinion is published at *United States v. Morton*, 46 F.4th 331 (5th Cir. August 22, 2022), reprinted on pages 1a–21a of the appendix.

Reasons for Granting an Extension

Petitioner/Applicant Brian Matthew Morton sustained a federal conviction for the contraband found on his cell phone’s photos application. *See United States v. Morton*, 46 F.4th 331, 333 (5th Cir. August 22, 2022)(*en banc*); App 1a-2a. Police found this material during a warrant search; the warrant permitted search of every application on the phone. *See Morton*, 46 F.4th at 333; App. 3a. The probable cause presented to the magistrate who signed this warrant (and two others, for two other phones in the car), however, rested primarily on the drugs found in his car. *See id.* at 333; App. 3a. Indeed, it sought evidence of violations of drug laws. *See id.*; App. 3a.

The defendant moved to suppress the evidence arising from this search. *See id.* at 334; App. 3a-4a. He argued that possession of drugs, without more, did not provide probable cause to search a cell phone. He also argued that “the search warrant affidavits make no connection to why the officers needed to search Mr. Morton’s photos to find additional evidence that he possessed drugs.” The district court denied the motion on the grounds that the affidavits “contain sufficient details to allow a neutral magistrate to reasonably infer that Morton’s phones could contain information connected to his purchase and possession of controlled substances.” App.

66a. Mr. Morton entered a conditional plea allowing appeal of the denial of the motion to suppress. *See Morton*, 46 F.4th at 334; App. 4a.

On appeal, a panel of the Fifth Circuit reversed the conviction. *See United States v. Morton*, 984 F.3d 421 (5th Cir. 2021), *vacated* 996 F.3d 754 (May 18, 2021), *different results reached en banc* 46 F.4th 331 (5th Cir. August 22, 2022); App. 24a-38a. It found that the possession of drugs – as related in the affidavits – provided probable cause to search certain applications of the phone, but not to search its photos. App. 31a-34a. And it thought this deficiency in the warrant sufficiently clear to defeat the good faith exception. App. 35a-38a.

The government petitioned for rehearing *en banc*. It assembled every US Attorney in the Circuit to sign its Petition, asserting that the issues resolved by the panel represented ones of exceptional importance. App. 39a-40a. It thought that the holding of the panel would “inhibit[] law enforcement’s ability to conduct comprehensive and reliable forensic cell-phone searches.” App. 44a. The *en banc* court granted the petition, App. 22a-23a, which drew two amicus briefs representing a total of four civil rights organizations, *see* Brief of *Amicus Curiae* Upturn, Inc., in *United States v. Morton*, No. 19-10842, 2021 WL 3036323 (5th Cir. Filed July 26, 2021); Brief of *Amicus Curiae* Electronic Frontier Foundation, *et al*, in *United States v. Morton*, No. 19-10842, 2021 WL 3036324 (5th Cir. July 16, 2021).

A divided *en banc* court affirmed the district court. Although it acknowledged that “[i]t is a close call whether the evidence recounted in the affidavits established probable cause for drug trafficking as opposed to drug possession,” and that “if the evidence indicated only possession, then it is another close call whether there was probable cause to believe that evidence of drug possession would be found on the phones.” *Morton*, 46 F.4th at 338; App. 11a. But it found that this close call justified application of the good faith exception. *See id.*; App. 11a. It did not think

the defendant had preserved any claim to distinguish between applications of the phone in terms of the legitimate scope of the warrant, but declined to do so in any case; in its view, the “good-faith inquiry did not parse probable cause for each category” of information on a phone. *Id.* at 339 (quoting *United States v. Cherna*, 184 F.3d 403, 406 (5th Cir. 1999)); App. 11a-12a.

A concurrence expressed concern that the ability to search “the entire contents” of a phone any time police found user quantities of drugs would turn the warrant requirement of *Riley v. California*, 573 U.S. 373 (2014), into “merely a paperwork requirement.” *Id.* at 340-341 (Higginson, J., concurring); App. 14a-15a. The dissent echoed this concern, warning that the decision permitted the use of “a traffic stop that produced evidence of a marginal offense ... as an excuse to gain unfettered access to a device saturated with personal, private information.” *Id.* at 342 (Graves, J., dissenting); App. 17a. All told, 7 Judges joined either the dissent or some part of the concurrence. An eighth Judge joined the majority without reservation, but had joined the panel majority.

In short, the case involves enormously significant and unresolved constitutional questions of privacy in the digital age, a fact attested by the decision to take the case *en banc* below, by the government’s decision to marshal every U.S. Attorney in the Circuit in support of its Petition for Rehearing, by substantial *amicus* interest from civil rights organizations, and by the number of Judges below who at some point expressed disquiet with the outcome or holding, or who thought it necessary to add caveats. Preparation of any Petition for Certiorari accordingly requires the utmost care and extensive research.

Lead counsel at the panel and en banc stages – Mr. Brandon Beck – has left the Federal Public Defender’s Office for the Texas Tech School of Law. He had primary drafting authority for the Initial Brief, Reply Brief, Response to the Petition for Rehearing, and Supplemental Brief.

He also exercised leadership responsibility coordinating contributions from other drafting attorneys. And he argued the case before the Fifth Circuit at both the panel and en banc stages. After his departure, the Office reassigned the lead counsel role to Assistant Federal Public Defender Jessica Graf. Her work on the case, however, was cut short by her decision to enter private practice. She is the third Assistant Federal Public Defender from the office's appellate division to leave this year. Of these three attorneys, only one has yet been replaced, though another will shortly come on board.

The turnover in attorneys working on the case has delayed work on the Petition for Certiorari. First, it requires new attorneys to relearn the material in the depth of the original lead counsel. Given the significance and scope of the case, this requires mastery of a substantial body of precedent and the relevant historical sources, as well as the record and case timeline. Second, it has increased the division's per capita workload, such that other cases have consumed our attention. For example, I am currently lead counsel on Mr. Morton's case, and expect that the Petition's current deadline is among five¹ that will fall in the same week, including: *United States v. Keith*, 22-10790 (Initial Brief due in the Fifth Circuit November 21, 2022); *Barrieta-Barrera v. United States*, 22-8229 (Expected Filing Date of Reply in Support of Petition for Certiorari); *United States v. Quinonez*, 22-10793 (Initial Brief due in the Fifth Circuit November 23, 2022); *United States v. Jacquot*, 22-10305 (Initial Brief due in the Fifth Circuit November 25, 2022).

Accordingly, appropriate attention to the weighty and complicated issues involved may require an additional two weeks to prepare the Petition. Petitioner, by and through counsel, requests a new deadline of December 5, 2022.

¹ It is possible that I may seek an extension on one or two of the Fifth Circuit deadlines.

Respectfully submitted,

/s/ Kevin Joel Page

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