NO. _____

In the Supreme Court of the United States

TAUREAN JEROME WEBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when it determined Instagram's boilerplate Terms of Service delineated Petitioner's Fourth Amendment rights and held no search occurred?

2. Does the Fourth Amendment forbid warrantless government trespass on an individual's digital property under the rationale of *United States v. Jones*, 565 U.S. 400, 406 (2012)?

3. Did the Ninth Circuit err when it alternatively held that the good faith exception to the exclusionary rule saved suppression?

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

No. 22-30191

United States of America, *Plaintiff-Appellee,* v. Taurean Jerome Weber, *Defendant-Appellant.*

Date of Final Opinion: February 22, 2024

U.S. District Court for the District of Montana

No. CR 21-28-M-DLC

United States of America, *Plaintiff,* v. Taurean Jerome Weber, *Defendant.*

Date of Final Judgment: July 13, 2022

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PETITION FOR A WRIT OF CERTIORARI

TAUREAN JEROME WEBER [*Weber*] 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 United States Court of Appeals for the Ninth Circuit is an unreported decision. *See United States of America vs. Taurean Jerome Weber*, No. 22-30191. App.1a-6a. The opinion of the United States District Court for the District of Montana is reported as *United States v. Weber*, 599 F. Supp. 3d 1035 (D. Mont. 2022). App.11a-35a.

JURISDICTION

The Ninth Circuit issued its Opinion and Order denying Weber's request for appellate relief on February 22, 2024. App.1a. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. IV

> 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.

STATEMENT OF THE CASE

I. Introduction

The central issue in this case is whether *Jones* applies when the government trespasses on a citizen's digital property. As discussed herein, Weber contends that *Jones* precludes warrantless government trespass in the digital world just as it does in the physical world. As recognized in the dissent in *Carpenter v. United States*, 585 U.S. 296 (2018), suppression litigants have generally forfeited *Jones* arguments in favor of *Katz*[1] style arguments. The *Carpenter* dissent encouraged litigants to bring *Jones* style arguments in cases like this one:

> Litigants have had fair notice since at least *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) and *Florida*

[1] *Katz v. United States*, 389 U.S. 347 (1967)

> *v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* handwaving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

Carpenter, at 406 (Gorsuch, J. dissenting)

Consistent with that dissent, Weber advanced the *Jones* argument at the district court and appellate levels. Weber's case presents the opportunity for this Court to clarify if *Jones* applies in the digital world. It also presents the opportunity for the Court to determine the effect of private terms of service on Fourth Amendment rights, and the scope of the good faith exception.

Weber requests this Court grant his petition for Certiorari on these questions and vacate the judgment against him.

II. Prior Proceedings and Procedural History

On July 28, 2021, in the District of Montana, Weber was charged in a 10-count Indictment with (5) counts of Transportation of Child Pornography in violation of 18 U.S.C. § 2252A(a)(1) and (b), and five (5) counts of Distribution and Receipt of Child Pornography in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). App.36a.

The Indictment also included a forfeiture allegation pursuant to 18 U.S.C. § 2253(a). *United States v. Taurean Jerome Weber*, CR 21-28-M-DLC. *Id.*

On December 27, 2021, Weber filed a motion to suppress evidence for violation of his Fourth Amendment rights. App.11a. Weber argued that law enforcement's warrantless review of media from a social media account was a search. *Id.* A suppression hearing was held on February 4, 2022. *Id.*

On April 22, 2022, the district court denied Weber's suppression motion in a written order. App.11a-35a.

Weber's trial began on July 11, 2022. On July 13, 2022, the jury returned a guilty verdict on all tried counts and a true finding as to forfeiture. App.7a-10a.

On November 18, 2022, Weber was sentenced to 180 months in prison.

On November 28, 2022, Weber appealed to the Ninth Circuit, raising the Fourth Amendment suppression issue and two other issues.

On February 9, 2024, Weber's case was argued and submitted to the Ninth Circuit.

On February 22, 2024, the Ninth Circuit issued its opinion affirming the district court. App.1a-6a. Weber did not seek en banc review.

This petition follows.

III. Statement of Facts

When an electronic service provider ("ESP")-like Google, Instagram, or Facebook-locates child sexual abuse material on their platforms, they must report that information to the National Center for Missing and Exploited Children ("NCMEC"). *See* 18 U.S.C. § 2258A(f)(3). App.13a. In turn, NCMEC must compile and send that information (known as a CyberTip) to

local law enforcement where the alleged activity occurred for investigation. *Id.*

CyberTips contain a compilation of the ESP report, incident information, suspect information, and file information. In general, the CyberTip displays the IP address, screen name, and email address associated with the transmission of child abuse material. *Id.* The CyberTip will sometimes include a brief description of the transmitted content, a media file attachment of the image or video, and occasionally, an indication of whether the media was previously viewed by the ESP. *Id.*

Five CyberTips initiated this case. The CyberTips were sent to Montana's Internet Crimes Against Children ("ICAC") task force in 2019 and 2020. App.13a-14a. Detective Katherine Petersen of the Missoula Police Department was assigned to investigate the CyberTips. App.14a.

All five of the CyberTips came from the social media platform Instagram, and all five CyberTips had child abuse material videos appended to them. *Id.* Detective Hall reviewed the media files transmitted with Cyber Tips without a warrant. App.16a. The district court wrote that, "[d]etective Hall did not get a warrant because not only did four of the CyberTips specifically indicate Instagram had viewed the files, but her training had taught her that Instagram, unlike some other electronic service providers, had a policy of viewing images of suspected child pornography before sending them off to NMEC." *Id.*

After reviewing the media without a search warrant, Detective Hall believed the media met the federal definition of child pornography and applied for

numerous other investigative subpoenas and warrants. App.16a-17a. She described the CyberTips media or her impression of the media in all subsequent warrant applications. *Id.* A host of investigative subpoenas and search warrants were then issued by state district courts in the summer of 2020 based on Hall's warrant applications. *Id.*

Pursuant to those subpoenas and warrants, Hall searched and obtained evidence from Weber's home, electronic devices, and numerous electronic service provider accounts, including Instagram, SnapChat, DropBox and Google. *Id.* Images and videos allegedly found in those locations form the basis of the counts in Weber's Indictment. *Id.*

Instagram is a photo and video sharing platform, where, among other things, an individual can upload photos and make them "public or private." App.12a. To create an Instagram user account, a person must create a username, provide an email address, and create a password. *Id.* Additionally, a user must agree to the terms of use before being allowed onto the application. *Id.*

In October 2019, during the time of the first reported CyberTip, an Instagram user would have agreed to the following terms of use:

> We develop and use tools and offer resources to our community members that help to make their experiences positive and inclusive, including when we think they might need help. We also have teams and systems that work to combat abuse and violations of our Terms and policies, as well as harmful and deceptive behavior. We use all the information

> we have-including your information-to try to keep our platform secure. We also may share information about misuse or harmful content with our other Facebook Companies or law enforcement.

Id.

IV. Lower Court Opinions on Suppression Issue

A. Trial Court Opinion

Relying on *United States v. Wilson*, 13 F.4th 961, 964 (9th Cir. 2021), Weber filed a motion to suppress all evidence found pursuant to the later warrants because Detective Hall's initial viewing of the media appended to the CyberTips was a warrantless search and no exceptions to the warrant requirement applied. App.18a. In the Ninth Circuit under *Wilson*, law enforcement may not review media attached to a CyberTip under the private search exception to the exclusionary rule unless the ESP has first viewed the media. App.25a-29a.

The government opposed Weber's motion, relying on the private search exception and the good faith exception to the warrant requirement. *Id.*

The government argued that the good faith exception to the warrant requirement applied because Detective Hall relied on Instagram's report to NCMEC that they had "lawfully reviewed the attached files." App.29a-31a. Since Instagram followed its statutory duty to report child pornography and "Detective Hall reasonably relied on Instagram's representation that it viewed the file attachments," the government argued the good faith exception applied. *Id.*

On April 22, 2022, the district court denied Weber's motion to suppress. App.31a.-32a. In the order, the district court held that no search occurred. App.22a-24a. The district court analyzed both the *Katz* reasonable expectation of privacy doctrine and the *Jones* trespass doctrine related to Fourth Amendment searches in denying Weber's motion. *Id.*

Relevant here, the district court rejected Weber's *Jones* based trespass argument finding that social media accounts are not a "modern-day [form of] property and chattel" such that Fourth Amendment protections apply. App.24a. The district court also noted that this Court has never applied *Jones* to digital searches. *Id.*

Even though the district court concluded that Detective Hall's actions were not a search, the court sided with Weber on the questions that were the focus of the parties' briefing. App.25a-32a. The district court chose to "assume, for the moment, that Instagram's viewing of the image and video files on his account was a search and address[ed] the application of the private search exception." *Id.* "The Court finds that at least as far as application of the private search exception is concerned, it is constitutionally significant that the nature of Instagram's 'viewing' of the media files attached to the CyberTips is unknown." App.28a. Given this lack of evidence, the district court found that the government could not meet "its burden in finding that the private search exception applie[d] in this case." App.29a.

Similarly, the court found that the good faith exception did not apply. App.31a. The district court held that the good faith exception extends only to those situations in which law enforcement relies on a

judicially issued warrant. *Id.* "Because the constitutional error that happened in this case, if any, occurred when Detective Hall warrantlessly viewed the media files included with the CyberTips, the Court finds the good faith exception inapplicable." *Id.*

B. The Ninth Circuit Opinion

Weber appealed the district court's decision to the Ninth Circuit. Weber argued that under *Jones*, Detective Hall's warrantless review of the media appended to the CyberTips was a digital trespass and a search for Fourth Amendment purposes, and that the good faith exception did not save suppression. App.2a.

After briefing and argument, the Ninth Circuit affirmed the district court's denial of Weber's suppression motion. App.1a-6a. The Ninth Circuit did not determine if the *Jones* "trespass theory applies to searches of electronic information, because the disclosure of Weber's media by Instagram to the government was licensed pursuant to Instagram's Terms of Service." App.2a. Alternatively, the Ninth Circuit held that the good-faith exception to the warrant requirement applied "even if there was a search." App.3a-4a.

REASONS FOR GRANTING THE PETITION

A compelling reason for granting certiorari is if a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c), Rules of the Supreme Court of the United States, January, 2023.

Weber's case raises three questions of Fourth Amendment law in the digital sphere that have not been settled by this Court and are of national significance.

At its heart, this case asks whether the *Jones* property-based framework for determining if a search occurred applies to government intrusions in the digital world. *See Jones*, 565 U.S. at 404. Weber contends that it does, because when the government intrudes or trespasses upon any constitutionally protected area—a "persons, houses, papers, [or] effects"—"for the purpose of obtaining information," there is a search. *Id*.

Weber seeks Certiorari asking this Court to explicitly extend the *Jones* prohibition on warrantless government trespass to the digital world, to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Jones*, 565 U.S., at 406, (quoting *Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)).

The Ninth Circuit avoided this important question by holding that there was not a search here because the government's intrusion was licensed pursuant to Instagram's Terms of Service. App.2a-3a. As discussed

below, as more of our private lives are digitized, the effect of a private company's Terms of Service on a user's Fourth Amendment rights is of national import.

Finally, the Ninth Circuit held that even if there was a search, that the good faith exception to the exclusionary rule saved suppression. App.4a. This Court should grant Certiorari to determine if the good faith exception to the exclusionary rule applies when the case agent themselves (and not a third party) illegally trespasses under *Jones*.

Each question is discussed in turn.

I. THE NINTH CIRCUIT ERRED BY HOLDING THAT TERMS OF SERVICE WERE DETERMINATIVE OF WEBER'S FOURTH AMENDMENT CLAIM

The Ninth Circuit erred in relying on Instagram's Terms of Service to resolve Weber's Fourth Amendment claim because a private party's Terms of Service should have little to no impact on a citizen's Fourth Amendment rights. *See generally* Kerr, Orin, S., *Terms of Service and Fourth Amendment Rights* (January 29, 2023), UNIVERSITY OF PENNSYLVANIA LAW REVIEW (forthcoming), at 1, available at: https://ssrn.com/abstract=4342122.

A. The Effect of Terms of Service on Fourth Amendment Rights Is a Question of National Importance

Millions of citizens entrust personal and confidential information to corporations operating online platforms. Every second of the day Americans use online platforms to store and transmit their most sensitive and private personal information. For example, we all send sensitive emails, talk on social media accounts,

bank online, and attend medical and legal appointments virtually. As time goes on, even more of our lives will be online. Most people safely assume that the information they entrust to electronic service providers is and will remain private. However, before using those online platforms, citizens must agree to the company's Terms of Service prior to using the service. The effect of these Terms of Service on a citizen's Fourth Amendment rights online has not been considered by this Court.

B. Lower Courts are Split on the Significance of Terms of Service on Fourth Amendment Rights

Lower courts have split over the significance of Terms of Service in the Fourth Amendment context. Kerr, Orin, S., *Terms of Service and Fourth Amendment Rights* at 7-16.

Considering how much of modern life is online and in "the cloud" the question of how private contract Terms of Service affect Fourth Amendment rights will become a recurring question in criminal cases. Modern law enforcement investigative techniques routinely focus on people's cell phone data and information, their emails and text messages, their social media accounts, and online history. As such, this Court should clarify what effect Terms of Service have on the ability of the government to mine and access this information without a warrant.

Like the Ninth Circuit did here, some lower appellate courts have held that Terms of Service are relevant and define the scope of Fourth Amendment rights online. For example, in *United States v. Adkinson*, the Seventh Circuit held that the defendant waived

his Fourth Amendment rights in cell phone location information by agreeing to T-Mobile's *Terms of Service*. 916 F.3d 605 (7th Cir. 2019).

Also, in *Commonwealth v. Dunkins*, 263 A.3d 247 (Pa. 2021), the Pennsylvania Supreme Court held the defendant had no Fourth Amendment rights in data in his student account based on the terms of service of the system. *Id.* at 255.

Likewise, federal district courts in the Tenth and Ninth Circuits have held that Terms of Service inform and delineate an individual's Fourth Amendment rights in the digital world. *See United States v. Sporn*, No. 21-CR-10016, 2022 WL 656165, at *10, 2022 U.S. Dist. LEXIS 39070, at *25-26 (D. Kan. Mar. 4, 2022) (defendant had no reasonable expectation of privacy in Twitter account based on Terms of Service); *United States v. Bohannon*, 506 F. Supp. 3d 907, 915 (N.D. Cal. 2020) ("Bohannon consented to Microsoft's PhotoDNA search by agreeing to Microsoft's terms of service.")

Conversely, other courts have held that a private company's Terms of Service are generally irrelevant to Fourth Amendment rights. As Professor Kerr describes, the leading case on this point is *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), which held that the Terms of Service of the internet provider at issue did not eliminate the defendant's Fourth Amendment right of privacy: " a subscriber agreement might, in some cases, be sweeping enough to defeat a reasonable expectation of privacy in the contents of an email account," but the Sixth Circuit doubted "that will be the case in most situations . . . ." 631 F.3d at 286.

Considering the differing significance lower courts have placed on Terms of Service in the Fourth

Amendment context, and considering the national significance of the question, this Court should grant Certiorari on this question.

C. Terms of Service are Boilerplate Private Contracts and Should Not Define Fourth Amendment Rights

Here, the Ninth Circuit held that Instagram's Terms of Service were determinative on the Fourth Amendment question "because the disclosure of Weber's media by Instagram to the government was licensed pursuant to Instagram's Terms of Service." App.2a.

Weber asks that this Court grant Certiorari and find that Terms of Service do not define Fourth Amendment rights in the digital sphere. This is because Terms of Service are private contracts between the owner of a digital platform and the user. Terms of Service are not agreements with the government or general waivers of Fourth Amendment protections. *See* Kerr, Orin, S., *Terms of Service and Fourth Amendment Rights* at 16. Agreements between private parties bind the parties only—they do not define or control the scope of Fourth Amendment protection against government trespass. *Id.*

In explaining the irrelevance of the terms on Fourth Amendment rights, Professor Kerr points to authorities holding that private contracts do not *per se* define Fourth Amendment protections. *Id.* at 20. Professor Kerr observes that, "[c]ontractual rights between private parties [are] usually irrelevant to Fourth Amendment rights." *Id.*

For example, in *Byrd v. United States*, 584 U.S. 395 (2018), the district court found Byrd did not have standing to challenge a rental car search because he

was not a party to the rental car contract. This Court reversed, holding that car rental contracts have "long lists of restrictions" but none of those restrictions have anything to do with a person's Fourth Amendment rights in the car. *Id.* at 407-408. This Court also observed that even if Byrd's contractually unauthorized operation of the car breached the rental contract, "the government could not explain how that breach effected privacy expectations in the car." *Id.*

Further, Terms of Service are contracts of adhesion, entered without any bargaining between the parties. Lower courts have held that adhesion contracts requiring an individual to waive Fourth Amendment protections are ineffective. *See, e.g.*, *Anobile v. Pelligrino*, 303 F.3d 107, 123-25 (2d Cir. 2002) (refusing, under the totality of the circumstances, to construe a blanket waiver of Fourth Amendment protections as a condition of horse racing licensure to be valid consent to otherwise unreasonable searches); *Toomey v. Bunnell*, 898 F.2d 741, 744 (9th Cir. 1990) ("We do not approve of general waivers of Fourth Amendment rights as a condition of parole.").

Significant to the *Jones* analysis discussed below, Instagram's Terms of Service specifically said that items in the Instagram account remain the user's property and that Instagram "claim[s] no ownership" of the digital property. App.12a. Instagram's Terms say that the user's property is the user's alone and that "nothing is changing about your rights in your content." *Id.* This means that while the content may be bailed or "licensed" to Instagram, an Instagram user retains an interest in the content enough to be aggrieved by a warrantless government trespass:

We do not claim ownership of your content,

> but you grant us a license to use it. Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service. Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). You can end this license anytime by deleting your content or account.

Id.

While the Terms of Service purport to give Instagram a license, they do not change the user's property interest in items in the account or change anything about the user's "rights in [the] content." In fact, the Terms specifically say that the items remain the user's property. This is significant to Weber's trespass claim discussed below. Like using an email service, entrusting digital data to Instagram may create a bailment, but Instagram's terms are clear that the user does not forfeit their ownership right—and thus the right to exclude others—by agreeing to the boilerplate terms. *See Carpenter,* 585 U.S. at 401 (Gorsuch, J. dissenting) ("just because you <u>have</u> to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it") (emphasis in original).

Finally, from a policy perspective, reading boilerplate terms of service as consent to government search or trespass would eviscerate millions of citizens' Fourth Amendment rights in their online lives. This cannot be the case in our digital age. *See Jones*, 565 U.S. at 417 (Sotomayor, J., concurring) (explaining the third-party doctrine "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.").

The Ninth Circuit's reading of the effect of Instagram's Terms of Service severely limits Fourth Amendment protections in the digital sphere and ignores this Court's directive that in reviewing Fourth Amendment questions, "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Jones*, 565 U.S., at 406, (quoting *Kyllo v. United States*).

II. *JONES* PROHIBITS WARRANTLESS GOVERNMENT TRESPASS ON A CITIZEN'S DIGITAL PROPERTY

Weber's main argument at the district court and to the Ninth Circuit was that the government trespassed on digital property without a warrant to gather information thus requiring suppression under *Jones*. The decisions below warrant review to clarify if the *Jones* decision applies to digital or online searches.

A. This Court Should Explicitly Extend *Jones* to Digital Trespasses

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. As the district court noted, "two doctrines have emerged regarding

whether something is a 'search' such that the Fourth Amendment is triggered." App.18a-19a. The most recent and common doctrine is the *Katz* test, which examines if government conduct intruded on a subjective interest of privacy that society is willing to recognize as reasonable. *Kyllo v. United States*, 533 U.S. at 32-33 (2001) (internal citations and quotation marks omitted).

The second (and older) doctrine holds that if the government intrudes or trespasses on a citizen's person, house, papers, or effects, a search occurs. *Jones* at 404. When the government intrudes or trespasses upon a constitutionally protected area—a "persons, houses, papers, [or] effects"—"for the purpose of obtaining information," there is a search. *Id.* Notably, "many courts have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications." *United States v. Ackerman*, 831 F.3d 1292, 1308 (10th Cir. 2016) (citing cases).

As discussed above, the Ninth Circuit did not address Weber's *Jones* based argument because it determined there was not a search based on Instagram's Terms of Service. App.2a. Assuming this Court determines the Terms of Service do not define Fourth Amendment rights, the Court should grant Certiorari to explicitly extend *Jones* to digital trespass.

This Court has not yet explicitly addressed if *Jones* applies to digital or cyberspace searches. But there is no reason that *Jones* should be limited to intrusions in the "real world" as opposed to the digital one. A government trespass onto a citizen's property offends similar sensibilities no matter if the trespass is into a person's home or vehicle or the person's email or Facebook account. Just as government trespass onto a traditional mailed letter has been illegal since *Ex Parte*

Jackson, 96 U.S. 727, 733 (1877), so should government trespass onto digital correspondence and property. Both items are a citizen's property, and both are protected by the Fourth Amendment. Just because you cannot hold digital correspondence in your hand like you can a traditional letter does not diminish an ownership interest in such property. As the Tenth Circuit observed, government trespass onto email "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." *Ackerman*, at 1307. Further, "[f]ew doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest." *Carpenter,* at 400 (Gorsuch, J. dissenting).

Application of *Jones* to digital searches would simplify search and seizure analysis for lower courts in certain instances, allowing them to avoid the "amorphous balancing tests" and the "series of weighty and incommensurable principles" inherent in the *Katz* based search and seizure analysis. *Carpenter,* at 406 (Gorsuch, J. dissenting)

Application of the *Jones* test to searches in the digital world is logical, and better serves "the development of a sound [and] fully protective Fourth Amendment jurisprudence." *Id. Jones* should apply to law enforcement trespasses in the digital world and cyberspace as much as it does in the "real world."

This Court should grant Certiorari to confirm that *Jones* applies to digital trespass by law enforcement.

B. Weber Should Have Prevailed on His Suppression Motion

Had the Ninth Circuit addressed the substance of Weber's Fourth Amendment claim, the evidence should have been suppressed. Digital property like that at issue here is like email, and emails are properly analogized to regular mail for Fourth Amendment purposes. Traditional mail has long been protected by the Fourth Amendment even though traditional mail is temporarily "bailed" to a common carrier. *See Ex parte Jackson,* at 733 ("The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures" applies to letters and sealed packages in the mail). Again, "e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest." *Carpenter,* at 400 (Gorsuch, J. dissenting). As such, when law enforcement views or trespasses on these digital effects without a warrant, "that 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." *Ackerman*, at 1307. Even though "the framers were concerned with the protection of physical rather than virtual correspondence, a more obvious analogy from principle to new technology is hard to imagine." *Id*. at 1308.

Here, Detective Hall trespassed by reviewing the digital property attached to the CyberTips without a warrant. This is the digital equivalent of a traditional common law trespass. *Jones*, 565 U.S. at 419 n.2 ("At common law, a suit for trespass to chattels could be maintained if there was a violation of the dignitary interest in the inviolability of chattels.") (Alito, J.,

concurring) (internal quotations and citation omitted). Hall's warrantless review of the media was a digital trespass, was a search under *Jones*, and all evidence flowing from her trespass is suppressible.

III. THE GOOD FAITH EXCEPTION SHOULD NOT SAVE SUPPRESSION WHEN THE GOVERNMENT TRESPASSES WITHOUT A WARRANT

Relying on *Herring v. United States*, 555 U.S. 135 (2009), the Ninth Circuit alternatively held that even if there was a search here, the good faith exception to the warrant requirement would save suppression. App.4a. The good faith exception is rooted in this Court's holding "that the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecutor's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid." *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

Certiorari should be granted so that this Court can clarify the applicability and the scope of the good faith exception on *Jones* style searches. First, does the good faith exception ever apply when a law enforcement trespasses under *Jones* without a warrant? Second, does the good faith exception apply if it is the officer themselves who made the Constitutional error, rather than a third party?

As to the first question, Weber contends that a warrantless trespass by a government agent that is deemed a search under *Jones* could rarely be excused by the good faith exception because that type of trespass is deliberate. In *Herring*, this Court held that for suppression to be a remedy, the "police conduct must

be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 144.

Second, on Certiorari this Court can explicitly clarify if the good faith exception applies when it was the law enforcement officer who made the Constitutional error, and not a magistrate or third party. Notably, "[this Court] has never applied the good faith exception to excuse an officer who was negligent himself, and whose negligence directly led to the violation of the defendant's constitutional rights." *United States v. Camou*, 773 F.3d 932, 945 (9th Cir. 2014).

Discussing *Herring*, the Ninth Circuit panel wrote that:

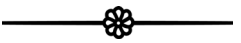
> *Herring* dealt with an officer's reliance on a county clerk's assertion that the defendant had an outstanding warrant, which was in turn based on another law enforcement employee's negligence. The officer was not negligent himself; the negligence was two degrees removed from the officer and thus amounted to "isolated negligence attenuated from the arrest.

Camou, at 945 (emphasis added).

In granting Certiorari here, this Court can clarify if the good faith exception applies to errors made by the case agents themselves, or if it is limited to situations where errors were made by a magistrate or another third party. Notably, two post *Herring* Ninth Circuit panels have reached differing conclusions on this question. While *Camou* found that the good faith exception should not apply if it was the officer who

made the error, the panel in *United States v. Artis*, 919 F.3d 1123, 1133 (9th Cir. 2019) held that the good faith exception is not "categorically inapplicable whenever a search warrant is issued on the basis of evidence illegally obtained as a result of constitutional errors by police." In granting Certiorari, this Court can clarify the precise parameters of the good faith exception, especially as it applies to searches under *Jones*.

Here, Hall trespassed on digital effects by reviewing the CyberTip images without a warrant. This is a plainly unconstitutional trespass under *Jones* and the Ninth Circuit erred in determining good faith was an alternative ground to deny Weber relief.



CONCLUSION

For the above reasons, Weber's petition for a writ of certiorari should be granted.

Respectfully submitted,

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