NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

JACOB PAUL BERMEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Bermel's minor child found a small camera in her bathroom. She had no knowledge of the camera and had never used it before. The child removed the camera and her mother, who lived in a different residence, contacted law enforcement. Law enforcement came to the mother's house and seized the camera. Law enforcement did not ask the child or the mother for permission to search the camera. Law enforcement conducted several searches of the camera and enclosed SD card, all without a warrant.

Mr. Bermel's case presents two questions for this Court:

I. Whether the failure to object to law enforcement search establishes implied consent to search for purposes of the Fourth Amendment?

II. Whether a minor child has apparent authority to consent to a search of their parent's electronic device if the child has apparent authority to consent to a search of the room the device is found in?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Bermel, 3:21-cr-00110-SMR-SBJ-001 (S.D. Iowa) (criminal proceedings), judgment entered September 26, 2022.

United States v. Bermel, 22-3092 (8th Cir.) (direct criminal appeal), opinion and judgment entered December 12, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jacob Paul Bermel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit affirmed the district court's decision in a published decision, available at 88 F.4th 741. The opinion is reproduced in the appendix to this petition at Pet. App. p. 20. The Eighth Circuit denied Mr. Bermel's petition for rehearing en banc/by the panel on February 6, 2024. Pet. App. p. 29.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment in Mr. Bermel's case on December 12, 2023. Pet. App. p. 27. 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."

STATEMENT OF THE CASE

A. Introduction

Mr. Bermel lived alone at his residence in Muscatine, Iowa, for the most part. His 14-year-old daughter (hereinafter "V1"), lived with him part-time, although her mother's house was her primary residence. During one of her stays, V1 discovered a small camera in the bathroom. V1 took the camera. She contacted her mother, who came and picked her up. Her mother contacted law enforcement. Law enforcement then seized the camera and searched an SD card found inside the camera, all without a warrant. Law enforcement then relied upon this initial warrantless search to obtain search warrants for Mr. Bermel's residence and electronic devices. These later searches revealed child pornography.

At the district court, Mr. Bermel moved to suppress the evidence. The Eighth Circuit found that V1 had provided implied consent to a search of the camera and that she had apparent authority to do so. The Eighth Circuit's decision conflicts with decisions of this Court, as well as the decisions of other circuits.

First, the Eighth Circuit held that the failure to object when an officer states an intent to search a device constitutes implied consent. This is inconsistent with this Court's decision in *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), where the Court held that "acquiescence to a claim of lawful authority" does not establish consent. Further, other circuits have found no valid consent under similar circumstances—where an officer does not even request consent to search, but the

government argues consent was implied because the individual failed to object to the officer's action. *United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990); *United States v. Most*, 876 F.2d 191, 199 (D.C. Cir. 1989); *United States v. Little*, 431 F. App'x 417, 420 (6th Cir. 2011). Courts have rejected implied consent arguments even if the individual has requested law enforcement assistance or was generally cooperative with law enforcement. *People v. Prescott*, 205 P.3d 416, 421 (Colo. App. 2008). Certiorari is appropriate to address this conflict.

Next, the Eighth Circuit's holding that a minor child has apparent authority to consent to a search of their parent's electronic device, based solely on the fact that the electronic device was found in a room the minor child used, conflicts with decisions of this Court and other circuits. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007); *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). The crux of the "common authority" test from *Matlock* is that an individual can have apparent authority to consent to a search if there is some indication of mutual use of the specific item to be searched. The Eighth Circuit's expansion of this test, allowing a minor child to consent to a search of their parent's personal items if found in a room that the minor child uses, should be rejected by this Court.

This Court should grant Mr. Bermel's petition for writ of certiorari.

B. Mr. Bermel moves to suppress evidence obtained after a warrantless search.

Mr. Bermel was indicted in the Southern District of Iowa on one count of production of child pornography, in violation of 18 U.S.C. § 2251(a), one count of receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2), 2252(b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2). R. Doc. 2.[1]

Mr. Bermel filed a motion to suppress evidence found after the warrantless search of his SD card. R. Doc. 29. He argued the warrantless seizure and search of the SD card violated his Fourth Amendment rights. R. Doc. 29. All evidence discovered after this illegal search, including evidence found pursuant to search warrants, was fruit of the poisonous tree. R. Doc. 29.

The prosecution resisted. R. Doc. 40. The prosecution asserted that the warrantless search of the SD card was a valid consent search. R. Doc. 40. The prosecution stated that V1 consented to a search of the SD card, and that she had apparent authority to consent to the search. R. Doc. 40. The prosecution argued:

> The Child, as an occupant of the house, would have authority to consent to the search of the entire house based on her living there on a part-time basis and having control over common areas. The Child had authority to consent to search all items inside the house.

[1] In this petition, the following abbreviations will be used:
"R. Doc." - district court clerk's record, followed by docket entry and page number, where noted;
"Supp. Tr." – Suppression hearing transcript, followed by page number;
"Gov't Ex." – Government suppression hearing exhibit, followed by number;
"Def. Ex." – Defense suppression hearing exhibit, followed by letter; and
"Pet. App." – Petitioner's Appendix, followed by page number.

R. Doc. 40, p. 12. Because the prosecution believed the initial search was valid, it argued the later search warrants were not fruit of the poisonous tree. R. Doc. 40.

Mr. Bermel filed a reply. R. Doc. 41. He asserted that V1 lacked actual or apparent authority to consent to a search of Mr. Bermel's SD card. R. Doc. 41. Mr. Bermel noted that whether V1 had apparent authority to consent to a search of his residence was irrelevant; the SD card was seized at V1's mother's home. R. Doc. 41. Mr. Bermel noted that V1's periodic visitation to Mr. Bermel's residence did not establish joint access or control of the SD card. R. Doc. 41. Further, V1 was a minor and the child of Mr. Bermel. R. Doc. 41.

The district court set the motion for a hearing. The following facts were established at the hearing.

On May 6, 2021, Jacob Elliott, an officer with the Muscatine Police Department, was on patrol. Dispatch contacted Elliott and reported that V1, a minor, had found a camera in Mr. Bermel's bathroom. R. Doc. 45, Gov't Ex. 3.

Elliott contacted V1's mother by telephone. Supp. Tr. p. 7. V1 had told her mother that she found a camera in her bathroom. Supp. Tr. p. 8. V1 took the camera and asked her mother to come pick her up. Supp. Tr. p. 8. V1's mother picked her up, and the two returned to her mother's home. Supp. Tr. p. 8.

During the call, V1's mother described the camera. Supp. Tr. p. 9. The camera was small and cordless. Supp. Tr. p. 9. V1 found it in the bathroom cabinet soon after getting out of the shower. Supp. Tr. p. 9. Elliot then told V1's **mother** that he

was going to come and collect the camera tonight "if that's alright with you." Gov't Ex. 1, 4:28.[2] Elliot told V1's mother that he was going to see if they could "get anything off of it." Gov't Ex. 1, 4:36.

Elliott asked for permission to speak with V1. Supp. Tr. p. 11. Elliott acknowledged that, when dealing with juveniles, his department requires parental permission before conducting an interview. Supp. Tr. p. 21. Later that evening, Elliott went to V1's mother to speak with V1 and her mother.

Elliot asked about V1's living situation. V1's primary residence was her mother's house. Supp. Tr. p. 21. There was no formal custody arrangement. Supp. Tr. p. 23. V1 had been visiting Mr. Bermel's residence "less and less." Supp. Tr. p. 23. Elliott testified that V1 stated she used the bathroom frequently while at Mr. Bermel's residence, and that she stored items in the bathroom. Supp. Tr. pp. 17-18. Elliott did not ask whether Mr. Bermel also used this bathroom, or whether he also had stored his personal items in the bathroom. Supp. Tr. p. 24.

As to the incident, V1 stated she noticed the camera after taking a shower. Supp. Tr. p. 11. V1 told Elliott that this was her first time seeing the camera. Supp. Tr. p. 25. She had not used the camera before. Supp. Tr. p. 25. V1 did not claim any kind of possessory interest in the camera. Supp. Tr. p. 25. Overall, V1 appeared to not want anything to do with the camera. Supp. Tr. p. 35.

[2] A copy of the video exhibits, Gov't Ex. 1, Gov't Ex. 2, and Def. Ex. D have previously been sent to the Eighth Circuit.

Elliott asked to see the camera. Supp. Tr. p. 13. He claimed V1's mother handed it over "willingly" and that V1 did not object. Supp. Tr. p. 17. The camera was in a Ziploc bag with tape over the lens. Supp. Tr. p. 13. Elliott inspected the camera and discovered an SD card inside the camera. Supp. Tr. p. 13. He told his fellow officer as they were leaving the residence, "I didn't say anything there, but yes, there is an SD card." Gov't Ex. 2, 6:40. V1 and her mother were unaware that the camera even contained an SD card. Supp. Tr. p. 27.

Before he left, Elliot told V1 and her mother: "What's going to happen is I'm going to take this [while holding up the camera]. Okay. We're going to analyze and see if there's anything on it." Gov't Ex. 2, 4:02. Elliott then took the camera with the included SD card back to the police department. Supp. Tr. pp. 14-15.

Once at the police department, Elliott put the SD card in a computer so he could access the files on the SD card. Supp. Tr. p. 15. Elliott reviewed the files and observed images of Mr. Bermel's face, as well as images of V1 naked. Supp. Tr. p. 15. Elliott reviewed all of the contents of the SD card. Supp. Tr. p. 28. Elliott told other officers what he had seen on the SD card, to allow them to apply for a search warrant. Supp. Tr. p. 34. The search revealed child pornography on additional devices.

C. The district court denies the motion to suppress, and Mr. Bermel enters a conditional guilty plea.

The district court denied the motion to suppress by written order. R. Doc. 47; Pet. App. p. 1. First, the court determined law enforcement's seizure of the SD card

was reasonable and justified under the exigent circumstances exception. R. Doc. 47; Pet. App. p. 7.

Next the court held that the warrantless search of the SD card was a valid consent search by V1. R. Doc. 47; Pet. App. p. 9. The court did not explicitly state that V1 had actual authority but held that V1 had apparent authority. R. Doc. 47; Pet. App. p. 9. V1 lived part-time at Mr. Bermel's residence, and when she stayed at his house, she was the primary user of the bathroom. R. Doc. 47; Pet. App. p. 9. Therefore, "[i]t was not unreasonable for Officer Elliott or other law enforcement officers to rely on the consent given by [V1] to search a memory card found in a home where she commonly resided and shared space with [Mr. Bermel]." R. Doc. 47; Pet. App. p. 9.

Mr. Bermel entered a conditional guilty plea to the production and possession counts, pursuant to a plea agreement. R. Doc. 55. Mr. Bermel preserved the right to challenge the denial of his motion to suppress on appeal. *Id.* Mr. Bermel was ultimately sentenced to 300 months of imprisonment. R. Doc. 73; Pet. App. p. 13.

D. The Eighth Circuit rejects Mr. Bermel's challenge to his motion to suppress on appeal.

Mr. Bermel challenged the denial of his motion to suppress on appeal, and a panel affirmed the district court. *United States v. Bermel*, 88 F.4th 741 (8th Cir. 2023). As relevant to this petition, the panel determined that V1 had consented to a search of the camera and SD card. *Id.* at 746. The government met its burden to

establish consent because (1) her mother had contacted police initially, (2) the officer stated he intended to search the camera, and (3) the minor child did not object. *Id.*

The panel also held that the consent was valid because the minor child had apparent authority to consent to a search of the camera. *Id.* at 745. However, the panel's analysis focused on the minor's usage of the bathroom, not the camera. The panel discussed how the minor child used the bathroom while staying with Mr. Bermel. *Id.* Next, the panel noted that "[t]he camera that she found in her bathroom was not locked or otherwise fixed in place. Nor was it, as the district court found, "even completely concealed from view[,] as the daughter noticed its light while exiting the shower." *Id.* . Therefore, the panel held:

> The district court did not clearly err in determining that these facts established joint access to and control of the bathroom, the camera, and the memory card it contained. And we further conclude that these facts sufficed to lead a person of reasonable caution in the officers' situation to believe that the daughter had authority over the camera and its memory card and that she could validly consent to a search of it.

Id.

Mr. Bermel filed a petition for rehearing en banc/by the panel. The Eighth Circuit Court of Appeals denied his petition. Pet. App. p. 29.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's holding allows implied consent based on a failure to object to a search. This is inconsistent with the decisions of the Supreme Court and other Circuits.

The failure to object when an officer states that he or she intends to search an item does not constitute valid consent. This Court has made clear than "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he [or she] has the burden of proving that consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49.

Based upon this language from this Court, other circuits have required the government to show more than the failure to object to or resist an officer's conduct. *United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990). Circuits acknowledge the need for equivocal consent is stronger when the officer fails to actually ask for consent. *United States v. Little*, 431 F. App'x 417, 420 (6th Cir. 2011) ("[L]ogic dictates that a person cannot consent to a request that has not been made—particularly in light of the fact that the government bears the burden of showing that consent was given voluntarily."). While nonverbal "gestures and conduct" can illustrate consent, if a person is not asked for consent, there is nothing to consent to. *Id.*

For example, in *Shaibu*, the Ninth Circuit held that "in the absence of a specific request by police for permission to enter a home, a defendant's failure to object to [police] entry is not sufficient to establish free and voluntary consent." *Shaibu,* 920 F.2d at 1428. The D.C. Circuit has also reasoned that "[i]t is clear . . . that for constitutional purposes nonresistance may not be equated with consent." *United States v. Most*, 876 F.2d 191, 199 (D.C. Cir. 1989); *see also Williams v. United States*, 263 F.2d 487, 489 (D.C. Cir. 1959) (finding a person's failure to object to an officer's statement "I don't want to discuss my business out in the hallway, let's go inside where its private" was not a consent to search); *United States v. Roldan,* No. 97 CR. 567 (JFK), 1997 WL 767564, at *6 (S.D.N.Y. Dec. 11, 1978) (finding an officer's use of the imperative form "let's look in the bag" was a command and the defendant's acquiescence did not constitute consent to search the bag).

As part of the panel's reasoning, it noted that V1's mother had requested the help of law enforcement, and this supported implied consent. But the Eighth Circuit and others have rejected that calling law enforcement for help, or otherwise cooperating with law enforcement in some fashion, establishes implied consent for a warrantless search. *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985); *People v. Prescott*, 205 P.3d 416, 421 (Colo. App. 2008). For example, in *Prescott*, the defendant had called law enforcement and asked for assistance in retrieving his money. 205 P.3d at 421. The Colorado Court of Appeals determined that this request for help was not implied consent to enter the defendant's home. *Id*. In *Patzner*, the Eighth

Circuit found no valid consent to law enforcement's entry of the home based upon an individual agreeing to go into the home and retrieve another person. 779 F.2d at 1369. *Patzner* illustrates that general cooperation with law enforcement does not establish consent to a search, without an explicit request and permission.

Overall, based upon the decisions from other circuits, the failure to object to a search conducted by an officer who has not even asked permission to search does not establish implied consent. The Eighth Circuit's holding otherwise conflicts with these decisions and the principles laid out in *Bumper v. North Carolina*. This Court should grant certiorari to address this split. After all, "[i]f a law enforcement officer, and ultimately the [prosecutor], desires to rely on consent as an exception to the warrant requirement, it is not too much to ask to expect the officer to actually ask for and receive that consent in an unequivocal manner." *State v. Boley*, 949 N.W.2d 450 (Iowa Ct. App. 2020) (Ahlers, J., concurring).

II. The Eighth Circuit held that a minor child has apparent authority to consent to a search of their parent's electronic device if the child has apparent authority to consent to a search of the room the device is found in. This conflicts with the decisions of the Supreme Court and other circuits.

Even if the panel's finding that V1 provided consent was not erroneous, its holding that V1 had apparent authority to consent to a search of the camera solely because she had apparent authority to consent to a search of the room it was found in, is inconsistent with this Court's precedent and the decisions of other circuits. Generally, the question of a third party's ability to consent to a search comes down to

"common authority," often referred to as the *Matlock* test. *See generally United States v. Matlock*, 415 U.S. 164 (1974). Under this test, consent is only valid if V1 had "common authority over, or sufficient relationship to," Mr. Bermel's camera and SD card. *United States v. Long*, 797 F.3d 558, 568-69 (8th Cir. 2015). "Common authority" rests "on mutual use of the property by persons generally having joint access or control for most purposes…" *Matlock*, 415 U.S. at 171 at n.7. *Matlock* is premised on the notion of "assumption of risk," as roommates "understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006).

The district court and Eighth Circuit relied upon V1's access and use of the bathroom to find V1 had apparent authority to consent to a search of the camera. Considering the nature of electronic storage devices, courts should not assume mutual use and control of a device simply because another had access to the room an electronic storage device is discovered in. The question of common authority to an electronic storage device is more specific, as the Eighth Circuit itself has previously recognized. *United States v. Clutter*, 674 F.3d 980, 986 (8th Cir. 2012). The Fourth Circuit has also recognized this limitation, noting that "[a]lthough common authority over a general area confers actual authority to consent to a search of that general area, it does not 'automatically ... extend to the interiors of every discrete enclosed

space capable of search within the area.'" *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007) (quoting *United States v. Block*, 590 F.2d 535, 539 (4th Cir. 1978)).

The panel's decision is inconsistent with this Court's reasoning that common authority rests upon a sufficient relationship to the "*effects to be inspected*," not just the room any items are found in. *Matlock*, 415 U.S. at 171. It is premised on the notion that it is "reasonable to recognize that any of the co-[users] has the right to permit the inspection in h[er] own right and that others have assumed the risk that one of their number might permit the common [effects] to be searched." *Id.* at 171, n.7.

Instead, the relevant factors support that V1 did not have apparent authority to consent to a search of Mr. Bermel's camera and SD card. V1 had no possessory interest in the camera and SD card, beyond the camera and SD card being in the bathroom she used. The prosecution did not present evidence that V1 used the camera or SD card. V1 did not even know the SD card existed. Her only use of the camera and SD card was that she found it. "For purposes of searches of closed containers, mere possession of the container by a third party does not necessarily give rise to a reasonable belief that the third party has authority to consent to a search of its contents." *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). Periodic use of a bathroom at a part-time residence does not provide grounds to consent to a search of an electronic item of another found in that room. Under the panel's decision,

a parent has now "assumed the risk" by having children that these children will consent to a search of their personal belongings, including electronic devices.

The nature of the item, an SD card, also supports that any reliance on V1's "consent" was unreasonable. "[I]t is less reasonable for a police officer to believe that a third party has full access to a defendant's purse or a briefcase than, say, an open crate." *Basinski*, 226 F.3d at 834. Here, the device was an electronic storage device, capable of holding a significant amount of data and personal information. *See Riley v. California*, 573 U.S. 373, 393 (2014) (holding that cell phones today are subject to heightened privacy expectations in part because of their "immense storage capacity").

Finally, V1's minority status supports that the officer's reliance was unreasonable. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998).

CONCLUSION

For these reasons, Mr. Bermel respectfully requests that the Petition for Writ of Certiorari be granted. The Eighth Circuit's decision conflicts with opinions from this Court and the decisions of other circuits.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick

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