No. 23-893

IN THE

Supreme Court of the United States

JONATHAN WALKER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition for a Writ of Certiorari
to the Arkansas Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State admits there is a "conflict," BIO 5, between the Ninth Circuit on the one hand and the Fifth and Sixth Circuits on the other (not to mention various state courts). Rightly so. The Ninth Circuit has held that the Fourth Amendment requires police to get a warrant before opening a digital file flagged by a private technology company's algorithm as potentially containing illegal content. Pet. 13-14. The other two circuits and various state courts hold that the private search exception excuses police from getting a warrant in precisely the same situation. *Id.* 10-13. That "conflict"—also known as a circuit split—is sufficient to warrant certiorari, particularly since the State doesn't deny that this case would allow the Court to resolve the question presented or that the question presented recurs frequently.

Instead, much of the brief in opposition is devoted to arguing the merits of that issue. The State's arguments on that score are unpersuasive, particularly at this stage. There will be time to address the merits if this Court grants certiorari. The opportunity to resolve the circuit split over how the Fourth Amendment applies to the fact pattern in this case is reason enough to grant certiorari.

I. This case is an appropriate vehicle to resolve an important constitutional question on which the circuits are split.

As the petition for certiorari explained, there is a square split on the question presented; this case would provide the Court with the opportunity to resolve that question; and, given the volume of potential contraband flagged by private technology companies'

algorithms, the question is likely to recur with increasing frequency. Pet. 28-29. The State contests none of that, and its related arguments are either wrong or irrelevant.

1. The State emphasizes that this Court has previously denied certiorari on the question presented. But most of the cases the State cites (BIO 15 n.3) predated the Ninth Circuit's decision in *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021), which created the circuit split at issue here. *See* Pet. 15-16.

Only two of the State's cited cases postdate the Ninth Circuit's decision. The first is *People v. Wilson*, 270 Cal. Rptr. 3d 200 (Cal. Ct. App. 2020), *review denied*, 2021 Cal. LEXIS 485 (Cal. 2021), *cert. denied sub nom. Wilson v. California*, 142 S. Ct. 751 (2022) (No. 20-1737), the California Court of Appeals' decision regarding the same defendant as the Ninth Circuit's *Wilson* decision. In that case, California's brief in opposition argued that "the issues are of limited and diminishing importance" because at least some law enforcement units had already changed their practice and begun securing warrants before opening images flagged by private companies' algorithms. Brief in Opposition at 28-29, *Wilson v. California*, 142 S. Ct. 751 (2022) (No. 20-1737). But, as this case makes clear, law enforcement units outside the Ninth Circuit have not changed their practices. California's prediction that the question would be of diminishing importance has thus been proven unfounded.

The other case, *United States v. Phillips*, 32 F.4th 865 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 467 (2022) (No. 22-5898), was not about the question presented in this case and didn't implicate the circuit split. *See*

Petition for Writ of Certiorari at 9-11, *Phillips v. United States*, 143 S. Ct. 467 (2022) (No. 22-5898).

2. The State doesn't deny that the question presented was both pressed and passed upon below. And it concedes that the evidence used to convict Mr. Walker was the "fruit" of the warrantless search at issue in this case. BIO 18.

The State halfheartedly claims that this Court should deny certiorari because a court on remand might still admit the evidence against Mr. Walker under the good-faith exception. BIO 18-19. But as the State acknowledges, this Court routinely grants certiorari on Fourth Amendment questions and leaves disputes over the good-faith exception for remand. *Id.* 19; *see, e.g.*, Certiorari Reply Brief at 11-12, *Carpenter v. United States*, 581 U.S. 1017 (2017) (No. 16-402); Certiorari Reply Brief at 4-6, *Heien v. North Carolina*, 572 U.S. 1059 (2014) (No. 13-604); *see also Davis v. United States*, 564 U.S. 229, 247 (2011) ("[A]pplying the good-faith exception . . . will not prevent judicial reconsideration of prior Fourth Amendment precedents."). It should do the same here.

That's particularly so because, given the current state of the law, the question presented will reach this Court only where a criminal defendant does the petitioning. As California's brief in opposition in *Wilson v. California* emphasized, law enforcement agencies in the Ninth Circuit (including the United States) are now complying with the Ninth Circuit's rule and seeking warrants. Pet. 16 (citing Brief in Opposition at 28-29, *Wilson v. California*, 142 S. Ct. 751 (2022) (No. 20-1737)). So no government actor will be petitioning this Court from the one circuit that has adopted the pro-defendant position on the question

presented. The only way for the question presented to reach this Court given the current circuit lineup is from a case like this one, resulting from a warrantless search in a jurisdiction that rejects the Ninth Circuit's rule.

3. Finally, the State doesn't dispute that technology companies' algorithms, using the same technology at issue in this case, flag all sorts of potential contraband. *See* BIO 22-23. It argues that the program at issue in this case is somehow different because it matches users' files to files "that someone has previously seen and flagged" as potential child pornography. *Id.* 23 (internal quotation marks omitted). But someone has "previously seen and flagged" as potential contraband other categories of files—for instance, material that potentially infringes copyright or potential terrorist content—that algorithms routinely scan for. *See* Pet. 26-27.

The State nonetheless claims the question presented isn't important because officers will typically be able to obtain warrants in cases like this one. BIO 20-21. That's certainly true if Microsoft's processes—both its system for having human employees identify potential contraband and its algorithm for matching new files to files previously flagged—are as reliable as the State claims. But the only way to ensure that reliability, particularly in the face of changing technologies, is to give a neutral and detached magistrate a say before law enforcement opens a private file. *See* Pet. 28-29.[1]

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[1] The State claims that Mr. Walker did not "challenge the accuracy of Microsoft's algorithm." BIO 4. But of course, it was

For the same reason, this Court should not be deterred by the State's argument that, if Mr. Walker is successful, police will likely "skip the step of reviewing a suspect's image and simply get a warrant to search his devices." BIO 22. To get the warrant to search a suspect's devices, police will have to present evidence to a magistrate about the reliability of a technology company's processes for identifying potential contraband. Because a neutral and detached party signs off before police violate a suspect's privacy, the Fourth Amendment would be satisfied by such a change in police practice.

II. The Arkansas Court of Appeals' holding is wrong.

The bulk of the State's brief in opposition is devoted to arguing the merits of the question presented. Those arguments aren't a reason to deny certiorari, and in any event, the State is wrong.

1. To start, the State's suggestion that an earlier private search "frustrate[s] *any* expectation of privacy" in the files, BIO 12 (emphasis added), is impossible to square with *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Walter v. United States*, 447 U.S. 649 (1980). In both cases, there had indisputably been a private search of the contents of the packages at issue. *Jacobsen*, 466 U.S. at 111; *Walter*, 447 U.S. at 656. But this Court did not hold that subsequent government searches of the packages' contents were permissible

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the State's burden to make out the private search exception to the Fourth Amendment's warrant requirement and thus the State's burden to put in evidence regarding reliability, to the extent that consideration is relevant to the private search exception. *See* Pet. 17-18.

simply because the earlier private searches had frustrated all expectations of privacy in those items. Instead, this Court asked whether the *scope* of the private search had been exceeded. *See Jacobsen*, 466 U.S. at 115 ("The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search."); *Walter*, 447 U.S. at 657 ("[T]he Government may not exceed the scope of the private search unless it has the right to make an independent search.").

2. The State next offers three reasons why police officers' search in this case did not exceed the scope of Microsoft's algorithmic search of Mr. Walker's file, none availing.

a. First, the State objects that any government search intended only to "verify that the private [search] was accurate" must fall within the private search exception. BIO 12. The State is wrong. The State may have been free to confirm the accuracy of the private search of Mr. Walker's file by running their own hash-matching algorithm on the file. But that's not what happened here. Instead, law enforcement opened and viewed the file, which went beyond the scope of Microsoft's search.

b. Second, the State argues that law enforcement did not, in fact, exceed the scope of the private search because a Microsoft employee had previously viewed *another* file that Microsoft believed depicted the same content as Mr. Walker's file. BIO 13-14; Pet. App. 93a. But as the Ninth Circuit explained in *Wilson*, this argument ignores that the Fourth Amendment requires a focus on "the extent of [the] private search of [the defendant's] effects, not of other individuals'

belongings," because "Fourth Amendment rights are *personal* rights." *United States v. Wilson*, 13 F.4th 961, 975 (9th Cir. 2021).

The State cites no relevant authority for its claim that the police can search one person's property because a private party searched *someone else's* property. Indeed, the State admits that, under its view of the law, the police in *Walter* could have viewed the misdelivered films so long as some other private party had, at some point, viewed a *copy* of those films. BIO 14; *see also Wilson*, 13 F.4th at 975. And the State's understanding of the private search exception would allow the government to open a sealed briefcase and review the files within without a warrant, so long as the government had some evidence that those files were copies of files in *another person's* briefcase that had been subjected to a private search. That cannot be correct.

c. Third, the State claims that law enforcement opening Mr. Walker's file did not expand the scope of the private search because Microsoft's algorithm already examined the file "pixel by pixel." BIO 14. But *whenever* someone sends an email, backs up a video to the cloud, or texts a photograph, some piece of private software processes the file letter by letter, frame by frame, or pixel by pixel. *See* Victor Luckerson, *Why Google Is Suddenly Obsessed with Your Photos*, Ringer (May 25, 2017), https://perma.cc/C9BZ-3JMF. By the State's logic, police officers could search all of those materials without a warrant. The State's argument would prove far too much.

3. Citing *Burdeau v. McDowell*, 256 U.S. 465 (1921), the State claims that the private search exception allows the government to trespass on

private property to the same extent that a private party has. Wrong. In *Burdeau*, the private party broke into the defendant's desk and safe, then turned the papers they found over to police. *Id.* at 470-71. This Court held that police could use the papers so turned over without violating the Fourth Amendment because "whatever wrong was done was the act of individuals in taking the property of another," not the State. *Id.* at 475-76. But *Burdeau* didn't hold that police could break into the defendant's desk and safe just because a private party previously had—the equivalent of opening the file in this case.

Indeed, arguments from trespass actually put the private search exception on shakier footing. As Mr. Walker's petition explained, this Court's recent cases emphasizing that a trespass to property is a Fourth Amendment search are difficult to reconcile with its private search cases. *See* Pet. 15, 23; *United States v. Miller*, 982 F.3d 412, 418 (6th Cir. 2020) ("legitimate" objections to applying private search exception to digital trespass); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) (status of private search exception at best "uncertain" in light of trespass cases).

4. The State seeks to justify the lower court's holding on two separate grounds never addressed by the Arkansas Court of Appeals.

First, the State suggests that because Mr. Walker's image turned out to be contraband, he had no Fourth Amendment protection against governmental trespass. BIO 15-16. But the State cites no authority for the claim that the Fourth Amendment allows the government to trespass against private

property without recourse so long as the trespass ultimately uncovers contraband.

Second, the State claims that Mr. Walker lacked any Fourth Amendment interest in his files because Microsoft's service agreement (which is not in the record in this case) permitted Microsoft to flag potential CSAM to law enforcement. BIO 16. But the argument that Microsoft, not Mr. Walker, had control over the file involves a different exception to the Fourth Amendment's warrant requirement: the third-party doctrine. *See Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). The State never invoked that exception below. The only basis on which the State sought to excuse its warrantless search—the basis on which the Arkansas Court of Appeals ruled—was the private search exception. And for good reason. This Court has held that the third-party doctrine does not apply to technologies that are "such a pervasive and insistent part of daily life" that using them is "indispensable to participation in modern society." *Id.* at 2220. Technologies like the file backup systems at issue in this case surely qualify.

5. Finally, the State claims that complying with a warrant requirement will be too onerous for law enforcement. BIO 21. But there's no reason to think the State is correct. Police already comply with the *Wilson* rule in the Ninth Circuit, and several law enforcement agencies in the Ninth Circuit chose to do so even before the decision came down. *See* Brief in Opposition at 28-29, *Wilson v. California*, 142 S. Ct. 751 (2022) (No. 20-1737); *see* Cal. Dist. Att'ys Ass'n, *Search Warrants Library (Digital Evidence)*, e-Crimes and Digital Evidence Community and Library, *available at* https://perma.cc/PH3V-W42U ("Cybertip

Batch SW Post Wilson 2021"). The State raises the specter of a warrant requirement "endanger[ing] here-and-now victims." BIO 21. But other exceptions to the Fourth Amendment's warrant requirement, not the private search exception, are designed to account for such cases. *See, e.g.*, *Missouri v. McNeely*, 569 U.S. 141, 148-49 (2013) (exigent circumstances exception).

In the end, the purpose of the Fourth Amendment is not to maximize law enforcement's flexibility and discretion. The warrant requirement reflects a constitutional principle that "[w]hen the right of privacy must reasonably yield to the right of search is . . . to be decided by a judicial officer, not by a policeman." *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also Riley v. California*, 573 U.S. 373, 403 (2014) (emphasizing that opposition to discretionary searches was "one of the driving forces behind the Revolution itself"). This Court should grant certiorari to make clear that principle still stands in the face of changing technology.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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