

No. 25-1191

In The
Supreme Court of the United States

— ♦ —
MICHAEL JOSEPH GASPER,

Petitioner,

v.

WISCONSIN,

Respondent.

— ♦ —
ON PETITION FOR WRIT OF CERTIORARI TO
THE WISCONSIN SUPREME COURT

— ♦ —
BRIEF IN OPPOSITION
— ♦ —

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General

JOHN A. BLIMLING
Assistant Attorney General
Counsel of Record

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
john.blimling@wisdoj.gov

QUESTIONS PRESENTED

Snapchat used a hash-value scanning program to identify a 16-second video in Michael Gasper's account as child sexual abuse material. Snapchat reported the video. A Wisconsin detective reviewed Snapchat's report and viewed the video without a warrant. In an interlocutory decision, the Wisconsin Supreme Court held that the private search doctrine applied. The detective did not need a warrant to view the video because his viewing did not expand the private search already conducted by Snapchat.

Although the Wisconsin Supreme Court addressed only the private search doctrine, Gasper's petition presents three questions:

1. Did Gasper prove:
 - a) a subjective expectation of privacy in the video attached to the CyberTip; and
 - b) that this subjective expectation of privacy was objectively reasonable?
2. Did the detective expand Snapchat's private search by viewing the video?
3. Alternatively, does the good faith exception to the exclusionary rule apply?

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INTRODUCTION

Gaspar's petition for certiorari presents three issues, but the Wisconsin Supreme Court addressed only one of them (the second question presented). And although there is a conflict among the courts on that second question, Gaspar's petition for certiorari does not provide this Court the right opportunity to resolve it.

Most importantly, this Court lacks jurisdiction. The Wisconsin Supreme Court's decision was interlocutory and does not fit within any exception recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Gaspar has not been convicted; and the Wisconsin Supreme Court remanded Gaspar's case. On remand, Gaspar will litigate additional suppression arguments that remain pending. Because Gaspar has not been convicted and further proceedings remain in state court, the Wisconsin Supreme Court's decision is not a final judgment that provides this Court jurisdiction.

Even if this Court had jurisdiction, certiorari would not be merited. Although the Wisconsin Supreme Court addressed only the private search doctrine, Gaspar raises two additional questions. This Court should adhere to its practice of declining to decide issues in the first instance. As for the private search doctrine, several vehicle problems weigh against this Court addressing that issue in this case. Reversal of the Wisconsin Supreme Court's decision would have no practical effect on Gaspar's case because the child pornography files found on his cell phone that led to his charges would remain

unexcluded. In addition, the record precludes Gasper from proving that the Fourth Amendment applies to the video file reported by Snapchat. Finally, the Wisconsin Supreme Court's decision is sound. This Court should deny Gasper's petition.

JURISDICTIONAL STATEMENT

Gasper erroneously claims that the decision of the Wisconsin Supreme Court is a final judgment that confers jurisdiction on this Court pursuant to 28 U.S.C. § 1257(a). Pet. 1. This Court lacks jurisdiction because the Wisconsin Supreme Court's decision is not a "final judgment[]" under 28 U.S.C. § 1257(a). Gasper has not been convicted or sentenced, and he has future criminal proceedings awaiting in the Wisconsin trial court. As explained in further detail below, these future proceedings in state court preclude the Wisconsin Supreme Court's decision from constituting a final judgment under 28 U.S.C. § 1257(a).

STATUTORY PROVISION

28 U.S.C. § 1257 provides:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant

to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

Snap, Inc., an electronic service provider (ESP), detected a 16-second video depicting child sexual abuse material (CSAM) in Gasper’s account on Snap’s social media platform, Snapchat. Pet. App. 5a–6a ¶ 7, 91a ¶ 2 n.1. Snapchat detected the video using PhotoDNA, a program that scans files to determine if they are copies of known CSAM files. Pet. App. 5a–6a ¶ 7. PhotoDNA detects CSAM files using hash values. Pet. App. 5a–6a ¶ 7.

A hash value “is a string of characters obtained by processing the contents of a given computer file and assigning a sequence of numbers and letters that correspond to the file’s contents.” *United States v. Reddick*, 900 F.3d 636, 637 (5th Cir. 2018). A file’s hash value remains constant regardless of the file’s name, making it similar to a vehicle identification number. Pet. App. 6a ¶ 8 n.9. ESPs can scan a file, derive its hash value, and compare that hash value to a database containing hash values for files previously seen and identified as CSAM. *See* Pet. App. 5a–7a,

¶¶ 7–8 & n.9. If the hash value of the scanned file matches a hash value in the database, then the scanned file is identified as a copy of a known CSAM file. *See* Pet. App. 6a ¶ 8 & n.9.

The uniqueness of a hash value makes it extremely sensitive to any changes to the file. If a user alters a single pixel in a file, then the hash value for that file will change substantially. Pet. App. 6a ¶ 8 n.8. A possessor of CSAM can evade hash-value detection by slightly altering the CSAM file. Pet. App. 6a ¶ 8 n.8. PhotoDNA combats this evasive tactic. Pet. App. 6a ¶ 8 n.8. Instead of obtaining and comparing hash values of individual files, PhotoDNA obtains the hash values of “pieces” of scanned files and compares them to the hash values for the “pieces” of previously identified CSAM files. Pet. App. 8a ¶ 12.

Snapchat reported Gasper’s CSAM video in a CyberTipline report (CyberTip) with the National Center for Missing and Exploited Children (NCMEC). Pet. App. 2a, 5a–6a ¶¶ 2, 7. No one at Snapchat viewed the 16-second video before reporting it. Pet. App. 6a ¶ 7. “NCMEC also did not view the video, but did confirm that the video was CSAM through a hash match of the uploaded file to visually similar files that were previously viewed and categorized by NCMEC.” Pet. App. 6a ¶ 8. NCMEC sent the CyberTip with the video to the Wisconsin Department of Justice, where an analyst viewed the video without a warrant. Pet. App. 6a–7a ¶ 8. After confirming that the video depicted CSAM, the analyst issued an administrative subpoena to Gasper’s internet service provider. Pet. App. 7a ¶ 8. After the administrative subpoena returned Gasper’s name and address, the analyst

forwarded the CyberTip to a local detective. Pet. App. 7a ¶ 9.

The local detective reviewed the CyberTip and viewed the CSAM video without a warrant. Pet. App. 7a ¶ 9. Based upon the CyberTip and the content of the video, the detective obtained and executed a search warrant on Gasper's residence and electronic devices. Pet. App. 7a ¶ 9. Investigators found ten CSAM files on Gasper's phone. Pet. App. 7a ¶ 9. Gasper admitted that he accessed and stored CSAM on his cell phone. Pet. App. 7a ¶ 9. No law enforcement officer ever accessed Gasper's Snapchat account or cell phone without a warrant. Pet. App. 32a–33a ¶ 45.

The State of Wisconsin (the State) charged Gasper with ten counts of possessing child pornography and nine counts of sexual exploitation of a child in violation of state law. Pet. App. 7a–8a ¶ 10. Gasper filed a motion to suppress, raising numerous grounds. Pet. App. 119a. He argued that Wisconsin's administrative subpoena statute violates the U.S. Constitution, the Wisconsin constitution, and Wisconsin state law. Pet. App. 121a–22a. He argued that he had a reasonable expectation of privacy in the video attached to the CyberTip, and that the detective violated the Fourth Amendment by viewing that video without a warrant. Pet. App. 122a–23a. He argued that the search warrant did not authorize a search of the contents of his electronic devices. Pet. App. 123a. Gasper also filed a separate motion to suppress his statements to law enforcement. Pet. 6.

The trial court held a hearing. The detective explained how PhotoDNA works and described the CyberTip process. Pet. App. 8a ¶ 11. Based on his prior experience, the detective considered PhotoDNA to be a reliable means of identifying suspected CSAM. Pet. App. 8a ¶ 11. The detective had never received a CyberTip with a PhotoDNA match that did not have CSAM attached. Pet. App. 8a ¶ 11.

The State submitted Snapchat's terms of service into evidence. Pet. App. 9a ¶ 13. In those policies, Snapchat informed users that CSAM was banned, Snapchat searched for CSAM, and Snapchat reported CSAM to NCMEC. Pet. App. 9a ¶ 13. Gasper did not testify, but he attempted to submit an affidavit regarding his subjective expectation of privacy, notwithstanding Snapchat's terms and conditions. Pet. App. 9a ¶ 14. The trial court ruled the affidavit inadmissible. Pet. App. 9a ¶ 14.

The trial court determined that the detective violated the Fourth Amendment by viewing the CSAM video attached to the CyberTip without a warrant. Pet. App. 9a–10a ¶ 15. The trial court “essentially determined that Gasper had a reasonable expectation of privacy because he used a cell phone to access Snapchat,” citing *Riley v. California*, 573 U.S. 373 (2014), and *Carpenter v. United States*, 585 U.S. 296 (2018). Pet. App. 13a ¶ 21 n.13. Because no one at Snapchat viewed the video, the trial court reasoned that the detective expanded Snapchat's search by viewing the video. Pet. App. 9a ¶ 15. The trial court excluded the video and all the CSAM recovered from Gasper's phone as fruit of the poisonous tree. Pet.

App. 107a.¹ The trial court did not address any of Gasper’s other suppression arguments. Pet. App. 108a–17a.

The State appealed and the Wisconsin Court of Appeals reversed. The court of appeals determined that Gasper failed to prove either his subjective expectation of privacy or the objective reasonableness of his expectation of privacy. Pet. App. 101a ¶ 20. Gasper failed to “submit any admissible evidence to meet his burden to show that he believed the video downloaded on Snapchat was private.” Pet. App. 101a ¶ 20. Gasper did not challenge the trial court’s ruling excluding his affidavit and, thus, “abandoned any effort to rely on the affidavit.” Pet. App. 101a ¶ 20 n.7. Any subjective expectation of privacy “would be objectively unreasonable given Snapchat’s policies regarding sexual content in general and sexually explicit content involving children in particular.” Pet. App. 102a ¶ 22.

Gasper obtained review by the Wisconsin Supreme Court. Pet. App. 11a ¶ 18. The supreme court affirmed the court of appeals on an alternative ground—the private search doctrine. Pet. App. 5a ¶ 6.² The Wisconsin Supreme Court explained that, consistent with *United States v. Jacobsen*, 466 U.S. 109 (1984), the detective did not expand Snapchat’s

¹ The trial court did not address the good faith exception because it erroneously believed that the State did not argue it. Pet. App. 113a.

² The Wisconsin Supreme Court vacated the Wisconsin Court of Appeals’ opinion, depriving it of any precedential value. Pet. App. 5a ¶ 6 n.6.

private search by viewing the flagged video because Snapchat’s private scan with PhotoDNA provided a “virtual certainty” that the video depicted nothing but CSAM. Pet. App. 31a ¶ 43. Because the detective did not expand Snapchat’s private search by viewing the video, the detective did not need a warrant. Pet. App. 33a ¶ 46.

The Wisconsin Supreme Court did not address whether Gasper proved his reasonable expectation of privacy or whether the good faith exception to the exclusionary rule applied. Pet. App. 33a–35a ¶¶ 47–50. It remanded the case to the trial court “for further proceedings consistent with this opinion.” Pet. App. 36a ¶ 52.

Two justices disagreed with the Wisconsin Supreme Court’s rationale, but they would not have affirmed the trial court’s suppression order. Pet. App. 43a–44a ¶ 66, 70a ¶ 107. Justice Dallet concurred in the judgment after concluding that the good faith exception applied. Pet. App. 61a ¶ 91. Justice Crawford concluded that the good faith exception did not apply, requiring exclusion of the video attached to the CyberTip. Pet. App. 86a–87a ¶¶ 132–33. However, Justice Crawford concluded that the CyberTip provided lawfully collected evidence that established probable cause for the search warrant. Pet. App. 88a ¶ 136. Therefore, the CSAM files obtained from Gasper’s phone “need not be excluded.” Pet. App. 89a ¶ 137.

Gasper then petitioned for a writ of certiorari.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for three reasons. First, this Court lacks jurisdiction. The Wisconsin Supreme Court's decision is not a final judgment under 28 U.S.C. § 1257(a) because Gasper has not been convicted and further proceedings remain in the Wisconsin trial court.

Second, Gasper's petition presents a poor vehicle in which to resolve any of his questions presented. The Wisconsin Supreme addressed only one of his three questions—the application of the private search doctrine. The private search doctrine question is not suitable for this Court's review because, even if Gasper were to prevail, he would still not be able to exclude the CSAM files from his phone that provide the basis for his charges. This Court could also affirm on the alternative basis that Gasper failed to prove that the Fourth Amendment even applied to the video attached to the CyberTip. Gasper cannot prove his subjective expectation of privacy in the video, and he has never asserted a property interest in the video.

Third, the Wisconsin Supreme Court issued a legally sound and reasonable decision that does not require this Court's intervention.

I. THIS COURT LACKS JURISDICTION BECAUSE THE WISCONSIN SUPREME COURT'S DECISION IS NOT A FINAL JUDGMENT.

This Court should deny certiorari for lack of jurisdiction. This Court has jurisdiction to review

“[f]inal judgments and decrees rendered by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). “In general, the final-judgment rule has been interpreted ‘to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.’” *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (alteration in original) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). “In criminal prosecution, finality generally ‘is defined by a judgment of conviction and the imposition of a sentence.’” *Florida v. Thomas*, 532 U.S. 774, 777 (2001) (quoting *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989)).

Gaspar’s guilt has not yet been adjudicated, and he has not been sentenced. For that reason, the Wisconsin Supreme Court remanded the case “for further proceedings consistent with this opinion.” Pet. App. 36a ¶ 52. Gaspar has pending suppression arguments to litigate on remand. The trial court has yet to determine whether Wisconsin’s administrative subpoena statute violates the U.S. Constitution, the Wisconsin constitution, or Wisconsin state law. Pet. App. 121a–22a. The trial court has yet to decide whether the search warrant extended to the contents of Gaspar’s phone, which is where law enforcement found the CSAM files that animate Gaspar’s charges. Pet. App. 7a ¶ 9, 123a. The trial court still must address Gaspar’s motion to suppress his statements. Pet. 6.

Depending on the result of those suppression arguments, Gasper will have to decide whether to accept a plea or proceed to trial. An erroneous failure to suppress evidence may prove harmless at a trial. Alternatively, a successful suppression motion may require additional litigation regarding the fruit of the poisonous tree doctrine. These future proceedings in Wisconsin state court establish that the Wisconsin Supreme Court's decision for which Gasper seeks a writ of certiorari is not a final judgment under 28 U.S.C. § 1257(a).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized four categories of state court decisions that qualify as final judgments, notwithstanding the existence of future proceedings in state court. The Wisconsin Supreme Court's decision does not fit within any of the four categories.

The first category covers interlocutory decisions in a criminal case when “there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained.” *Cox*, 420 U.S. at 479. This situation arose in *Mills v. Alabama*, 384 U.S. 214 (1966), in which the defendant argued that a state criminal offense violated the First Amendment. *Id.* at 216–18. The defendant had no other defense. *Id.* at 217. This Court determined that it had jurisdiction because further proceedings “would be no more than a few formal gestures leading inexorably towards a conviction.” *Id.*

Thomas illustrates why Gasper’s case does not fall within the scope of *Mills*. Like Gasper’s case, *Thomas*, concerned a state supreme court’s interlocutory ruling on a motion to suppress evidence. *Thomas*, 532 U.S. at 776–77. The Florida Supreme Court had rejected the State’s reliance on *New York v. Belton*, 453 U.S. 454 (1981), in arguing that narcotics evidence obtained from a car should not be suppressed. *Thomas*, 532 U.S. at 776–77. The Florida Supreme Court remanded for additional fact-finding and for the trial court to determine whether the search of the car was justified under *Chimel v. California*, 395 U.S. 752 (1969). *Thomas*, 532 U.S. at 777. Because “[t]he Florida Supreme Court remanded the case not only for application of *Chimel*, but for further factfinding, and the State has not conceded that the search is invalid under *Chimel*,” *Mills* was inapt. *Thomas*, 532 U.S. at 778.

Like *Thomas*, the suppression arguments raised in Gasper’s petition are neither conclusive nor outcome determinative. As in *Thomas*, the Wisconsin Supreme Court remanded Gasper’s case for further proceedings, which will include resolution of Gasper’s alternative theories of suppression. Pet. App. 36a, 120a–24a. At least one of those theories, the challenge to the search warrant, provides a means independent of this petition of suppressing the CSAM that forms the basis for Gasper’s charges. Pet. App. 123a. As in *Thomas*, the State does not concede any of Gasper’s alternative theories of suppression. Thus, *Mills* does not apply because the viability of Gasper’s prosecution does not rise and fall with the issues raised by Gasper’s petition. Remand is not a mere formality for an inexorable march to conviction.

The second *Cox* category arises when “the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.” *Cox*, 420 U.S. at 480. This situation did not arise in *Thomas* because a decision on the *Belton* issue raised by the petition for certiorari “would no longer be necessary” if the Florida state court determined that *Chimel* authorized the search of the vehicle. *Thomas*, 532 U.S. at 779. Similarly, here, if Gasper prevails on one of his alternative motions to suppress the CSAM obtained from his phone, then a decision regarding the private search doctrine would no longer be necessary.

Moreover, *Thomas* noted that this category of state court judgments assumes “that ‘the federal questions that could come here have been adjudicated by the State court,’ and the state proceedings to take place on remand ‘could not remotely give rise to a federal question . . . that may later come here.’” *Id.* (alteration in original) (quoting *Cox*, 420 U.S. at 480). That assumption cannot be made here. Gasper’s pending constitutional challenges could plausibly create additional federal questions that may later come to this Court.

The third *Cox* category arises when “the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.” *Cox*, 420 U.S. at 481. This scenario arose in *New York v. Quarles*, 467 U.S. 649 (1984), in which the prosecution sought certiorari for a suppression order

prior to trial. *Id.* at 651. Future review of this suppression order was not possible: “[S]hould the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal.” *Id.* at 651 n.1.

Thomas was distinguishable from *Quarles*. If the State of Florida prevailed on the *Chimel* issue, then the *Belton* claim would be moot. *Thomas*, 532 U.S. at 780. If Florida lost the *Chimel* issue, however, then “the question of suppression would be finally decided by the Florida courts, and the State could then seek certiorari in this Court” and “obtain review of both the *Belton* issue and the *Chimel* issue.” *Id.* Gasper faces the same situation. If he succeeds in suppressing the CSAM recovered from his phone on an alternative basis, then the Wisconsin Supreme Court’s application of the private search doctrine becomes moot. If he loses, then the issue of suppression is finally decided, and he can seek certiorari on all Fourth Amendment claims.

The fourth and final *Cox* category applies only in very particular circumstances. *Cox* described this category as follows:

[W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state

court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Cox, 420 U.S. at 482–83. This Court will grant certiorari in these circumstances only “if a refusal immediately to review the state court decision might seriously erode federal policy.” *Id.*

These circumstances are not present here. If Gasper were to prevail in this Court, his prosecution would continue because the CSAM files from his phone underlying his charges would not be suppressed. Not even the two justices who accepted Gasper’s private search doctrine argument determined that the CSAM from Gasper’s phone had to be suppressed. Pet. App. 61a ¶ 91, 89a ¶ 137. As a result, the trial court would still need to decide Gasper’s pending suppression challenge to the CSAM from his phone. Moreover, Gasper “can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials.” *Thomas*, 532 U.S. at 780.

For these reasons, the decision of the Wisconsin Supreme Court for which Gasper seeks a writ of certiorari is not a final judgment under 28 U.S.C. § 1257(a). This Court should therefore deny certiorari for lack of jurisdiction.

II. GASPER'S PETITION PROVIDES A POOR VEHICLE IN WHICH TO ADDRESS AN ISSUE THAT HAS DIVIDED COURTS.

Even if this Court has jurisdiction, certiorari remains unwarranted. At a minimum, this Court should deny certiorari on Gasper's questions regarding his reasonable expectation of privacy and the good faith exception because the Wisconsin Supreme Court did not address either issue.

Although the application of the private search doctrine in these circumstances has divided courts, Gasper's petition is ill-suited for resolving that split because the issue is not dispositive. The Wisconsin Supreme Court unanimously concluded that Gasper was not entitled to the original suppression order that excluded not only the video attached to the CyberTip, but also all CSAM recovered from his phone that form the basis for his charges. Gasper does not provide any reason to conclude that the CSAM recovered from his phone would be excluded if he prevailed on the private search doctrine in this Court.

In addition, Gasper's petition presents a poor vehicle to address the split because this Court has an alternative basis to affirm. Gasper cannot establish that the Fourth Amendment applied to the video attached to the CyberTip because he cannot prove his subjective expectation of privacy and he does not assert a property interest in the video.

- A. This Court should not grant certiorari on two questions unaddressed by the Wisconsin Supreme Court.

This Court should deny certiorari for Gasper's first and third questions about his reasonable expectation of privacy and the good faith exception, respectively, because the Wisconsin Supreme Court did not address either issue. Pet. i; Pet. App. 33a–35a ¶¶ 47–50. The Wisconsin Supreme Court addressed only the private search doctrine. Pet. App. 33a ¶ 46. This Court is “a court of review, not of first view.” *Smith v. Arizona*, 602 U.S. 779, 801 (2024) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). This Court should decline to be “the pioneer court” to address either Gasper's reasonable expectation of privacy or the good faith exception in the first instance. *Id.*

Although the Wisconsin Court of Appeals decided this appeal based on Gasper's failure to prove his reasonable expectation of privacy, the Wisconsin Supreme Court vacated that decision without addressing the issue. Pet. App. 5a ¶ 6 n.6. Moreover, this Court's jurisdiction is limited to final judgments issued “by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). For either reason, this Court's review is limited to the Wisconsin Supreme Court's decision.

- B. Gasper has not shown that a victory in this Court on the private search doctrine question will have any practical effect.

As the Wisconsin Supreme Court noted, whether the private search doctrine applies when an ESP reports a file as CSAM based on hash-value scanning without viewing the file has divided courts. *Compare Reddick*, 900 F.3d at 637–38; *United States v. Miller*, 982 F.3d 412, 417–18 (6th Cir. 2020) (concluding that the private search doctrine applies) *with United States v. Wilson*, 13 F.4th 961, 971–75 (9th Cir. 2021); *United States v. Maher*, 120 F.4th 297, 312–20 (2d Cir. 2024) (concluding that the private search doctrine did not apply). Pet. App. 21a–22a ¶ 33 & n.19.³

The Wisconsin Supreme Court joined three state courts in following the reasoning of *Reddick* and *Miller*. Pet. App. 21a–22a ¶ 33 & n.19. Since then, a divided panel of the Fourth Circuit sided with *Wilson* and *Maher*. *See United States v. Lowers*, 170 F.4th 134, 156 (4th Cir. 2026) (“[W]e align ourselves with the Second and Ninth Circuits.”); *id.* at 161 (King, J., concurring in the judgment) (“I would simply join the

³ When an ESP employee does view the flagged file, courts agree that the private search doctrine applies. *See United States v. Bebris*, 4 F.4th 551, 562 (7th Cir. 2021); *United States v. Ringland*, 966 F.3d 731, 737 (8th Cir. 2020); *United States v. Powell*, 925 F.3d 1, 6 (1st Cir. 2018); *see also United States v. Meals*, 21 F.4th 903, 908 (5th Cir. 2021) (reaching this conclusion with respect to NCMEC while assuming NCMEC to be a government actor).

Fifth and Sixth Circuits and rule that the ‘private search doctrine’ applies.).⁴

Gasper’s petition does not present this Court with the right opportunity to resolve this split. If Gasper were to prevail on the private search doctrine, he would obtain only a symbolic victory. The CSAM files that form the basis for his charges would remain unexcluded.

Gasper obtained a sweeping suppression victory in the Wisconsin trial court. The trial court excluded *all* CSAM evidence as fruit of the poisonous tree, including the ten CSAM files recovered from Gasper’s phone. Pet. App. 107a. By excluding the ten CSAM files from Gasper’s phone, the trial court excluded the evidence that provided the factual basis for Gasper’s charges, which included ten counts of possessing child pornography. Pet. App. 7a ¶¶ 9–10. Gasper has failed to show that he can exclude those ten CSAM files if he convinces this Court that the private search doctrine does not apply.

No justice on the Wisconsin Supreme Court believed that Gasper was entitled to exclude the ten CSAM files that provided the basis for his charges. The two justices who agreed with Gasper that the private search doctrine should not apply nonetheless shared this conclusion. Justice Dallet argued that no evidence should be excluded because the good faith exception to the exclusionary rule applied. Pet. App.

⁴ Gasper does not appear to be aware of *Lowers*. The Fourth Circuit decided *Lowers* one month before Gasper filed his petition.

60a–61a ¶¶ 90–91. Justice Crawford argued that the video should be excluded because the good faith exception did not apply, Pet. App. 87a–89a ¶¶ 135–37, but she determined that the CSAM files obtained from Gasper’s phone pursuant to a search warrant “need not be excluded,” Pet. App. 89a ¶ 137. Justice Crawford reasoned that the search warrant for Gasper’s phone was supported by sufficient untainted evidence. Pet. App. 88a–89a ¶ 137.

Gasper argues that the good faith exception should not apply, but he does not explain how that leads to the exclusion of the ten CSAM files from his phone. Pet. 28–31. He does not address Justice Crawford’s conclusion that the ten CSAM files from his phone should not be excluded even if the good faith exception does not apply. Pet. App. 87a–89a ¶¶ 135–37.

Thus, Gasper presents this Court only with an academic exercise. This Court avoids issuing advisory opinions. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). Because resolution of the private search doctrine question would have no practical effect for Gasper, this Court should deny certiorari.

- C. Gasper cannot prove that the Fourth Amendment applies to the video on this record.

Gasper’s petition fails to provide an opportunity to resolve the split in authorities regarding the private search doctrine for an additional reason. Gasper cannot prove that his Fourth Amendment rights were implicated when the detective viewed the

video attached to the CyberTip. The record precludes him from establishing his subjective expectation of privacy in the video, and he has never argued that he has a property based Fourth Amendment interest. These omissions doom Gasper’s Fourth Amendment challenge and provide an alternative basis to affirm the Wisconsin Supreme Court.

A person can obtain the protection of the Fourth Amendment by “demonstrat[ing] that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (citing *Rakas v. Illinois*, 439 U.S. 128, 143–44 & n.12 (1978)). Disputes about the applicability of the Fourth Amendment frequently turn on whether the claimed expectation of privacy is legitimate or objectively reasonable. *See, e.g., Byrd v. United States*, 584 U.S. 395, 402–10 (2018). But the objective reasonableness of a claimed expectation of privacy, alone, is not sufficient to trigger the Fourth Amendment. The person claiming an expectation of privacy must also demonstrate an actual or subjective expectation of privacy. *Carter*, 525 U.S. at 88; *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

Gasper cannot prove his subjective expectation of privacy in the video. Snapchat’s terms of service “specifically ‘banned [CSAM]’ and informed its users that Snapchat was actively scanning for CSAM on its platform.” Pet. App. 9a ¶ 13 (alteration in original). Snapchat’s policies also informed users that it would report CSAM to NCMEC and law enforcement. Pet. App. 9a ¶ 13. Gasper agreed to these policies. Pet. App. 105a ¶ 28. These policies regarding CSAM

“vitiating any subjective expectation of privacy [Gasper] might have had.” Pet. App. 105a ¶ 28.

Gasper failed to provide any admissible evidence that he possessed a subjective expectation of privacy despite Snapchat’s terms to the contrary. “Gasper did not testify, nor did he submit any admissible evidence to meet his burden to show that he believed the video downloaded on Snapchat was private.” Pet. App. 101a ¶ 20. He attempted to submit an affidavit attesting to his subjective expectation of privacy, but the trial court excluded it. Pet. App. 101a ¶ 20 n.7. On appeal, Gasper “abandoned any effort to rely on the affidavit.” Pet. App. 101a ¶ 20 n.7. Given this state of the record, Gasper cannot prove a subjective expectation of privacy. *See United States v. Dixon*, 137 F.4th 592, 602 (7th Cir. 2025) (“[I]t is almost impossible to find a privacy interest without an affidavit or testimony from the defendant.”).

An individual may claim the Fourth Amendment’s protection without proving a reasonable expectation of privacy. The reasonable expectation of privacy test “supplements, rather than displaces, ‘the traditional property-based understanding of the Fourth Amendment.’” *Byrd*, 584 U.S. at 403 (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). Gasper, however, has never argued that he has a property interest in the video that triggers the Fourth Amendment. Gasper has consistently argued only that he “had a reasonable expectation of privacy because he used a cell phone to access Snapchat,” Pet. App. 13a ¶ 21 n.13; *see* Pet. 10–21.

Gaspar's inability to prove that he had a Fourth Amendment interest in the video attached to the CyberTip is dispositive of his Fourth Amendment challenge. Because of this alternative basis for affirmance, Gaspar's petition does not present an opportunity to decide the private search doctrine issue that has divided courts.

III. THE WISCONSIN SUPREME COURT'S DECISION IS SOUND.

This Court need not grant certiorari for the additional reason that the Wisconsin Supreme Court correctly applied the private search doctrine.

The private search doctrine reflects the fact that the Fourth Amendment provides "rights against the government," not private parties. *Hiibel v. Sixth Jud. Dist. Ct. Nev., Humboldt Cnty.*, 542 U.S. 177, 187 (2004). Once a private party has searched an item, the owner's "expectation of privacy" in that item "has . . . been frustrated" such that the owner no longer has a "legitimate expectation of privacy." *Jacobsen*, 466 U.S. at 117, 119–20. A government agent may "view[] what a private party ha[s] freely made available for his inspection" without offending the Fourth Amendment. *Id.* at 119.

The Wisconsin Supreme Court relied on *Jacobsen*. In *Jacobsen*, Federal Express employees called law enforcement after accidentally damaging a package and discovering a tube containing baggies of white powder inside the package. *Jacobsen*, 466 U.S. at 111–12. The Federal Express employees repackaged the box. *Id.* at 111. DEA agents responded, reopened

the package, reopened the tube, and tested the white powder, which tested positive for cocaine. *Id.* at 111–12. *Jacobsen* concluded that the reopening of the package did not violate the Fourth Amendment. *Id.* at 119. Because there was a “virtual certainty that nothing else of significance was in the package, . . . it hardly infringed respondents’ privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube.” *Id.* “The agent’s viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.” *Id.*

The Wisconsin Supreme Court applied the private search doctrine because there was a virtual certainty that the detective’s viewing of the video would “disclose *nothing more* than what [Snapchat’s] search ha[d] revealed.” Pet. App. 33a ¶ 46 (citation omitted). The Wisconsin Supreme Court noted that hash value scanning “detects CSAM with ‘almost absolute certainty.’” Pet. App. 20a ¶ 32 (quoting *Reddick*, 900 F.3d at 639). The PhotoDNA scan used hash values to identify Gasper’s 16-second video as CSAM, and the detective “testified that he had never seen a file identified by PhotoDNA as CSAM be anything other than CSAM.” Pet. App. 21a ¶ 32. Because of this virtual certainty, the detective did not expand Snapchat’s private search when he viewed the video that Snapchat had freely made available for his inspection. Pet. App. 32a–33a ¶¶ 45–46.

The Wisconsin Supreme Court persuasively explained why *Wilson* and *Maher* (and by extension *Lowers*) are flawed. “[T]hose courts concluded that expansion of the private search occurs when law

enforcement is able to view more precise details about the content of the videos, rather than whether law enforcement was virtually certain to view anything else of significance.” Pet. App. 27a–28a ¶ 38. This approach led to a highly subjective inquiry aimed at the investigator’s mind rather than the scope of the antecedent private search, which was inconsistent with *Jacobsen*. Pet. App. 29a–31a ¶¶ 41–42.

The Wisconsin Supreme Court’s holding leads to a more reasonable investigative process than *Wilson* and *Maier*. Under the Wisconsin Supreme Court’s approach, an investigator can verify that a CyberTip truly reported CSAM before taking further investigative steps. Pet. App. 31a–32a ¶ 44. *Maier* expressly contemplated the opposite sequence of events. While *Maier* refused to apply the private search doctrine to a single file flagged as CSAM attached to a CyberTip, it nonetheless concluded that the CyberTip, alone, would have “demonstrated probable cause to support warrants for [the government’s] own searches of Maier’s *Google accounts and residence*.” *Maier*, 120 F.4th at 319 (emphasis added).

Maier’s result is puzzling. It is more reasonable to enable officers to view the flagged video before obtaining a search warrant for the subject individual’s home to spare innocent individuals from the significant invasion occasioned by a search of the home. In this way, *Wilson*, *Maier*, and *Lowers* run afoul of the “ultimate touchstone” of the Fourth Amendment: “reasonableness.” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

Justice Crawford’s opinion puts the unreasonableness of this result in stark relief. Justice Crawford characterized the flagged video as merely “*potential* CSAM,” Pet. App. 77a ¶ 119, and she found that the majority’s application of the private search doctrine “creates troubling precedent.” Pet. App. 81a ¶ 124. Yet Justice Crawford also concluded that the CyberTip, alone, “can provide probable cause for a search warrant, even when the investigator does not view the flagged file.” Pet. App. 88a ¶ 136. The investigative process contemplated by Justice Crawford—and *Wilson*, *Maher*, and *Lowers*—is far more “troubling” for individual privacy than the Wisconsin Supreme Court’s application of the private search doctrine. Pet. App. 81a ¶ 124. An objectively reasonable person who was the subject of an erroneous report of CSAM would surely prefer that the investigator view the reported file and discover that it is not CSAM rather than obtain and execute a search warrant for the person’s house without viewing the reported file.

This Court need not grant certiorari to the Wisconsin Supreme Court’s decision that correctly applied *Jacobsen* and reached a reasonable result.

CONCLUSION

The petition for certiorari should be denied.

Dated at Madison, Wisconsin this 1st day of June
2026.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General

JOHN A. BLIMLING
Assistant Attorney General
Counsel of Record

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
john.blimling@wisdoj.gov