IN THE

Supreme Court of the United States

JAMES T. OLIVER,

Petitioner,

v.

STATE OF CLINTONIA.

Respondent.

On Writ of Certiorari to
the Supreme Court of Clintonia

BRIEF OF THE PETITIONER

Team I

Counsel for Petitioner

QUESTIONS PRESENTED

I. Under rational basis review, does a statute fail to advance a legitimate government interest when circumstances have changed since the passage of the statute, there is no longer a legitimate public health and safety or consumer deception concern, and the statute takes an economically protectionist approach?

II. Under Fourth Amendment jurisprudence, are the nine images recovered from Oliver's USB drive inadmissible when the officer's subsequent inspection exceeded the scope of a private citizen's search and physically trespassed upon Oliver's USB drive without a warrant?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTION

REGULATIONS

OTHER AUTHORITIES

OPINION BELOW

The decisions of the Circuit Court of Clintonia and the Supreme Court of Clintonia have not been reported in an official or unofficial reporter at the time of filing this Brief.

JURISDICTION

The decision of the Clintonia Supreme Court was entered on October 29, 2016. The petition for Writ of Certiorari was filed on November 10, 2016. That petition was granted on June 20, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The Clintonia legislature enacted a statute to prevent citizens from manufacturing low cost, quality caskets based upon a study that has since been found to be factually baseless. James T. Oliver ("Oliver"), a citizen of Clintonia, was indicted under this statute after providing a customer a casket for the customer's mother. Subsequent to the sale, the customer entered Oliver's home uninvited, conducted a search of Oliver's home, and seized a piece of Oliver's property, a USB, before returning to the customer's home. Once there, the customer searched the USB drive he had removed from Oliver's home. The customer found what appeared to be child pornography, at which point, he delivered the USB to the police. The police expanded the original search conducted by the customer prior to arresting Oliver.

A. Enactment of Clintonia Funeral Directors and Embalmers Act

The Clintonia legislature enacted Clintonia Statute Section 18.942, the Clintonia Funeral Directors and Embalmers Act ("FDEA"), in 1932. R. at 4. The statute requires individuals who intend to sell time of need caskets to be licensed under the FDEA. R. at 3. A time of need casket sale occurs when the prospective occupant is already deceased at the time of purchase. R. at 3. Originally, the FDEA did not contain the criminal provision that Oliver is being charged

under in this case. R. at 4. The FDEA created the Board of Funeral Directors and Embalmers ("Board") which has the sole authority to promulgate license requirements in the state of Clintonia. R. at 3-4.

The Board provided that an individual can gain a license in one of two ways. R. at 4. The first way requires an individual to complete one year of mortuary school at an accredited school followed by a two-year apprenticeship. R. at 4. The other path required an individual to complete three years of apprenticeship. R. at 4. At the conclusion of either path, an individual must pass a funeral director's exam in order to receive a license. R. at 4.

B. Criminal Provision of FDEA Based Upon Factually Baseless Study

In 1956, the Clintonia legislature amended the FDEA to include a criminal provision that criminally penalized the intrastate sale of time of need caskets by individuals who do not have the proper license under the FDEA. R. at 5. The sponsor of this amendment touted a study that claimed ten percent of non-licensed retailers of caskets sold caskets that did not meet FDEA standards. R. 5. Additionally, the sponsor stated that members of the legislature should "protect morticians in Clintonia from unlicensed competition" and to "[c]all it public safety, call it consumer protection, justify it however you like, but pass this bill to keep Clintonia's morticians thriving." R. at 5. The statute states, in part: "No resident of Clintonia may, without a proper license … sell a time-need-casket . . . violation is punishable … by up to one year in prison and a $1,000 fine." R. at 3.

The study that led to the aforementioned amendment of the FDEA has since been debunked as factually baseless. R. at 5. In 2011, it came to light that the study was a "factually baseless propaganda tool created by the Board." R. at 5. As a matter of fact, caskets sold by licensed morticians in Clintonia were on average 800 percent more expensive than those sold by

unlicensed retailers. R. at 5. This is in spite of the fact that the caskets sold by each were of similar quality. R. at 5.

C. Oliver Begins Manufacturing Caskets

Oliver spent a portion of his adult life serving as a monk at St. Michael's Abbey in Sandersburg. R. at 5. While there, Oliver observed his fellow monks create a casket to bury an abbot who had died. R. at 5. Oliver enjoyed and respected the quality and simplicity of the casket. R. 5. At that time, he wanted to begin producing the caskets for sale. R. at 5.

In 2012, Oliver left the Abbey and moved to a home in Clintonia where he began selling the caskets he learned to make while at the Abbey. R. at 5. In the course of this business, Oliver came into contact with Bruce Walker ("Walker"), a former FBI agent. R. at 5. Walker's mother had recently died, and Walker was looking to purchase a casket for her funeral. R. at 5-6. First, Walker attempted to purchase from a licensed mortician in Clintonia, but the licensed mortician offered a casket at a price of $9,000. R. at 6.

After baulking at the cost charged by the licensed mortician, Walker contacted Oliver. R. at 6. Oliver offered to create a casket for Walker for only $1,000. R. at 6. Walker was very happy with the casket and expressed his satisfaction with the casket to Oliver. R. at 6. During this conversation, Oliver told Walker about the law that required a license and informed Walker that he did not have the license. R. at 6. He told him that the law was not enforced, but he kept a fake license on a USB on his nightstand just in case; this ended the conversation. R. at 6.

D. Walker Performs Search of Oliver's Home

The day after the funeral, Walker went uninvited to Oliver's home. R. at 6. When he arrived, he found no car in the driveway. R. t 6. Walker continued up to Oliver's door. R. at 6. When he knocked on the door, it swung open. R. at 6. Walker called out for Oliver, but there

was no response. R. at 6. At that point, Walker entered Oliver's home. R. at 6. Walker explored Oliver's home and eventually found Oliver's bedroom. R. at 6. Once in Oliver's bedroom, Walker went to Oliver's nightstand where he found a USB drive. R. at 6. Walker took the drive from Oliver's home and left. R. at 6.

Later, Walker inserted the drive he removed from Oliver's home into his own computer. R. at 6. Walker found two folders on the drive. R. at 6. Walker clicked on the folder titled "F." R. at 6. In this folder, he found randomly numbered subfolders. R. at 6-7. Walker entered the first subfolder, where he found several JPEG images. R. at 7. Walker clicked on the first image which contained what appeared to be child pornography. R. at 7. Walker does not know which JPEG image he clicked on originally. R. at 7.

E. Police Expand the Original Search

After removing the USB drive from Oliver's home and viewing one image on his home computer, Walker delivered the USB to the police department. R. at 7. Walker told the police what he had found on the USB and showed them how to get to the "F" folder. R. at 7. Once in that folder, Walker simply stated that the image was "one of those." R. at 7. At that time, an Officer Jones clicked through each of the first ten images to view their contents. R. at 7. Once Officer Jones completed his own search of the USB, he delivered the USB drive to his superiors. R. at 7. Oliver was subsequently arrested as a result of the images found on the USB. R. at 7.

F. Procedural History

Oliver was arrested and charged by indictment relating to charges under the FDEA and the Clintonia Child Protection Act. R. at 2. Oliver moved to dismiss all counts under Clintonia Rule of Criminal Procedure 3.190(c)(4). R. at 2. The parties jointly moved to stay the proceedings to allow the Clintonia legislature to review the FDEA, including its enforcement

provision concerning time of need caskets. R. at 2. The Clintonia legislature repealed both the license requirement and enforcement provisions as of January 1, 2015. R. at 2. The repeal did not contain a retroactive repeal. R. at 2.

The Circuit Court of Clintonia granted Oliver's Motion to Dismiss all counts. R. at 14. The Supreme Court reversed over the dissent of Justice Wall. R. at 24-25. Oliver timely filed his petition for Writ of Certiorari on November 10, 2016. R. at 26. This Court granted the petition on June 30, 2017. R. at 26.

SUMMARY OF THE ARGUMENT

First, rational basis review of Section 18.942 should be evaluated based on the government's interest at the time of a challenge to a statute. Here, the Clintonia legislature had no legitimate public health or safety purpose in Section 18.942 at the time of enforcement as the information the legislature relied on in passing the statute is no longer applicable. Additionally, pure economic protectionism is not a legitimate governmental purpose. Even if this Court evaluates the statute based on the legislature's purpose at the time of enactment, the law is not rationally related to a legitimate government purpose and instead was enacted to inhibit competition.

Second, this Court should hold the images uncovered during the officer's unconstitutional search inadmissible. The officer's actions constituted a government search under the Fourth Amendment because his inspection exceeded the scope of the private citizen search. Moreover, the Supreme Court has held that a court may not allow in evidence that is the product of an unreasonable government search. A government search is unreasonable under the Fourth Amendment when the government physically trespasses upon the property or effects of a defendant without a warrant. Here, the officer physically trespassed upon Oliver's USB drive

without first seeking a warrant from a neutral magistrate. Therefore, this Court should hold the images uncovered during the unconstitutional search inadmissible.

Finally, this Court should decline to extend the good faith exception to the facts of this case because the mistake that resulted in the violation of Oliver's Fourth Amendment rights was purely the result of unsupported police action. The Supreme Court has extended the good faith exception to the Fourth Amendment exclusionary rule if an officer reasonably relies upon appellate precedent controlling at the time of the search. The Supreme Court issued a rule prior to the search in question that stated that a physical trespass of the effects of a defendant is a violation of the Fourth Amendment. Nonetheless, the officer in this case physically trespassed Oliver's USB. This necessitates that the evidence be excluded to give effect to the deterrent goals of the Fourth Amendment exclusionary rule. Thus, this Court should decline to extend the good faith exception to the facts in this case.

I. THE RATIONAL BASIS TEST IS BASED ON THE LEGITIMACY OF THE GOVERNMENT'S INTEREST AT THE TIME OF CHALLENGE TO A STATE LAW BECAUSE CIRCUMSTANCES MAY CHANGE FROM THE TIME A STATUTE IS DRAFTED TO THE TIME A STATUTE IS ENACTED, AND SECTION 18.942 IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST BECAUSE IT DOES NOT RELATE TO PUBLIC HEALTH, DOES NOT PROTECT CONSUMERS, IS PURE ECONOMIC PROTECTIONISM, AND DOES NOT SATISFY ANY OTHER LEGITIMATE GOVERNMENT INTEREST.

The Fourteenth Amendment allows for equal protection and due process of law for citizens. U.S. Const. amend. XIV. The Supreme Court has established three standards of review for an equal protection or due process challenge. As the statute at issue does not affect a suspect class, or discriminate on the basis of gender, the appropriate framework for analysis is rational basis scrutiny. *Romer v. Evans*, 517 U.S. 620, 632 (1996). Statutes and regulations subject to rational basis review must show a rational basis to a legitimate state interest. *Id.* While the Court

provides deference, "deference is not abdication and 'rational-basis scrutiny' is still scrutiny." *Nordlinger v. Hahn*, 505 U.S. 1, 31 (1992).

This Court should find that the Circuit Court of Clintonia was correct in determining that the rational basis test is evaluated based on the legitimacy of the government's interests at the time of a challenge. Even if this Court finds that the legislature's purpose at the passage of Section 18.942 is controlling, there is still not a legitimate government interest at the time of enactment in 1956.

Furthermore, Section 18.942 is not rationally related to a legitimate government interest. Section 18.942 fails the rational basis test because it fails to accomplish any of its stated purposes; protecting consumers from deceptive sales practices and protecting public health and safety. Furthermore, economic protectionism, a justification relied upon by the Supreme Court of Clintonia, is not a legitimate government interest absent an additional rationale. Even if this Court finds that economic protectionism is a legitimate government interest, Section 18.942 still does not fall within that purview.

A. The rational basis test evaluates the legitimacy of a government interest at the time of a challenge to a statute.

The rational basis test is based on the legitimacy of the government's interest at the time of the challenge to state law. Changed circumstances between the passage of a statute, and the time of a challenge to a statute should be taken into account in a rational basis analysis. *See United States v. Carolene Products*, 304 U.S. 144, 153 (1938). "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.* This reasoning has been articulated numerous times by this Court. *See e.g.*, *Id.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct.

2292, 2306 (2016). The Court should thus follow *stare decisis* and review the legitimacy of a government interest based on that interest in a statute at the time it is challenged.

The Supreme Court of Clintonia argues that the changed circumstance test articulated in *Carolene Products* and *Whole Women's Health* is dicta because neither party argued that the statute should be invalidated based on changed circumstances. *See State v. Oliver*, No. SC-cr-2353, *20 (Sup. Ct. Clintonia). A court is not limited to the particular legal theories advanced by the parties, but retains an ability to identify and apply proper law. *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993). Thus, simply because neither party directly addressed the changed circumstances does not mean that the court cannot consider the changed circumstances between enactment and the time of a challenge.

Even if the statements are dicta, dicta can be compelling if it contains an expression of the opinion of the court. *Brink v. Smith Companies Const., Inc.*, 703 N.W.2d 871, 877 (Minn. Ct. App. 2005). It can thus can be entitled to considerable weight. *Id.* Therefore, even if it is dicta, it does not mean that the opinion cannot be given weight.

Following this Court's lead, a number of circuits already review the legitimacy of a government interest at the time of a challenge to a state law. *See e.g.*, *Milnot Co. v. Richardson,* 350 F.Supp. 221 (N.D. Ill. 1972) (holding Filled Milk Act passage rational no longer applied); *Dias v. City & Cty. Of Denver,* 567 F.3d 1169 (10th Cir. 2009) (holding information relied upon in passing the statute was no longer rational based on the state of science in 2009). *Minot Co.* involved a challenge to the statute at issue in *Carolene Products*. *Milnot*, 350 F.Supp. at 225; *Carolene Products,* 304 U.S. at 146. In *Minot Co.*, Minot challenged the Filled Milk Act, which prevented the interstate shipment of filled milk products. *Minot*, 350 F.Supp. at 225. When passed, the legislature justified the statute as necessary to prevent consumer confusion. *Id.* The

Court went on to determine that the product at issue already appeared on grocery store shelves, was sold overseas, and was frequently used by the military, therefore negating consumer confusion as a justification for the statute. *Id.*

The changed circumstances in *Milnot Co.* directly mirror those at hand because in this case, the legislature in Clintonia relied upon information, in amending Section 18.942, that is no longer applicable. For example, the legislature relied upon a 1955 study that showed that at least ten percent of unlicensed casket retailers took advantage of consumers by selling caskets that did not meet the standards laid out by the FDEA. This study was conclusively proven false in 2011. Moreover, the FDEA standards were repealed in 2012, and Clintonia no longer places restrictions on caskets. Thus, reviewing Section 18.942 based on the legitimacy of the government's interest at the time of the challenge is the proper standard, and is a sentiment echoed by a number of courts.

The rational basis test is based on the legitimacy of the governmental interest at the time of the challenge to state law because courts are best suited to respond to changing circumstances. "In light of the legislature's limited responsiveness, courts provide the best forum to evaluate the continuing rationality of laws." Sean G. Williamson, Comment, *Contemporary Contextual Analysis: Accounting for Changed Factual Conditions Under the Equal Protection Clause*, 17 U. Pa. J. Const. L. 591, 622 (2014). Courts can provide the best forum to evaluate the rationality of a law because they are more dynamic, and thus, the Court should evaluate rationality at the time of a challenge, rather than abide by archaic reasoning.

Furthermore, the rational basis test should be based on the legitimacy of the governmental interest at the time of the challenge because courts are facts finders. Courts, as skilled fact finders, have access to vast amounts of information, as well as the tools to conduct

empirical analysis. *Id.* at 622. Here, the Circuit Court of Clintonia had access to information that the legislature did not when it first passed the statute, namely that the study relied upon to justify the statute was conclusively discredited. *State v. Oliver*, No. 14-cr-554, *2, 10 (Cir. Ct. Clintonia). Therefore, the legitimacy of the governmental interest, as probed through the rational basis test, should be based on the facts as they stand at the time of the challenge to the statute.

The Supreme Court of Clintonia relied upon *Minnesota v. Clover Leaf Creamery Co.* in reaching its conclusion that the time of passage controls rational basis analysis. The Supreme Court of Clintonia relied upon this statement: "litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken and that the government's interest should be evaluated at the time of the passage of the statute" to reach its conclusion. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). However, the Supreme Court of Clintonia misapplied it. The Court in *Clover Leaf Creamery* was resolving an issue of a questionable factual basis for the statute at the time of passage. *See id.; see also* Williamson, *supra* at 617. The issue here revolves around a change in factual basis subsequent to the passage of the statute. Thus, *Clover Leaf Creamery* is not controlling.

Further, the other cases relied upon by the Supreme Court of Clintonia are distinguishable because even if the government's interest at the time of enactment is evaluated, the Clintonia legislature did not have a legitimate purpose in enacting Section 18.942. The Supreme Court of Clintonia contends that statutes should be evaluated at the time of enactment, and that the legislature acted reasonably. *Oliver*, No. SC-er-1353 at *18, *21 (relying on *W. & S. Life Ins. Co. v. State Bd. Of Equalization of California*, 451 U.S. 648, 672 (1981); *Murillo v. Bambrick*, 681 F.2d 898, 906 (3rd Cir. 1982)). Here, the legislature did not act reasonably because the statute's purpose was to shield morticians from competition, which as discussed below, is not rationally

related to a legitimate government interest. While the Supreme Court stated that the legislature acted to protect consumers and public health, it is clear from the statement of the sponsor of the 1956 Act that those were not the true motivations. *Oliver*, No. SC-er-1353 at *4 n.8 ("My colleagues, we need to protect Clintonia from unlicensed competition . . . . Call it safety, call it consumer protection, justify it however you like, but pass this bill to keep Clintonia's morticians thriving."). Thus, there was no legitimate purpose at the time of enactment.

B. Section 18.942 is not rationally related to a legitimate government interest because it does not protect public health, prevent consumers from deceptive practices, nor is economic protectionism a justification for a legitimate state interest.

Criminal enforcement of Section 18.942 is not rationally related to any legitimate government interest. The circuit court was correct in determining that the statute was not rationally related to an important government interest because the changed circumstances doctrine negates the state's interest in protecting consumers from deceptive sales tactics, Oliver does not handle bodies or provide embalming services, and economic protectionism is not a legitimate government interest. *Oliver*, No. SC-er-1353 at *8-11.

i. There is no rational basis between the state's articulated public health and consumer protection rationales because circumstances have changed since the statute's passage in 1956.

The Circuit Court correctly concluded that there was no rational basis for Section 18.942 because circumstances had changed in regards to consumer protection and public health since the statute's passage in 1956. *See Carolene Products Co.*, 304 U.S. at 153; *Oliver*, No. SC-er-1353 at *9. Here, the legislature relied on two circumstances that have now changed since the passing of Section 18.942: (1) regulations regarding decomposing bodies, which were repealed in 2012; and (2) a study stating that unlicensed retail casket sellers took advantage of customers that was debunked in 2011.

Furthermore, Section 18.942 does not contain standards for caskets, and is thus not rationally related to a legitimate interest. A statute that places requirements on casket sellers, but does not contain standards for design or construction is not rationally related to a legitimate state interest. *See Peachtree Caskets Direct, Inc. v. State Bd. Of Funeral Servs. of Georgia*, No. Civ.1:98-CV-3084-MHS, 1999 WL 33651794, at *1 (N.D. Ga. Feb. 9, 1999). The Clintonia legislature relied upon FDEA standards for caskets in passing its laws. Those standards were repealed in 2012, and Clintonia law now does not require any specific type of casket for burial, nor does the statute contain any standards for the design or standards required for the casket. Therefore, Section 18.942 does not satisfy the rational basis test.

The legislature also claimed that the additional requirements on casket retailers were in place because the licensing process would ensure the proper preparation and disposal of deceased bodies. *Oliver*, No. 14-cr-554 at *10. When the party selling the casket does not handle bodies or engage in embalming services, the statute does not rationally relate to public health or consumer protection. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (stating that there was no rational basis for a licensing scheme that applied to casket sellers that did not handle bodies or provide embalming services). Oliver does not handle bodies or provide embalming services. Identically, Oliver was simply providing caskets for purchase. Therefore, there is no rational basis for the statute's licensing scheme to apply to him.

In support of Section 18.942, the legislature had also offered evidence that unlicensed retail casket sellers took advantage of customers by selling lower quality caskets than set out by the FDEA**.** However, this study was conclusively disproven in 2011. This reasoning has also been further articulated by the Federal Trade Commission. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 219 (5th Cir. 2013); Trade Regulation Rule; Funeral Industry Practices, 47 Fed. Reg.

42,260 (Sept. 24, 1982); *see also* 16 C.F.R. § 453.1 et seq. The FTC passed the "Funeral Rule" in the early 1980s to mitigate unfair or deceptive funeral provider practices. *St. Joseph Abbey*, 712 F.3d at 218. The FTC reevaluated the Rule in 2008, and expressly declined to subject third-party casket vendors to the Rule because, "in contrast to state-licensed funeral directors, 'the record was bereft of evidence indicating significant consumer injury caused by third-party sellers.'" *Id.* at 219 (quoting Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. 13740, 13745 (Mar. 14, 2008)). Furthermore, "requiring independent casket sellers to have funeral director's licenses does not further the goals of the Funeral Rule." *See* Asheesh Agarwal, *Protectionism as a Rational Basis? The Impact on E-Commerce in the Funeral Industry*, 3 J.L. Econ. & Pol'y 189, 203 (2007). As the study was conclusively disproven over six years ago, and those same sentiments are echoed by the Federal Trade Commission, this no longer provides a rational basis for Section 18.942.

The argument that retail casket sellers took advantage of customers was also debunked as an attempt by the funeral industry to maintain control over the industry and restrain competition. Shielding a discrete group of people from competition is not a legitimate government interest. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624; *Craigmiles*, 312 F.3d at 225. In *Craigmiles*, the legislature evaluated the legitimacy of a statute that required casket sellers to be licensed. *Craigmiles*, 312 F.3d at 224. Similar to this case, the court in *Craigmiles* found that funeral home operators were marking up the price of caskets 250-500 percent, whereas third-party sellers operated on smaller margins. *Id.* The *Craigmiles* court held that because the licensing requirement created significant barriers to competition in the casket market, the statute was not rationally related to a legitimate government interest. *Id.* at 228. Here, the funeral industry played a substantial role in the passage of the statute to impeded competition. *Oliver*,

No. 14-cr-554 at *4-5, n.8 ("During the debates on the amendment, Senator Gaines said, 'We might not be able to regulate interstate activity thanks to the Commerce Clause, but we can regulate intrastate sales[.]'"). Caskets in Clintonia were also 800 percent more expensive than those sold by unlicensed retailers. *Id.* at *5. Therefore, Section 18.942 is not rationally related to a legitimate government interest because it was enacted to impede competition.

In *St. Joseph Abbey*, a group of monks challenged a Louisiana statute that regulated intrastate casket sales. *See St. Joseph Abbey*, 712 F.3d at 220. The Louisiana statute at issue required a prospective casket retailer to become a licensed funeral establishment, and for the establishment to employ a full-time funeral director. *See id.* at 218; La. Stat. Ann. §§ 37:831(37)-(39); 37:848 (2017). This statute effectively limited the intrastate sale of caskets to funeral homes. *See St. Joseph Abbey*, 712 F.3d at 218. The Court of Appeals in *St. Joseph Abbey* held that the statute was not rationally related to policing deceptive sales tactics because even if deceptive sales could be linked to independent third-parties, there was no link between restricting casket sales to funeral homes and preventing consumer fraud and abuse. *Id.* at 225 (explaining funeral homes, not independent third party sellers, marked up prices and bundled products, creating problems for consumers). This case is directly analogous to the case at hand; the Clintonia statute limits intrastate casket sales to funeral directors, and requires a funeral director to obtain a license. *Oliver*, No. 14-cr-554 at *4. Thus it follows that there is no link between Section 18.942, which limits casket sales to funeral directors, and preventing consumer fraud and abuse.

The purpose advanced by the legislature also harms consumers. A consumer is harmed by a regulation when they are offered fewer choices for the purchasing of a casket because of the regulation. *See Casket Royale, Inc. v. Mississippi*, 124 F.Supp. 434, 440 (S.D. Miss. 2000). Here,

Section 18.942 has the effect of diminishing competition because it only allows licensed funeral directors to sell caskets. This results in less competition, and can ultimately lead to higher prices in the marketplace. *See id*. Thus, Section 18.942 harms rather than protects citizens.

Even if this Court were to follow the mistaken approach articulated by the Supreme Court of Clintonia, Section 18.942 is not rationally related to preventing consumer fraud and abuse, or protecting public health. The court stated at two-part test: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? *W. & S. Life Ins. Co. v. State Bd. Of Equalization of California*, 541 U.S. 648, 668 (1981). The statute was enacted as a response to lobbying by a group of wealthy and powerful morticians. *Oliver*, No. 14-cr-554 at *4. The chief sponsor of the amendment made it clear to the legislature that the amendment was to prevent funeral directors from competition. Courts have held that impeding intrastate competition is not a legitimate purpose. *See e.g., St. Joseph Abbey*, 835 F.Supp.2d at 153; *City of Philadelphia*, 437 U.S. at 624; *Craigmiles*, 312 F.3d at 223. While it may have been reasonable for the legislature to believe that the statute would promote that purpose, it was not legitimate to begin with, and therefore, even if this Court were to rely upon the legislature's purpose at the time of enactment, the statute was not rationally related to a legitimate purpose in 1956.

ii. The Circuit Court of Clintonia correctly concluded that economic protectionism is not a legitimate public interest.

The Circuit Court was correct in holding that economic protectionism is not a legitimate government interest. *Oliver*, No. 14-cr-554 at *11. The federal circuits are divided on this issue. *Compare e.g., St. Joseph Abbey*, 712 F.3d at 222 (holding casket statute to not be rationally related to legitimate government interest); *and Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (holding that "mere economic protectionism for the sake of economic

protectionism is irrational with respect to determining if a classification survives rational basis review . . . .) *with Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

However, the Supreme Court has already clearly addressed this issue, and has held that pure economic protectionism is not a legitimate interest, and thus fails rational basis review. *See Metro Life Ins., Co. v. Ward*, 740 U.S. 869, 882 (1985); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *City of Philadelphia*, 437 U.S. at 624; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). Additionally, courts that have addressed economic protectionism arguments, specifically in the context of casket statutes, have held that statutes restricting third-party sales do not serve legitimate interests. *See St. Joseph Abbey*, 712 F.3d at 222; *Craigmiles*, 312 F.3d at 229.

The Supreme Court of Clintonia incorrectly disagreed with the Circuit Court's reliance on *City of Philadelphia v. New Jersey*. The Supreme Court of Clintonia contends that *City of Philadelphia* is inapplicable as it involved a challenge to a statute that affected interstate commerce, rather than intrastate commerce. *Oliver*, No. SC-cr-1353 at *22; *City of Philadelphia*, 437 U.S. at 624-630. However, the Supreme Court of Clintonia is mistaken because *City of Philadelphia* does not distinguish between intrastate and interstate sales in discussing legitimate government interests. *See City of Philadelphia*, 437 U.S. at 617; *see also* Jim Thompson, *Powers v. Harris: How the Tenth Circuit Buried Economic Liberties*, 82 Denv. U. L. Rev. 585, 602 (2005). The Court simply stated "Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *City of Philadelphia,* 437 U.S. at 624. Additionally, the position advanced in *City of Philadelphia*, that pure economic protectionism is not a legitimate interest, has also been advanced in other decisions by this Court. *See e.g.*, *H.P. Hood & Sons, Inc.*, 336 U.S. at 537-38; *Energy Reserves Group, Inc.*, 459 U.S. at

411. Thus, there is no basis for the contention that *City of Philadelphia* is not controlling, nor that it is inapplicable because it relates to interstate economic discrimination.

Moreover, the Supreme Court of Clintonia was incorrect in relying upon *Powers v. Harris*. *Powers* stands in contrast to other decisions that have addressed economic protectionism as a justification of casket licensing statutes. *Compare Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *and Peachtree Caskets Direct, Inc.*, 1999 WL 33651794; *and St. Joseph Abbey*, 712 F.3d 215 *with Powers v. Harris*, 379 F.3d 1208. None of the cases relied upon in *Powers* support the proposition that naked economic protectionism is a legitimate state purpose. *See Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)*; Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103 (2003)*; City of New Orleans v. Dukes*, 427 U.S. 297 (1992)*;* Thompson, *supra* at 603. The concurring opinion in *Powers* recognized as much. *See Powers*, 379 F.3d at 1225 (Tymkovich, J., concurring). "The majority is correct that courts have upheld regulatory schemes that favor some economic interests over others . . . . But all of the cases [cited by the majority] rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest." Marc P. Florman, Comment, *The Harmless Pursuit of Happiness: Why "Rational Basis With Bite" Review Makes Sense for Challenges to Occupational Licenses*, 58 Loy. L. Rev. 721, 766 (2012) (quoting *id.).*

The cases relied upon in *Powers* are also distinguishable on the facts. None of the cases used to support the proposition, that economic protectionism is a legitimate state interest, are cases involving casket statutes. *See generally Powers*, 379 F.3d.. The cases cited provided additional justification for the statutes at issue, rather than allowing them under an economic protectionism argument. *Williamson*, 348 U.S. at 485 (limiting optometrists to fitting eye glass frames advanced a public policy purpose); *Fitzgerald*, 539 U.S. at 109 (limiting gambling could

encourage the economic development of river communities); *Dukes*, 427 U.S. at 304 (discriminating between older and newer vendors preserved the appearance of the French Quarter for tourists). Accordingly, pure economic protectionism, absent an additional policy rationale, is not a legitimate purpose, and the *Powers* court was therefore incorrect in reaching its conclusion, and the Supreme Court of Clintonia was likewise incorrect in relying upon it.

Finally, even if economic protectionism is found to be a legitimate government interest, Clintonia's statute does in fact discriminate between interstate and intrastate competition. Clintonia's statute is not rationally related to a legitimate interest because it discriminates against intrastate sales, but not does not discriminate against interstate sales. A statute that differentiates between intrastate and interstate casket sales does not relate to a legitimate governmental interest. *See Peachtree Caskets Direct, Inc.*, 1999 WL 33651794 at *1. The statute at issue in *Peachtree Caskets Direct* did not apply to caskets purchased out of state, gifted or manufactured for personal use. *See id.* Similarly, Section 18.942 does not apply to caskets purchased out of state, gifted, or manufactured for personal use, applying a textualist reading of the statute. *Oliver*, No. 14-cr-554 at *3 ("No resident of Clintonia may, without a proper license … *sell* a time-need-casket . . . .") (emphasis added). Thus, the statute is not rationally related because it discriminates against only intrastate sales and does not apply to caskets that are not technically being sold.

For the foregoing reasons, the purpose of the legislature is evaluated at the time of the challenge to a statute. Here, the Clintonia legislature had no legitimate public health or safety purpose in Section 18.942 at the time of enforcement as the information the legislature relied on in passing the statute is no longer applicable. Finally, economic protectionism is not a legitimate governmental purpose. Even if this Court evaluates the statute based on the legislature's purpose at the time of enactment, the law is not rationally related to a legitimate purpose.

II. THE NINE IMAGES RECOVERED FROM PETITIONER'S USB DRIVE ARE INADMISSIBLE UNDER THE FOURTH AMENDMENT BECAUSE THE OFFICER'S SEARCH OF THE USB EXCEEDED THE SCOPE OF THE PRIVATE CITIZEN'S SEARCH, OLIVER POSSESSED A REASONABLE EXPECTATION OF PRIVACY WITH RESPECT TO THE USB AND ITS CONTENTS, THE OFFICER'S ACTIONS CONSTITUTED A TRESPASS, AND THE OFFICER'S ACTIONS WERE NOT IN GOOD FAITH, GIVEN THE SUPREME COURT'S HOLDING IN *UNITED STATES V. JONES*.

The nine images recovered from Oliver's USB drive are inadmissible under the Fourth Amendment and were correctly suppressed by the Circuit Court because they were the result of an unlawful search. The Fourth Amendment provides the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "This constitutional protection is incorporated against the states 'by virtue of the Fourteenth Amendment.'" *Oliver*, No. 14-cr-554 at *11 (citing *Hayes v. Florida*, 470, U.S. 811, 812 (1985)). This amendment protects individuals against unlawful searches and seizures performed by the government and is only implicated when a state actor transgresses its protections. *Oliver*, No. SC-cr-1353 at *23 (citing *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)); *see also United States v. Ackerman*, 831 F.3d 1292, 1295 (10th Cir. 2016), *reh'g denied* (Oct. 4, 2016) ("[T]he Fourth Amendment only protects against unreasonable searches undertaken by the government or its agents—not private parties.").

When the state seeks to introduce evidence against a defendant that was recovered during a warrantless search, the defendant may move to suppress the evidence on the grounds that the search was unconstitutional. Indeed, searches conducted without a warrant are *per se* unreasonable searches and therefore subject to a Fourth Amendment challenge. *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). In reviewing a Fourth Amendment challenge to suppress evidence, courts often consider: whether the subject of the search was a person, house, paper, or effect within the ambit of the Fourth

Amendment. *See United States v. Jacobsen*, 466 U.S. 109 (1984); *United States v. Jones*, 656 U.S. 400 (2012); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Goodale*, 738 F.3d 917, 921 (8th Cir. 2013); *United States v. Lichtenberger*, 786 F.3d 478, 488 (6th Cir. 2015).

Here, Oliver's USB qualifies as an "effect" subject to the protections of the Fourth Amendment. "A form of communication capable of storing all sorts of private and personal details, from correspondence to images, video or audio files, and so much more" is an "effect" within the meaning of the Fourth Amendment. *United States v. Ackerman*, 831 F.3d at 1304 (citing *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (en banc)).

Next, in deciding whether to admit the images, this Court must consider Oliver's (A) reasonable expectation of privacy with respect to the USB and (B) Oliver's lawful right to have his property free from trespass. The answers to both (A) and (B) pivot on whether this court correctly finds that *United States v. Jones* abrogated *United States v. Jacobsen*, thereby defeating and nullifying, the Government's position that Officer Jones' search did not exceed the scope of Walker's private-citizen search. *See United States v. Ackerman*, 831 F.3d 1292 (2016); Daniel Keats Citron & David Gray, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & Tech. 381 (2013). Where a physical trespass occurs during a government search or the scope of a government search unreasonably exceeds a private citizen search, *Jones* mandates that evidence derived from said unconstitutional search be suppressed. *See Walter v. United States*, 447 U.S. 649, 656 (1980) (A court will typically not allow the government to introduce evidence gathered through a wrongful search or seizure because it violates the defendant's Fourth Amendment rights); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998); *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003).

A. All nine images are inadmissible under the Fourth Amendment because the scope of the government's search exceeded the scope of Walker's undefined search, and Oliver enjoyed a reasonable expectation of privacy as to the images.

Where a defendant moves to suppress evidence resulting from an expansive government search that exceeds the parameters of the private citizen's search, the motion should be granted so long as those effects enjoy a reasonable expectation of privacy. The private search doctrine is not an exception to the Fourth Amendment, but instead a mechanism that establishes whether a Fourth Amendment search occurred in the first place. The private search doctrine declares "that governmental inspections following on the heels of private searches are not searches at all as long as the police do no more than the private parties have already done." *United States v. Jacobsen*, 466 U.S. at 129 (1984). The party moving to suppress evidence on the basis of an expanded government search bears the burden of demonstrating that the government actually performed a Fourth Amendment search. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). Thus courts, like this court, must determine if the state's inspection exceeded the scope of the private actor's search that preceded it. In answering this question, courts ask: "how much information the government [stands] to gain when it re-examin[es] the evidence and, relatedly, how certain it [is] regarding what it [will] find." *United States v. Lichtenberger*, 786 F.3d at 488.

Where the government exceeds the scope of a private citizen's search to gain unidentifiable, additional information, it has performed a subsequent search; therefore, the search violates the Fourth Amendment unless it is shown that the government's search was *reasonable*. *See Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (holding that a defendant may show that he held a reasonable expectation of privacy as to the searched possession by establishing: that he held an actual (subjective) "expectation of privacy, and that this expectation of privacy is one that society is prepared to recognize as reasonable."). This is,

of course, because the Fourth Amendment only bars "unreasonable" searches. *Id.* In essence, a warrantless search is *unreasonable* if the search undermines a citizen's reasonable expectation of privacy. *Katz,* 389 U.S. at 361; *United States v. Correa*, 653 F.3d 187, 190-91 (3rd Cir. 2011). "[T]he reasonableness of an official invasion of the citizen's privacy . . . [is evaluated] on the basis of the facts as they existed at the time that invasion occurred." *Lichtenberger*, 786 F.3d at 485 (citing *United States v. Jacobsen*, 486 U.S. at 115).

i. Officer Jones' inspection exceeded the scope of Walker's search.

In the landmark case of *United States v. Jacobsen*, this Court addressed the Fourth Amendment protections afforded to citizens when they are subject to a government inspection that began at the behest of a private actor. First, *Jacobsen* explored whether a DEA agent's inspection of a package containing contraband exceeded the scope of the search of the private party who first reported the suspected contraband to the DEA. *Jacobsen*, 486 U.S. at 349. Next, *Jacobsen* explored whether a DEA agent's actions undermined a reasonable expectation of privacy held by the defendant, such that the DEA's search was unconstitutional.

In *Jacobsen*, the manager of a private freight carrier asked his employees to examine a package that was damaged by a forklift during transport; to do so, the employees opened the exterior cardboard casing of the box and pulled away several pieces of crumpled newspaper before uncovering "a tube about 10 inches long." *Id.* at 111. The employees and manager placed a slit in the tube and discovered that the tube "contained a series of four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder." *Id.* After visibly identifying the white powder, the private company employees contacted the Drug Enforcement Administration department at the airport. *Id.* The responding DEA agent noticed the slit in the side of the tube and removed the plastic bags from the tube. *Id.*

He went on to perform a field test on the white powdery contents, which were later identified as cocaine. *Id.* at 111-12. After additional investigation and testing, the DEA obtained a warrant to search the residence of the intended recipients of the package. *Id.* at 112. Ultimately, the intended recipients were indicted for the crime of possessing an illegal substance. *Id.* The defendants moved to suppress the evidence of on the grounds that the warrant was the product of an illegal search and seizure. *Id.* The trial court denied the motion, but the court of appeals reversed explaining that the warrant was based on the DEA's warrantless test of the white powder, which was a significant expansion of the private search performed by the employees. *Id.*

This Court granted certiorari to determine if the DEA's field-test of the white powder, exceeded the scope of the private citizen-employee's initial search of the powder and if so, did the government's inspection undermine the defendant's reasonable expectation of privacy. *Id.* at 122. First, this Court noted that the visible examination of white powder and subsequent removal did not constitute a search; "just like a balloon the distinctive character [of which] spoke volumes as to its contents, particularly to the trained eye of the officer," the plastic bags could no longer enjoy a reasonable expectation of privacy. *Id*. However, the Court noted that the government's field test of the white powder did exceed the scope of the private citizen search: the DEA agent removed the substance, destroyed a portion of the substance, and tested the substance. *Id.* at 119-121. This greatly exceeded the private actor's search. *Id.*

In *Jacobsen*, a private-actor identified what it expected to be contraband and notified the government; at present, Walker identified what he believed to be a USB containing child pornography and turned it over to the police. In *Jacobsen*, the private actor only opened the initial box and subsequently did not open all of the other packages therein, mainly the Ziplocs. Here, Walker opened only one of the eleven JPEGs contained within one folder on the USB;

much like the private actor in *Jacobsen*, he did not open the other ten JPEGs or any other folders on the USB. Still, just like the DEA agent in Jacobsen who performed the field test, Officer Jones' performed his own "test" and looked at a number of images on the USB without knowing any specifics as to which single image the private citizen had viewed. Just as the court in *Jacobsen* found that the field test expanded on the search of the private actor, so to this court should find that Officer Jones' inspection of all of ten of the JPEGs was far more expansive in scope that Walker's search.

ii. Oliver's USB enjoyed a reasonable expectation of privacy that was violated in the course of Jones random viewing of files on the USB.

Once the *Jacobsen* court determined that an apparent search occurred, it next looked to see if the field test violated a reasonable expectation of privacy held by the defendant and accepted by society. *Id.; Katz*, 389 U.S. at 361. The *Jacobsen* court explained that still no search implicating the Fourth Amendment had occurred because the government had "virtual certainty" that, besides cocaine, it could not discover or learn anything *significant* through the field test that the search of the private citizens had not already uncovered. *Jacobsen*, 486 U.S. at 122; *see also United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001). The field test could have revealed some previously unknown information, but "no other arguabl[y] private fact[s]." *Jacobsen*, 486 U.S. at 123. The DEA agent's "chemical test that merely disclose[d] whether or not a particular substance [was] cocaine [did] not compromise any legitimate interest in privacy." *Id.* at 123. The search would not reveal anything of "special interest" that society would view as protected information. *Id.* "The likelihood that official conduct of the kind disclosed [would] actually compromise any legitimate interest in privacy seem[ed] much too remote to characterize the testing as a search subject to the Fourth Amendment." *Id.* "There is no reasonable expectation of privacy in concealing whether something is or isn't contraband." *Ackerman*, 831 F.3d at 1292

(explaining *Jacobsen*, 466 U.S. at 122-23). Thus, there was no "reasonable expectation of privacy" that protected against the field test of the white powder, regardless of the scope of the private citizen search, and the field test results were accepted to the support the warrant at issue. *Jacobsen,* 466 U.S. at 126; *compare Rawlings v. Kentucky,* 448 U.S. 98, 104-105 (1980); *United States v. Gray,* 491 F.3d 138, 144 (4th Cir. 2007); see *United States v. Place,* 462 U.S. 696 (1983); *with Walter v. United States*, 447 U.S. 649 (1980) (explaining that where the Government viewed films that were not viewed by the private-citizen turning them in, the secondary screening was a significant expansion of the private party search that must be characterized as a "constitutionally triggering search" because the films enjoyed a reasonable expectation of privacy due to their unknown contents); *Ackerman*, 831 F.3d at 1292 (holding that where a private citizen reported an email with four attachments contained one image of child pornography and the government actor opens all four attachments, there is "risk [of] exposing noncontraband information" invoking the Fourth Amednment.).

When applying *Jacobsen's* "reasonable expectation of privacy" test in the context of layered data sources like cell phones and other electronics, courts like the district court of Clintonia, have emphasized the importance of identifying the data that was subject to the initial private-citizen search. *Lichtenberger*, 786 F.3d at 488; *United States v. Harling*, No. 15-10969, 2017 WL 3700890 (11th Cir. Aug. 28, 2017). For it is only that specific data that no longer enjoys a reasonable expectation of privacy, any other data contained on the electronic device is still afforded the protections of the Fourth Amendment. *United States v. Harling*, No. 15-10969, 2017 WL 3700890 (11th Cir. Aug. 28, 2017); see generally *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (explaining that devices with multiple layers of data implicate greater privacy rights than a physical container because of the vast quantity of information they can hold)).

Specifically, when a private citizen performs a search of a large, mixed-use dataset but is uncertain as to which file of that dataset revealed the alleged contraband, the governmental actor cannot later, in investigating the alleged contraband, view all of the data absent some "virtual certainty" that all of the data is contraband. *Lichtenberger*, 786 F.3d at 488.

In *Lichtenberger*, the defendant had previously been convicted of possessing child pornography. *Id.* at 480. The defendant lived with Holmes, his girlfriend, and Holmes' mother who were unaware of his past; one day, Holmes and her mother discovered the defendant's previous convictions and called the police to have him escorted off the property. *Id.* Once he was removed from the home, Holmes returned to the couples' bedroom where she proceeded to search through the defendant's password protected laptop. *Id.* Holmes' hacked the defendant's laptop and eventually uncovered "approximately 100 images of child pornography saved in several subfolders inside a folder entitled 'private.'" *Id.* Holmes called the police to come investigate the laptop, and upon arrival the police officer asked Holmes to show him the images. *Id.* "Holmes [proceeded to open] several folders and began clicking on *random* thumbnail images." *Id.* [emphasis added]. The defendant was later indicted for the possession of child pornography, and he subsequently moved to suppress the images that were the result of the officer's warrantless search. *Id.* In a hearing on the motion, Holmes testified "that she showed the officer 'a few pictures' from these files, although she was not sure if they were among the same images she had seen in her original search." *Id.* at 480-81. On this testimony, the district court granted the defendant's motion to suppress and the government appealed. *Id.*

The court first reviewed the expanded scope of the officer's search given "the extensive privacy interests at stake in a modern electronic device like a laptop." *Id.* at 485. Applying principles from *Jacobsen* and its progeny, the court asked what information the officer stood to

gain by viewing the images. *Id.* Specifically what certainty did the officer have that he would be viewing child pornography each time Holmes randomly clicked to open a file on the defendant's computer. *Id.* It found that there was a "very real possibility," that the officer "could have discovered something *else* on Lichtenberger's laptop that was private, legal, and unrelated to the allegations prompting the search." *Id.* at 487-488. Like cell-phone photo albums, the court noted that computer hard drives have immense storage capacity. *Id.* In exploring a laptop photo library: "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet." *Id.* (quoting *Riley v. California*, 134 S.Ct. at 2489). The defendant's enjoyed a reasonable expectation of privacy with respect to his laptop, and each time Holmes showed him a new "random" folder, file, or JPEG, the officer did not have the requisite certainty that the contents of that file would reveal pornography. It found that the images must be suppressed because they were the result of an unreasonable search that the officer lacked the requisite certainty to perform. *Id.; compare United states v. Tosti*, 733 F.3d 816, 822 (9th Cir. 2013) (where a detective inspected the exact same thumbnails of child pornography, that a private-citizen viewed, the secondary-search was permissible and reasonable under the Fourth Amendment); *United States v. Goodale*, 738 F.3d 917, 921 (8th Cir. 2013); *with United States v. Paige*, 136 F.3d 1012 (5th Cir. 1998) ("Unlike the package at issue in *Jacobsen,* which contained 'nothing but contraband,"' people's homes contain countless personal, non-contraband possessions. Certainly, . . . [the presumed privacy of] these possessions cannot be entirely frustrated simply because, *ipso facto*, a private party (e.g., an exterminator, a carpet cleaner, or a roofer) views some of those possessions."))

Jacobsen demands that this court determine if the images are admissible in light of Oliver's reasonable expectation of privacy as it relates to his USB. Like the laptop and cell phone described in *Lichtenberger*, Oliver's USB is a storage device with the ability to hold a variety of personal and private data. Like the defendant's laptop in *Lichtenberger*, Oliver's USB contained multiple folders with multiple files and a variety subfolders. Like the private-citizen in *Lichtenberger* who was unsure about which files she clicked on in discovering the child pornography, here Walker is uncertain as to which image he clicked on to discover child pornography on the USB. Whereas in *Jacobsen* there was a reasonable certainty that the DEA's over expansive field test would only uncover one thing (cocaine), here, like in *Lichtenberger* and *Paige*, there was not a reasonable certainty that Officer Jones' actions would uncover *only* child pornography. Instead, just as the *Lichtenberger* court warned, there was a likelihood here that the random files Jones' clicked on could have revealed private and unrelated material. Thus, this court should follow the *Lichtenberger* court and deny admission of these images.

However, regardless of whether this court finds that the images are admissible under the "reasonable expectation of privacy standard" from *Jacobsen*, the images are still inadmissible under more recent Supreme Court precedent. In 2012 this court heard *United States v. Jones* and expanded what government conduct may constitute a Fourth Amendment search and ultimately a violation of this hallowed constitutional protection by an overreaching governmental agent.

B. <u>The trial court correctly suppressed the nine images recovered from Petitioner's USB because they were the result of an unlawful trespass.</u>

Government conduct can qualify as a search when it involves "physical intrusion (a trespass) on a constitutionally protected space or thing ('persons, houses, papers, and effects') for the purpose of obtaining information." *Ackerman*, 831 F.3d at 1292 (citing *United States v. Jones*, 565 U.S. 400 (2012)). This Court abrogated *Jacobsen* in 2012 via its *Jones* opinion,

establishing that Fourth Amendment rights "do not rise or fall" exclusively with the *Katz* formulation adopted by *Jacobsen,* i.e. the "reasonable expectation of privacy" test. *Jones*, 565 U.S. at 406. In *Jones*, the FBI suspected the defendant of trafficking in narcotics. *Id.* As part of their investigation into the Defendant, the FBI applied for a warrant to place an electronic tracking device (GPS) on the Defendant's wife's car. *Id.* The United States District Court for the District of Columbia issued a warrant authorized a warrant which authorized the placement of the device on the car in the District of Columbia and within ten days. *Id.* FBI Agents ultimately placed the GPS on the car on the eleventh day while the car was located in Maryland, not in the District of Columbia. *Id.* at 403. The GPS device was on the car for twenty-eight days, during which time the car was parked in private parking lots and traversed public roadways. *Id.* The tracking device provided the FBI with a plethora of information that resulted in the multi-count indictment of the Defendant for various drug charges. *Id.* The defendant filed a motion to suppress the government's tracking device evidence on the grounds that it was the product of an unlawful search. *Id.* The district court granted the motion as to any data received while the car was stationary in its garage. *Id.* However, data the device provided while the car was in motion was admissible "because [a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* (quoting *United States v. Knotts,* 460 U.S. 276, 281 (1983)). The defendant was ultimately convicted and sentenced to life imprisonment. *Id.* The court of appeals reversed his conviction on the grounds that the GPS evidence was the result of a warrantless search in violation of the Fourth Amendment. *Id.* at 404.

The Supreme Court's analysis began by outlining the history of Fourth Amendment jurisprudence, noting that the facts before It indicated that the "government physically occupied

[the] private property [of Jones] for the purpose of gaining information." *Id.* Looking back to the meaning of "search" as it was understood when the Fourth Amendment was adopted, the *Jones* Court recognized that "such a physical intrusion" would surely qualify under the definition of search — regardless of the expectation of privacy associated with the subject of the search. *Id.* (citing *Entick v. Carrington,* 95 Eng. Rep. 807 (C.P. 1765)). *Jones* deferred to *Entick*, a case considered to be "the true and ultimate expression of constitutional law," for guidance. *Id.* at 405. *Entick* described the "significance of property rights in search-and-seizure analysis[:]"

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Entick, supra, at 817. The *Jones* court described that until the latter half of the twentieth century the Fourth Amendment jurisprudence was tied to common-law trespass of one's property — the same foundational precepts outlined in *Entick* above. *Id.;* see *Kyllo v. United States,* 533 U.S. 27, 31 (2001); Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L.Rev. 801, 816 (2004). Under this approach, a Fourth Amendment violation occurred if a government actor occupied an individual's "person[], house[], paper[] [or] effect[]." *Id.* at 205. The court held that this was precisely what happened: in placing a GPS on Jones' car the government performed a warrantless search of one of the defendants' effects, his car. *Id.* at 206. *Jacobsen* and its progeny "did not repudiate [the] understanding" that the Fourth Amendment extended protection to the "effects" under trespass principles. *Id.* The "reasonable expectation of privacy" test added to the common-law trespassery test, thus establishing two mechanisms to determine if the government performed an unlawful search. *Id.*; *Oliver v. United States,* 466 U.S. 170 (1984).

Then in 2016, Justice Gorsuch wrote an opinion for the Tenth Circuit that postulated the interplay between *Jacobsen* and *Jones*. In *United States v. Ackerman*, the defendant sent an email using his Internet service provider AOL. *United States v. Ackerman*, 831 F.3d 1292, 1293 (10th Cir. 2017). The email had four attached images. *Id.* Under its everyday operating procedure, AOL employed an automated "filter designed to thwart the transmission of child pornography." *Id.* AOL's filter instantly stopped delivery of the defendant's email when one of the attachment's hash values (string of data) matched a hash value AOL had flagged as containing child pornography. *Id.* Per federal law, AOL forwarded the email to the National Center for Missing and Exploited Children (NCMEC). *Id.* A NCMEC employee reviewed the email and each of the four images. *Id.* Soon after the defendant pled guilty to possession of child pornography, but he later appealed the denial of his motion to suppress the images viewed by the NCMEC employee. *Id.* One issue before the court was whether NCMEC's actions constituted a separate, unlawful search by a government agent. *Id.*

Applying the traditional "expectation of privacy" test from *Jacobsen*, the *Ackerman* court first held that the actions of NCMEC violated the defendant's reasonable expectation of privacy as to his emails. One expects that each individual attachment contained within the larger container of the email body itself enjoys some level of privacy. *Id.* The court then reaffirmed the traditional trespass approach adopted by *Jones* — where the government trespasses on the effects of an individual a warrantless search may be in violation of the promises of the Fourth Amendment. Then, Justice Gorsuch penned:

> Reexamining the facts of *Jacobsen* in light of *Jones*, it seems at least possible the Court today would find that a "search" did take place [in Jones]. After all the DEA agent who performed the drug test in Jacobsen took and destroyed a "trace amount" of private property, [citation omitted] a seeming trespass to chattels. Neither is there any question that the purpose … of the agent's action was to obtain information.

Ackerman, 831 F.3d at 1307. Effectively, *Ackerman* showed how the facts of *Jacobsen* would now constitute an unconstitutional search because the DEA agent in *Jacobsen* trespassed on the "effects" on an individual without a warrant. *Id.* Moreover, after *Jones*, the *Ackerman* court noted the facts before it were even more alarming: a "warrantless opening and examination of (presumptively) private correspondence that could have contained much besides potential contraband for all anyone knew." *Id.* Accordingly, the opening of the attachments "seem[ed] to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment." *Id.* It was a flagrant search under either theory. *Id*. The *Ackerman* court importantly noted that while "the framers were concerned with the protection of physical rather than virtual correspondence," many courts have already applied the common law's ancient trespass to chattels doctrine to electronic" data. *Id.* at 1306; *see eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058, 1069–70 (N.D. Cal. 2000); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015, 1027 (S.D. Ohio 1997); *Thrifty–Tel, Inc. v. Bezenek*, 46 Cal.App.4th 1559, 1565–67 (1996). In the end, the *Ackerman* court held that NCMEC's actions were a search under either *Jacobsen* or *Jones* and the images were eventually suppressed. *Id.* Moreover, it confirmed that under the laws effective in 2016, the facts of *Jacobsen* would represent a seizure by trespass on chattels. *Id.*

In *Ackerman*, a single image of child pornography was viewed and turned over by a private citizen, AOL, to a governmental agency; at present, a private citizen, Walker, viewed and turned over a single image of child pornography to Officer Jones. In *Ackerman*, the single image that was viewed was part of a larger set of data containing multiple images; likewise, Oliver's USB contained multiple images. In *Ackerman* the contents of the other three attachments were unknown to the private actor, here the contents of the other ten images as well as the other

folders were unknown to Walker. Just as in *Ackerman* where the court found the images were the result of an unconstitutional search, this court should find that the nine other JPEG images were the result of an unconstitutional search. Further, since the *Ackerman* court noted that *Jacobsen* no longer represents a reasonable search, *Jacobsen* and its progeny no longer provide the only legal framework that can be applied to show a search is unreasonable and unconstitutional. Instead, a trespass to chattels, as is the case here, will ultimately suffice.

C. The Good Faith Exception to the Fourth Amendment's exclusionary rule does not apply because the actions of the police were not reasonable under the circumstances.

In giving effect to the Fourth Amendment's prohibition on unreasonable searches, the Supreme Court created an exclusionary rule that made evidence obtained in violation of a defendant's Fourth Amendment right inadmissible in the defendant's trial. *United States v. Calandra*, 414 U.S. 338, 347 (1974). The Supreme Court created the exclusionary rule to deter future violations of individuals' Fourth Amendment rights. *Davis v. United States*, 564 U.S. 229, 236 (2011). The exclusionary rule is in place to "compel respect for the constitutional guaranty." *Elkins v. United States*, 364 U.S. 206, 217 (1960). Originally, the rule served as a bright-line exclusion on evidence that the government obtained in violation of a defendant's Fourth Amendment rights. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"). Later Fourth Amendment cases have removed the bright-line rule; however, the Supreme Court still recognizes the exclusionary rule as a strong deterrent to police misconduct. *Davis*, 564 U.S. at 231.

Once the Court eliminated the bright-line rule, the Court created exceptions to the exclusionary rule. For example, the Court created the good faith exception in *United States v.*

Leon. 468 U.S. 897, 906 (1984). The good faith exception, as stated in *Leon*, allowed evidence seized in violation of the Fourth Amendment to be admissible in a subsequent trial so long as the police officer was reasonably relying upon a search warrant issued by a neutral magistrate judge even if that warrant was later found to be invalid. *Id.* at 922. The good faith exception has since been expanded to allow police officers to conduct a search if they *reasonably* rely upon binding appellate precedent. *Davis*, 564 U.S. at 231 (emphasis added). The Court has consistently required a police officer's reliance to be reasonable in order for the good faith exception to apply. *See Leon*, 468 U.S. at 906 (requiring *reasonable* reliance upon a search warrant) (emphasis added); *Davis*, 564 U.S. at 231 (requiring *reasonable* reliance upon appellate precedent) (emphasis added). Courts implementing the reasonable reliance requirement have extended the good faith exception to situations where police officers rely upon the actions of third parties. *Id.* However, courts have held that the exclusionary rule applies to bar evidence when the Fourth Amendment is violated due to police misconduct. *See United States v. Clarkson*, 551 F.3d 1196, 1203 (10th Cir. 2009) (denying application of the good faith exception where officer relied upon fellow officer's representation that K-9 was properly trained).

In *Davis*, the Supreme Court extended the good faith exception when officers reasonably relied upon appellate precedent. In *Davis*, an officer conducted a search incident to arrest of the passenger compartment of a vehicle. *Davis*, 564 U.S. at 235. This search followed the then binding circuit court precedent that allowed this action. *Id.* Two years later, the Supreme Court issued a ruling making the search in *Davis* unconstitutional. *Id.* at 237. The defendant moved to suppress the evidence based on the new precedent. *Id.* at 235. The Supreme Court held that the good faith exception should extend to this situation because the officers were reasonably relying upon binding circuit court precedent at the time of the search. *Id.* The Court went on to state that

the deterrent effect of the exclusionary rule would not be realized in that situation because the conduct of the officers was blameless. *Id.*

This Court should hold that the good faith exception does not apply to this case because the mistake that led to the violation of Oliver's Fourth Amendment rights was purely the fault of the government. The officer accepted the USB from Walker. Upon receipt of the USB, the officer physically trespassed upon the contents of the drive by viewing the entirety of the "F" folder. The Supreme Court was clear in *Jones*, nearly four years ago, that a physical trespass is not allowed under the Fourth Amendment. Therefore, under *Davis*, the officer in this case could not have reasonably relied upon appellate precedent that said otherwise. Because the Supreme Court clearly outlawed the use of evidence that is the result of a physical trespass, the officer in this case cannot establish the reasonable reliance required by *Davis*. Therefore, this Court should hold that the good faith exception does not apply in this case.

This Court should hold that the good faith exception to the exclusionary rule does not apply. The exclusionary rule is intended to be a deterrent to police misconduct, and it would function as a deterrent here. In this case, the evidence was obtained due to a physical trespass. The officer performed a physical trespass upon the USB by viewing the entirety of the contents in the "F" folder. Therefore, this Court should not extend the good faith exception to the facts in this case.

CONCLUSION

For the reasons stated in this Brief, the Petitioner respectfully requests that this Court reverse the appellate court's decision.