NOTES

VIRTUALLY UNCERTAIN: THE FOURTH AMENDMENT AND LAPTOPS IN *UNITED STATES V. LICHTENBERGER*[*]

I. INTRODUCTION

Imagine returning home at the end of the day to find that your front door is smashed in and your home burglarized. Along with the rest of your valuable possessions, the thief stole your password-protected laptop, which contained incredibly personal details and effects: your address book, medical prescriptions, calendar, family videos and pictures, bank statements, and hundreds of private emails. You report the crime to the authorities, but as with most burglaries, it is unlikely to be solved.[1] A few weeks after the break-in, you receive a welcome surprise from the police: they recovered your laptop and ask that you come retrieve it and answer a few questions. Upon your arrival at the station, however, the police put you in handcuffs. It turns out that the thief was your coworker, who broke the password to the laptop and discovered an email implicating you in an embezzlement scheme. The coworker then turned the email over to the police, who plan to use the laptop as evidence against you at a criminal trial. Despite your pleas that you are protected against unreasonable searches and seizures by the Fourth Amendment, the police place you under arrest. Doesn't the Constitution protect you in this scenario? Surely a coworker breaking into your home and stealing your belongings is unreasonable? Put simply, can the police use the incriminating email against you at trial? The answer, perhaps surprisingly, is that they probably can.

The Fourth Amendment of the Constitution provides clear protection for citizens against unreasonable searches and seizures.[2] But the amendment only prohibits *government* action; a private searcher can conduct any search he

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1. According to the FBI, just 13.6% of all burglaries were resolved by arrest in 2014. *See* FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS tbl.25 (2014), http://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-25 [http://perma.cc/VP9N-DQ24].

2. U.S. CONST. amend. IV.

chooses, no matter how unreasonable.[3] The Supreme Court has long held that the Fourth Amendment only restrains governmental actors and that it is wholly inapplicable to private searchers.[4] Based on that restriction, the Court created a loophole of sorts known as the private search doctrine. The doctrine holds that the government can use the fruits of a search performed by a private party—no matter how unreasonable—so long as the private searcher was acting of her own volition and not at the instigation of the government.[5] The Fourth Amendment is only implicated in situations where government actors frustrate a reasonable expectation of privacy; if such expectation has *already* been frustrated by a private actor conducting his own search, subsequent government searchers frustrate nothing.[6] In the above example, the government can use the inculpatory emails as evidence because any expectation of privacy in the contents of the laptop had already been spoiled by the thieving coworker—a private actor, rather than a governmental one. The coworker could then turn the emails over to the police, who could use them as evidence with nary a constitutional question.

This Note explores a circuit split regarding the application of the private search doctrine to laptops and other electronic storage devices. The Fifth and Seventh Circuits have found a broad private search exception, holding that once a private searcher has examined at least some of the files on an electronic storage device, the government can use any information found on any part of the device.[7] Similarly, although not as directly on point, the Ninth Circuit has ruled

3. *See* Orin S. Kerr, *Lifting the "Fog" of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805, 837 n.154 (2003) (noting that the government can use evidence obtained illegally by a private party); Joel Varner, *Computers, the Private Search Doctrine, and the Fourth Amendment*, MICH. TELECOMM. & TECH. L. REV.: BLOG, http://mttlr.org/2015/11/05/computers-the-private-search-doctrine-and-the-fourth-amendment (last visited May 5, 2017) [http://perma.cc/CG5P-Q99P] ("[T]he Fourth Amendment does not protect individuals from invasions of privacy by private citizens.").

4. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) ("The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was . . . not intended to be a limitation upon other than governmental agencies . . . .").

5. *See* United States v. Jacobsen, 466 U.S. 109, 113–15 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting))).

6. *See id.* at 117 ("It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information . . . .").

7. *See* Orin Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, WASH. POST: VOLOKH CONSPIRACY (May 20, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers [http://perma.cc/5JJC-GWNW] [hereinafter Kerr, *Sixth Circuit*] ("The Fifth Circuit had held that . . . a private search of one file allowed the private party to turn over the entire computer to the government for a warrantless search. . . . [T]he Seventh Circuit joined the Fifth Circuit by adopting [this

that once a private searcher views a thumbnail image, any expectation of privacy in the enlarged image is frustrated.[8] Following the scenario above, government searchers could search the entire laptop if the private searcher turned over one incriminating email found on the hard drive, or could view an entire file if a private searcher saw only a small thumbail image. In contrast, the Sixth Circuit found the private search exception to be much narrower, holding that government agents can only view the specific files that a private searcher initially viewed.[9] Following the scenario above, if the private searcher turned over one incriminating email, the government searchers could only use that one incriminating email.[10]

This Note evaluates this circuit split created by the Sixth Circuit in *United States v. Lichtenberger*[11] and argues that the Supreme Court should uphold the Sixth Circuit's narrow ruling.[12] Given the original intent of the Fourth Amendment[13] and the private search doctrine,[14] the Court should hold that government agents can only view what they are "virtually certain" is the same incriminating evidence already discovered by a private party. In furtherance of this point, Section II summarizes the facts of *Lichtenberger*. Section III traces the original history of the Fourth Amendment, the development of the private search doctrine, its application to electronic devices in the circuit courts, and the Supreme Court's recent holding in *Riley v. California*,[15] which suggests the Court is willing to give special Fourth Amendment protections to electronic storage devices. Section IV reviews the Sixth Circuit's rationale for finding a narrow private search exception in *Lichtenberger*. Finally, Section V suggests several reasons why the Supreme Court should uphold the Sixth Circuit's narrow private

standard]."). See *infra* Part III.C for a more in-depth discussion of the Fifth and Seventh Circuit decisions at issue in Professor Kerr's article.

8. While Professor Kerr does not view the Ninth Circuit Case as part of the circuit split, *Lichtenberger* deals with it at some length, and its logic is instructive in defining what should be a constitutionally permissible search in this area. See *infra* Part III.C for a more in-depth discussion of the Ninth Circuit decision.

9. See *infra* Section IV for an in-depth discussion of the Sixth Circuit decision.

10. The searchers would likely be able to get a warrant for the rest of the computer based on the fruits of the private search. However, the split deals with what the government searchers can view *prior* to obtaining a warrant.

11. 786 F.3d 478 (6th Cir. 2015).

12. Since the Sixth Circuit decided *Lichtenberger*, the Eleventh Circuit has also weighed in on the private search doctrine as it applies to electronic storage devices. *See* United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015). *Sparks* adopted a similar standard to *Lichtenberger* in terms of what searches are permissible under the private search doctrine, thus deepening the split from a 2–1 split, with the Fifth and Seventh Circuits opposed to the Sixth Circuit, to a 2–2 split, adding the Eleventh Circuit to the Sixth Circuit's side of the split. *See* Orin Kerr, *11th Circuit Deepens the Circuit Split on Applying the Private Search Doctrine to Computers*, WASH. POST: VOLOKH CONSPIRACY (Dec. 2, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/02/11th-circuit-deepens-the-circuit-split-on-applying-the-private-search-doctrine-to-computers/?utm_term=.4f14476621d3 [http://perma.cc/EW84-DLP2].

13. See *infra* Part III.A for a discussion of the history of the Fourth Amendment.

14. See *infra* Part III.B for a discussion of the development of the private search doctrine.

15. 134 S. Ct. 2473 (2014).

search exception.

II. FACTS

At the time of his arrest, Aron Lichtenberger lived with his girlfriend, Karly Holmes, and Holmes's mother in Cridersville, Ohio.[16] All three were home on the afternoon of November 26, 2011, when two friends of Holmes's mother came to visit.[17] The friends informed Holmes and her mother that Lichtenberger had a history as a sex offender—he had been previously convicted on child pornography charges—and one of the friends called police to arrest Lichtenberger.[18] Several officers responded to the call and arrived at the Holmes residence, including Officer Douglas Huston, who determined that Lichtenberger had an active warrant out for his arrest for failing to register as a sex offender.[19] Huston placed Lichtenberger under arrest and took him to the police station.[20]

Once the police left with Lichtenberger in custody, Karley Holmes accessed Lichtenberger's personal laptop, which Lichtenberger had never allowed Holmes to use.[21] The laptop was password protected, but Holmes was able to access the laptop anyway by using a password recovery program and discovered approximately 100 images of child pornography stored on the laptop and saved inside a folder labeled "private."[22] After examining several of the images with her mother, Holmes called the police, and Huston returned to the residence.[23]

Holmes informed Huston that she had found child pornography on Lichtenberger's laptop.[24] She also stated that Lichtenberger was the only person who used the laptop and that she had cracked the laptop's password protection.[25] Huston then asked Holmes to show him what she discovered, and Holmes showed him several random image files saved inside the "private" folder.[26] Recognizing the images to be child pornography, Huston asked Holmes to shut down the laptop, seized the laptop as well as several other items given to

16. *Lichtenberger*, 786 F.3d at 480.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* On at least one prior occasion when Holmes had tried to use the laptop, Lichtenberger became angry and told her to stay away from it. *Id.*

22. *Id.* at 481. Holmes stated that all of the relevant files were in a folder marked "private," which contained several subfolders each labeled with numbers. The pornographic images were in the numbered subfolders. *Id.* at n.1.

23. *Id.* at 480.

24. *Id.*

25. *Id.*

26. *Id.* at 480–81. Holmes testified that she showed "a few pictures" to Huston. *Id.* at 481. Huston testified that Holmes showed him "probably four or five" photographs. *Id.* For purposes of the case, the exact number of photographs was unimportant. It was only important that Holmes was unsure whether the pictures she showed Huston were the same as those she had previously viewed on her own. *Id.*

him by Holmes, and left the premises.[27]

Following the seizure of his laptop, Lichtenberger was indicted on three charges of receipt, possession, and distribution of child pornography.[28] Before his trial, Lichtenberger moved to suppress all evidence gained by Huston's warrantless search of the laptop.[29] Lichtenberger's motion centered on the application of the private search doctrine and argued that it did not apply to the subsequent search of his laptop—that is, the search where Holmes showed Huston several of the pictures in the "private" folder, as opposed to Holmes's initial private search.[30] Lichtenberger made three arguments in support of his motion to suppress: (1) he had significant privacy interests in his laptop since it was located inside his residence; (2) Holmes was acting as an agent of the government in showing the pornographic pictures to Huston; and (3) the subsequent search, where Holmes showed pictures to Huston, exceeded the scope of Holmes's initial search.[31] The prosecution maintained that the subsequent search was permissible under the private search doctrine because Holmes had conducted the initial search of her own volition, and Huston's instruction to boot up the computer and show him several pictures was merely an attempt to verify Holmes's initial findings, rather than an order for Holmes to act on behalf of the government.[32] Based largely on a finding that Huston directed Holmes to show him the images, rather than passively viewing images that Holmes presented, the trial judge granted Lichtenberger's motion and suppressed all evidence gained by the subsequent search of the laptop.[33] Since the motion was decided on agency grounds, the trial judge considered Lichtenberger's argument about scope to be moot and did not address it.[34] The prosecution appealed the suppression order.[35]

III. PRIOR LAW

Lichtenberger relies on a long history of search and seizure jurisprudence in American law.[36] This Section traces the development of that jurisprudence, as well as the development of the private search doctrine exception to the Fourth Amendment. First, this Section considers the disagreement among contemporary

27. *Id.* at 480–81. Holmes gave Huston the laptop's power cord, as well as a cell phone, flash drive, and some marijuana that she claimed belonged to Lichtenberger. *Id.* at 481. These items were irrelevant to the criminal charges at issue against Lichtenberger and were not considered by either the trial court or the circuit court.

28. *Id.* at 481.

29. *Id.*

30. United States v. Lichtenberger, 19 F. Supp. 3d 753, 755–56 (N.D. Ohio 2014), *aff'd*, 786 F.3d 478 (6th Cir. 2015).

31. *Id.*

32. *Id.* at 758.

33. *Id.* at 758–59.

34. *Id.* at 760. See *infra* notes 108–11 and accompanying text for the agency and scope elements of the private search doctrine.

35. United States v. Lichtenberger, 786 F.3d 478, 481 (6th Cir. 2015).

36. See *infra* Section IV for a discussion of the Sixth Circuit's analysis in *Lichtenberger*.

legal and historical scholars over the original meaning of the Fourth Amendment. After considering the history of the amendment itself, this Section traces the development of the private search doctrine by the Supreme Court and examines the application of that doctrine to laptops and other electronic storage devices by several circuit courts. Finally, this Section details the Supreme Court's recent decision in *Riley*, where the Court considered the applicability of warrantless searches to cell phones.

A. The Original Meaning of the Fourth Amendment

This Part delves into a dispute among judges and legal historians over the meaning behind the Fourth Amendment's text. Part III.A.1 shows the division between the amendment's two clauses—the reasonableness clause and the warrant clause. Part III.A.2 examines the disagreement among scholars over how to interpret the clauses and how to divine the true meaning of the Fourth Amendment. Part III.A.3 discusses two cases—*United States v. Rabinowitz*[37] and *Trupiano v. United States*[38]—where the Court turned away from a "warrant preference" and embraced a "reasonableness standard."

1. The Fourth Amendment Generally

The Fourth Amendment provides the following guarantees:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[39]

The amendment contains two clauses.[40] The first, spanning from "[t]he right of the people" through "shall not be violated," is known as the reasonableness clause.[41] The reasonableness clause, it is suggested, "guarantees a freedom from unreasonable searches and seizures."[42] The second, from "and no Warrants shall

37. 339 U.S. 56 (1950), *overruled in part by* Chimel v. California, 395 U.S. 752 (1969). *Rabinowitz* generally stood for the proposition that police may search, incident to arrest, the area under the "control" of the suspect just prior to his arrest. *Rabinowitz*, 339 U.S. at 61. *Chimel* limited this area, defining the scope of an acceptable search incident to arrest as the suspect's "grabbing area." *Chimel*, 395 U.S. at 762–63. *Chimel* explicitly overruled *Rabinowitz* only so far as *Rabinowitz* was inconsistent with the more limited grabbing area definition promulgated in *Chimel*. *Id.* at 768. Beyond the technicalities of a constitutionally permissible search incident to arrest, *Rabinowitz* is still useful inasmuch as it overruled *Trupiano* and represents the baseline of Fourth Amendment jurisprudence—deference to a "reasonableness standard"—for the Supreme Court in the later part of the twentieth century.

38. 334 U.S. 699 (1948).

39. U.S. CONST. amend. IV.

40. *Id.*

41. Gerard V. Bradley, *Searches and Seizures*, HERITAGE FOUND., http://www.heritage.org/constitution/#!/amendments/4/essays/144/searches-and-seizures (last visited May 5, 2017) [http://perma.cc/WN4B-AR84].

42. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 202 (1993) [hereinafter Maclin, *The Central*].

issue" through "things to be seized," is known as the warrant clause.[43] That clause "specifies the form and content of search and arrest warrants."[44]

Two questions emerge from the Fourth Amendment itself: what do the clauses mean on their own terms, and what do they mean when read together? The ambiguity of these clauses and the conflict inherent in reading them together underlies the competing theories of Fourth Amendment interpretation.[45] In attempting to answer these questions, two camps have emerged. Those advocating a "warrant preference" suggest that the warrant clause modifies the reasonableness clause, such that all searches are generally unreasonable unless authorized by a valid warrant.[46] Those advocating a "reasonableness standard" read the clauses separately and suggest that the amendment prohibits unreasonable searches and that the warrant clause exists as a separate command for the issuance of warrants generally.[47]

2. Historical Meaning of the Fourth Amendment

This Part examines two methods of interpreting the Fourth Amendment's clauses to divine the historical meaning of the amendment and apply it to the modern day. Justice Scalia, writing for the Court in *Wyoming v. Houghton*,[48] suggested that all search and seizure cases must be analyzed first with a historical inquiry into the origins of the amendment.[49] While the circumstances of the Revolutionary War generation just prior to the amendment's adoption have been studied thoroughly,[50] scholars disagree sharply on how to apply that history to interpret the Fourth Amendment.[51] This split not only divides scholars, it divides Justices of the Court.[52] The two main competing factions differ primarily

43. William J. Stuntz, *Warrant Clause*, HERITAGE FOUND., http://www.heritage.org/constitution/#!/amendments/4/essays/145/warrant-clause (last visited May 5, 2017) [http://perma.cc/2Y8S-EK4E].

44. Maclin, *The Central*, *supra* note 42, at 202.

45. *See* Luis G. Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. REV. 33, 33 (1979) ("What is the relationship of one clause to the other? Is a search reasonable only if it complies with the . . . warrant clause? Does the reasonableness clause provide a broach search authority permitting some searches without warrants?").

46. *See* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 993 ("The warrant preference model construes the Reasonableness Clause as being defined by the Warrant Clause . . . ."). See *infra* Part III.A.2.a for a more in-depth discussion of the warrant preference.

47. See *infra* Part III.A.2.b for a more in-depth discussion of the reasonableness standard.

48. 526 U.S. 295 (1999).

49. *Houghton*, 526 U.S. at 299.

50. *See* State v. Ochoa, 792 N.W.2d 260, 269–75 (Iowa 2010) (listing a nonexhaustive list of legal and nonlegal scholars who have delved into the history of that time period).

51. *Id.* at 272.

52. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). Justice Scalia, one of the Court's most prominent reasonableness standard enthusiasts, wrote the majority opinion upholding a school drug-testing policy as permissible under the Fourth Amendment. *Id* at 666. Justice O'Connor, hardly a liberal, wrote a strident dissent based largely on her analysis that the amendment required a warrant preference. *Id.* at 669–71 (O'Connor, J., dissenting).

on which clause of the amendment they prioritize. Those who prioritize the warrant clause tend to read the clauses conjunctively and interpret the amendment to say that warrantless searches are per se unreasonable and require compelling justifications to be declared reasonable.[53] Those who prioritize the reasonableness clause tend to read the clauses separately: they interpret the amendment to say that all searches are required to be reasonable and believe that if police *decide* to procure a warrant, the warrant must be limited to probable cause and specific descriptions.[54]

a. The Warrant Preference

Put briefly, the warrant preference argument contends that the warrant clause modifies the reasonableness clause, such that the entirety of the Fourth Amendment should be read to mean that a warrant is—absent special circumstances—a precondition of a constitutionally permissible search.[55] The argument holds that the Fourth Amendment was drafted because of mistrust of police power and police discretion to conduct searches.[56] Two modern exemplars of this school of thought are Professors Tracey Maclin and William Cuddihy.[57] Professor Maclin offers a legal history point of view, arguing that the Fourth Amendment is best read like the rest of the Bill of Rights—as a restriction on executive power.[58] Professor Cuddihy, a historian rather than a lawyer, asserts that at the time of the drafting of the amendment, there was general consensus among the Framers that the more abusive practices of police were unreasonable and needed to be curtailed.[59] These proponents of the warrant preference suggest that the Framers intended that, absent special circumstances, searches must be authorized by a judicially issued warrant in order to be constitutionally permissible.

For Professor Maclin, the Fourth Amendment is not a call to question whether searches are reasonable, but rather one line item among many in the Bill of Rights expressing specific distrust of police and executive power.[60] Maclin

53. *See, e.g.*, Maclin, *The Central*, *supra* note 42, at 203–05.

54. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994).

55. Maclin, *The Central*, *supra* note 42, at 203–04.

56. *See id.* at 201–04.

57. Professor Maclin is a law professor at Boston University and has published numerous articles on the origins of the Fourth Amendment. Professor Cuddihy is a historian whose dissertation on the Fourth Amendment remained unedited, unpublished, and largely unknown until it was cited thirteen times by Justice O'Connor in her dissent in *Vernonia*. In that dissent, Justice O'Connor announced that she had in essence changed her position on the Fourth Amendment from a reasonableness standard to a warrant preference, based in part on Professor Cuddihy's work. *See* Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1050 (2011).

58. *See* Maclin, *The Central*, *supra* note 42, at 201–02 ("The constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is a distrust of police power and discretion.").

59. *See* Maclin & Mirabella, *supra* note 57, at 1052 (citing WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 739–50 (2009)).

60. *See* Maclin, *The Central*, *supra* note 42, at 197.

notes that without the added command of the warrant clause, the reasonableness clause is simply an instruction that judges perform a balancing test to determine whether any given search is permissible—hardly the stuff of constitutional importance.[61] Without reading the two clauses conjunctively, then, the reasonableness clause "lacks content, and amounts to nothing more than an ad hoc judgment about the desirability of certain police intrusions."[62] For Maclin, the underlying premise of the amendment is that judges should stand between police and the citizenry to provide a check on police authority.[63] A Fourth Amendment reading that commands only reasonableness would not make sense given that the Framers were trying to protect against police intrusion.[64] The point of the amendment is not to prevent police from investigating crimes but to ensure that judgments regarding what constitutes a reasonable inference are made by a neutral and detached judge, rather than the officer investigating the crime.[65]

Conversely, prioritizing the reasonableness clause over the warrant clause gives incredible discretion to police to determine which searches are constitutionally permissible, a broad power that Maclin contends is forbidden by the amendment.[66] Maclin notes that balancing tests have upheld warrantless searches of containers found in cars, despite the fact that most people would consider the contents of those containers, such as a purse or a briefcase, to be quite private.[67] Balancing tests have tended to prefer the governmental advantages of deferring to police judgment, while giving little consideration to the individual's privacy interest.[68] Testing the reasonableness of a search, rather than examining the privacy interests at stake, gives preference to police and ignores what Maclin asserts is a court's duty to stand as a check against police power.[69] For Maclin, this distrust of police, rather than the reasonableness or unreasonableness of any given search, is what actually motivated the Framers and should guide the Supreme Court's consideration of search and seizure cases.[70]

Beyond analyzing how the Court should interpret the text of the Fourth Amendment, Professor Cuddihy examined centuries' worth of historical documents to reconstruct what the amendment meant to the people who wrote it.[71] Professor Cuddihy suggests that warrants—not reasonableness—dominated

61. *See id.* at 210–11.

62. *Id.*

63. *Id.* at 213–14 (quoting Jacob W. Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 462 (1976)).

64. *Id.* at 210–11.

65. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 937 (1997) [hereinafter Maclin, *The Complexity*].

66. Maclin*, The Central*, *supra* note 42, at 230–31.

67. *Id.*

68. *Id.* at 231–32.

69. *Id.* at 246–47.

70. *Id.* at 249.

71. *See* CUDDIHY, *supra* note 59, at lxiv ("The central purpose of this study is, therefore, to

search and seizure law at the time of the Revolution.[72] Warrantless searches had become exceedingly uncommon in the years following the English Reformation in the 1530s and were replaced with commands for general warrants, which gave government agents broad discretion to search unspecified people for unspecified things.[73] Specific warrants, in turn, began to replace general warrants, starting in Britain in the 1680s and expanding to the American colonies as hostility to these intrusive searches led many colonial courts to refuse to issue general warrants or writs of assistance.[74] Under Cuddihy's reading, the American colonies at the time of the Revolution were concerned largely with these broad grants of authority to conduct searches, where government agents largely had carte blanche to investigate certain properties.[75] Celebrated cases, like *Paxton's Case* in Massachusetts, argued by James Otis, magnified popular antipathy to heavy-handed tactics.[76] The Framers of the Fourth Amendment lived in this period of transition, where specific warrants were quickly becoming the norm, and the main abuse to be curbed was overbroad general warrants. For Cuddihy, this temporal overlap illuminates the true purpose of the amendment, at least for the men who wrote it: banning general warrants and requiring specific warrants so as "to shield the people . . . from all unreasonable searches and seizures by the federal government."[77] Specific warrants were mandated *implicitly* by the amendment, in large measure because specific warrants had already grown commonplace in the newly independent United States.[78]

identify the kinds of searches and seizures that the amendment originally embraced as reasonable or unreasonable and to explain how and why it distinguished them.").

72. *See id.* at 776 ("[W]arrants enjoyed the overriding mandate of established usage.").

73. *Id.* at 774. For example, Cuddihy highlights a general warrant authorized by James I in 1603, instructing agents to search any house or place suspected of harboring Catholic priests or "other seducers of our people." *See id.* at 62. The Parliament also authorized general warrants in 1606 that allowed government agents to search the houses of any Catholic convicted of "nonconformity" and to destroy any Catholic paraphernalia. *Id.*

74. *Id.* at 490.

75. *See id.* at 530–33.

76. *See id.* at 377–78. In 1761, James Otis, a Boston lawyer, argued a case against writs of assistance, which were general warrants that allowed customs officers to search homes for any evidence of customs violations. In place of general writs of assistance, Otis advocated for specific warrants. *See* Maclin, *The Complexity*, *supra* note 65, at 945–47. In a letter written fifty years after the case, then-former President John Adams praised Otis as having sparked the flames of revolution in Massachusetts:

> Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.

Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 JOHN ADAMS, THE WORKS OF JOHN ADAMS 247–48 (Charles Francis Adams ed., 1856).

77. *See* CUDDIHY, *supra* note 59, at 767.

78. *See* Maclin, *The Complexity*, *supra* note 65, at 948–49 ("By the late 1780s the specific warrant formed the primary method of search and seizure in several states. . . . [E]vents indicate not only a preference for specific warrants as a precondition to search, but also a readiness to expand the right against unreasonable search and seizure beyond the textual confines prescribed in state constitutional provisions.").

b. The Reasonableness Standard

In contrast to the warrant preference, the reasonableness standard side of the debate gives preference to the reasonableness clause and suggests that the clauses are meant to be read separately.[79] The argument follows that the Fourth Amendment does *not* require a warrant as a condition of reasonableness, only that *if* a warrant is issued, it must be specific.[80] The reasonableness standard viewpoint tends to view judges as oppressive government agents and distrusts their ability to impartially grant specific warrants.[81] General warrants were a problem not because they authorized overbroad searches but because they immunized government agents from civil action regarding overbroad searches.[82] The leading proponents of this side of the argument are Professor Akhil Reed Amar[83] and Justice Antonin Scalia.[84] In this view, "the common sense of common people" governed the Fourth Amendment; thus, it was the intent of the Framers that the amendment govern the reasonableness of a search rather than serve as an explicit command that searches be preceded by a warrant.[85]

For judicial practitioners like Justice Scalia, adhering to a reasonableness standard would also correct what they viewed as a flawed jurisprudence surrounding the alleged warrant preference inherent in the amendment.[86] While the warrant preference had generally prevailed by the late 1960s, by the 1990s that preference had become riddled with exceptions, allowing police to perform warrantless searches based on reasonableness alone.[87] In an article examining the Court's Fourth Amendment decisions from the second half of the twentieth century, Professor Craig Bradley called the amendment "the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck."[88] He identified over twenty exceptions to the warrant

79. *See* Amar, *supra* note 54, at 761–65.

80. *See id.* at 774 ("The Warrant Clause says only when warrants may not issue, not when they may, or must.").

81. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991) ("Because juries could be trusted far more than judges to protect against government overreaching . . . warrants were generally *dis*favored. Judges and warrants are the heavies, not the heroes, of our story.").

82. *See* Amar, *supra* note 54, at 774–81.

83. Professor Amar has written numerous articles on the Fourth Amendment advocating a reasonabless standard, the most notable of which is perhaps *Fourth Amendment First Principles*, the 1994 article cited extensively herein. That article alone has been cited more than 800 times since its publication, including twice in majority opinions from the Supreme Court. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 170 (2008); Atwater v. City of Lago Vista, 532 U.S. 318, 336 (2001).

84. *See generally* Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 175 (2015) (noting that Justice Scalia was a "prominent voice on the Fourth Amendment," and examining his jurisprudence).

85. *See* Amar, *supra* note 54, at 759.

86. *See* California v. Acevedo, 500 U.S. 565, 582–84 (1991) (Scalia, J., concurring).

87. *See id.* at 582.

88. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985). Professor Bradley's two models refer broadly to the reasonableness standard and the warrant

requirement, including searches incident to arrest, automobile searches, and the like.[89] Justice Scalia's view, announced in his concurrence in *California v. Acevedo*,[90] was a return to the reasonableness standard, whereby searches were authorized under the amendment where they were reasonable or where the common law at the time of the drafting of the amendment required a specific warrant.[91]

3. *Trupiano* versus *Rabinowitz*

The Court dealt with these conflicting interpretations most clearly in two cases, both involving searches incident to arrest, in the 1940s and 1950s. In *Trupiano*, the Court held 5–4 that government agents must obtain a search warrant "wherever reasonably practicable,"[92] clearly embracing the warrant preference view of the Fourth Amendment. Yet just two years later, the Court reversed itself 5–3 in *United States v. Rabinowitz*, holding that "[t]he mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches"—not that government actors must obtain a warrant.[93] Realistically, the shift likely stemmed from a change in justices on the Court: Tom Clark replaced the deceased Frank Murphy, and Sherman Minton replaced the deceased Wiley Rutledge.[94]

In *Trupiano*, the Court relied on the warrant preference interpretation, suggesting that the amendment was an expression of a mistrust of police power.[95] The Court noted that the Fourth Amendment "rests upon the desirability of having *magistrates rather than police officers* determine when searches and seizures are permissible and what limitations should be placed upon such activities."[96] The Court felt that police officers would be too zealous to solve crimes and would be unlikely to pause and neutrally review which of the suspect's constitutional rights were being implicated.[97] It was this mistrust of the

preference—which he refers to as the "no lines" and "bright line" approaches, respectively. *See id.* at 1471–72. Bradley advocates that the Supreme Court should follow one or the other, and stick to that model, rather than dabbling in both. *See id.*

89. *Id.* at 1473–74.

90. 500 U.S. 565 (1991).

91. *Acevedo*, 500 U.S. at 583.

92. Trupiano v. United States, 334 U.S. 669, 705 (1948).

93. *See* United States v. Rabinowitz, 339 U.S. 56, 65–66 (1950) (emphasis omitted).

94. Justice Murphy had written the majority opinion in *Trupiano*, joined by Justices Rutledge, Frankfurter, Douglas, and Jackson. Chief Justice Vinson authored the dissent in *Trupiano*, joined by Justices Black, Reed, and Burton. When *Rabinowitz* came before the Court, it would be the newly-minted Justice Minton writing the majority, joined by newly-minted Justice Clark. Chief Justice Vinson and Justices Reed and Burton—dissenters in *Trupiano*—would join Minton's majority opinion. Justices Frankfurter and Jackson, majoritarians in *Trupiano*, would be relegated to dissenting from *Rabinowitz*. Justice Hugo Black dissented in both cases, and Justice William Douglas took no part in the *Rabinowitz* decision.

95. *See Trupiano*, 334 U.S. at 705.

96. *Id.* (emphasis added).

97. *Id.*

police that led the Framers to require "adherence to judicial processes."[98] Moreover, the Court found that "subsequent history has confirmed the wisdom of that requirement."[99] The Court struck down the fruits of a warrantless midnight raid of an illegal liquor distillery, saying that government agents imposed no limits on themselves and flagrantly violated the protections of the Fourth Amendment.[100] Recognizing that a warrantless search incident to arrest is valid and necessary under extenuating circumstances, the Court asserted that the exception is limited, "[o]therwise the exception swallows the general principle," namely that warrants are generally required under the amendment.[101]

Conversely, in *Rabinowitz*, the Court embraced deference to the discretion of police that it had so recently rejected.[102] Whereas the *Trupiano* Court had looked with suspicion on judgments made in the heat of the moment, the *Rabinowitz* Court noted approvingly that "flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential."[103] Rather than setting down a bright-line rule, the Court suggested that "questions of reasonableness of searches must find resolution in the facts and circumstances of each case."[104] In a strident dissent, Justice Frankfurter, who had joined the majority in *Trupiano*, noted that the Fourth Amendment must be read in conjunction with an understanding of its history.[105] His reading of the history of the time suggested that "the [F]ramers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."[106]

B. Development of the Private Search Doctrine

The private search doctrine operates as a functional exception to the Fourth Amendment, allowing government actors to use potentially unreasonably obtained evidence without implicating the amendment's prohibitions.[107] The first prong of the private search doctrine is the agency prong, which holds that initial searches performed by a private party—rather than by an agent of the government—do not implicate the Fourth Amendment.[108] The second prong is the scope prong, which states that subsequent government searches are permissible so long as they remain within the parameters of the initial private

98. *See id.*

99. *Id.*

100. *See id.* at 706–07.

101. *See id.* at 708.

102. *See* United States v. Rabinowitz, 339 U.S. 56, 65–66 (1950) ("[I]t becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required.").

103. *See id.* at 65.

104. *Id.* at 63.

105. *See id.* at 69 (Frankfurter, J., dissenting).

106. *Id.* at 70.

107. *See* Kerr, *Sixth Circuit*, *supra* note 7 (offering brief background about the creation and development of the private search doctrine).

108. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

search.[109] The doctrine developed in two steps. First, the Supreme Court ruled that the Fourth Amendment is only applicable to *governmental* action.[110] Second, the Court ruled that where an initial private search has frustrated a person's expectation to privacy, a subsequent government search within the scope of the private search is permissible, since the person had no remaining privacy interest in the searched item.[111]

For the first step, the Court held in *Burdeau v. McDowell*[112] that the Fourth Amendment was inapplicable to the actions of private parties.[113] J.C. McDowell was employed by a gas company before being fired for alleged unlawful and fraudulent conduct.[114] After McDowell was fired, a representative of the gas company entered his former office, opened a safe, and removed a number of papers, some belonging to the company and some belonging to McDowell.[115] Finding that some of McDowell's personal papers implicated him in a mail fraud scheme, the company representative turned the papers over to the FBI, and McDowell was later indicted on fraud charges.[116]

In reviewing the seizure of McDowell's private papers, the Supreme Court assumed for sake of argument that the company representatives had seized McDowell's papers unlawfully and that McDowell had an unquestionable right of action against his former employer for trespass.[117] However, the Court found no violation of the Fourth Amendment, holding that the amendment only applied to *governmental* action.[118] Since it was a representative of the gas company—a private actor—who had seized McDowell's private papers, there was no violation of the Fourth Amendment no matter how unreasonable or actually unlawful the private search may have been.[119]

For the second step, in *Walter v. United States*[120] a sharply divided Court held that any official use of a private person's invasion of another person's

109. *See* Walter v. United States, 447 U.S. 649, 657 (1980) (opinion of Stevens, J., joined by Stewart, J.) ("Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's re-examination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search."); *see also* United States v. Jacobsen, 466 U.S. 109, 115 (1984) ("The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search.").

110. *See Jacobsen*, 466 U.S. at 113–14 (citing *Walter*, 447 U.S. at 662 (Blackmun, J., dissenting)).

111. *See id.* at 114–15.

112. 256 U.S. 465 (1921).

113. *Burdeau*, 256 U.S. at 475.

114. *Id.* at 472–73 .

115. *Id* at 473.

116. *Id*. at 472–75.

117. *Id.* at 475 ("We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.").

118. *See id.*

119. *Id.*

120. 447 U.S. 649 (1980).

privacy must be strictly limited to the scope of the private search.[121] There, the Court was dealing with the inspection by government actors of 871 boxes of pornographic film reels accidentally sent to the incorrect recipient.[122] The boxes, which were addressed to "Leggs, Inc.," were delivered to L'Eggs Products, Inc., where they were opened by employees, who in turn called the FBI.[123] FBI agents seized the film reels and sometime after ran them through a projector, without first obtaining a warrant.[124] After viewing the projected films, the senders were indicted on pornography charges.[125] Justice Stevens, writing for a two-person plurality that nevertheless ended up being the lead opinion,[126] held that while the initial inspection of the boxes partially frustrated the senders' expectation of privacy, the senders held an expectation of privacy in the contents of the films, which had otherwise not been viewed by the L'Eggs employees.[127] The Court ruled that because the senders still retained an expectation of privacy in the unprojected images, the FBI overstepped the scope of the initial private search conducted by the L'Eggs employees.[128]

In *United States v. Jacobsen*,[129] Justice Stevens marshalled an outright majority of the Court in support of his primary holding from *Walter*.[130] In *Jacobsen*, FedEx employees, pursuant to a company policy, opened a package that had been damaged during shipping.[131] Upon opening the box, the employees discovered a tube wrapped with tape, which they then cut.[132] Inside, they discovered four Ziploc bags containing a white, powdery substance.[133] The employees placed the bags back in the tube and called the Drug Enforcement Administration (DEA).[134] DEA officials arrived and noting that the tube had already been opened, removed the bags.[135] They opened each bag and identified

121. *Walter*, 447 U.S. at 657 (opinion of Stevens, J., joined by Stewart, J.).

122. *Id.* at 651–52.

123. *Id.* The labels on the individual boxes indicated that they contained "obscene pictures." *Id.* at 651.

124. *Id*. at 652. It is unclear from the facts of *Walter* at what point the film reels were screened through the projector. Justice Stevens noted that at least one of the reels was not screened for two months after the initial seizure. *Id.*

125. *Id.*

126. Justice Stevens was joined in his opinion in full by Justice Stewart. *Id.* at 651. Justices White, Brennan, and Marshall concurred in the judgment. *Id*.

127. *Id.* at 658–59.

128. *Id.*

129. 466 U.S. 109 (1984).

130. *See Jacobsen*, 466 U.S. at 110. Justice Stevens again delivered the opinion of the Court and was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and O'Connor in full. *Id.* Justice White joined in part and filed a concurrence. *Id.* Justice Brennan filed a dissenting opinion, in which Justice Marshall joined. *Id.*

131. *Id.* at 111.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

the powdery substance as cocaine using a field testing kit.[136] Upholding this subsequent warrantless search, the Court relied on the idea that "there was a *virtual certainty* that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell [the officer] anything more than he already had been told."[137] Rather than overstepping the scope of the private search by the FedEx employees, the DEA's search was merely confirming the employees' recollection, not further frustrating the sender's privacy interests.[138] Unlike in *Walter*, the Court upheld this search.[139] The FedEx employees had already discovered the bags in the initial private search, so the subsequent government search did not frustrate an expectation of privacy.[140]

C. Application of Private Search Doctrine to Laptops

Though the Supreme Court has yet to apply the private search doctrine to electronic devices, several circuit courts have ruled on the matter. Three of these cases, *United States v. Runyan*,[141] *Rann v. Atchison*,[142] and *United States v. Tosti*,[143] are discussed at some length in *Lichtenberger*.[144] Each of those cases upheld a subsequent government search of electronic data as within the scope of an initial private search.[145]

In *Runyan*, the Fifth Circuit held that a government search did not exceed the scope of a private search when the government searchers examined more files than did the private searchers.[146] In that case, several disks and other electronic media—including a desktop computer—were taken from Runyan's home and turned over to the local district attorney's office.[147] The private

136. *Id.* at 111–12. Based on this information, the DEA procured a warrant to search the address to which the package had been addressed. *Id.* at 112.

137. *Id.* at 119 (emphasis added). The Sixth Circuit focused on this "virtual certainty" language in *Lichtenberger*. *See* United States v. Lichtenberger, 786 F.3d 478, 488 (6th Cir. 2015).

138. *Jacobsen*, 466 U.S. at 119.

139. *Id.* at 121–22. While Justice Stevens wrote the controlling opinion in both *Walter* and *Jacobsen*, the Justices supporting those opinions changed almost entirely.

140. *Id.* at 120. The Court also upheld the chemical testing of the powdery substance, concluding that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." *Id.* at 123. The Court also ran a balancing test to determine whether or not the destruction of the analyzed amount of cocaine was a breach of the Fourth Amendment. *Id.* at 124–26. It concluded that there was no violation because Jacobsen's interest in the small amount of cocaine that was destroyed for the analysis was de minimus, as compared to the government's great interest in determining whether the seized substance was actually cocaine. *Id.* at 126.

141. 275 F.3d 449 (5th Cir. 2001).

142. 689 F.3d 832 (7th Cir. 2012).

143. 733 F.3d 816 (9th Cir. 2013).

144. *See* United States v. Lichtenberger, 786 F.3d 478, 489–90 (6th Cir. 2015) (discussing cases from the Fifth, Seventh, and Ninth Circuits); *see also* Kerr, *Sixth Circuit*, *supra* note 7.

145. *See Lichtenberger*, 786 F.3d at 489–90.

146. *Runyan*, 275 F.3d at 464.

147. *Id.* at 452–55.

searcher, in that case Runyan's ex-wife, attested that there was child pornography on the devices.[148] Upon review, government agents confirmed that the devices did contain child pornography.[149] Runyan was subsequently convicted of sexual exploitation of children and distribution, receipt, and possession of child pornography.[150] On appeal, both parties conceded, and the Court held, that the computer disks at issue were properly governed as containers.[151] The Court likened the situation to *Jacobsen*, questioning whether the government search discovered something that the private search had not previously uncovered.[152] Ultimately, the Court reasoned that a government search exceeds the scope of a private search "when [government agents] examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise."[153] Put more succinctly, "the police do not engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the container."[154]

In *Rann*, the Seventh Circuit applied *Runyan* to hold that subsequent government searches are still permissible even if they search electronic devices *more thoroughly* than the initial private search.[155] There, a fifteen-year-old minor, S.R., reported that her biological father had sexually assaulted her and taken pornographic pictures of her.[156] S.R. and her mother subsequently turned over a zip drive and a camera memory card containing pornographic pictures that were admitted against S.R.'s father, Rann, at trial.[157] Rann moved to suppress the images, alleging that neither S.R. nor her mother knew what was on the media devices when they turned them over to police.[158] The court deferred to factual findings of the trial court, holding that it was highly likely that S.R. and her mother knew the devices contained evidence of the crimes Rann was charged with, and that it "defies logic" that they had no idea what the devices contained.[159] Adopting the rationale of *Runyan*, the Court ruled that even though police may have searched the media devices more thoroughly than did S.R. and her mother, the government searches of the media drives did not exceed the scope of the private searches.[160] Since S.R. and her mother had

148. *See id.* at 453–54.

149. *Id.* at 454.

150. *Id.* at 455.

151. *Id.* at 458.

152. *Id.* at 461.

153. *Id.* at 463.

154. *Id.* at 465.

155. Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012).

156. *Id.* at 834.

157. *Id.* No evidence suggested that either S.R. or her mother were instructed to retrieve these images by police. *Id.*

158. *Id.* at 836.

159. *Id.* at 838.

160. *Id.*

already (presumably) viewed the contents of the electronic devices, the subsequent government searchers were "substantially certain" the devices contained child pornography and therefore did not violate the Fourth Amendment.[161]

Similar to *Runyan* and *Rann*, the Ninth Circuit in *Tosti* upheld a subsequent government search of a computer as within the scope of an initial private search.[162] In that case, Tosti took his computer to a CompUSA store to be serviced.[163] While it was being worked on, a CompUSA technician discovered pornographic images saved in a folder, notified police, and began checking the computer more thoroughly for additional incriminating files.[164] Once police arrived at the store, the officers observed thumbnail images[165] readily visible on the computer's monitor of what was clearly child pornography and directed the technician to open the corresponding full-size images.[166] In his motion to suppress, Tosti argued that the officers exceeded the scope of the private search when they opened the full-size images, rather than restricting their search to the thumbnails that the technician had observed in his initial search.[167] In response, the officers attested that they could plainly see the images were child pornography based on the thumbnail images alone.[168] Applying *Jacobsen*, the Ninth Circuit ruled that the technician's initial search of the computer frustrated Tosti's expectation of privacy in the images and that therefore the subsequent government search was constitutionally permissible.[169] The court distinguished *Walter* on factual grounds, stating that the content of the films at issue in *Walter* was not discernable from the initial private search.[170] In contrast, the court held that Tosti's expectation of privacy in the images was completely frustrated upon the technician's observation of the thumbnails, because their content was readily discernable by the technician at that point.[171] Therefore, the subsequent government search was within the scope of the initial private search.[172]

In each of the three cases discussed above, the circuit courts upheld a subsequent government search as within the scope of an initial private search. In *Runyan* and *Rann*, the Fifth and Seventh Circuits ruled that once an electronic device had been searched at all, the expectation of privacy in the device as a

161. *Id.*

162. United States v. Tosti, 733 F.3d 816, 825 (9th Cir. 2013).

163. *Id.* at 818.

164. *Id.* at 818–19.

165. In the context of computers, a thumbnail image is typically a miniaturized version of a large image file (or a still frame from a video file) that serves as a visual representation of the file itself. *See* Margaret Rouse, *Thumbnail*, WHATIS.COM (Apr. 2005), http://whatis.techtarget.com/definition/thumbnail [http://perma.cc/EQ3P-W5BW].

166. *Tosti*, 733 F.3d. at 819.

167. *Id.* at 821–22.

168. *Id.*

169. *Id.* at 821.

170. *Id.* at 823.

171. *Id.*

172. *See id.* at 822–23.

whole had been frustrated.[173] In *Tosti*, the Ninth Circuit upheld the enlarging of thumbnail images because the police in that case testified that they knew the images contained child pornography based on their viewing of the thumbnails.[174] Circuit law prior to *Lichtenberger*, then, tended to find that subsequent government searches were within the scope of an initial private search where police were virtually certain of what they would find, be it on a disk where an expectation to privacy had already been frustrated or in a file whose contents were already clearly discernable.

D. Electronic Storage Devices in Riley v. California

More recently, the Supreme Court considered the application of the Fourth Amendment generally—although not the private search doctrine specifically—to electronic devices in the context of searches incident to arrest.[175] In *Riley*, the Court considered two consolidated cases involving searches of cell phones incident to arrest.[176] Writing for a unanimous Court,[177] Chief Justice Roberts posed the issue as "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."[178]

In the first case, David Riley was arrested for possession of concealed and

173. See *supra* notes 146–61 and accompanying text for a discussion of *Runyan* and *Rann*.

174. *Tosti*, 733 F.3d. at 822 ("[The police] testified that they could tell from viewing the thumbnails that the images contained child pornography. That is, the police learned nothing new through their actions.").

175. Interestingly, searches incident to arrest arise many times throughout Fourth Amendment jurisprudence and scholarship cited in this Note. Professor Amar noted that the Court has explicitly exempted searches incident to arrest from any warrant requirement and used that to argue that the Fourth Amendment cannot contain a blanket warrant requirement. *See* Amar, *supra* note 54, at 764–65. Professor Cuddihy argued the opposite, stating that search incident to arrest was a generally accepted practice at the time of the amendment's drafting. *See* CUDDIHY, *supra* note 59, at 434. *Trupiano* and *Rabinowitz*, in which the Supreme Court grappled with whether a warrant preference was commanded by the Fourth Amendment, are both cases about searches incident to arrest. *See* United States v. Rabinowitz, 339 U.S. 56, 57 (1950); United States v. Trupiano, 334 U.S. 699, 701–03 (1948).

176. Riley v. California, 134 S. Ct. 2473, 2480 (2014).

177. This decision brought together all nine Justices for at least portions of the opinion; it shows eight of the current members of the Court engaging the idea that electronic storage devices should be treated differently under the Fourth Amendment because of their massive storage capabilities. However, while Justice Alito concurred in the judgment, he did not join the entirety of Chief Justice Robert's opinion. *See id.* at 2495–98 (Alito, J., concurring in part and concurring in the judgment). Alito's concurrence is in large measure a disagreement with the majority over the origins of search incident to arrest. *See id.* The majority notes that the justifications for search incident to arrest are primarily the safety of arresting officers and prevention of destruction of evidence. *See id.* at 2484 (majority opinion). Alito disagreed. *Id.* at 2495 (Alito, J., concurring in part and concurring in the judgment). He also noted that any changes in search incident to arrest law would be better left to legislatures. *Id*. at 2497. He appeared, however, to fundamentally agree with the result of the case and the rationale behind the majority's opinion: "While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules." *Id.*

178. *Id.* at 2480 (majority opinion).

loaded firearms, specifically two guns underneath the hood of the car he was driving.[179] During the resultant search incident to Riley's arrest, the officer discovered items he believed to be associated with the Bloods street gang and seized a smart phone from Riley's pocket.[180] The officer accessed the phone and noticed some contacts preceded by the letters "CK," which the officer believed stood for "Crip Killers."[181] Riley was ultimately charged with several crimes, which the prosecution alleged he had committed "for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence."[182] Riley was subsequently convicted and sentenced to fifteen years to life in prison.[183]

In the second case, a police officer observed Brima Wurie making an apparent drug sale from a car.[184] After arresting Wurie, officers took him to the police station and seized two phones, including a flip phone.[185] The officers noted that the phone started receiving calls from a contact listed as "my house," with the contact displayed on the external screen.[186] The police then accessed the phone's call log, determined the number attributed to "my house," and used an online phone directory to trace the number to an address.[187] The officers went to the building, saw Wurie's name on the mailbox, and saw a woman who resembled a picture in Wurie's phone.[188] Upon obtaining a warrant for the apartment—which police assumed to be Wurie's—the police found 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm, ammunition, and cash.[189] Wurie was subsequently charged with various crimes, convicted, and sentenced to approximately twenty-two years in prison.[190]

At the outset of its analysis, the Court noted that "the ultimate touchstone of the Fourth Amendment is 'reasonableness'"[191] and that "reasonableness generally requires the obtaining of a judicial warrant."[192] Failing to find guidance in the history of the Fourth Amendment on how to apply the amendment to the cases at bar, the Court sought to determine if a warrant was necessary in either case by balancing intrusion on individual privacy against legitimate government interests.[193] The Court distinguished between applications of the Fourth Amendment to physical objects versus digital content.[194] The Court determined

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 2481.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 2482.
191. *Id.* (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).
192. *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).
193. *Id.* at 2484 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
194. *Id.*

that the vast amount of information held in a cell phone was not comparable to the information typically gained from brief searches of suspects incident to arrest.[195]

Under a traditional balancing test,[196] the Court acknowledged two exigencies that might prompt a warrantless search: potential harm to officers and possible destruction of evidence.[197] Rejecting the exigency of potential harm to officers, the Court noted that digital data stored on a cell phone cannot be used as a weapon against an arresting officer.[198] While a phone may conceal an actual weapon, like a razor blade, "data on the phone can endanger no one."[199] Therefore, there could be no possible danger to an officer from digital data.[200]

Similarly, the Court rejected the argument that cell phone searches are necessary to prevent the destruction of evidence.[201] The United States and California argued primarily that officers faced two risks in the potential destruction of evidence on the cell phone: remote wiping of data and permanent encryption of data.[202] The Court found neither of these arguments persuasive for various reasons, including that both remote wiping and data encryption are not prevalent problems facing police.[203] First, the Court felt that law enforcement already had non-search-related means to combat remote wiping, namely disconnecting the phone from an active network.[204] Second, the Court felt that it

195. *Id.* at 2485.

196. In the middle part of the twentieth century, the Court articulated a test whereby the individual interest in privacy was weighed against the government's interest in solving crimes. *See* Clancy, *supra* note 46, at 1005–07. For example, this balancing was employed to hold that "a warrant is not required to search a vehicle because individuals have a reduced expectation of privacy in a vehicle." *Id.* at 1006. It was in this era that both *Walter* and *Jacobsen* were decided, and both utilized some version of balancing. *See* United States v. Jacobsen, 466 U.S. 109, 124–26 (1984) ("To assess the reasonableness of [analyzing the cocaine], '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" (quoting United States v. Place, 462 U.S. 696, 703 (1983))); Walter v. United States, 447 U.S. 649, 654 (1980) ("[W]e are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy."). By the turn of the century, the Court had elevated the common law at the time of the framing of the Fourth Amendment as dispositive of the reasonableness of a search, with balancing to be used only as a backup. Clancy, *supra* note 46, at 1023. *Riley* follows this latter path. For a critique of such a view of the Fourth Amendment, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974). Amsterdam suggests that because trial courts are likely to defer to police in judgments about which searches are or are not reasonable, "a general sliding scale approach could only produce more slide than scale." *Id.*

197. *Riley*, 134 S. Ct. at 2484–85.

198. *Id.* at 2485.

199. *Id.*

200. *Id.*

201. *Id.* at 2486–87.

202. *Id.* at 2486.

203. *Id.* at 2486–87.

204. *Id.* at 2487. Chief Justice Roberts noted "two simple ways" to disconnect the phone from a network: "First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves." *Id.*

was unlikely that police would ever encounter an unlocked cell phone such that they could prevent it from locking and encrypting any incriminating data.[205] More to the point, the Court acknowledged that if police had knowledge that a given cell phone was having data remotely deleted, then it could perhaps use that exigency to justify a search.[206] While the Court acknowledged the possibility of exigent circumstances, it felt that a warrantless search of a cell phone was unlikely to prevent a remote wipe or encryption lock.[207] The Court noted that in any event, police already had means to deal with such possibilities.[208]

The Court specifically rejected multiple potential rules proposed by federal prosecutors.[209] The United States first proposed adopting a rule whereby police could perform a warrantless search of an arrestee's cell phone given a reasonable belief that the phone contained evidence relevant to the arrest.[210] In stark terms, Chief Justice Roberts noted that such a "limit" would in fact be no limit at all:

> It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. . . . The sources of potential pertinent information are virtually unlimited, so applying [such a] standard to cell phones would in effect give "police officers unbridled discretion to rummage at will among a person's private effects."[211]

Federal prosecutors also proposed a second rule, where an officer would be permitted to search *only* those areas of a cell phone where the officer reasonably believed he would find "information relevant to the crime, the arrestee's identity, or officer safety."[212] Again, Roberts rejected this proposal, noting that it would cover too broad an amount of information and would not offer an effective check on police authority.[213] Finally, Roberts rejected an argument that officers should be allowed to search only the call log of a seized cell phone, noting that a cell phone log has significantly more information than just phone numbers, like "any identifying information that an individual might add, such as the label 'my house' in Wurie's case."[214]

The Court also rejected an argument from California prosecutors that police be allowed to search any information that they could find on a predigital

205. *Id.* at 2486–87.

206. *Id.* at 2487 ("If 'the police are truly confronted with a "now or never" situation,'—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." (citation omitted) (quoting Missouri v. McNeely, 133 S. Ct. 1552, 1561–62 (2013))).

207. *Id.*

208. *Id.*

209. *Id.* at 2491–93.

210. *Id.* at 2492.

211. *Id.* (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

212. *Id.*

213. *Id.*

214. *Id.* at 2492–93.

possession.[215] Here, Roberts considered the difference in the *quantity* of information one carries in a pocket versus a cell phone.[216] Just because a person might have carried a picture in his pocket in the predigital days, that fact should not provide a basis for the police to search thousands of pictures in his phone.[217] Nor should police be able to search all bank statements from the past five years on a someone's phone simply because in the predigital days she might have kept a bank statement in her pocket.[218] Applying such rationale to the case at bar, Roberts wrote:

> In Riley's case, for example, it is implausible that he would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets. But because each of those items has a pre-digital analogue, police under California's proposal would be able to search a phone for all of those items—*a significant diminution of privacy*.[219]

After rejecting all prosecution proposals, Roberts noted that while the decision would inarguably have a detrimental impact on policing, "[p]rivacy comes at a cost."[220]

Chief Justice Roberts closed the *Riley* opinion with a nod to warrants, an acknowledgement that electronic devices should be treated differently under search doctrine, and a short ode to the history of the Fourth Amendment.[221] Though he began by noting that reasonableness is the "touchstone" of the Fourth Amendment,[222] Roberts closed his opinion by holding that "a warrant is *generally required* before [a search of a cell phone], even when a cell phone is seized incident to arrest."[223] He seemed to reject the reasonableness standard, stating that "the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow "weighed" against the claims of police efficiency.'"[224] Finally, and importantly to this discussion, Roberts noted (and all nine Justices agreed) that "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—*get a warrant*."[225]

215. *Id.* at 2493.

216. *See id.*

217. *Id.*

218. *Id.*

219. *Id.* (emphasis added).

220. *Id.*

221. *See id.* at 2493–94.

222. *Id.* at 2482 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

223. *Id.* at 2493 (emphasis added).

224. *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).

225. *Id.* at 2495 (emphasis added). Justice Alito, although only concurring in part, affirmatively agreed that "law enforcement officers, in conducting a lawful search incident to arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone." *Id.* (Alito, J., concurring in part and concurring in the judgment).

IV. COURT'S ANALYSIS

On appeal in *Lichtenberger*, the Sixth Circuit upheld the suppression of the laptop evidence because Huston's subsequent search of Lichtenberger's laptop exceeded the scope of Holmes's initial search.[226] Although the court upheld the suppression, it found that the district court's rationale was flawed.[227] The court found that the district court considered Lichtenberger's arguments out of order; once the district court (properly) determined the case to be governed by the private search doctrine, it should have analyzed the scope of the subsequent search and only then proceeded to an agency analysis.[228] Applying the scope analysis first, the Sixth Circuit found that the scope of the subsequent search exceeded that of Holmes's initial search[229] and therefore excluded information gained from the laptop.[230]

Because the Sixth Circuit was reviewing the district court's suppression order, it reviewed all issues of law de novo.[231] The circuit court reviewed issues of fact on a clear error standard.[232] As a preface to examining *Jacobsen*, the court noted that all Fourth Amendment cases are inherently fact specific.[233]

A. Sixth Circuit Dissects the Private Search Doctrine

The Sixth Circuit first reviewed the application of the private search doctrine as found in *Jacobsen*.[234] After examining the facts of *Jacobsen*—where police conducted a warrantless search of a package—the court identified two principles emanating from the Fourth Amendment.[235] First, "the Fourth Amendment protects 'an expectation of privacy that society is prepared to consider reasonable.'"[236] Second, the amendment protects only against "governmental action; it is wholly inapplicable to a 'search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the

226. United States v. Lichtenberger, 786 F.3d 478, 490–91 (6th Cir. 2015).

227. *Id.* at 484 ("While we agree with the district court's conclusion, we disagree with its approach.").

228. *Id.* at 484–85.

229. *Id.* at 485.

230. *Id.* at 491.

231. *Id.* at 481. In reviewing a case de novo, an appellate court decides matters of law without giving any deference to the legal conclusions or assumptions of the lower court. *See De Novo Judicial Review*, BLACK'S LAW DICTIONARY (10th ed. 2014).

232. *Lichtenberger*, 786 F.3d at 481. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

233. *Lichtenberger*, 786 F.3d at 481.

234. *Id.* at 481–90. See *supra* notes 137–40 and accompanying text for a summary of the private search doctrine as applied in *Jacobsen*.

235. *Lichtenberger*, 786 F.3d at 481–82. See *supra* notes 130–37 and accompanying text for a summary of the facts of *Jacobsen*.

236. *Lichtenberger*, 786 F.3d at 482 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

Government or with the participation or knowledge of any governmental official.'"[237]

Noting the aforementioned principles, the court continued to its analysis of *Jacobsen*.[238] The court pointed out that the *Jacobsen* Court decided that "[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information."[239] Put another way, once a private party has conducted a search, the privacy interests in that item have been "frustrated," and further searches do not trigger Fourth Amendment protections.[240] Importantly, the *Lichtenberger* court noted that under *Jacobsen*, such subsequent searches by a government agent "must be tested by the degree to which they exceeded the scope of the private search."[241] The court noted that the DEA agents at issue in *Jacobsen* had a "virtual certainty" that they would find contraband—and little else—in the already opened tube.[242]

In *Lichtenberger*, the Sixth Circuit found that unlike the DEA agents in *Jacobsen*, Huston had no virtual certainty that his findings would be limited to the images Holmes had already viewed in her initial private search.[243] The court applied *Jacobsen*'s "virtual certainty" test.[244] Under this test, a government search is permissible if there is a virtual certainty that the subsequent search would not uncover anything more than the private search had already uncovered.[245] The Sixth Circuit found that this "plainly was not the case" for the search done by Huston.[246] Due to the amount of data a laptop can hold, there was no virtual certainty that any file viewed by Huston would be incriminating, unless Holmes had previously viewed it and vouched for its contents.[247] The court determined that there was no virtual certainty because neither Holmes nor Huston were sure that the photographs viewed in the government search were the same as those viewed in the initial private search.[248] The court reasoned that this was exactly the kind of overreach that *Jacobsen* sought to dissuade.[249] Because of the vast storage capacity of a laptop, any range of documents could have been among the photographs, from bank statements to medical histories.[250]

237. *Id.* (quoting *Jacobsen*, 466 U.S. at 113–14).
238. *Id.* at 482–83.
239. *Id.* at 482 (alteration in original) (quoting *Jacobsen*, 466 U.S. at 113–14).
240. *See id.* at 482–83.
241. *Id.* at 482 (quoting *Jacobsen*, 466 U.S. at 115).
242. *Id.* at 483 (quoting *Jacobsen*, 466 U.S. at 118–20).
243. *Id.* at 488.
244. *Id.*
245. *See id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 488–89.
250. *Id.*

B. Sixth Circuit Rejects Extending Home-Based Protections to Computers

The *Lichtenberger* court also considered and dismissed an argument that laptops should be exempt from the private search doctrine.[251] Lichtenberger had urged the court to extend *United States v. Allen*,[252] which held that the private search doctrine did not extend to a motel room.[253] In that case, the Sixth Circuit pointedly refused to extend the doctrine to "cases involving private searches of residences."[254] Lichtenberger analogized his laptop computer to a residence, claiming that since a laptop might contain private information such as one would find in a home, laptops also deserved special protection.[255] While the court was sympathetic to Lichtenberger's argument, it ultimately rejected an expansion of *Allen* to laptops.[256] The court reasoned that homes are uniquely protected under the Fourth Amendment because of what they are, not because of the quality or quantity of information found there.[257]

C. Sixth Circuit Holds that Government Search Exceeded the Scope of Private Search

When the Sixth Circuit agreed with the district court that *Jacobsen* applied, it held that a scope analysis should precede agency analysis.[258] The circuit court determined that *Jacobsen* governs all cases involving the scope analysis of the private search doctrine.[259] However, the court noted that *Jacobsen* was decided on scope grounds and that while the agency discussion was still relevant, it was merely dicta.[260] An agency analysis is only relevant, the court reasoned, for elements of the subsequent search that exceeded the scope of the initial search.[261] In order to conduct an agency analysis at all, one must first conduct a scope analysis to determine the actual findings from the initial private search and

251. *Id.* at 483–84.

252. 106 F.3d 695 (6th Cir. 1997).

253. *Allen*, 106 F.3d at 699.

254. *Id.*

255. *Lichtenberger*, 786 F.3d at 483–84. The Fourth Amendment protects people from unreasonable searches and seizures in their "persons, houses, papers, and effects." U.S. CONST. amend. IV. Beyond this, courts give special protection to homes. *See* Maureen E. Brady, *The Lost "Effect" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 950 (2016) (noting that the home is the "pinnacle" of Fourth Amendment protection).

256. *Lichtenberger*, 786 F.3d at 484 ("[T]here is good reason to be concerned about the breadth of private information contained in a laptop . . . .").

257. *Id.* ("Homes are a uniquely protected space under the Fourth Amendment, and that protection 'has never been tied to measurement of the quality or quantity of information obtained.'" (quoting Kyllo v. United States, 533 U.S. 27, 37 (2001))).

258. *Id.* See *supra* notes 108–09 and accompanying text for a description of the agency and scope analyses.

259. *See Lichtenberger*, 786 F.3d at 484.

260. *Id.* at 484–85. The court noted that in *Jacobsen*, the lower courts found that there was no governmental action at issue; that finding went uncontested in the appeal. *Id.* at 485 (citing United States v. Jacobsen, 466 U.S. 109, 115 n.10 (1984)). Therefore, *Jacobsen* was only controlling for its scope analysis. *See id.*

261. *Id.* (citing *Jacobsen*, 466 U.S. at 117–18).

the subsequent government search.[262] In summary, the circuit court reversed the order of analyses utilized by the district court, which had proceeded first to an agency analysis.[263]

Reframing the order of analyses, the circuit court found that Huston's search of Lichtenberger's laptop exceeded the scope of the earlier private search conducted by Holmes.[264] The court noted that its stance was due largely to the extensive privacy interests inherent in electronic devices such as Lichtenberger's laptop.[265] To the court, the overriding principle stemming from *Jacobsen* was not whether a governmental search exceeded the scope of an initial private search, but "how much information the government stands to gain . . . [and] how certain it is regarding what it will find."[266] The court likened this test to officers having a "near-certainty regarding what they would find and little chance to see much other than contraband."[267] The court reiterated that a government search going beyond the scope of an initial private search does not fall under the private search doctrine.[268]

The Sixth Circuit found that searches of physical items and spaces are significantly different from searches of electronic devices.[269] The court looked to the rationale underlying *Riley*.[270] Under *Riley*, the Supreme Court held that the search-incident-to-arrest exception to warrants did *not* extend to cell phones.[271] The Sixth Circuit noted that *Riley* considered the balance between privacy interest on one hand and promotion of legitimate government interest on the other.[272] The *Lichtenberger* court reasoned that when examining complex electronic devices like cell phones, the balance between these competing interests shifts significantly.[273] In searching a digital device, government interests in officer safety and preventing destruction of evidence are minimal—digital data literally cannot be used as a deadly weapon and is unlikely to be deleted by

262. *Id.*

263. *See* United States v. Lichtenberger, 19 F. Supp. 3d 753, 758 (N.D. Ohio 2014), *aff'd*, 786 F.3d 478 (6th Cir. 2015). The district court performed the agency analysis first and concluded that Holmes had been acting as an agent of the government. *Id.* at 758–59. Since this meant that the private search doctrine was inapplicable and the laptop evidence would be suppressed anyway, it considered the scope analysis to be moot and declined to rule on those grounds. *Id.* at 760.

264. *Lichtenberger*, 786 F.3d at 485.

265. *Id.*

266. *Id.* at 485–86 (citing *Jacobsen*, 466 U.S. at 119–20).

267. *Id.* at 486.

268. *Id.*

269. *Id.* at 487.

270. *Id.* See *supra* Part III.D for a more in-depth discussion of *Riley*.

271. *Id.* at 487–88 (citing Riley v. California, 134 S. Ct. 2473, 2489 (2014)).

272. *Id.* at 487 (citing *Riley*, 134 S. Ct. at 2484–85).

273. *Id.* at 487–88. The *Riley* Court described at length the myriad of ways cell phones were not like typical items. *Riley*, 134 S. Ct. at 2489. Of particular interest was the fact that the Court saw cell phones as miniature computers: "[Cell phones] are in fact minicomputers that also happen to have the capacity to be used as a telephone. . . . One of the most notable distinguishing features of modern cell phones is their immense storage capacity." *Id.*

an already-arrested suspect.[274] Conversely, privacy interests are heightened because of the vast amount of information that can be stored on a digital device.[275] The *Lichtenberger* court was particularly persuaded by *Riley*'s contention that because cell phones store immense quantities of data, the privacy concerns at issue are more pronounced.[276]

D. Court Denies There Is a Circuit Split

The Sixth Circuit considered three circuit cases regarding the private search doctrine as applied to contemporary electronic devices—*Runyan*, *Rann*, and *Tosti*—and noted that all three were in line with its holding.[277] The court commented that rather than creating a split, its own decision was in line with its sister circuits.[278] It noted that in *Runyan*, the Fifth Circuit analogized computer disks to containers, ruling that police extended the scope of the search by examining a container not previously opened by a private searcher and in so doing, had no virtual certainty that they would find the same incriminating items as the private searchers had.[279] Similarly, the Seventh Circuit held in *Rann* that there *was* virtual certainty when a victim turned over a single memory card, and her mother turned over a single zip drive, saying those devices contained child pornography.[280] Finally, the *Lichtenberger* court noted that the Ninth Circuit decided *Tosti* on virtual certainty grounds.[281] The court also used *Tosti* to reaffirm its own holding: whereas the record in *Tosti* clearly established that the officer viewed the exact same images as the private party in that case, Huston was not at all sure he had viewed the same images as Holmes in her private search.[282] The court found that this lack of virtual certainty on Huston's part was dispositive and ruled to suppress the evidence on Lichtenberger's laptop because the government search exceeded the scope of the private search.[283]

V. ANALYSIS

This Section argues that the Supreme Court should resolve this split (and it is indeed a split) in line with the Sixth Circuit. Part V.A notes that contrary to

274. *See Lichtenberger*, 786 F.3d at 491 (citing *Riley*, 134 S. Ct. at 2485).

275. *See id.* at 488 (quoting *Riley*, 134 S. Ct. at 2488).

276. *Id.* at 487–88.

277. *Id.* at 489–90. See *supra* Part III.C for a full discussion of *Runyan*, *Rann*, and *Tosti*.

278. *See Lichtenberger*, 786 F.3d at 489 ("We are not alone in our approach to these modern considerations under the Fourth Amendment. Our sister circuit courts have placed a similar emphasis on virtual certainty in their application of *Jacobsen* to searches of contemporary electronic devices."). Thus, the Sixth Circuit in *Lichtenberger* does not see itself as creating a split from prior circuit decisions like *Runyan* or *Rann*. However, commentators (and the author of this Note) consider it a split. *See, e.g.*, Kerr, *Sixth Circuit*, *supra* note 7.

279. *See Lichtenberger*, 786 F.3d at 489 (citing United States v. Runyan, 275 F.3d 449, 463 (5th Cir. 2001)).

280. *See id.* at 489–90, 90 n.6 (citing Rann v. Atchison, 689 F.3d 832, 837–38 (7th Cir. 2012)).

281. *See id.* at 490 (citing United States v. Tosti, 733 F.3d 816, 822 (9th Cir. 2013)).

282. *See id.*

283. *Id.* at 490–91.

the words of the Sixth Circuit in *Lichtenberger*, it did in fact create a circuit split, as it changed the relevant scope analysis under the private search doctrine. Part V.B argues that the Supreme Court should uphold *Lichtenberger* because it is a more faithful application of *Jacobsen* and *Walter.* Finally, Part V.C suggests that in light of the Supreme Court's recent decision in *Riley*, the Court should uphold *Lichtenberger* as a more realistic assessment of the privacy interests inherent in electronic storage devices.

A. Sixth Circuit Did In Fact Create a Circuit Split in Lichtenberger

It is first important to note that *Lichtenberger* did in fact create a circuit split over how to apply the private search doctrine to laptops. As noted above, the Sixth Circuit did not view its own decision as a split with other circuit cases.[284] This position is untenable. In *Runyan* and *Rann*, the Fifth and Seventh Circuits suggested that a private search of any part of an electronic storage device frustrated privacy interests in the entirety of the device.[285] In both cases, subsequent government searchers of electronic storage devices were justified because the initial private searcher had already frustrated any expectation to privacy *in the entire device*.[286] *Lichtenberger*, on the other hand, considers the proper unit to be the individual file, rather than the entire device.[287] If the Sixth Circuit had properly applied the other circuits' decisions, it would have held that Lichtenberger's expectation to privacy in *any* file contained in his laptop was frustrated the moment Holmes viewed a single file on that laptop. Moreover, Holmes had in fact viewed several images inside a specific folder marked "private."[288] The pictures she showed Huston were other images saved in that folder.[289] Rather than saying Lichtenberger's privacy interest in the laptop's contents—or even in the contents of the "private" folder—had been frustrated by Holmes's initial private search, the Sixth Circuit ruled that Lichtenberger still had a privacy interest in the other files *in that same folder*.[290] The *Lichtenberger* view is significantly more limited than the *Runyan*/*Rann* view and would protect privacy interests in a large number of files that the other circuits would open to warrantless review. This split needs to be resolved to avoid inconsistent decisions in lower courts.

Under the more the Fifth and Seventh Circuits' more permissive view, any

284. See *supra* Part IV.D for a summary of the Sixth Circuit's view that its decision in *Lichtenberger* did not create a split with its sister circuits.

285. *See* Kerr, *Sixth Circuit*, *supra* note 7.

286. *Id.* In *Rann*, it was not even clear that S.R. and her mother *had* actually viewed any of the material on the electronic storage devices at issue before turning them over the authorities; the Seventh Circuit merely assumed they had. *See* Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012).

287. *See* Kerr, *Sixth Circuit*, *supra* note 7.

288. *Lichtenberger*, 786 F.3d at 481.

289. *See id.* at 488 ("Holmes admitted during testimony that she could not recall if these were among the same photographs she had seen earlier because there were hundreds of photographs in the folders she had accessed. And Officer [Huston] himself admitted that he may have asked Holmes to open files other than those she had previously opened.").

290. *See id.* at 488–89.

file contained on an electronic storage device turned over to government agents is fair to use as long as there is reason to believe that a private actor viewed *any* file in the device.[291] As demonstrated in *Rann*, this view can allow police to view any file on a storage device, even when there is no evidence to suggest that a private searcher viewed any of the files—only evidence to suggest that the private searcher *believed* the files were incriminating.[292] Under *Lichtenberger*, the only files that can be viewed and used by the government are the *exact* files viewed by the private searcher; all other files on the device are protected, even if they are stored in a folder marked "private" and saved alongside 100 images of child pornography.[293] In *Lichtenberger*, there would have been an incredibly strong inference that all other files (or at least the majority of the other files) in the "private" folder would be child pornography.[294] The same files protected in the Sixth Circuit would be open for government use in the Fifth and Seventh Circuits. The Supreme Court needs to correct this inequitable application of the law.

B. Supreme Court Should Uphold Lichtenberger *on Private Search Grounds*

Accepting that there is in fact a split to resolve, the Supreme Court should affirm *Lichtenberger* as a more faithful interpretation of the private search doctrine precedent. Both *Jacobsen* and *Walter* are instructive as precedent for the application of the private search doctrine, but for different reasons. As the one of the two private search doctrine cases to command an actual majority, *Jacobsen* is more instructive for precedential purposes. Moreover, *Lichtenberger* relies heavily on *Jacobsen*, referencing that case at least thirty times while mentioning *Walter* only in passing.[295] Yet *Walter* actually presents a more compelling factual comparison to *Lichtenberger*. While the Sixth Circuit relied more heavily on *Jacobsen*, the Supreme Court should rely on both cases. Under the legal principles set forth in *Jacobsen* and the factual scenario at issue in *Walter*, *Lichtenberger* should be upheld as prohibiting an impermissible governmental search exceeding the scope of the private search doctrine.

As established above, courts use a two-pronged test to determine whether evidence should be excluded under the private search doctrine: first, whether the subsequent search exceeded the scope of initial search; and second, whether the private searcher was acting as an agent of the government.[296] Here, the Court should affirm the Sixth Circuit and find a narrow private search exception

291. *See* Kerr, *Sixth Circuit*, *supra* note 7.

292. See *supra* notes 156–58 and accompanying text for a summary of the facts in *Rann*.

293. See *supra* Section II for an overview of the facts of *Lichtenberger*.

294. One might suggest there was a *virtual certainty* that there were more pornographic images in the "private" folder.

295. The *Lichtenberger* court cited *Walter* only once in a parenthetical—and only because the court quoted from the *Jacobsen* decision, which had itself quoted Blackmun's dissent in *Walter*. *See Lichtenberger*, 786 F.3d at 482.

296. See *infra* Part III.B for a discussion of the development of the private search doctrine, including the two-pronged scope and agency test.

because while Karley Holmes was not acting as a government agent during the subsequent government search, that search did exceed the scope of Holmes' initial private search.

1. The Subsequent Search was Outside the Scope of the Initial Search

The subsequent search was outside the scope of the initial search, and the Supreme Court should uphold the Sixth Circuit's ruling on those grounds. *Jacobsen* centers on when privacy interests have been frustrated by a private searcher.[297] In *Lichtenberger*, on the other hand, there are still significant privacy interests in the laptop. Unlike the FedEx package in *Jacobsen*, not every part of the laptop had been exposed to the private searcher Holmes. By her own testimony, Holmes viewed upwards of 100 images on Lichtenberger's computer.[298] Surely, Lichtenberger's privacy interests in *those* files had been frustrated. But he still retained interest in unopened files. Even in a folder marked "private," a laptop could have any number of different files, from those that are entirely innocent to those that may incriminate the laptop's owner in the crime under investigation—or in some other, wholly unrelated wrongdoing. *Jacobsen* allowed government agents to confirm the contents of the private search because they had a *virtual certainty* that they would find the evidence described by the private searcher.[299] In *Lichtenberger*, Huston had no such virtual certainty that randomly selected images would be the same incriminating evidence that Holmes had seen. He may have *suspected* that scanning random images in the same folder would turn up additional incriminating pornographic files; it may have even been more likely than not that such a search *would* find more pornographic images. But based on the amount of information a laptop can hold,[300] neither of those standards can rise to the virtual certainty required by *Jacobsen*.[301]

297. See *supra* notes 131–36 and accompanying text for a summary of the facts of *Jacobsen*.

298. See *supra* notes 16–27 and accompanying text for the facts of the private search in *Lichtenberger*.

299. See *supra* notes 137–40 and accompanying text for a summary of the holding in *Jacobsen*.

300. The author's own laptop, a Lenovo IdeaPad Y510P—a model which is already out of production—comes with one terabyte of storage capacity. *See Lenovo Y510p Laptop: Tech Specs*, LENOVO, http://shop.lenovo.com/us/en/laptops/lenovo/y-series/y510p/#tab-tech_specs (last visited May 5, 2017) [http://perma.cc/P2CK-STM6]. By way of reference, one terabyte is capable of storing roughly 310,000 image files. *See* Melvin Foo, *How Much Can a 1 TB External Hard Drive Hold?*, PC NINJA (Feb. 8, 2012), http://www.pcninja.us/how-much-can-a-1-tb-external-hard-drive-hold/ [http://perma.cc/6FX8-JEXY].

301. The *Jacobsen* Court uses the term "virtual certainty" to indicate that the officers knew the package contained the white powdery substance that the FedEx employees found and moreover that it could contain nothing else. *See* United States v. Jacobsen, 466 U.S. 109, 118–19 (1984). Virtual certainty does not necessarily refer to a likelihood or even a great probability; it more closely means that the police officers had near 100 percent certainty, and all they had to do was confirm what they had been told. *See* United States v. Lichtenberger, 786 F.3d 478, 488 (6th Cir. 2015) (noting that in order for the governmental search to be permissible, Huston had to be virtually certain that the inspection of the laptop and its contents would not tell him anything more than what he had already told by Holmes, the private searcher).

2. Karly Holmes Was Not Acting as a Government Agent

Conversely, the subsequent government search was clearly permissible on agency grounds. Holmes was acting of her own volition in showing the pictures to Huston, rather than acting as his agent. In suppressing the subsequent search on agency grounds, the trial court pointed to the fact that that Huston asked Holmes to boot up the laptop and show him the images.[302] The implication was that since Huston gave this specific command and Holmes followed it, Holmes's subsequent actions were as an agent of Office Huston. This ignores the fact that Holmes called the Cridersville Police to return to the home *specifically because* she had found child pornography on the laptop.[303] The trial court itself noted that the *intent* of the private searcher is the controlling decision in determining government agency.[304] When Holmes called the police the second time, it was clearly her intention that the police see the images she had discovered on the laptop; there would be no other logical reason for her to have called them back to her house.[305] The police had already arrested Lichtenberger for failing to register as a sex offender, a crime for which there was no evidence for police to search.[306] He had already been removed from the house, which was Holmes's complaint in the first place.[307] Lichtenberger was not suspected of, nor were the police looking for evidence of, possession of child pornography prior to Holmes's showing Huston the incriminating images.[308] By the time of Holmes's second call, the police had no cause to return to the Holmes residents; Huston returned only at Holmes's request. If anything, Huston was acting as *Holmes's* agent.

The agency standard suggested by the trial court would be excessively narrow. In order to demonstrate that showing the pictures to Huston was wholly of Holmes's own volition, Huston would have had to stand in her kitchen, silent, until Holmes booted up the computer and showed him the images. That Huston asked Holmes to show him the pictures should be irrelevant; Huston only returned to the house to view the laptop because Holmes had explained to him that she found child pornography on the laptop.[309] Without Holmes's second call to the police, and without her explanation that she found child pornography on the laptop, Huston would likely never have asked to see the laptop or the

302. United States v. Lichtenberger, 19 F. Supp. 3d 753, 758–59 (N.D. Ohio 2014), *aff'd*, 786 F.3d 478 (6th Cir. 2015).

303. *Id.* at 755 ("When [Holmes] found the first image, she took the laptop to the kitchen to show her mother. There, they clicked through several more sexually-explicit images involving minors. She closed the laptop and called the Cridersville Police Department.").

304. *Id.* at 758 ("If '*the intent of the private party* conducting the search *is entirely independent* of the government's intent to collect evidence for use in a criminal prosecution,' then 'the private party is not an agent of the government.'" (quoting United States v. Bowers, 594 F.3d 522, 526 (2010))).

305. See *supra* Section II for a full recitation of the facts of *Lichtenberger*.

306. *Lichtenberger*, 19 F. Supp. 3d at 755.

307. *Id.*

308. See *supra* notes 16–20 and accompanying text for a summary of why the police were initially called to the house.

309. *See Lichtenberger*, 19 F. Supp. 3d at 755.

pictures Holmes found; he would have had no cause to do so of his own accord. To say that the mere act of Huston asking Holmes to show him the pictures imputes government agency onto the subsequent search is a much too tenuous argument to make the search constitutionally impermissible.

3. *Lichtenberger* Should Be Upheld as Factually Similar to *Walter*

More than just the law of *Jacobsen*, the Court should look to the facts of *Walter* to affirm the violation of the private search doctrine. The mistakenly mailed boxes at issue in *Walter* contained hundreds of reels of film with suggestive names and images appearing on the outside.[310] It was highly likely that the government searchers could infer what was on the films—prohibited pornography. Yet the *Walter* Court still ruled that projecting the images exceeded the scope of the initial search, even though it was highly likely that the reels did contain contraband.[311] The *Jacobsen* Court notes that the government searchers in *Walter* "could only draw inferences about what was on the films."[312]

In *Lichtenberger*, once Holmes viewed over 100 incriminating images of child pornography on Lichtenberger's laptop, she likely could reasonably infer that she would find more of the same, particularly in the "private" folder. But the *Walter* Court indicated that this reasonable inference was not enough. Though the labels on the films were obscene, and the police officers likely had probable cause to believe the films were obscene, that belief alone did not give them sufficient reason to project the films without a warrant.[313] Applying these facts to *Lichtenberger*, while the images of child pornography on Lichtenberger's laptop may have given Huston probable cause to believe he would find more, it did not and should not have given him reason to search the laptop absent a warrant.

C. Supreme Court Could Mark a Bright-Line Rule and Require Warrants

Looking at the history of the Fourth Amendment, particularly to the historical record highlighted by Professor Cuddihy,[314] it becomes clear that the original intent of the amendment was to require specific warrants to reign in government searches. However, more recent jurisprudence has been hostile to this idea.[315] Instead of requiring police to make on-the-spot determinations of the constitutional permissibility of warrantless searches, and exposing those determinations to post hoc review by judges, the Court should take this

310. See *supra* notes 122–28 and accompanying text for the facts of *Walter*.

311. Walter v. United States, 447 U.S. 649, 657 (1980) (opinion of Stevens, J., joined by Stewart, J.).

312. United States v. Jacobsen, 466 U.S. 109, 116 (1984) (quoting *Walter*, 447 U.S. at 657).

313. *Walter*, 447 U.S. at 654.

314. See *supra* notes 71–78 and accompanying text for a summary of Professor Cuddihy's findings.

315. See *supra* notes 102–06 and accompanying text for a summary of the Supreme Court's decision in *Rabinowitz*, in which the Court most clearly embraced the reasonableness standard and rejected the warrant preference.

opportunity to make a bright-line rule for police to follow. Justice Scalia had been a long-time proponent of bright-line rules, and Justice Alito appears to share a similar enthusiasm for them.[316]

When police were again called to the Holmes household, Huston likely had probable cause to obtain a warrant to search Lichtenberger's laptop. He knew that Lichtenberger had a history as a sex offender, and it is likely that Holmes told him that Lichtenberger had been previously arrested for child pornography offenses.[317] He knew that Lichtenberger had just been arrested for failure to register as a sex offender.[318] And he had Holmes calling the police station and saying that she found child pornography on Lichtenberger's personal—and fiercely guarded—laptop.[319] It seems likely that obtaining a warrant would not even have been a close call. Under the Sixth Circuit's opinion, the evidence may only be suppressed because Holmes could not remember *which* pictures she showed Lichtenberger, rather than any other legal problem.[320] This seems to be a "technicality" of the Fourth Amendment that would let an otherwise clearly guilty offender go free.[321]

The impulse, of course, is to legitimize police conduct that would lead to the imprisonment of a clearly guilty party. However, as Justice Frankfurter noted in his dissent in *Rabinowitz*, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[322] To compensate for this, the Court should require police to get a warrant before returning for a subsequent government search. By definition, all incriminating evidence at issue in a private search case is going to be in possession of the private searchers at the time government agents could review it: the cocaine in *Jacobsen* was in the possession of FedEx employees, the films in *Walter* were in possession of L'Eggs employees, the pornography in *Runyan* and *Rann* was in possession of other parties, the computer in *Tosti* was in the possession of CompUSA, and the laptop in *Lichtenberger* was in possession of Holmes at the time she called the police to return to her home. In

316. *See* Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring) ("Law enforcement officers need clear rules regarding searches incident to arrest . . . .").

317. *See* United States v. Lichtenberger, 19 F. Supp. 3d 753, 754–55 (N.D. Ohio 2014) (noting that the impetus for the first call to police that day was the fact that friends of Holmes's mother had just "told both Holmes and her mother that Lichtenberger had been previously convicted of child pornography offenses"), *aff'd*, 786 F.3d 478 (6th Cir. 2015).

318. *Id.* at 755.

319. *See id.*

320. *See* United States v. Lichtenberger, 786 F.3d 478, 490 (6th Cir. 2015) ("Holmes was not at all sure whether she opened the same files with Huston as she had opened earlier that day. . . . We find that Huston's lack of 'virtual certainty' when he reviewed the contents of Lichtenberger's laptop is dispositive in this instance.").

321. *See* President Barack Obama, Speech Nominating Judge Merrick Garland for Appointment to the Supreme Court (Mar. 16, 2016), http://time.com/4260979/supreme-court-nominee-merrick-garland-speech-transcript [http://perma.cc/9P5K-PTQR] (suggesting that a good prosecutor would refuse evidence voluntarily turned over and instead follow proper procedures, so that a guilty suspect would not "go free on a technicality").

322. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

any situation where a private search has turned up incriminating evidence, there will likely be probable cause to get a warrant to conduct a subsequent search, and there will likely be no extenuating circumstances where the evidence may be lost or destroyed. Indeed, Lichtenberger had already been arrested *prior* to Holmes accessing his laptop. Rather than embracing the warrant preference outright, promulgating such a rule would be an effort to prevent police from committing mistakes that could lead to evidence being suppressed at trial.[323]

D. Alternately, Supreme Court Could Uphold Lichtenberger *by Applying* Riley

The Court could also uphold *Lichtenberger* based on its rejection of an application of container search doctrine[324] to cell phones in *Riley* and its recognition that electronic devices hold a fundamentally different quality and quantity of information than typical searches involve. These dueling rationales led an otherwise decidedly conservative Court to hold unanimously in *Riley* that warrants are the preferred method for searching cell phones.[325] Moreover, while *Riley* is explicitly about searches incident to arrest, the closing of the opinion may suggest that *all* cell phone searches, not just those incident to arrest, should be governed by a warrant preference.[326] Through *Riley*, the Court has shown that it is open to acknowledging the fundamental differences between electronic device searches and traditional searches and that it is willing to do so in a potentially broad fashion. If cell phones are the start, laptops are the next logical step.

Because the *Riley* Court refused to extend container search doctrine to cell phones, the Court should similarly refuse to extend it to laptops in *Lichtenberger*. The circuit courts in *Runyan* and *Rann* relied almost exclusively on container law to deal with laptop searches.[327] However, the *Riley* Court

323. To put it bluntly, had Huston obtained a warrant to search Aron Lichtenberger's laptop after Holmes's initial search but before the subsequent search—which he likely would have been able to do—the laptop evidence would have been admissible in *any* circuit, and there would have been no risk at all of suppression. Such a clear rule should be attractive to any judge or justice who wishes to give the police unambiguous guidelines for collecting evidence that will be admissible at trial.

324. Put briefly, container search doctrine is an extension of searches incident to arrest. When searching a person incident to a lawful arrest, police officers are allowed to search anything—with no additional warrant—considered to be in the area within the arrestee's possession and control just prior to his arrest. *See* Chimel v. California, 395 U.S. 752, 760 (1969); United States v. Rabinowitz, 339 U.S. 56, 61 (1950). Container search doctrine extends the area subject to that warrantless search such that when the passenger of a motor vehicle is arrested, the entire passenger compartment of the vehicle—and any container therein—are considered within the area of control. Arizona v. Gant, 556 U.S. 332, 340–41 (2009).

325. *See* Riley v. California, 134 S. Ct. 2473, 2495 (2014).

326. *See id.* at 2494–95 ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." (citation omitted) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886))).

327. See *supra* notes 146–61 and accompanying text for a discussion of the *Runyan* and *Rann* cases.

rejected the application of the doctrine to cell phone searches, noting that warrantless searches of vehicles and the containers therein incident to arrest are permitted due to "circumstances unique to the vehicle context."[328] These "unique circumstances are 'a reduced expectation of privacy' and 'heightened law enforcement needs' when it comes to motor vehicles."[329] As explained above, the Court rejected the argument that cell phones presented exigent circumstances that would require a warrantless search.[330] Specifically, the Court noted that there was a distinct unlikelihood that the data from a cell phone would be destroyed by remote wiping.[331] *Lichtenberger* in dicta mentions that by the time of Huston's subsequent government search, Lichtenberger himself was already outside of the house in police custody, and the police were already functionally in possession of the laptop.[332] It is hard to see how the Court would *unanimously reject* exigency arguments in the cell phone context in 2014, only to turn around and endorse exigency arguments in the laptop context so shortly thereafter.

VI. CONCLUSION

The Fourth Amendment was written to restrict the ability of the government to conduct unreasonable searches and seizures. As Fourth Amendment jurisprudence developed, courts concluded that the amendment only applied to governmental actors. The private search doctrine then arose as a narrow exception to the amendment, suggesting that once a person's expectation of privacy was frustrated by an initial private search, a subsequent government search disturbed nothing.

The broad private search exception created by the circuit decisions in *Rann* and *Runyan* runs completely contrary to this idea. Modern laptops can store one terabyte worth of information,[333] enough memory to hold 1,000 hours of video, 310,000 photos,[334] or a virtually unlimited number of emails.[335] The idea that a private party viewing even one of those files could frustrate the expectation of privacy in the rest of them runs completely contrary to the policy behind the exception. Resolving the circuit split in favor of the more limited exception will restore the private search doctrine to its original intent. If the overall purpose of the Fourth Amendment was to restrict governmental abuses of search and

328. *Riley*, 134 S. Ct. at 2492 (quoting *Gant*, 556 U.S. at 343).

329. *Id.* (quoting Thornton v. United States, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in the judgment)).

330. See *supra* notes 206–25 and accompanying text for a discussion of why the *Riley* Court rejected the argument that cell phones present exigent circumstances requiring warrantless searches.

331. *Riley*, 134 S. Ct. at 2486.

332. United States v. Lichtenberger, 786 F.3d 478, 491 (6th Cir. 2015).

333. *See Lenovo Y510p Laptop: Tech Specs*, *supra* note 300.

334. See Foo, *supra* note 300.

335. *See* Salvador Rodriguez, *Yahoo Cuts 'Unlimited' Email Storage, Hoping 1 Terabyte Sounds Better*, L.A. TIMES (Oct. 8, 2013, 11:24 AM), http://www.latimes.com/business/technology/la-fi-tn-yahoo-email-1-tb-storage-unlimited-20131008-story.html [http://perma.cc/88FZ-URKJ] ("[Yahoo] said that no user of the free version of Yahoo Mail has ever filled up 1 terabyte of space.").

seizure, broadening the exception to tens of thousands of unsearched documents would run completely contrary to the amendment itself. Moreover, it presents a bright-line rule for police to follow: get a warrant when you have probable cause to do so. In conclusion, the Court should resolve the split in favor of the Sixth Circuit's narrow grounds.