NO. 17-795

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

JAMES T. OLIVER,

Petitioner,

v.

STATE OF CLINTONIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Clintonia

BRIEF FOR PETITIONER

TEAM R

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the enforcement provisions of the Clintonia Funeral Directors and Embalmers Act, which promulgates the requirement for obtaining a funeral director's license and which criminalizes the intrastate sale of caskets by those not licensed as funeral directors, rationally relates to any of the State of Clintonia's purported interests.

II. Whether nine images recovered from a USB drive should be excluded as the fruits of an unreasonable warrantless search under the Fourth Amendment when a law enforcement officer went onto the USB drive to open and view files without virtual certainty that they would not contain information previously unknown to him.

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STATEMENT OF JURISDICTION

The petition for the writ of certiorari was granted by this Court on June 30, 2017. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1257 (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the Fourth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends IV, XIV. *See* App. "A." This case also involves the following statutes: Clintonia Funeral Directors and Embalmers Act ("FDEA"); Clint. Stat. § 18.942; and Clintonia Child Protection Act, Clint. Stat. § 18.999.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This case concerns the constitutional rights of James T. Oliver to continue his passion of creating and selling wooden caskets consistent with his monastic traditions, and to protect his private property stored within electronic devices from unreasonable searches.

Oliver's Monastic Traditions. As a practicing monk and former member of St. Michael's Abbey in Sandersburg, Clintonia, Petitioner, James T. Oliver manufactures and sells simple funeral caskets. R. at 5. He does not handle dead bodies nor engage in embalming services, he simply provides caskets to families to bury their loved ones. R. at 10. Due to his simplistic

design and quality workmanship, Oliver makes high-quality caskets for significantly lower prices than funeral directors. R. at 6.

Oliver's Intrastate Sale of Funerary Caskets. In 2013, James T. Oliver sold one of his caskets to Bruce Walker, whose mother passed away. R. at 6. Walker had recently retired from the F.B.I. and came to Clintonia to visit his dying mother. R. at 5. After her passing, Walker began making funeral arrangements and contacted a funeral director in Sandersburg. R. at 6. To his surprise, the director's price for a casket was marketed at $9,000. R. at 6. In hopes of finding a proper, yet more affordable casket, Walker came across Oliver's website, www.monasticcaskets.com, and contacted Oliver. R. at 5, 6. Thereafter, Oliver travelled to the funeral home armed with an appropriate casket for Walker. R. at 6. Impressed by the quality of workmanship and simple design, Walker purchased the casket for $1,000. R. at 6. Walker thanked Oliver, who in turn expressed his happiness that the high-quality, yet low-price casket met Walker's needs, even though he did not possess a license to legally sell them. R. at 6. Obtaining a funeral director's license is "no small feat"—it requires participating in three years of coursework and/or an apprenticeship, maintaining reports, and passing a final examination. R. at 4.

Walker's Private Search of Oliver's Home. Suspicious of Oliver's remarks, Walker inquired whether one needed a license to sell caskets. Oliver responded that a criminal statute required it, but it was never enforced. R. at 6. He also told Walker that he kept a fake license on him, and saved a printable version in a USB device on his nightstand at home. R. at 6.

The next day, Walker entered Oliver's home, searched his bedroom, and found Oliver's USB drive, with an inscribed tag "Dup. License/Fun!" R. at 6. Walker plugged the USB into his personal computer and saw it contained two major folders titled, "DL" and "F". R. at 6. He

clicked on the "F" folder which contained approximately 100 randomly numbered subfolders. R. at 6–7. He clicked on the first subfolder, which contained 11 JPEG files, numbered 1–11. R. at 7. The numbered JPEG files did not explain the contents, meaning there was no way to tell the contents of the files. R. at 7. Walker then clicked on one of the files, which contained what appeared to be a young minor engaged in a sexual act with an adult. R. at 7.

Subsequently, Walker brought the flash drive to the Sandersburg Police Department. R. at 7. He explained what he found to an officer, Private Rookie Jones, but did not explain how he found it. R. at 7. Walker later testified that he could not remember which JPEG file he opened, and could not provide a description of the image. R. at 2, 7 n.12.

Jones' Search of Oliver's Electronic Device. Upon obtaining Oliver's USB from Walker, Private Jones plugged the device into his computer, and Walker guided him to the "F" folder and the first subfolder. R. at 7. Walker did not specify which file he previously viewed, and walked away before Jones proceeded to view images 1–10 in order. R. at 7. JPEGs 1–9 contained an image of "potential" child pornography, while JPEG 10 contained a printable copy of Oliver's fake license. R. at 7. Private Jones did not open the eleventh file, and delivered the USB to his superiors instead, stating a "private citizen" had given him the drive. R. at 7.

II. PROCEDURAL HISTORY

Because Oliver did not complete the multiple years of required education and/or training nor pass the funeral directors' final examination, Oliver's sale of the funeral casket without the FDEA's license constituted a criminal offense under the Clintonia Statute, § 18.942. R. at 2, 3–4. Additionally, because Oliver's private property had been searched, seized, and searched again, Oliver's private materials on the USB drive constituted a criminal offense under the Clintonia Child Protection Act, § 18.999. R. at 2, 7.

As such, Oliver was arrested and charged by indictment on eleven counts. R. at 2. He subsequently filed a motion to dismiss the indictment, and in April 2015, the Circuit Court of the Fifteenth Judicial Circuit for Bill County, Clintonia entered a judgment granting Oliver's motion to dismiss the indictment. R. at 16. The court found the FDEA's licensure requirements unconstitutional because it failed to survive rational basis review, thus violating Oliver's Fourteenth Amendment rights. R. at 14–15. The court additionally held Private Jones' viewing of Oliver's USB violated Oliver's Fourth Amendment rights because Private Jones exceeded the scope of the private search conducted by Walker. R. at 15.

The State of Clintonia appealed and secured a reversal and remand from the Supreme Court of Clintonia. R. at 25. There, the majority held § 18.942 survived rational basis review, while application of Fourth Amendment protection improper. R. at 25. The minority of justices concurred, while one justice dissented, agreeing with the Circuit Court's decision. R. at 25. Oliver appealed the decision of the Supreme Court of Clintonia, and this Court granted his petition for writ of certiorari on June 30, 2017. R. at 26.

SUMMARY OF THE ARGUMENT

I.

Clintonia's current policy of restricting intrastate casket sales only to those with a funeral director's license does not rationally relate to any of its asserted interests in consumer protection, public health and safety, or economic protectionism. While consumer protection is a legitimate interest, the repealed regulations and debunked study indicates changed factual circumstances. These changed circumstances paired with the Federal Trade Commission's encouragement of third-party sellers entering the funeral market industry shows a lack of rationality in protecting consumers from these sellers. Allowing unlicensed casket retailers to sell caskets in Clintonia

would benefit consumers by decreasing the funeral director's monopoly over the industry, thereby eliminating the effects of price gouging.

Health and safety, while also found to be a legitimate interest, cannot survive rational basis review. Because Clintonia does not even require caskets to be used for burials, asserting that Oliver's casket is of lesser quality without the proper training is simply without merit. At its maximum, five percent of the education and training requirements necessary for licensure relate to caskets. Requiring Oliver to receive superfluous training that will not assist him in his relevant specialty is inapposite. Thus, because Oliver does not handle dead bodies nor engage in funeral services, requiring a funeral director's license for casket sales does not rationally relate to protecting public health and safety. Lastly, Clintonia's interest relating to economic protectionism is an illegitimate interest and therefore cannot survive rational basis review. Clintonia cannot show that restricting competition to one group will advance the public interest or general welfare in any way. Thus, § 18.942 should be deemed unconstitutional because its restrictions do not rationally relate to any of the State's purported interests.

II.

Private Jones violated Oliver's Fourth Amendment right against unreasonable searches and seizures when he viewed the ten files in the "F" folder on Oliver's USB to search for evidence of child pornography. Under this Court's controlling precedent in *Jones*, this constituted an impermissible search because Private Jones trespassed on Oliver's constitutionally protected right for the purpose of obtaining additional information. Even if this Court decides that *Jacobsen* controls whether an unconstitutional search occurred, Private Jones' viewing of the images on the USB impermissibly exceeded the scope of Walker's prior private search because he lacked virtual or substantial certainty that his search would not produce previously unknown information. Therefore, all of the images Private Jones discovered by his unconstitutional search should be excluded from Oliver's trial.

This Court should reverse the judgment of the Supreme Court of the State of Clintonia.

ARGUMENT AND AUTHORITIES

This appeal raises legal questions related to the denial of a motion to dismiss an indictment. The standard of review involving challenges to the constitutionality of a state statute involves reviewing the findings of fact for clear error and reviewing the conclusions of law de novo. *See One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011). Additionally, the necessary standard involving review of a motion to suppress presents a mixed question of law and fact. *See United States v. Mathis*, 767 F.3d 1264, 1274–75 (11th Cir. 2014). "In considering the [district court's] ruling on a motion to suppress," this Court should "review the [district court's] factual findings for clear error and its legal conclusions *de novo*." *United States v. Odoni*, 782 F.3d 1226, 1237 (11th Cir. 2015).

I. SECTION 18.942 VIOLATES OLIVER'S FOURTEENTH AMENDMENT RIGHTS BECAUSE THE STATE OF CLINTONIA CANNOT PROVE THE STATUTE'S LICENSURE RESTRICTION RATIONALLY RELATES TO ANY OF THE STATE'S PURPORTED INTERESTS.

The first issue examines whether Oliver's Fourteenth Amendment right guaranteeing the right to equal protection and due process of law are violated by § 18.942. *See* U.S. Const. amend. XIV. A liberty interest exists in the right of an individual to pursue an occupation. *See Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 437 (S.D. Miss. 2000). Since Oliver is not in a suspect class or asserting a claim surrounding a fundamental right, § 18.942 and the FDEA regulations are subject to rational basis review. R. at 8; *see also Romer v. Evans*, 517 U.S. 620, 632 (1996). This standard requires the provision at issue to bear some rational relation to a legitimate state interest. Whilst rational basis review does not place any affirmative evidentiary burdens on the government, the petitioner may negate a seemingly plausible basis for the law by pointing to evidence of irrationality. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (6th Cir. 2013). For Oliver's Fourteenth Amendment claims, the analysis for his Equal Protection Clause claim will be the same as his Due Process Clause analysis. *See Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir. 1980) ("In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers any legitimate state objective.").

A statute is unconstitutional under rational basis review, if an examination into a state's purported interests yields the result that there is not a rational relationship between the asserted interests and the means utilized to affect these interests. *See Sammon v. N.J. Bd. of Medical Exam'rs*, 66 F.3d 639, 645 (3d Cir. 1995) ("Where rational basis review is appropriate, a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute."). Clintonia asserts three

governmental interests, namely consumer protection against deceptive sales tactics, public health and safety, and economic protectionism. However, none of these interests survive rational basis review because the interests are either illegitimate or not rationally related to § 18.942. Therefore, § 18.942 is unconstitutional and violates Oliver's Fourteenth Amendment rights because it does not rationally relate to any of the State's purported interests.

A. The State of Clintonia's Purported Interest in Protecting Consumers from Fraud Fails Rational Basis Review Because Consumer Protection Does Not Rationally Relate to § 18.942 After Application of the Changed Circumstances Doctrine.

Clintonia's first asserted governmental interest relates to consumer protection against deceptive sales tactics. Whilst this is considered a legitimate interest, Clintonia's interest fails rational basis review because there is no rational relationship at the time of the challenge to this asserted interest. Application of the changed circumstances doctrine effectively demonstrates the irrationality behind Clintonia's currently proposed relationship, causing the interest of consumer protection to fail rational basis review.

1. This Court should apply the changed circumstances doctrine to challenges involving the constitutionality of state statutes because precedent supports analyzing factual conditions at the time of challenge.

This Court's precedent supports analyzing the factual conditions at the time of challenge. Rational basis review, while more deferent, still demands an examination of present facts, just like strict or intermediate scrutiny. Sean G. Williamson, *Contemporary Contexual Analysis: Accounting for Changed Factual Conditions Under the Equal Protection Clause*, 17 U. Pa. J. Const. L. 591, 592 (2014).

In *United States v. Carolene Products*, this Court provided a strong statement in favor of examining the current factual conditions in rational basis review. 304 U.S. 144, 153 (1938). This

Court explained that the "constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing that those facts ceased to exist." *Id.* Reaffirming the validity of this principle in *Whole Woman's Health v. Hellerstedt*, this Court acknowledged "such changed circumstance will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent." 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016); *see also Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied.").

This Court has repeatedly emphasized the applicability of changed circumstances, particularly in cases involving the different levels of scrutiny. This Court's expectation that racial preferences in higher education will reach a "logical end point" illustrates that changed circumstances, such as the development of race-neutral alternatives, could alter the applicability of the current narrowly tailored relationship to the government's interest in diversity. *See Grutter v. Bollinger*, 539 U.S. 306, 341–43 (2003). The expectation that racial preferences will not be needed by the year 2028 should not be construed as a strict time limit on affirmative action. Williamson, *supra* at 612. Rather, it emphasizes this Court's intention to continually reassess factual conditions. *Id.* While diversity in education will likely remain a compelling interest, racial preferences may someday be an overly burdensome method for promoting that interest. *Id.* Thus, this Court has repeatedly found changed factual circumstances can alter the result for whether the government's interest will pass judicial scrutiny.

Yet some lower courts still exhibit uncertainty about applying *Carolene Products* to changed circumstances where legislative judgment is drawn into question. *See Murillo v. Bambrick*, 681 F.2d 898, 906 (3d Cir. 1982) ("All that is required in either instance—whether at

the time of enactment or at the time of oversight—is that the legislature act reasonably."). This misplaced uncertainty stems from general language in *Carolene Products* speculating that whether judicial notice may be taken is "at least debatable." 304 U.S. at 154.

The Third Circuit addressed changed circumstances when plaintiffs argued that collecting special fees for matrimonial actions lost its rational relationship to a legitimate government interest after the State of New Jersey adopted no-fault divorces. *Murillo*, 681 F.2d at 907–08. Determining the consideration of changed circumstances as "impos[ing] an unwarranted obligation upon legislative bodies" that the Constitution "neither demands nor expects" legislatures to exercise once its laws take effect, the court reasoned that only when a statute remains in effect for years without legislative action can it then be struck down for being unreasonable due to changed conditions. *Id.* at 911. But this conclusion undermines both the judiciary and legislative branches.

While individuals should complain about irrational laws to their legislative representatives, the process for maintaining updated law through the legislative process is both complex and time-consuming. In light of any limited response from the legislature, the judicial system provides the best forum to evaluate the continuing rationality of laws. Courts are skilled empirical fact-finders and the adversarial process allows for both sides to zealously present his or her arguments. If courts refused to consider changed circumstances and analyzed only the rationality of classifications at the time of creation, then courts would rarely find irrationality unless the legislature made a clear mistake, thereby, turning the already deferential rational basis review into a toothless inquiry. Williamson, *supra*, at 622.

Allowing irrational classifications to remain in effect abdicates the courts role as monitors of constitutional compliance. *Id.* This could cause the public to question the legitimacy and

competence of the judicial system, because giving the legislature exclusive control over the rationality of classifications would permit the legislature to swell beyond its constitutional bounds. Therefore, due to a court's ability to engage in empirical fact-finding paired with this Court's precedent indicating changed circumstances can affect the rationality of laws, it is clear that the legitimacy of a governmental interest must be measured at the time of the challenge.

2. After Clintonia repealed the regulation regarding casket specifications and the study underlying the repealed law was exposed as fraudulent, the continued enforcement of § 18.942 can no longer be rationally related to any legitimate government interest.

Clintonia contends that requiring a funeral license for casket sellers protects consumers from fraudulent practices. R. at 8. Although consumer protection is conceded to be a legitimate government interest, § 18.942 is not rationally related to this interest. R. at 9. This is due to a change in two important factual circumstances since the implementation of § 18.942. First, Clintonia repealed regulations dictating casket specifications. R. at 10. Second, a study purporting retail casket sellers engage in manipulative trade practices was determined to be fraudulently created by the Board to maintain control and bar competition. *Id.* As a result, the government's interest in protecting consumers is ironically frustrated by criminalizing the sale of caskets from unlicensed third-party casket sellers. Not only is the market for caskets to consumers narrower resulting in price gouging which actually harms consumers, but the changed factual circumstances further indicates that requiring a funeral director's license is not rationally related to consumer protection.

The Fifth Circuit's recent ruling on the constitutionality of the Louisiana Board of Funeral Directors rules granting exclusive rights to funeral homes for selling caskets is instructive. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013). In that case, thirty-eight monks of St. Joseph Abbey began creating caskets at lower prices than funeral homes. *Id.* The State of

Louisiana did not regulate casket specifications or construction, but did require intrastate sales of caskets to be made by a licensed funeral director. *Id.* at 218. Although consumer protection is a legitimate governmental interest, the Fifth Circuit held this interest was not rationally related to restricting casket sales exclusively to funeral directors. *Id.* at 223; *see generally Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189–90 (1997) (finding consumer protection to be a legitimate government interest). Examining the federal regulations implemented by the Federal Trade Commission (FTC) regarding funeral industry standards highlighted this lack of rationality. *Id.* at 219.

When the FTC created regulations to mitigate unfair or deceptive practices of funeral providers, the principal objective was encouraging entry into the funeral market for new competitors to allow lower prices. *Id.*; *see* Trade Regulation Rule; Funeral Industry Practices, 47 Fed. Reg. 42260 (Sept. 24. 1982); 16 C.F.R. § 453.1 *et seq.* These regulations were amended in 2008 expressly declining to subject third-party vendors to the rule because in contrast to state-licensed funeral directors, "[t]he record [was] bereft of evidence indicating significant consumer injury caused by third-party sellers." *Id.* (quoting 73 Fed. Reg. 13740, 13745 (Mar. 14, 2008)). Thus, the FTC found that third-party sellers were not detrimental to consumer protection, rather they are instrumental.

Although the FTC's "Funeral Rule" does not preempt states from making independent assessments of consumer abuse by third-party intrastate sellers, an attempt to shut these sellers out of the market would be in tension with the FTC rules. *Id.* at 226. The FTC found a necessity in protecting consumers from the pricing practices of funeral directors in the funeral industry, especially regarding casket sales. The court found the Louisiana funeral statute at issue, on the other hand, effectively restricted competition and limited sales to the licensed few,

accomplishing just the opposite. Therefore, the court determined that granting an exclusive right of sale to funeral directors does not rationally relate to protecting consumers because it puts consumers at a greater risk of abuse for exploitative prices. *Id.*

Clintonia law is no different. Similar to Louisiana law in *St. Joseph Abbey*, Clintonia does not place any requirements on caskets. R. at 5, n. 9. As one of the changed factual circumstances, the repeal of regulations surrounding casket specification places Clintonia in the same factual standing as Louisiana. Additionally, the changed circumstance involving the debunked study illuminates the lack of factual basis proving that third-party casket sellers manipulate consumers in Clintonia. As a result of these changed circumstances, there is deficient evidence indicating that introduction of third-party sellers' practices to the funeral market would harm consumers. Rather, their exclusion from the market is what harms consumers. This conclusion is furthered by *St. Joseph Abbey'*s analysis surrounding the interplay of the FTC regulations paired with the lack of independent evidence of consumer abuse asserted by the state. Because Clintonia no longer has supplemental information supporting its reasoning for excluding third-party sellers, like Louisiana, there cannot be a rational relationship to the asserted interest of consumer protection.

The FTC regulations explicitly encourage the introduction of third-party sellers into the funeral industry as a means of curbing deceptive consumer practices. Requiring that only licensees be allowed to sell caskets monopolizes the funeral industry market, and by extension, allows for deceptive consumer practices because the licensed few able to sell caskets can continue to unnecessarily elevate prices. This deceptive practice already exists in Clintonia evidenced by the 800-percent markup price of caskets sold by licensed funeral directors compared to unlicensed retailers. R. at 5. Instead, introducing unlicensed sellers to the funeral

market would allow for a more extensive and diverse inventory of caskets to be available to consumers at various prices. By embracing unlicensed retailers, Clintonia would shield consumers from the current monopolistic effects like price gouging, thereby achieving its purported interest.

Currently, § 18.942 imposes a significant barrier to competition in the casket market. Due to both changed circumstances highlighting the lack of evidence indicating how third-party sellers would harm this market, their exclusion from the market cannot meet rational basis review. In continually reassessing applicable factual conditions, while the interest in consumer protection remains legitimate, the method currently utilized to achieve this interest has now become overly burdensome. The means for promoting consumer protection, namely excluding unlicensed casket retailers, is in direct conflict with the FTC regulations encouraging their introduction to the market. Therefore, without the original evidence adducing how including unlicensed retailers in Clintonia's market harms consumers paired with the regulatory mandate that these same retailers should already be included in this market, shows the lack of any rational relationship to Clintonia's interest. Thus, the licensing requirements and the criminalization of unlicensed sales under § 18.942 is not rationally related to Clintonia's interest in consumer protection in light of the changed circumstances and FTC regulations.

B. The State of Clintonia Cannot Prove A Rational Relationship Between Its Purported Interest in Protecting Public Health and Safety and § 18.942's Restriction of Intrastate Casket Sales to Licensed Funeral Directors.

Clintonia's second asserted governmental interest relates to protecting public health and safety. While this can be a legitimate interest, there cannot be a rational relationship between restricting casket sales to licensed funeral directors and protecting public health and safety based on concerns for handling bodies, making quality caskets, and receiving education, training, and

expertise. When faced with substantially similar facts as in the instant case, both the Fifth and Sixth Circuit Courts of Appeals held that restricting intrastate casket sales to licensed funeral directors bears no rational relationship to the asserted interest of protecting public health and safety. *See St. Joseph Abbey*, 712 F. 3d at 226; *Craigmiles v. Giles*, 312 F. 3d 220, 225, 226 (6th Cir. 2002). The State of Clintonia contends that this restriction rationally relates to protecting public health and safety based on the training requirements necessary for licensure ensuring proper disposal of dead bodies and the creation of quality caskets. R. at 10–11. Analyzing these same concerns in *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals found none of these reasons as persuasive for supporting the state's contentions. 312 F.3d at 225–26.

In *Craigmiles*, the Tennessee Funeral Directors and Embalmers Act forbids anyone from selling caskets without being licensed as a "funeral director" under the state. *Id.* at 222. The plaintiffs operated independent casket stores selling caskets only after the death of the intended occupant, i.e., at "time of need." *Id.* They did not engage in embalming, cremations, burials, or the arranging of funeral services. *Id.*

Tennessee first argued that the education and training necessary for a license ensured that those handling dead bodies would dispose of the bodies safely and prevent the spread of communicable diseases. *Id.* at 225. Because the plaintiffs did not handle dead bodies nor engage in conducting any funeral services, the Sixth Circuit found this argument unpersuasive. *Id.* Simply selling a casket to a deceased's family member, then delivering the casket to a funeral home to handle the body was not rationally related to safely disposing of dead bodies or preventing the spread of communicable diseases because the plaintiffs never encountered any of the bodies. *Id.* Accordingly, the Sixth Circuit found this failed to support rational basis review. *Id.*

Like the plaintiffs in *Craigmiles*, Oliver does not handle dead bodies nor engage in funeral services; he simply manufactures and sells caskets to consumers. R. at 10–11. His specialty lies in creating simply designed caskets inspired by his monastic traditions, not in the handling of the deceased. Therefore, Oliver's lack of involvement with the bodies, or in any of the funerary services, shows that the interest in promoting safe disposal of the bodies to prevent the spread of diseases is irrationally related to restricting him from selling his caskets in Clintonia.

Additionally, Clintonia contends that the previously repealed provision requiring caskets to be of a certain quality rationally relates to its interest in protecting public health and safety. R. at 21. A similar argument about the potential for bacteria or communicable diseases to spread from a decomposing body due to a poorly made casket was made in *Craigmiles*. *See* 312 F.3d at 225. The Sixth Circuit found the same argument unpersuasive, particularly when a person could legally make a homemade casket, just not sell it. *Id.* Further, there were no state laws requiring the use of a container for burials, let alone any requirements for the use of a casket. *Id.*; *accord St. Joseph Abbey*, 712 F. 3d at 226 (holding that no rational relationship existed where the laws within the state did not require a casket for burial).

The same analysis applies here and the resulting conclusion results irrespective of the 2012 repealed provisions requiring caskets to meet certain standards. Although § 18.942 required caskets to meet certain standards prior to the repeal, nowhere in the provisions did the statute require caskets to be used in burials. Therefore, the same conclusion results as in *Craigmiles.* Because Clintonia does not legally require a body to be buried in a casket either, there cannot be a rational relationship between the licensure requirements and protecting health and safety based on the quality of caskets. Due to the lack of requirements from the FDEA imposing the use of a

casket for burial, both before and after the 2012 repeal, the quality of a casket threatening health and safety cannot rationally relate to the licensure requirements.

Lastly, Clintonia asserts that subjecting casket retailers to the necessary training requirements relates to public health and safety because it ensures the proper preparation and disposal of the deceased. R. at 10. *Craigmiles* also rejected this argument that involved similar training and education standards. 312 F.3d at 222. Tennessee granted a funeral director license once a person either completed one year of coursework at an accredited mortuary school followed by one year of apprenticeship, or by completing two years of apprenticeship. *Id.* Tennessee has one mortuary school whose coursework involves eight credit hours in embalming, three in restorative art, and twenty-one in funeral services. *Id.* No more than 5% of the school's curriculum pertained to casket and urns. *Id.* As a result of the lack of emphasis on creating any special expertise for caskets, the court held there was no rational relation between these licensure requirements and ensuring proper disposal of the deceased *Id.* at 226.

Both the Fifth and Sixth Circuit independently reached the result that without any special expertise on caskets, or even with this minimal training, the states could not prove a rational relationship between public health and safety and limiting intrastate sales of caskets to funeral directors based on their education, training, and expertise. *See St. Joseph Abbey*, 712 F.3d at 226; *Craigmiles*, 312 F.3d at 226. Because the same conclusion may be made here, this Court should follow the reasoning in *Craigmiles* and *St. Joseph Abbey.*

Similarly, a person may obtain a funeral director's license in Clintonia either by completing three years of apprenticeship or one year of mortuary school followed by two year of apprenticeship. R at 4 n.4. The credited coursework relating to caskets and urn issues consist of only five percent of the twenty-one credit hours for funeral services. R. at 4. Even if Oliver had

completed either method of training to obtain his license under the FDEA, his education relating to his relevant business in caskets would have been limited in scope to a very small percentage. If he chose to attend mortuary school, only five percent of the information he learned would be potentially applicable for his specialty. Comparatively, if he had chosen the purely apprenticeship path, there is no guarantee that he would have received any training on caskets because it is not required by the curriculum. R. at 4.

Although nothing in the FDEA regulations prevents casket retailers from becoming licensed funeral directors, dedicating years and thousands of dollars to the education and training necessary for licensure is undoubtedly a significant barrier to allow entry into the casket market. *See Craigmiles*, 312 F.3d at 224–25. Forcing Oliver to receive superfluous training that will not assist him in this introduction is inapposite. If Clintonia truly had an interest in protecting public health and safety out of concerns for handling dead bodies correctly, selling quality caskets, and providing education, training, and expertise on casket issues, then it would have created specific requirements addressing those interests and concerns. Therefore, because the license restrictions lack even a foundation for finding rational basis, § 18.942 cannot pass even slight constitutional scrutiny.

C. Economic Protectionism Is Not A Legitimate Governmental Interest, Therefore It Cannot Rationally Relate to § 18.942's Restricting Intrastate Casket Sales to Licensed Funeral Directors Under Controlling Authority.

Clintonia's third asserted governmental interest relates to economic protectionism. However, this asserted interest of mere economic protectionism, without more, is simply an illegitimate interest unable to survive rational basis review. Since Clintonia cannot assert this interest involves more than mere economic protectionism, the interest remains illegitimate and therefore cannot survive rational basis review.

This Court should adopt the holding from the circuit court finding mere economic protectionism to not be a legitimate state interest. R. at 11. The Supreme Court of Clintonia incorrectly held mere economic protectionism to be a legitimate interest and cited the Tenth Circuit's holding in *Powers v. Harris* as support. R. at 22; *see Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (holding mere economic protectionism to constitute a legitimate state interest). Yet the *Powers* decision was determined by the Fifth Circuit to lack a proper analysis of controlling authority. *St. Joseph Abbey*, 712 F.3d at 223. The Fifth Circuit examined both the *Craigmiles* and *Powers* rationale before rendering its holding on mere economic protectionism, and ultimately reasoned *Craigmiles* was persuasive.

In *St. Joseph Abbey*, the Fifth Circuit affirmed the Sixth Circuit's decision in *Craigmiles,* holding that "protecting a discrete interest group from economic protectionism is not a legitimate governmental purpose." *Id.* at 222 (quoting *Craigmiles*, 312 F. 3d at 226). The *Craigmiles* court concluded that requiring a funeral director license to sell funeral merchandise intrastate was "nothing more than an attempt to prevent economic competition." 312 F.3d at 225. The Fifth Circuit ultimately found this reasoning to be controlling, but only after a thorough examination into *Powers*. *See St. Joseph Abbey*, 712 F.3d at 222–23.

Similar to *Craigmiles* and *St. Joseph Abbey*, the *Powers* court examined the restriction of intrastate casket sales solely to licensed funeral directors in the interest of economic protectionism. 379 F. 3d at 1220. Arguing against the Sixth Circuit's authorities and subsequent rationale to decide *Craigmiles*, the Tenth Circuit proclaimed, "the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate interest." *Id.* Yet when the Fifth Circuit examined these Supreme Court cases cited by *Powers*, none asserted that conclusion. *See*

St. Joseph Abbey, 712 F.3d at 222. Instead, the cases indicated, "protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of an industry can be linked to advancement of the public interest or general welfare." *Id.*

Where *Craigmiles* found illegitimacy of economic protectionism as an interest and thereafter an irrational relationship to the restriction, *Powers* found the relationship to be a "traditional wielding of state power and rational by definition." *Id.* But because neither precedent nor broader principles suggested economic protection of a particular industry to be a legitimate governmental purpose, the Fifth Circuit adopted *Craigmiles* as controlling. Thus, this decision added to the growing list of courts repeatedly recognizing that protecting a discrete interest group from economic competition is not a legitimate purpose. *Id.*; *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislature, a virtually per se rule of invalidity has been erected.").

This Court should end the debate. Relying on *St. Joseph Abbey* as instructive, for mere economic protectionism to be considered a legitimate interest, Clintonia must show that restricting competition will also advance the public interest or general welfare. Clintonia cannot show this because the very act of restricting competition to one group in the market injures the general public. The discussion above analyzing consumer protection and health and safety as not bearing a rational relationship to the restriction should be applied here. There will not be any advancements in the public interest or general welfare, rather, consumers will be repeatedly injured by the effects of a restrictive market and its deceptive practices. As such, mere economic protectionism cannot be deemed a legitimate government interest. Therefore, § 18.942 cannot survive rational basis review as it does not relate to any of the State's purported interests.

II. PRIVATE JONES' WARRANTLESS SEARCH OF THE USB DRIVE VIOLATED OLIVER'S FOURTH AMENDMENT RIGHTS.

The second issue examines whether Oliver's Fourth Amendment rights were violated by Private Jones' warrantless search of Oliver's USB. Two competing interpretations exist as to whether a search occurred, which specifically stem from this Court's decisions in *United States v. Jacobsen* and *United States v. Jones.* While the *Jones* analysis is controlling for determining that a search occurred in the instant case, the competing interpretation under *Jacobsen* still results in a search, when the appropriate test of virtual certainty is applied. Therefore, under either interpretation, this Court should find that Private Jones violated Oliver's Fourth Amendment rights by searching Oliver's USB.

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This allows for an individual to be protected against both a "search" and a "seizure". A search occurs when the government: (1) trespasses on a person's constitutionally protected area ("persons, houses, papers, and effects") to collect information, or (2) infringes a person's reasonable expectation of privacy. *See United States v. Jones*, 565 U.S. 400, 407–08 (2012); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Whereas, a seizure of property occurs when there is interference with an individual's possessory interests in the property. *Id.* The issue on appeal relates only to the State's violation of Oliver's Fourth Amendment right against unreasonable searches.

One legal framework for defining a search under the Fourth Amendment was established in *Katz v. United States*, 389 U.S. 347 (1967). There, this Court found that a search occurred when an electronic listening device was placed outside of a public phone booth, despite the lack of any physical intrusion or trespass. *Id.* Thus, the *Katz* Court held that a search occurs when the

government violates the privacy on which a person justifiably relies. *Id.* Justice Harlan's concurrence has since become the identifiable test for determining whether the government has invaded a person's "constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). Under the *Katz* test, the government violates the Fourth Amendment if it (1) intrudes on a person's subjective expectation of privacy; and (2) that expectation of privacy is objectively reasonable by society's standards. *Id.*

Searches conducted by police without a warrant are presumptively invalid, and any exceptions to this rule must be "jealously and carefully drawn." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). This Court in *Jacobsen* created an exception now known as the private search doctrine. 466 U.S. at 113. This exception to the warrant requirement is based on the notion that the Fourth Amendment does not apply to searches or seizures "by a private individual not acting as an agent of the Government." *Id.* Further, an individual's reasonable expectation of privacy in particular information is frustrated when a private individual conducts a search. *Id*. at 116. Under the private search doctrine, law enforcement may conduct a subsequent search of that information because the person's reasonable expectation of privacy has been frustrated. *Id*. at 117. However, the subsequent warrantless search by law enforcement is valid only to the extent that it does not exceed the scope of the prior private search. *Id.* at 116. Thus, the *Jacobsen* Court answered the *Katz* inquiry by concluding that the search of a container that merely repeats a prior private search does not invade an individual's reasonable expectation of privacy because the expectation of privacy in the container was destroyed by the private actor. Andrew MacKie-Mason, *The Private Search Doctrine After Jones*, 126 Yale L.J. Forum 326, 329 (2017).

In 2012, this Court reexamined the Fourth Amendment doctrine in *United States v. Jones*, 565 U.S. 400, 406–07 (2012). Reviving the "common law trespassory" approach, *Jones*

abrogated the relevance of *Jacobsen* to cases where the government trespasses on a constitutionally protected area. *Jacobsen* examines whether government actions violate a reasonable expectation of privacy, but courts must now also ask whether the action in question constitutes a trespass under *Jones*. Under *Jones*, an unconstitutional search occurs when the government trespasses on a constitutionally protected area to obtain or gather information. Id. *Jones* does not just limit the private search doctrine, it acknowledges that a person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id.* at, 406. This Court explained that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409 (emphasis in original). Therefore, the Court's reasoning in *Jacobsen* is inapposite to cases where the government trespasses on a constitutionally protected area for the purpose of gathering information.

A. A Search Occurred Because Private Jones Trespassed on Oliver's Constitutionally Protected "Effect"—the USB Drive—to Obtain Information.

In *Jones*, law enforcement officials installed a GPS device on a vehicle to track the driver's movements for several weeks. 565 U.S. at 402–03. The government asserted that this was not a search in violation of the Fourth Amendment because Jones did not have a reasonable expectation of privacy in the movements of his vehicle. *Id.* at 406. This Court held that an unconstitutional search occurred because the physical mounting of the GPS onto the vehicle constituted an impermissible trespass to his "effects". *Id.* This Court explained that the *Katz* inquiry was not dispositive when the government engages in conduct that trespasses on a constitutionally protected area. *Id.* at 407. The *Jones* test defines government action as an unconstitutional search when the government trespasses on a constitutionally protected area for the purposes of obtaining or gathering information. *Id.* at 406–07.

Installing the GPS on Jones' car was a trespass because Jones did not consent to the installation. 565 U.S. at 404. Because his car was his effect, it fell within a constitutionally protected area. *Id.* This Court distinguished *Knotts* and *Karo* from *Jones*, by pointing out that *Knotts* applied the wrong test and *Karo* turned on the owner's consent to a trespass. *Id*. at 409–10; *see also United States v. Knotts*, 460 U.S. 276, 281 (1983) (applying reasonable expectation of privacy test); *United States v. Karo*, 468 U.S. 705, 707 (1984) (addressing whether installation of a beeper "with the consent of the original owner constitutes a search or seizure within the meaning of the Fourth Amendment"). Because Jones never consented to the insertion of the GPS onto his vehicle, the government violated his Fourth Amendment rights by trespassing on his constitutionally protected effect. *Id.* at 404–05.

Following this decision, this Court decided *Florida v. Jardines*, which determined whether a drug-sniffing dog that walked up to a front porch and alerted law enforcement to the presence of drugs constituted a search. 569 U.S. 1, 3 (2013). This Court found that the police had physically intruded upon the house to obtain information without consent. *Id.* at 11. This Court held that the physical intrusion was an unconstitutional "search" because the government trespassed on a constitutionally protected area for the purpose of obtaining information on Jardine. *Id*. at 5–6; *see id*. at 16 (Alito, J., dissenting) ("The Court's decision . . . is based on a putative rule of trespass law."). This Court concluded that it is unnecessary to address the *Katz* reasonable expectation of privacy test when "the government gains evidence by physically intruding on constitutionally protected areas." *Id*. at 11. Therefore, the relevant inquiry is whether a government agent trespassed on a constitutionally protected area as a means of obtaining information.

Private Jones violated Oliver's Fourth Amendment rights by trespassing onto a constitutionally protected area to obtain information. Oliver's USB drive was his effect and contained many of his papers, thus it falls within a constitutionally protected area. Private Jones' opening of the files on it was a trespass because he did not have Oliver's consent to conduct the search. Further, this trespass on Oliver's constitutionally protected effect was solely to obtain information. The USB contained two folders, with the "F" folder containing one hundred randomly named subfolders. R. at 7. Therefore, Private Jones' trespass on a constitutionally protected area involved the procurement of information in violation of the Fourth Amendment.

Jacobsen is fundamentally distinguishable. Because this case deals with a trespass to a constitutionally protected area, the Court need not even inquire about Oliver's reasonable expectation of privacy at all. Under *Jacobsen,* an officer may perform a search for information about an individual when a prior private search frustrates any reasonable expectation of privacy in that information. Here, it is not relevant whether Oliver's reasonable expectation of privacy was frustrated by Walker's private search because the reasonable expectation of privacy test does not apply to this case.

In this modern technological age, it makes little sense to balance Fourth Amendment rights through a reasonable expectation of privacy analysis. Limiting an individual's rights in this manner would be counterproductive. Individuals will become apprehensive about using electronic devices if he or she cannot be certain that his or her right to be secure in the information on those devices will be protected. *Jones'* trespass doctrine establishes a clear, boundary line for protecting individual rights. This Court has previously rejected bright line rules for searches involving consent, reasonableness, or probable cause, because those tests require incorporating facts specific to those cases. The *Jones* boundary assists law enforcement officials

and the public. Defining areas that always enjoy protection, namely houses, persons, papers, and effects, allows the police to efficiency determine when they must obtain a warrant before conducting a search. At the same time, it deters police conduct that infringes on areas that are constitutionally protected. Thus, the *Jones* rule better accords with the purpose of the Fourth Amendment as applied to electronic storage devices and it furthers its purpose of deterring unlawful searches.

B. Even Under *Jacobsen,* A Search Occurred Because Private Jones' Exceeded the Scope of the Private Search.

This Court concluded in *Jones* that it is unnecessary to address the *Katz* reasonable expectation of privacy test when the evidence obtained by the government physically intrudes on a constitutionally protected area. Yet, even under the *Katz* test, Private Jones still exceeded the scope of the private search doctrine created under *Jacobsen,* by viewing more containers than Walker had in his prior private search.

In *United States v. Jacobsen*, FedEx employees discovered a damaged package, which they searched per company policy. 466 U.S. at 111. The employees uncovered a duct-taped tube in the package containing four plastic bags filled with a powdery, white substance. *Id.* The employees subsequently notified the F.B.I., and the F.B.I. replicated the search by opening the package. *Id.* The F.B.I. then tested some of the white powder, positively identifying it as cocaine. *Id.* at 111–12. This Court held that the government did not violate the Fourth Amendment because Jacobsen's reasonable expectation of privacy was frustrated when the private employees originally opened the package and searched its contents. *Id*. at 119–21. Further, the F.B.I. agent's additional search testing the white substance did not exceed the scope of the FedEx employees' private search, because the F.B.I. agent did not learn any additional information beyond what they had already been told (i.e., the package contained cocaine). *Id.* As a result, the private

search doctrine was created. Although the *Jones* test remains the controlling analysis for the instant case, Private Jones' actions still constitutes a search under *Jacobsen* because of the additional information Private Jones obtained thereby exceeding the scope of the prior private search.

1. This Court should apply the virtual certainty test to define the parameters of a private search.

Since *Jacobsen*, circuit courts have split in determining the appropriate test for whether a government search exceeds the scope of a previous private search, particularly when involving an electronic device. *See United States v. Lichtenberger*, 786 F.3d 478, 490 (6th Cir. 2015); *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001). As a result, two dominant ideologies emerged, namely virtual certainty and closed container. The Fifth and Seventh Circuits utilize the "closed container test" that dictates police exceed the scope of a private search when they open a container not previously viewed by the private party, unless they are substantially certain of its contents based on the statements of the private searchers, their replication of the private search, and their expertise. *See Runyan*, 275 F.3d at 463. Comparatively, the Sixth and Eleventh Circuits apply the "virtual certainty test" which states that police exceed the scope if they are not virtually certain what the search will yield. *See Lichtenberger*, 785 F.3d at 488. Despite the apparent similarities between the tests, the virtual certainty test should be employed by this Court because it is better suited to protect evolving individual privacy expectations surrounding modern technological devices.

In *Riley v. California*, this Court expressed a preference for providing cell phones, computers, and other personal storage devices special protection under the Fourth Amendment. 134 S. Ct. 2473 (2014). Although this Court did not decide the case in relation to the private search doctrine, this Court declined to extend the search-incident-to-arrest exception to the

search of an arrestee's cell phone. *Id.* In its rationale, this Court emphasized the "vast quantity of personal information" on electronic devices and the continuous erosion of Fourth Amendment protection of these devices under current law. *See id.* at 2489–90.

Less than a year later, the Sixth Circuit created the virtual certainty test in *Lichtenberger*, 786 F.3d at 488. There, Karley Holmes hacked her boyfriend's password-protected computer and found images showing child pornography in a folder labeled "private." *Id.* at 480–81. Thereafter, Holmes showed Officer Huston multiple images, despite her uncertainty about whether they were the same images she had originally seen. *Id.* The Sixth Circuit acknowledged that under the private search doctrine, the critical measures of whether a government search exceeds the scope of the private search depends on how much information the government stands to gain and how certain it is regarding what it will find. *Id.* at 485.

Yet the court explained that searches of physical spaces differ significantly from searches of complex electronic devices. "As with any Fourth Amendment inquiry, [this Court] 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." *Jacobsen*, 466 U.S. at 125. This Court's decision in *Riley* did not change the fundamentals of this inquiry. *Riley* did, however, change the weight of the interests. Under *Riley*, "the nature of the electronic device greatly increase[d] the privacy interests at stake, adding weight to one side while the other remain[ed] the same." *Lichtenberger*, 786 F.3d at 488. This shift manifests in *Jacobsen's* "virtual certainty" requirement.

To permit the review of Lichtenberger's laptop, the Sixth Circuit found *Jacobsen* instructed them to analyze whether Officer Huston stayed within the scope of Holmes' initial private search. *Id.* In its view, the measure was whether the law enforcement officer had "virtual

certainty that the inspection of the [laptop] and its contents would not tell [him] anything more than what he had already been told by Holmes." *Id.* (alteration in original). The court found Officer Huston could not have been virtually certain he would not reveal more information than what he had previously learned, largely due to the wealth of information typically stored on a laptop. *Id.* Not only was there no virtual certainty that Officer Huston's search was limited to the photographs from Holmes' prior search, but he had no virtual certainty that he would not discover something else on the laptop that was private, legal, and unrelated to the allegations prompting the search. *Id.* at 488–89. This type of discovery is the very result that this Court in *Jacobsen* tried to avoid by articulating its beyond-the-scope test. *Id.*

The Sixth Circuit then acknowledged the holdings and ideology of the Fifth and Seventh Circuits in similar electronic device cases. *Id.*; *see also Runyan*, 275 F.3d at 453 (holding that the scope of a prior private search is exceeded when the police examine a closed container not previously opened by the private searchers *unless the police are already substantially certain of what is inside*); *Rann v. Atchison*, 689 F.3d 832, 834 (7th Cir. 2012) (holding because the victim and her mother knew of the contents of the digital media device, police were "substantially certain" the devices contained child pornography). These cases emphasized that virtual certainty must exist when opening a container that the private searcher previously had not opened. Accordingly, in reconciling these circuit decisions, the remaining discrepancy between the tests involves determining what the correct unit of measurement is for a container. *See United States v. Ackerman*, 831 F.3d 1292, 1305 (10th Cir. 2016) (determining the appropriate unit of measurement for an electronic container is each individual file, and as a result, the government entity unreasonably searched Ackerman's email under both the *Jones* and *Jacobsen* analyses).

2. Private Jones conducted a search because he lacked virtual certainty that the nine files would not produce previously unknown information.

Private Jones committed an unreasonable search of Oliver's USB. Private Jones opened files that Walker never even viewed. On this basis alone, Private Jones exceeded the scope because, by viewing these images, he opened nine separate containers. Evidenced by the vast quantity of folders and files saved on the USB, Private Jones could not have had virtual certainty that these other containers would not provide any other information. In fact, the discovery of Oliver's duplicate license in Private Jones' search proves that he was uncertain about what the contents of each file would be. Additionally, the record states that there was no way to discern the contents of the individual files by looking at the JPEG tiles. R. at 7. This further illuminates the lack of virtual certainty Private Jones had regarding the contents of each individual container. Therefore, even under *Jacobsen*, Private Jones exceeded the scope by opening more files than previously searched because he lacked virtual certainty of what he would discover in each container.

Although this case should be resolved solely under the *Jones* analysis, this Court should explicitly validate the unit of measurement for an electronic container under *Jacobsen* as the individual file. This Court opined that simply because technology allows individuals to "carry such information in [their] hand[s] does not make the information any less worthy of the protection for which the Founders fought." *Riley,* 134 S. Ct. at 2495. Personal information stored on an electronic device should retain its character as that individual's personal information, regardless of the interface where the information can be found. Thus, although electronics can store a wealth of information, each individual piece of information on the device should be considered independently of all other files. This conclusion is not only consistent with this

Court's precedent, but it also addresses this Court's concern that individuals' Fourth Amendment rights will not be eroded based on modern society's ability to now consolidate information onto electronic devices.

C. The Nine Images Are Inadmissible Under the Exclusionary Rule Because the Good Faith Exception Does Not Apply.

After determining that a violation of the Fourth Amendment has occurred, the court must then determine whether the evidence should be excluded. Under the exclusionary rule, any evidence obtained through an unconstitutional search or seizure is inadmissible in court. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The primary purpose of this rule is to deter the government from engaging in conduct that violates individuals' Fourth Amendment rights by removing the incentive to disregard these rights. *Id.* at 656. If the government were permitted to use the evidence that it collected in violation of the Fourth Amendment, the "assurance against unreasonable . . . searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties[.]" *Id*. at 655.

To determine if the exclusionary rule should apply in particular circumstances, this Court weighs the likelihood that the exclusion of evidence will deter future government misconduct against the social cost of preventing the use of reliable evidence. *United States v. Leon*, 468 U.S. 897, 909 (1984). In *Leon*, this Court considered whether the exclusionary rule should apply to a circumstance where an officer reasonably relied "on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id*. at 900. This Court created a good faith exception to the exclusionary rule by holding that evidence should not be excluded when the police search was based on objectively reasonable reliance on a warrant later held invalid. *Id*. at 922. Therefore, an officer can rely on the determinations of a detached

and neutral magistrate, only if a reasonably well-trained police officer would have believed the warrant was valid. *Id*. at 923.

In expounding on the good faith exception from *Leon*, this Court has only chosen to extend the exception to cases where a police officer reasonably relied on the determinations of a neutral third-party. *See Illinois v. Krull*, 480 U.S. 340, 349–50 (1987) (noting that unless the statute is clearly unconstitutional, an officer may rely on a statute that is later declared unconstitutional); *Arizona v. Evans*, 514 U.S. 1, 16 (1995) (holding an officer may reasonably rely on clerical errors of court employees); *Herring v. United States*, 555 U.S. 135, 144 (2009) (recognizing an officer's reasonable reliance on a police recordkeeping error does not always trigger exclusion). These cases all dealt with situations where an officer reasonably believed that a warrant or statute authorized what turned out to be an unconstitutional search or seizure.

Unlike the officers in *Leon*, *Krull*, *Evans*, and *Herring*, Private Jones was not reasonably relying on the determinations of a neutral third-party. There is no suggestion that a state statute authorized Private Jones' search of Oliver's USB. Further, there is no suggestion that Private Jones reasonably believed that a warrant existed to conduct the search. Rather, Private Jones never even sought a warrant to search the files in this case, either before viewing the files or after. The only justification that can be offered for Private Jones' warrantless search is that he believed Walker's prior opening of one file in the USB permitted him to search the other files in that folder under *Jacobsen*. This justification fails to pass constitutional muster for two reasons: First, Private Jones' search did not even satisfy the standard established in *Jacobsen*, because he exceeded the scope of Walker's search. Second, and more importantly, *Jacobsen* did not apply to Private Jones' search because *Jones* was the controlling precedent for determining whether the search of Oliver's files was a violation of the Fourth Amendment.

In *Davis v. United States*, this Court held that the exclusionary rule does not apply to a search conducted based on objectively reasonable reliance on binding appellate precedent. 564 U.S. 229, 239 (2011). The officer in *Davis* relied on existing circuit court precedent interpreting *New York v. Belton*, which allowed him to search the passenger compartment of Davis' car. *Id*. at 233 (citing *New York v. Belton*, 453 U.S. 454, 459–60 (1981)). While Davis' appeal was pending, this Court announced a new rule governing automobile searches in *Arizona v. Gant* that retroactively made the officer's search unconstitutional. *Id*. at 234 (citing *Arizona v. Gant*, 556 U.S. 332, 351 (2009)). Because all agreed the search was conducted in strict compliance with then-binding circuit precedent, this Court held that the officer's actions were not culpable or deliberate enough to trigger the exclusionary rule. *Id*. at 239–40. Therefore, this Court held that the exclusionary rule should not apply to cases where an officer acts in strict compliance with then-existing binding precedent. *Id*. at 240.

Here, Private Jones' search of Oliver's USB was not in strict compliance with binding Supreme Court or circuit court precedent. At best, Private Jones was acting on a misinterpretation of the applicability of *Jacobsen*'s private search doctrine to the files in Oliver's USB. Unlike in *Davis*, Private Jones was not relying on binding Supreme Court or circuit court precedent in determining whether the search was permissible under the Fourth Amendment. This is because he was not acting in compliance with the precedent established in *Jacobsen* when he exceeded the scope of Walker's prior search. More importantly, the Supreme Court abrogated *Jacobsen* when it decided *Jones* in 2012. Because *Jones* now controls whether a search is permissible under the Fourth Amendment when the government trespasses onto a constitutionally protected area, Private Jones should have conformed his conduct to the precedent established by *Jones*. There is also no binding circuit court precedent authorizing

Private Jones' search under these circumstances. Therefore, unlike in *Davis* and any other cases outlining the good faith exception to the exclusionary rule, Private Jones was not relying on the mistakes of a neutral third-party when he improperly searched Oliver's USB files.

Rather, Private Jones was relying on his own misinterpretation of binding court precedent. This Court has never found that a misinterpretation of court precedent satisfies the objectively reasonable reliance test for the good faith exception and it should not choose to do so now. The exclusionary rule was initially established to prevent the very kinds of warrantless searches conducted by Private Jones in this case. Allowing officers to justify unconstitutional searches and seizures by claiming that they simply misinterpreted court precedent would permit the good faith exception to swallow the exclusionary rule all together. Such a holding would provide officers the ability to avoid the exclusionary rule anytime they violate a constitutional right, by claiming that they merely misunderstood what was required by binding court precedent. Therefore, this Court should preserve the balance in preventing police misconduct and allowing law enforcement's use of unconstitutionally obtained evidence by holding that Private Jones' misinterpretation of court precedent does not satisfy the good faith exception to the exclusionary rule.

CONCLUSION

Petitioner respectfully requests that this Court REVERSE the Supreme Court of Clintonia's judgment and REINSTATE the Circuit Court's judgment based on violations of Oliver's Fourth and Fourteenth Amendment rights.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

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APPENDIX "A"

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV. Searches and Seizures; Warrants.

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.

U.S. Const. amend. XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX "B"

CLINTONIA FUNERAL DIRECTORS AND EMBALMERS ACT

Clint. Stat. § 18.942.

No resident of Clintonia may, without a proper license under the FDEA, sell a time-of-need casket for use in a funeral within the state of Clintonia. A violation of this section is a first-degree misdemeanor and punishable by up to one year in prison and a $1,000 fine. This section only applies to wholly intrastate transactions.