No. 13-186

IN THE

Supreme Court of the United States

HOWARD WESLEY COTTERMAN, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of U.S. Border Control Foundation, U.S. Border Control, Policy Analysis Center, U.S. Justice Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, Center for Media and Democracy, Gun Owners Foundation, Gun Owners of America, Lincoln Institute, Institute on the Constitution, Downsize DC Foundation, DownsizeDC.org, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, English First, and English First Foundation in Support of Petitioner

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

U.S. Border Control Foundation, Policy Analysis Center, Gun Owners Foundation, U.S. Justice Foundation, Free Speech Defense and Education Fund, Center for Media and Democracy, Downsize DC Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and English First Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). U.S. Border Control, Free Speech Coalition, Gun Owners of America, Inc., The Abraham Lincoln Foundation for Public Policy Research, Inc., DownsizeDC.org, and English First are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the rights to own and use firearms, and

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

related issues. Each organization has filed *amicus curiae* briefs in this and other courts. With respect to the Fourth Amendment, many of these *amici* filed an *amicus* brief at the petition stage as well as an *amicus* brief on the merits in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).

SUMMARY OF ARGUMENT

The Ninth Circuit determined that the federal government may seize, copy, and forensically analyze the hard drive of a laptop of a U.S. citizen returning to the country, without a warrant, based merely on "reasonable suspicion." The circuit court reached this decision based only on judge-made doctrines, including the border search exemption to the Fourth Amendment's warrant requirement, the right of privacy, reasonableness, and interest balancing, without any meaningful textual analysis of the Fourth Amendment.

In doing so, the circuit court sanctioned the general search of Mr. Cotterman's private papers, in violation of the Fourth Amendment's prohibition on general searches. Such searches have long been considered to be *per se* unreasonable, and at the core of what is prohibited by the Fourth Amendment. According to prior decisions of this Court, such a paper search is prohibited, and it does not matter that the government was searching for contraband. Such an absolute rule has been highly valued as a necessary precondition to preserve political liberty and personal freedom.

The circuit court opinion also reveals that this Court needs to provide guidance to the lower federal courts on how the historic property underpinnings of the Fourth Amendment, identified and revitalized just last year by this Court in United States v. Jones, should be applied to digital searches, using an analysis not based exclusively on ephemeral "expectations of privacy."

Lastly, the *en banc* court reached its conclusion that "reasonable suspicion" could justify such a search of a hard drive while disregarding established procedural rules by *sua sponte* resurrecting an issue which the government had waived on appeal, ignoring the requirements of Rule 28(a)(9), F.R.App.P., and then arbitrarily reversing the factual finding made by the district court that no reasonable suspicion existed.

ARGUMENT

In reaching its decision below, the U.S. Court of Appeals for the Ninth Circuit sitting *en banc* erroneously decided two issues regarding which certiorari is sought:

> (I) a substantive issue — whether the computers and electronic files of U.S. citizens re-entering the country, consistent with the original meaning of the Fourth Amendment, may be seized at the border by the federal government, and forensically searched upon reasonable suspicion of containing contraband; and

(II) a procedural issue — whether issues not identified by appellant on appeal and thus waived may nevertheless be revived at will by a federal court of appeals.

This *amicus curiae* brief addresses both of these issues. Section I considers the Fourth Amendment's so-called "border search exception," concerning which there exists a conflict in the circuits involving important questions of federal law as described by Petitioner (Pet. Cert. at 16-17). More importantly, there is a conflict between the text of the U.S. Constitution and relevant decisions of this Court. Section II addresses the authority of the circuit court to *sua sponte* resurrect an issue on appeal that had been abandoned by the government — an important question of federal law that has not been, but should be, settled by this Court.

I. The Circuit Court Sanctioned Border Searches Based on Judicially Created Standards that Conflict with the Prohibition on General Searches and the Property Principles Contained in the Fourth Amendment Text.

A. The Circuit Court Employed an Atextual Analytical Approach.

The circuit court framed the legal issue in this case without regard to the text of the Fourth Amendment, as follows:

> This watershed case implicates both the scope of the narrow **border search exception** to the Fourth Amendment's warrant requirement and **privacy rights** in commonly used electronic devices. The question we confront "is what limits there are upon this power of technology to shrink the realm of guaranteed **privacy**." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). More specifically, we consider the **reasonableness** of a computer search that began as a cursory review at the border but transformed into a forensic examination of Cotterman's hard drive. [United States v. Cotterman, 709 F.3d 952, 956-57 (9th Cir. 2013) (*en banc*) (emphasis added).]

1. Border Search Exception.

With respect to the "border search exception," the circuit court relied on United States v. Ramsey, 431 U.S. 606, 621 (1977), as having determined that border searches constitute a "'historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained.'" Cotterman, 709 F.3d at 957. There is no border search exception in the text of the Fourth Amendment. The Fourth Amendment protects U.S. citizens irrespective of — and indeed in defiance of — what the United States government believes to be its interests at the border, or elsewhere. Yet too often this Court has viewed its role to be that of balancing the demands of the government in particular contexts against the constitutionally protected rights of the people. *See*,

e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 273-74 (1973) (White J., concurring).

As then-University of Virginia law professor Charles Whitebread has explained:

> Judicial response to the special exigencies involved in border zone searches and seizures has created the impression that these cases constitute a separate exception to the warrant requirement. Such searches, however, are viewed more correctly from the perspective of traditional Fourth Amendment analysis. [C. Whitebread, Criminal Procedure (Foundation Press: 1980), p. 226.]

Indeed, the positing of the existence of an atextual, so-called "border search exception," followed by a hunt for its meaning, can only be expected to lead to the denigration of Fourth Amendment protections against unlawful searches and seizures, a result never intended by the Founders.

2. Privacy Rights.

The circuit court again departed from the text in identifying, and relying on, a so-called "right to privacy," also not found in the Constitution. The circuit court explained that privacy rights can be balanced away in favor of a superior government interest:

> [t]his does not mean, however, that at the border "anything goes." ... Even at the border,

> individual **privacy rights** are not abandoned but "**[b]alanced** against the sovereign's interests." ... That **balance** "is qualitatively different ... than in the interior" and is "struck much more favorably to the Government." [Cotterman, 709 F.3d at 960 (emphasis added).]

In truth, the foundational principles of the Fourth Amendment are based on property principles, not a vague right of privacy that can be defeated by a superior governmental interest. *See* United States v. Jones, 132 S.Ct. at 949.

Constitutional rights are not to be "balanced" against governmental interests for, as Justice Scalia observed with respect to the First and Second Amendments, they were "the very *product* of an interest balancing by the people...." D.C. v. Heller, 554 U.S. 570, 635 (2008) (Scalia, J.).

3. Reasonableness.

The circuit court explained that, under its view:

> [T]he touchstone of the Fourth Amendment analysis remains **reasonableness**. The reasonableness of a search or seizure depends on the **totality of the circumstances**, including the scope and duration of the deprivation. [Cotterman, 709 F.3d at 960 (citations omitted) (emphasis added).]

Applying prior Supreme Court and Ninth Circuit precedents, as it understood them, to the totality of facts of this case, the circuit court concluded "that, under the circumstances here, reasonable suspicion was required for the forensic examination of Cotterman's laptop [and] border agents had such a reasonable suspicion." *Id*. at 957.

But the touchstone of the Fourth Amendment is not "reasonableness" as applied to the motivation for government conduct. The Fourth Amendment employs the word "unreasonable," but only to describe certain types of searches which were always unreasonable — per se unreasonable — such as general searches. *See, e.g.,* Sec. I.B., *infra*.

Even with the reasonableness test, the circuit court expressed the sense that the lower federal courts have been left adrift by the U.S. Supreme Court in understanding how to decide such cases:

> Over the past 30-plus years, the Supreme Court has dealt with a handful of border cases in which it reaffirmed the border search exception while, at the same time, **leaving open the question** of when a "particularly offensive" search might fail the **reasonableness** test. [*Id*. at 963 (emphasis added).]

The circuit court concluded that this Court "has **never defined the precise dimensions** of a reasonable border search, instead pointing to the necessity of a **case-by-case analysis**." *Id*. (emphasis added).

4. Rule by Judges, not by Law.

Marching into this perceived vacuum, the court of appeals developed an analytical framework which gives judges completely unfettered discretion to make it up as they go. Reliance on phrases devoid of objective meaning allows judges to decide cases as may seem right to them. Neither "privacy rights" nor "expectation of privacy" appear in the Constitution, and as this and other cases demonstrate, any effort to find objective meaning in those words is utterly hopeless.[2] Certainly, constitutional rights were not written down so they could be defined subjectively by judges based on a review of "the totality of the circumstances."

The circuit court analysis was not wholly atextual. It quotes the Fourth Amendment once, and uses it correctly as authority for the proposition that the Amendment's protection of "papers" is not limited to the "physical" but extends to the "digital form" which "reflect our most private thoughts and activities." Cotterman, 709 F.3d at 957. However, in all other respects, the circuit court's analysis of the Fourth Amendment is woefully lacking. The circuit court's opinion gives the appearance of legal reasoning, but is unfaithful to the constitutional text, and little more than a thin veil designed to obscure the denigration of

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[2] The so-called "right" is said to have had its origins in an article by Samuel D. Warren and future U.S. Supreme Court Justice Louis Brandeis in The Right To Privacy, IV HARVARD LAW REVIEW, No. 5 (1890), published 100 years after the Bill of Rights was ratified.

a constitutional right that has fallen into disfavor with the federal judiciary.

B. The Circuit Court Sanctioned Search Violates the Fourth Amendment Ban on General Searches.

The circuit court sanctioned the warrantless search, *inter alia*, of all of Petitioner's personal papers and effects that existed in the form of digital files contained on his laptop computers. It did so based on the "reasonable suspicion" of law enforcement personnel at the border. This type of search violates the Fourth Amendment prohibition on general searches. If there is one certainty as to the original meaning of the Fourth Amendment, it is that the federal government has no authority whatsoever to conduct general searches among the personal papers of a citizen. *See* R. Perry & J. Cooper, eds., Sources of our Liberties, pp. 304-06 (ABA Found., rev'd ed. 1978).

The prohibition on general searches was clearly articulated in Entick v. Carrington, 95 Eng. Rep. 807 (C. P. 1765), a landmark case recognized by this Court just last year to be "a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' with regard to search and seizure." United States v. Jones, 132 S.Ct. at 949. In that case, deeply frustrated with criticism of the government contained in anonymous newspaper articles, the government obtained a warrant to arrest John Entick, the person thought to have published the seditious

libels against the government. The warrant also authorized the search of his house and the seizure of all his books and papers. At a time that government officials could be held accountable civilly for unlawful searches, Entick sued in trespass the four government officials who searched his house and seized his papers.

Lord Camden ruled "we are of the opinion that the warrant to seize and carry away the party's papers in this case of a seditious libel, is illegal and void." Particularly relevant to the instant case, papers evidencing a seditious libel then were not just evidence of a crime, but constituted contraband: a "libel was a writing which defamed the government, and ... mere possession of a libel was a crime." R. Galloway, Jr., "The Intruding Eye: A Status Report on the Constitutional Ban Against Paper Searches," 25 HOW. L.J. 367, 369 (1982).

The Entick decision was at the core of the founders' understanding of the types of searches that were *per se* unreasonable, irrespective of warrant, as identified in the first clause of the Fourth Amendment. In Boyd v. United States, 116 U.S. 616 (1886), Judge Bradley's ringing words explained that significance:

> As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this **monument of English freedom**, and considered it as the true and **ultimate expression of constitutional law**, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth

> Amendment to the Constitution and were considered as sufficiently explanatory of what was meant by **unreasonable** searches and seizures. [*Id*. at 626-27 (emphasis added).]

The Boyd case also placed elevated primacy on the people's right to be secure in their papers over the government's perceived needs. In Boyd, an order of a federal judge to produce certain business invoices relating to the government's suit against Boyd for smuggling was ruled illegal under both the Fourth and Fifth Amendments. The court viewed the order to compel the production of papers to be the equivalent of a search for those papers. *Id*. at 622. Justice Bradley described the rule of Entick to prohibit "the practice of issuing general warrants ... for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel." Boyd at 625-26.

While there is always the temptation to grant to the government broad powers to search and seize evidence of a heinous crime such as child pornography, Justice Bradley understood the full consequence of his decision, quoting the words of Lord Camden, that:

> there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. [Boyd, 116 U.S. at 629.]

The vital policy that demands such a result also was clearly articulated in Entick, and then repeated and relied on in Boyd:

> "The great end for which men entered into society was to secure their property....
>
> "Papers are the owner's goods and chattels; they are his dearest property and are so far from enduring a seizure that they will hardly bear an inspection.... Where is the written law that gives any magistrate such a power? I can safely answer there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society." [Boyd, 116 U.S. at 627-28 (quoting Entick).]

Justice Bradley then added his own observations about the policy undergirding the Fourth Amendment:

> [A]ny compulsory discovery ... compelling the production of his **private books and papers**, to convict him of crime, or to forfeit his property, is contrary to the principles of a **free government**. It is abhorrent to the instincts of an ... American. It may suit the purposes of **despotic power**; but it cannot abide the pure atmosphere of **political liberty** and **personal freedom**. [Boyd, 116 U.S. at 631-32 (emphasis added).]

Thirty years later, this Court, in Weeks v. United States, 232 U.S. 383 (1914), reaffirmed the particular

responsibility of courts to defend the people from breaches of Fourth Amendment, stating:

> The effect of the **Fourth Amendment** is to put the **courts** of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to **forever secure the people**, their persons, houses, papers and effects against all **unreasonable searches and seizures** under the guise of law. This protection reaches all alike, whether accused of crime or not.... The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures ... should find no sanction in the judgments of the courts.... [Weeks, 232 U.S. at 391-92 (emphasis added).]

In a warrantless search of a home, the officers in Weeks had "seized all of [defendant's] books, letters, money, papers, notes," etc. The search was analyzed in accordance with the principles of Boyd, and those rules applicable to a "general warrant." The search was said to violate the principle that "a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers" (*id.* at 390). The Court went on to say:

> The efforts of the courts and their officials to bring the guilty to punishment ... are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering

> which have resulted in their embodiment in the fundamental law of the land. [*Id*. at 393.]

Summarizing two centuries of Supreme Court decisions, Professor Russell Galloway concluded:

> One of the most important types of general searches banned by the fourth amendment is general paper searches. Typically, such searches are "specific" as to the person and/or place to be searched, but they are "general" because the quest for incriminating papers requires examination of the contents of innocent papers containing private expressions and communications. ["The Intruding Eye" at 397, and n.132, citing, *inter alia*, Stanford v. Texas, 379 U.S. 476 (1965).[3]]

Professor Galloway identified the "core evil" of the general paper search as:

> the indiscriminate reading of the private thoughts that are expressed in one's writings and personal records. The central constitutional defect is the government's roving examination of the content of one's private written expressions, the visual rummaging in the most private realm of one's mental life. "The reason why we shrink from allowing a personal diary to be the object of a search," Judge Friendly tells us, "is that the

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[3] *See also* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) and United States v. Lefkowitz, 285 U.S. 452 (1932).

> entire diary must be read to discover whether there are incriminating entries." ["The Intruding Eye" at 400 and n.162, quoting from United States v. Bennett, 409 F.2d 443, 467 (2d Cir 1971).]

The laptop computers of Mr. Cotterman may have contained digital files, but as the circuit court made clear, this is "a case directly implicating substantial personal privacy interests. The private information individuals store on digital devices – [are] their personal 'papers' in the words of the Constitution...." Cotterman, 709 F.3d 964. They would not be searched without exactly the type of "indiscriminate reading of the private thoughts that are expressed in one's writings and personal records" as Professor Galloway described. Although Cotterman's photographs themselves constituted contraband, that gave the government no license to search for them. *See* Stanford at 479. The same Fourth Amendment protection that the Boyd Court determined applied to bar a search and seizure, even when the crime of murder was suspected, would no less apply when the crime is child pornography.

C. This Court Needs to Provide Guidance to Lower Courts on the Property Basis of the Fourth Amendment.

Throughout its *en banc* opinion below, the court of appeals assumed that the Fourth Amendment's standard of "reasonableness" required it to weigh "individual privacy rights ... against the sovereign's interests." Cotterman, 709 F.3d at 960. Thus, in

deciding that the government must have "reasonable suspicion" to justify a forensic examination of Cotterman's laptop, the Court paid "heed to the nature of the electronic devices and the attendant expectation of privacy." *See id.* at 964. Not once did the court of appeals ask, much less answer, the question whether the forensic examination was reasonable with respect to Cotterman's property interest in his laptop. *See id.* at 964-67. Yet this Court decided in Jones that the primary purpose of the Fourth Amendment is to protect the property interests of the people, and that the privacy interests were a judicially-created add-on, not a textual substitute, and certainly not a displacement of property rights. *See id.*, 132 S.Ct. at 953-54.

By failing to honor this revitalized property principle from Jones, the court of appeals fell into old habits, declaring that a government intrusion into a gas cap of a vehicle was not a violation of the Fourth Amendment because the "dignity and privacy interests of the person being searched – simply do not carry over to vehicles." Cotterman, 709 F.3d at 963. Such reasoning was rejected in Jones, which ruled that the Fourth Amendment applied, and protected a vehicle owner from the government placing a GPS tracking device on the vehicle, even though the placement did no damage and did not interfere with the owner's use of the vehicle. Jones, 132 S.Ct. at 949. Because the placement of the tracking device was a common law trespass at the time that the Fourth Amendment was ratified, the Court ruled the installation of a GPS tracking device unconstitutional without regard to whether there was any invasion of privacy.

Contrary to the teaching of Jones, the *en banc* court below insisted that the Fourth Amendment protection accorded Cotterman's laptop depended upon the comparative weight of Cotterman's privacy interest in the information stored in his computer and the scope and intensity of the government's forensic examination of its contents. Balancing the government's interest in enforcing its child pornography laws against Cotterman's privacy concerns, the court below ruled that Cotterman's laptop was subject to a forensic search upon "reasonable suspicion." *See* Cotterman, 709 F.3d at 962-68.

Had the *en banc* court applied the Jones property principle, the outcome would have been in Cotterman's favor. Cotterman's property interest in his laptop was not "circumscribed by the size of [his] luggage or automobile." *Id.* at 964. Rather, as the court noted, "[t]he average 400-gigabyte laptop hard drive can store over 200 million pages – the equivalent of five floors of a typical academic library." *Id.* Additionally, the typical laptop, observed the court below, "contain[s] the most intimate details of our lives: financial records, confidential business documents, medical records and private emails." *Id.* Further, the court continued, "[e]lectronic devices often retain sensitive and confidential information far beyond the perceived point of erasure, notably in the form of browsing histories and records of deleted files." *Id.* at 965. Before the digital age, a person engaged in international travel could pick and choose what to leave at home and what to take with him. With the

laptop in vogue, the court acknowledged, he does not have that choice:

> When packing traditional luggage, one is accustomed to deciding what papers to take and what to leave behind. When carrying a laptop, tablet or other device, however, removing files unnecessary to an impending trip is an impractical solution given the volume and often intermingled nature of the files. [*Id.*]

In today's world of international travel, a forensic examination of a traveler's laptop is an invasion of his papers and effects,[4] as well as a virtual breaking into that part of his house where such papers and effects are kept. *See* Kyllo v. United States, 533 U.S. 27 at 34-35 (2001). Under the property principle of the Fourth Amendment, "the home is first among equals," and "the area 'immediately surrounding and associated with the home' — what our cases call the curtilage — [is regarded] as 'part of the home itself for Fourth Amendment purposes.'" Florida v. Jardines, 569 U.S. __, 133 S.Ct. 1409, 1414 (2013). Thus so, as it would be unreasonable for the government to break into the international travelers home to rummage through his books and files looking for contraband, it would be unreasonable to conduct a forensic examination of the traveler's laptop which is a virtual

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[4] Cotterman's property interest in digitally stored information, even though not in physical form, is nonetheless protected by the Fourth Amendment, notwithstanding the erroneous legal assumptions in Olmstead v. United States, 227 U.S. 438 (1928).

library and home office. As the court below so aptly put it, "[a] person's digital life ought not be hijacked simply by crossing a border." Cotterman, 709 F.3d at 965.

Under the Jones property principle, a search of a laptop upon entry at the border should be governed by the same rule that governs the search of a person's papers and effects in that person's home. *See* Jardines, 133 S.Ct. at 1414.

D. Under the Circuit Court's Approach, No One Would Be Safe from Unreasonable Searches and Seizures.

In this case, reasonable suspicion was based almost entirely on the fact that Mr. Cotterman appeared on a government list. And, although that may have been justified here, recent history demonstrates that it is far too easy for one's name to appear on such a government list without ever having done anything wrong, and often with little or no redress. For example, in 2004, the late Senator Ted Kennedy's name appeared on the federal "No Fly" list,[5] and in 2010, a six-year-old girl was placed on that same list."[6] Publications of the FBI and various states have warned that Americans should be considered potential terrorists if they engage in perfectly

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[5] R. Swarns, "Senator? Terrorist? A Watch List Stops Kennedy at Airport," *The New York Times*, Aug. 20, 2004.

[6] "6-Year-Old Ohio Girl Placed on 'No-Fly' List," Fox News, June 26, 2010.

legitimate behaviors, such as: "demand[ing] identity 'privacy'"[7]; "insist[ing] on paying with cash"; believing in "gun rights," federalism, or "constitutional issues"[8]; and claiming to be "sovereign citizens" or "tax protestors."

Although Cotterman was personally implicated by the child pornography images on his computer, it is possible for images to be placed on a computer's hard drive, residing in the unallocated space, without culpability. For example, the Associated Press reported several cases where computer viruses deposited child pornography images onto personal computers without the owners' knowledge.[9] Additionally, an "unsolicited 'pop up'" could store images on a person's computer even if he immediately closes the window.[10]

Last month, Dan Johnson of People Against the NDAA ("PANDA") received a fraudulent email using a "Tormail" account. Suspecting it was malicious, he

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[7] "Potential Indicators of Terrorist Activities Related to Military Surplus Stores," Bureau of Justice Assistance, Federal Bureau of Investigation.

[8] Trooper J. Wright, Virginia State Police, "Crisis Controlled: Assessing Potential Threats of Violence," Terrorism Awareness and Prevention.

[9] Associated Press, "Viruses Frame PC Owners for Child Porn" (Nov. 9, 2009).

[10] D. Elm, "Internet Child Pornography," For the Defense, Vol. 16, Issue 8 (Aug. 2006).

had a computer security expert analyze the file, and discovered it contained child pornography images.[11] Had Johnson unwittingly opened the file, and even if he had immediately deleted the content, residual evidence of such images would have remained on his computer. Knowledge that border searches, or other routine searches based on only "reasonable suspicion," would result in the law enforcement finding such images could further encourage use of such malicious techniques to discredit one's political or other adversaries.

II. The *En Banc* Court Was without Authority to Determine that the Government Had Reasonable Suspicion.

Both the magistrate judge and the district court judge below determined that the government had no reasonable suspicion to search the Cottermans' electronic devices. Cotterman, 709 F.3d 952, 959. On appeal, the government chose not to seek review of that decision, but rather to establish that it was not required to have any suspicion at all. *Id.* Thus, in its opening brief in the court of appeals, the government asked the circuit court to reverse the trial court on the ground that it had authority "to search a laptop computer *without reasonable suspicion*." *Id.*

A panel of the Ninth Circuit agreed with the government that no reasonable suspicion was required, and reversed. *Id.* However, after granting

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[11] http://oathkeepers.org/oath/2013/08/03/warning-someone-is-trying-to-set-up-liberty-activists-using-child-porn/.

Cotterman's motion for a rehearing, the Ninth Circuit, *en banc*, agreed with the district court, determining that "forensic examination at the border requires reasonable suspicion." *Id.* at 962. However, on its own motion, the *en banc* court "requested supplemental briefing on the issue of whether reasonable suspicion existed at the time of the search." *Id.* On the basis of this briefing, the Court put aside the district court's ruling that there was no such reasonable suspicion, concluding that "the examination of Cotterman's electronic devices was supported by reasonable suspicion...." *Id.* at 970.

Not surprisingly, Cotterman objected to this procedural manipulation. According to Rule 28(a)(9), F.R.App.P., the government appellant was required to state its "contentions and reasons for them" in its opening brief. In reliance on the rule that an appellant's argument "must contain" both his "contentions and reasons," Cotterman concentrated his efforts on appeal to refute the government's argument that it did not need reasonable suspicion to justify the forensic attack on his laptop. In short, having failed to contest the district court's finding of lack of reasonable suspicion, the government waived that issue. Thus, Cotterman contended that the *en banc* court "may not address" it. Cotterman at 959.

Deeming irrelevant Cotterman's argument that "the government has abandoned and conceded the issue," the *en banc* court claimed authority to "review de novo the ultimate question of whether a

warrantless search was reasonable..." *Id.* at 959-60.[12] In its defense, the *en banc* court insisted that resolution of the ultimate question "necessarily encompasses a determination as to the applicable standard...." *Id.* And because the issue of the applicable standard was properly before the court, it decided to resolve the further question whether there were sufficient facts upon which to rest a finding of reasonable suspicion. But the court put the cart before the horse, as appellant correctly argues in his petition. Pet. Cert. at 26-27. It is necessary first to set reasonable suspicion as the appropriate standard **before** determining whether the government in fact had reasonable suspicion. The court below was asked only to address the first part — what standard was appropriate. It is true that the first step is necessary to reach the second step. But the court cannot justify the opposite — as it attempts to do here — reaching step two as a necessary part of determining step one.

In support of this unusual claim, the *en banc* court argued that it can resurrect the reasonable suspicion determination *sua sponte* if "the issue was fully briefed and argued below," citing United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992), and if it "will not prejudice the opposing party."[13] Cotterman at 960.

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[12] The court cited United States v. Johnson, 256 F.3d 895 (9th Cir. 2001), for this proposition. But one of the parties in Johnson had actually appealed the validity of the search, whereas here neither of the parties raised an issue regarding reasonableness of the search.

[13] Petitioner explains in great detail the extent to which he was prejudiced by the *en banc* court's *ex post* ordering of additional

But Ullah is inapplicable here. In that case, a criminal defendant did not object at trial to a district court's use of a nonunanimous jury verdict. The court in Ullah determined that the use of a nonunanimous jury verdict was plain **legal** error, and that the right to a unanimous jury "**cannot be waived**" by the defendant. Thus, for "a right or requirement [that] cannot be waived, a party need not object to its deprivation in order to preserve the issue for appeal." *Id.* at 512-13 (emphasis added). Here, though, whether the seizure of electronics in this case was reasonable was substantially a **factual** issue. And clearly the government, after abandoning the issue on appeal, was nonetheless permitted to take it up again, as if it had done so in its opening brief, as required by Rule 28(a)(9). In Ullah, the issue had not been intentionally abandoned, as it was here. *See* Pet. Cert. at 25. Additionally, although one co-defendant in Ullah failed to raise the nonunanimous jury issue, the other co-defendant did raise it, permitting the court to receive briefing and argument without having to ask for it. Finally, the Ullah court found that the government was not prejudiced because "Ullah's failure to raise the issue until his reply brief did not impair the government's position on appeal." Ullah at 514.

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briefing. *See* Pet. Cert. at 29-33. Of course, in a fundamental sense, Cotterman was prejudiced severely in that the *en banc* court fashioned its own independent reason to uphold his conviction. Judge Smith notes this in his dissent, writing that "[t]he majority claims that Cotterman has not been prejudiced — despite the fact that the majority's finding of reasonable suspicion is the *raison d'être* for his conviction...." Cotterman at 989.

The *en banc* court blithely asserted that Cotterman suffered no prejudice by its *nunc pro tunc* ruling, because it allowed supplemental briefing by both parties. *Id.* Dissenting Judge Smith was not so sanguine, maintaining that "*Cotterman has been severely prejudiced*, because his conviction is based solely on an issue the government conceded, and that [the government], and the lower courts, took for granted because it was not needed for a border search." *Id.* at 989. Indeed, having resurrected the "reasonable suspicion" arguments, Judge Smith contended, the *en banc* court became, in effect, the prosecutor. *Id.* Thus, Judge Smith observed that:

> In its zeal to cripple the application of the current border search doctrine, while still securing Cotterman's conviction, the majority turns on their heads all the parties' arguments about reasonable suspicion as to Cotterman, and the findings made by the lower courts concerning that suspicion. [*Id.* at 988.]

Indeed, it is difficult to believe that the Ninth Circuit would have raised this issue *sua sponte* had the roles been reversed. If the district court had determined that the search was reasonable, and Cotterman had abandoned that issue on appeal, it is beyond belief that the Ninth Circuit would have taken it upon itself to investigate the question of reasonableness, determine that the seizure of electronics was unreasonable, and allow this particular defendant to go free.

CONCLUSION

For the reasons above, the petition should be granted.

Respectfully submitted,

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