No. 05-1058

In the Supreme Court of the United States

KEITH A. VA LERIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's checked luggage was seized within the meaning of the Fourth Amendment when law enforcement officers, following a procedure requested by the bus company, removed the luggage from the baggage compartment of the bus to a room in the bus terminal in order to seek petitioner's consent to search his luggage, where the removal did not delay the travel of either petitioner or his luggage.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville Ry.*, 148 U.S. 372 (1893) 7
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 7
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 7
People v. *McPhee*, 628 N.E.2d 523 (Ill. App. Ct. 1993) 13
People v. *Ortega*, 34 P.3d 986 (Colo. 2001) 13
People v. *Shapiro*, 687 N.E.2d 65 (Ill. 1997) 13
State v. *LaSalla*, 536 So. 2d 1037 (Fla. Dist. Ct. App. 1988) 13
State v. *Ressler*, 701 N.W.2d 915 (N.D. 2005) 12
Texas v. *Brown*, 460 U.S. 730 (1983) 8
United States v. *Aldaz*, 921 F.2d 227 (9th Cir. 1990), cert. denied, 501 U.S. 1207 (1991) 13
United States v. *Banks*, 3 F.3d 399 (11th Cir. 1993), cert. denied, 510 U.S. 1129 (1994) 13

Cases—Continued: Page

United States v. *Brown*, 884 F.2d 1309 (9th Cir. 1989), cert. denied, 493 U.S. 1025 (1990) 11
United States v. *Demoss*, 279 F.3d 632 (8th Cir. 2002) . . . 4
United States v. *Dennis*, 115 F.3d 524 (7th Cir. 1997) . . . 13
United States v. *Glover*, 104 F.3d 1570 (10th Cir. 1997) 13
United States v. *Jacobsen*, 466 U.S. 109 (1984) 5, 6, 8, 9
United States v. *Johnson*, 990 F.2d 1129 (9th Cir. 1993) 11
United States v. *Lovell*, 849 F.2d 910 (5th Cir. 1988) 10, 11
United States v. *Robinson*, 390 F.3d 853 (6th Cir. 2004) 13
United States v. *Van Leeuwen*, 397 U.S. 249 (1970) 13
United States v. *Ward*, 144 F.3d 1024 (7th Cir. 1998) . . . 11
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 7

Constitution and statutes:

U.S. Const. Amend. IV . . . . . *passim*
21 U.S.C. 841(a)(1) 2
21 U.S.C. 891(b0(1) 2

Miscellaneous:

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 7

In the Supreme Court of the United States

No. 05-1058

KEITH A. VA LERIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 424 F.3d 694. The panel opinion of the court of appeals (Pet. App. 65a-91a) is reported at 385 F.3d 1141. The opinion of the district court (Pet. App. 35a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2005. On December 27, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 16, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 500 or more grams of a substance containing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Pet. App. 1a, 51a. As relevant here, the magistrate judge recommended that petitioner's motion to suppress the drug evidence be denied, *id.* at 51a-63a, but the district court granted the motion, *id.* at 35a-49a. The government appealed, and a divided panel of the court of appeals affirmed. *Id.* at 65a-91a. On rehearing en banc, the full court of appeals reversed and remanded for trial. *Id.* at 1a-34a.

1. On December 23, 2002, petitioner was traveling on a Greyhound bus from Los Angeles, California to Washington, D.C. At about noon, the bus stopped for refueling at a bus station in Omaha, Nebraska. During refueling and cleaning, Greyhound requires its passengers to wait inside the terminal. Pet. App. 2a. Nebraska State Patrol Investigator Alan Eberle, a drug interdiction officer, looked inside the lower baggage compartments on the bus, where he noticed a new-looking bag with a baggage claim ticket that contained a name but no telephone number. The bag had no other name tag. *Ibid.*; Tr. 6-11. Investigator Eberle ran a computer check and learned that the person who checked the bag had purchased a one-way ticket on the day of travel and paid $164 in cash. Pet. App. 2a; Tr. 11-12, 63. Investigator Eberle decided to ask the owner of the bag for consent to search it. Because Greyhound had requested that investigators not bring passengers to the refueling area, Investigator Eberle had another investigator take

the bag into the rear baggage room inside the bus terminal. Pet. App. 2a; Tr. 12-13, 58-59. See Pet. App. 52a.

Investigator Eberle paged petitioner, who approached the ticket counter in response. Investigator Eberle, who was wearing jeans, a t-shirt, and a winter coat, displayed his badge, identified himself as a law enforcement officer, and told petitioner he was not in any trouble or under arrest. Petitioner agreed to speak with Investigator Eberle and showed him his bus ticket and identification, which matched the information on the piece of luggage from the bus. Pet. App. 2a-3a; Tr. 12-15. Petitioner then agreed to accompany Investigator Eberle to a room in the rear baggage terminal, and once there, he confirmed that the bag was his. Investigator Eberle then explained that he was a narcotics investigator, and he asked for consent to search petitioner's bag. Petitioner consented, and a search of the bag revealed five vacuum-sealed bags of cocaine. Pet. App. 2a-3a; Tr. 17-22. See Pet. App. 52a-54a.

2. Following an evidentiary hearing on petitioner's motion to suppress, the magistrate judge recommended that the motion to suppress the drug evidence be denied. Pet. App. 63a. The magistrate judge concluded that the officers had reasonable suspicion to detain the bag briefly and that the detention was minimally intrusive and not unreasonable under the Fourth Amendment. *Id.* at 56a-58a. The magistrate judge also concluded that petitioner voluntarily consented to the search of the luggage. *Id.* at 59a-60a.[1]

---

[1] Petitioner also moved to suppress statements he had made after his arrest. The magistrate judge recommended that the statements be suppressed for all purposes, including impeachment, Pet. App. 61a-63a; the district court agreed, *id.* at 49a; and the government did not appeal from that ruling, *id.* at 67a-68a n.3.

The district court sustained petitioner's objections to the magistrate judge's recommendation and suppressed the drug evidence. Pet. App. 35a-49a. The district court concluded that the removal of the bag to a room inside the terminal without petitioner's knowledge or consent was a substantial interference with his possessory interest in the bag. The court further concluded that the information possessed by Investigator Eberle did not amount to reasonable suspicion to detain petitioner's luggage. The court therefore held that the bag had been seized in violation of the Fourth Amendment. *Id.* at 38a-45a. The district court also concluded that petitioner's consent to the search of the bag did not vitiate the illegal seizure. Petitioner's consent was not voluntary, the court held, because under all the circumstances, no reasonable person would think he had a choice to refuse consent; furthermore, the court concluded that not enough time had passed to show that petitioner's consent broke the causal chain between the illegal seizure and the consent. *Id.* at 45a-49a.

3. A divided panel of the court of appeals affirmed. Pet. App. 65a-91a. The panel held that the bag was seized when the officers removed it from the bus, took it into a rear baggage room, and detained it while the officers attempted to locate its owner. *Id.* at 72a-74a. The court of appeals therefore concluded that the seizure violated the Fourth Amendment.[2]

Judge Melloy concurred, concluding that the court of appeals' decision in *United States* v. *Demoss*, 279 F.3d 632 (8th Cir. 2002), dictated affirmance. Pet. App. 77a-

[2] The government did not contend on appeal that it had reasonable suspicion to detain the bag. Pet. App. 74a & n.5, or that petitioner's consent to search the bag vitiated any unlawful seizure, *id.* at 75a-76a & n.6.

79a. Questioning the court of appeals' precedents on the definition of a seizure, however, Judge Melloy called for the full court to revisit the issue. *Id.* at 78a-79a. Judge Riley dissented and joined Judge Melloy in urging the court to re-examine the issue. *Id.* at 79a-91a. Judge Riley agreed with Judge Melloy that "a brief detention of a piece of [checked] luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a seizure." *Id.* at 89a (quoting *id.* at 78a (Melloy, J., concurring)).

On rehearing en banc, the full court of appeals vacated the panel's decision and reversed the district court's suppression of the drug evidence. Pet. App. 1a-34a. Based on this Court's decision in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), the court of appeals concluded that a seizure of property occurs when the government's actions "constitute[] some meaningful interference with a person's possessory interests." Pet. App. 12a. After surveying the decisions of other courts of appeals dealing with the question whether checked luggage has been seized, see *id.* at 13a-18a, the court concluded that the government's interference with checked luggage is not a seizure as long as the detention (1) did not "delay a passenger's travel or significantly impact the passenger's freedom of movement," (2) did not delay the checked luggage's "timely delivery," and (3) did not deprive "the carrier of its custody of the checked luggage," *id.* at 20a.

Applying that standard to the facts of this case, the court held that petitioner's luggage was not seized within the meaning of the Fourth Amendment. Pet. App. 22a-23a. The "brief and temporary removal of [petitioner's] checked luggage from the luggage compartment to ask [him] to consent to a search did not delay

[his] travel or impact his freedom of movement," nor did it "affect the timely delivery of the luggage." *Id.* at 22a. Furthermore, the court reasoned, any bus passenger would expect that Greyhound personnel, or others at Greyhound's request, might remove the luggage from the compartment; the officers, who would have preferred to bring petitioner to his luggage, only took it from the bus to the baggage room inside the terminal at the request of Greyhound. That action, the court held, did not deprive Greyhound of its custody of petitioner's luggage. *Ibid.*

The court further concluded that petitioner voluntarily consented to the search of his luggage, noting that the facts "strongly support[ed]" the magistrate judge's recommended finding that petitioner voluntarily consented and that, contrary to the district court's view, the officers had no obligation to inform petitioner of his right to refuse consent. Pet. App. 23a-27a. The court therefore reversed the district court's order suppressing the drug evidence and remanded for further proceedings. *Id.* at 27a.

Judge Colloton, joined by four other judges, dissented. The dissent viewed this case as indistinguishable from *Jacobsen*, *supra*, finding that the investigators here, just as in *Jacobsen*, exerted dominion and control over the luggage for law enforcement purposes. Pet. App. 27a-34a.

ARGUMENT

Petitioner contends (Pet. 9-29) that the decision below conflicts with this Court's holding in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), and that confusion in the lower courts exists about how to determine whether a seizure of property has occurred. The court of ap-

peals' interlocutory decision is correct, and further review is not warranted.

1. As an initial matter, the procedural posture of this case makes it an inappropriate vehicle for further review at this time. Petitioner seeks review of an opinion reversing a pretrial suppression order and remanding the case for trial. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting the denial of the petition). If petitioner is acquitted, the claims he raises in the petition will be moot. If he is found guilty, and his conviction is affirmed on appeal, he will be able to raise the same claims—together with any other claims arising from the trial and sentencing—in a certiorari petition that seeks review of the judgment of conviction. For those reasons, this Court ordinarily denies petitions by criminal defendants challenging interlocutory decisions. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That practice promotes judicial efficiency by ensuring that "all claims can be presented in a single petition if, in fact, the defendant is convicted." *Id.* § 4.18, at 259 n.59.

2. Further review would be unwarranted even if the court of appeals' decision were not interlocutory. The decision below is consistent with this Court's decisions on Fourth Amendment seizures, and it accords with other lower court decisions involving similar circumstances.

a. The court of appeals correctly identified this Court's test for determining whether a Fourth Amendment seizure of property has occurred. The Court repeated in *Jacobsen* the same test that it had established in earlier cases, that is, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." 466 U.S. at 113 & n.5. Contrary to the views of petitioner (Pet. 9-15) and the dissenting judges of the court of appeals (Pet. App. 29a-30a), *Jacobsen* did not equate that test with a simple "dominion and control" standard, nor is the decision below inconsistent with the result reached in *Jacobsen*.

At issue in *Jacobsen* was a package that had been sent via a private courier, and that had already been examined by Federal Express employees and found to contain a suspicious white powder. When Federal Express agents notified the Drug Enforcement Administration of their discovery and invited them to examine the package, a federal agent proceeded to remove the four plastic bags from the opened package and to use a small amount of white powder from each bag to field-test the substance, which proved to be cocaine. 466 U.S. at 111-112. The Court, without any extended analysis, stated that "the agents' assertion of dominion and control over the package and its contents" constituted a "seizure," though not an unreasonable one, in light of their prior knowledge that the package apparently contained "contraband and little else." *Id.* at 120-121 (citing, *inter alia*, *Texas* v. *Brown*, 460 U.S. 730, 743 (1983) (plurality opinion)). The Court also concluded that the field test was a further seizure because it destroyed some of the powder and therefore permanently deprived the owner of his possessory interests as to that small

amount of the drugs; that seizure, too, the Court concluded, was a reasonable one in light of its de minimis impact. *Id.* at 124-126.

As the court below correctly recognized (Pet. App. 12a), the *Jacobsen* Court did not use two different tests for the seizure determination; rather, the Court meant to describe the agents' initial actions as having satisfied the "meaningful interference" test. Federal Express employees, having discovered what they thought to be contraband, relinquished control of Jacobsen's package to the law enforcement agents, who immediately did more than merely examine the outside or move the package briefly; rather, the first agent proceeded to open it and examine its contents with a law enforcement purpose. In those circumstances, the agents were already interfering with the owner's possessory interests—an interference that became permanent once the agents actually destroyed a trace amount of the contraband inside to conduct a field test of the substance.

The court of appeals correctly understood that *Jacobsen* was applying the "meaningful interference" test at both points. By focusing on three factors (Pet. App. 20a)—the impairment of the traveler's freedom of movement, delay in timely delivery of the luggage, and deprivation of the carrier's custody of the luggage—the court of appeals was not formulating a new test, but simply providing useful guidelines for application of this Court's seizure standard to the particular situation of checked luggage, mindful that not every police interference with private property constitutes a seizure, but only those interferences that are "*meaningful*." *Id.* at 19a.

The conclusion of the court below that the luggage in this case was not seized is consistent with *Jacobsen*.

Significantly, the bus company here did not relinquish all control over the bag. Unlike the Federal Express employees in *Jacobsen*, who invited federal agents to take charge of the package and its apparent contraband, the bus company in this case in no way ended its bailment of the luggage entrusted to it for transportation to the traveler's destination. To the contrary, investigators here acted as they did because Greyhound still controlled the luggage. Greyhound preferred to have passengers and police discuss the checked luggage somewhere away from the refueling bus. Pet. App. 2a, 22a. The agent did not take the bag into law enforcement custody; he merely had it moved to the bus terminal's baggage room, where the passenger could decide whether he would consent to its search. And unlike the package in *Jacobsen*, the luggage here was not opened by the agents and the contents examined before the owner had consented.[3]

b. As the court of appeals noted (Pet. App. 19a-21a), its decision is consistent with that of every other federal court of appeals to examine the question whether law enforcement actions constitute a Fourth Amendment seizure of checked luggage. The Fifth, Seventh, and Ninth Circuits have all reached similar conclusions. In *United States* v. *Lovell*, 849 F.2d 910 (5th Cir. 1988), border patrol agents, seeing a nervous airline passenger check two pieces of luggage, removed the luggage from the baggage conveyor belt, compressed the bags' sides and smelled marijuana. The agents then detained the bags and, after a positive alert by a drug detection canine, they obtained a search warrant. The court of ap-

[3] Petitioner does not challenge in this Court the court of appeals' conclusion (Pet. App. 23a-27a) that he voluntarily consented to the search.

peals noted that the defendant had surrendered his luggage to a common carrier, with the expectation that he could reclaim his bags at his destination. The court then concluded that in the absence of any delay in his travel or in the expected delivery of the suitcase, the "momentary delay occasioned by the bags' removal from the conveyor belt was insufficient to constitute a meaningful interference with [defendant's] possessory interest in his bags." *Id.* at 916.

The Ninth Circuit followed the approach of *Lovell* in *United States* v. *Brown*, 884 F.2d 1309 (1989), cert. denied, 493 U.S. 1025 (1990). In that case, an airline passenger was acting suspiciously and narcotics detectives arranged to have his checked luggage held while they spoke to him. He eventually consented to a search of the luggage he was carrying and the bags he had checked; the checked luggage contained two kilograms of cocaine. The court of appeals found no seizure in the "brief diversion of [the defendant's] suitcases from their journey to the cargo hold," reasoning that there was no meaningful interference with his possessory rights when neither his own travel nor his expectations concerning the luggage he had surrendered to a common carrier were frustrated. *Id.* at 1311. See *United States* v. *Johnson*, 990 F.2d 1129, 1132-1133 (9th Cir. 1993) (no seizure when officers, with the permission of the airline, removed checked luggage from the tarmac, where it had missed its owner's flight, to airline terminal for dog sniff because the "entire process * * * was completed prior to the time the luggage would have been placed on the [next] airplane").

The Seventh Circuit used the same analysis in *United States* v. *Ward*, 144 F.3d 1024 (1998), where the court held that removal of a checked bag from the lug-

gage compartment of a bus did not amount to a seizure. Consistent with the court of appeals' decision here, the Seventh Circuit held that "[t]he earliest point at which the bag was seized in the Fourth Amendment sense" was when the officer "interrupted the bag's transport" by holding the bag for a dog sniff despite the departure of the bus. *Id.* at 1033.

Like the decision below, each of these cases applied the test from *Jacobsen*—whether a meaningful interference with possessory interests occurred—and each case focused on the expectations about checked luggage as a way to determine whether the owner's possessory interests had been meaningfully affected. Contrary to petitioner's claim (Pet. 17-21), there is no confusion among the courts on how to determine whether a seizure has occurred when checked luggage is briefly detained or otherwise handled.

c. Nor is there any conflict with state appellate cases involving luggage or packages that are detained for investigative purposes. In *State* v. *Ressler*, 701 N.W.2d 915 (N.D. 2005), for example, a shipping company employee discovered a large amount of currency in a suspicious package and called the police, who took the package to a law enforcement center for a canine sniff. The North Dakota Supreme Court held that, although police had reasonable suspicion to detain the package for further investigation, transporting it to a completely different place for a canine sniff was an unreasonable seizure. *Id.* at 921-922. The finding of a seizure is consistent with both *Jacobsen* and the decision below; the clerk's relinquishment of the package to police for their investigation would have qualified as a seizure under the third prong of the court of appeals' test in this case. The same reasoning explains the other cases upon which pe-

titioner relies (Pet. 18-19). See *People* v. *Ortega*, 34 P.3d 986, 992 (Colo. 2001) ("officer exercised control over defendant's property"); *People* v. *Shapiro*, 687 N.E.2d 65, 68, 70-71 (Ill. 1997) (package removed from the mail stream and shipped from Chicago to St. Louis for investigation); *People* v. *McPhee*, 628 N.E.2d 523, 529-530 (Ill. App. Ct. 1993) (police detective removed envelope from Federal Express facility and locked it in his police car pending a dog sniff); *State* v. *LaSalla*, 536 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1988) (per curiam) (police removed suitcase from the airline's possession).[4]

---

[4] Petitioner also asserts (Pet. 19-20) that the courts have caused confusion by sometimes requiring reasonable suspicion for any detention of personal effects in transit, applying this Court's holding in *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). Unlike the brief detention in this case, however, in that case and in the lower court cases cited by petitioner, the package in question was removed from the stream of mail and (as petitioner acknowledges, see Pet. 21 n.10) held for a significant time (29 hours in *Van Leeuwen*) by law enforcement authorities for further investigation. See *United States* v. *Robinson*, 390 F.3d 853, 870 (6th Cir. 2004) (detention of package for "a few hours" for exposure to drug-sniffing dog was justified by reasonable suspicion); *United States* v. *Dennis*, 115 F.3d 524, 531-533 (7th Cir. 1997) (detention of mailed package for less than 48 hours for dog sniff and obtaining of warrant justified by reasonable suspicion); *United States* v. *Glover*, 104 F.3d 1570, 1575-1577 (10th Cir. 1997) (detention of mailed package for one day justified by reasonable suspicion); *United States* v. *Banks*, 3 F.3d 399, 401-403 (11th Cir. 1993) (per curiam) (delay of mailed package for less than one day for dog sniff and warrant justified by reasonable suspicion), cert. denied, 510 U.S. 1129 (1994); *United States* v. *Aldaz*, 921 F.2d 227, 231 (9th Cir. 1990) (delay caused by transferring packages to Anchorage was reasonable and justified by reasonable suspicion), cert. denied, 501 U.S. 1207 (1991). The fact that the courts in those distinguishable cases concluded that investigatory detentions were justified by reasonable suspicion does not demonstrate confusion in the lower courts in cases such as this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

MAY 2006