No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an officer has probable cause to obtain a search warrant or to make a warrantless arrest for the offense of possession of child pornography based on a report that a person possessed images of nude minors.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED CASES

- *United States v. Diaz*, No. 18-cr-160, U.S. District Court for the Southern District of Texas. Judgment entered May 1, 2019.
- *United States v. Diaz*, No. 19-40430, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 3, 2020.

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PRAYER

Petitioner Manuel Diaz prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as Appendix A. The district court's order denying the motion to suppress evidence is attached as Appendix B.

JURISDICTION

The Fifth Circuit's judgment was entered on August 7, 2020. *See* Appendix A. This petition is filed within 150 days of that date. *See* Sup. Ct. Order of Mar. 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amendment IV

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.

STATEMENT OF THE CASE

A. Indictment and plea.

On May 23, 2018, a federal grand jury in the Corpus Christi Division of the United States District Court for the Southern District of Texas returned a two-count indictment charging Manuel Diaz with distribution of child pornography on or about June 29, 2017, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1) (Count One) and possession of child pornography on or about July 3, 2017, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2) (Count Two). ROA.20-22.[1]

In accordance with a conditional plea agreement, ROA.287-291, Mr. Diaz pleaded guilty to Count One of the indictment. ROA.262. As a part of his plea agreement, Mr. Diaz expressly reserved his right to appeal the district court's denial of his motion to suppress. ROA.250.

B. Motion to suppress and suppression hearing.

On June 29, 2018, Mr. Diaz filed a motion to suppress, contending that he was arrested without probable cause. ROA.38-42. The government filed a first amended response to the motion on August 29, 2018. ROA.52-70.

On September 5, 2018, the district court held a suppression hearing. Three witnesses testified: Jorge Alberto Montoya, Officer Phillip Peterson, and Detective Alicia Escobar.

Mr. Montoya testified that, on July 3, 2017, he was working at a Walgreens in Corpus Christi, Texas. ROA.177. He was working the Photo Lab shift, which involved

[1] The citations are to the electronic record on appeal ("ROA") filed in the Fifth Circuit.

helping customers with the photo kiosk. ROA.177-178. Another employee, Justin, was working as a stocker that day. ROA.178. At about 5:30 PM, Mr. Montoya was helping a customer who was looking for a specific photo that was not coming up on the kiosk screen. ROA.179. The customer "had a lot of porn on their phone that was popping up" on the kiosk screen. ROA.179-181. The images coming up on the kiosk screen were of adults, not children. ROA.194.

The customer asked for assistance to find some family photos that were not coming up on the main kiosk screen. ROA.181. To assist the customer, Mr. Montoya looked for other folders on the customer's phone to then move the photo to the main folder. ROA.182. Mr. Montoya made an in-court identification of Mr. Diaz as the customer who requested his help. ROA.182.

When going through the folders on Mr. Diaz's phone, Mr. Montoya saw "[m]ore porn, but in one of the folders it seemed a lot of younger girls." ROA.183. The photos were naked photos. ROA.183-184. Mr. Montoya was alarmed, kept scrolling, and saw more. ROA.184. He told Mr. Diaz that he would be right back and that he had to check something, and he then went to the back of the office where his manager and Justin were. ROA.184. Mr. Montoya told his manager that he thought he "just saw child porn on this guy's phone." ROA.184. Mr. Montoya asked Justin to go help Mr. Diaz to confirm what Mr. Montoya saw. ROA.184. Justin went and helped Mr. Diaz for about 10 minutes, came back, and told Mr. Montoya "that was absolutely child porn that he saw, as well." ROA.184. They decided to call the police. ROA.184.

When first hired, a manager told Mr. Montoya to not print pornographic things

because it could be copyrighted. ROA.185. Mr. Montoya was also told to call the cops if he ever saw child pornography. ROA.185. The adult pornography "looked professional" with "bright lighting" and "looked staged" like they were "on a set." ROA.185. "The CP that [Mr. Montoya] saw was like it happened in someone's bedroom, like they were – like it was not professional. They were just, you know, in someone's bedroom or personal." ROA.185-186.

After the manager had called the police, Mr. Diaz stayed in the Photo area and eventually found the photos for which he was searching. ROA.186. Those photos were printed and Mr. Diaz paid for them. ROA.186.

On cross-examination, Mr. Montoya testified that he defined "child pornography" to include pictures of naked children. ROA.188-189. What he saw was pictures of naked children. ROA.189. He called Justin over to get a second opinion. ROA.189. Mr. Montoya has never taken a law class and was unaware of the legal definition of child pornography. ROA.189. He told the police officers that what he saw was child pornography. ROA.189-190.

Officer Peterson testified that he was hired by the Corpus Christi Police Department in February 2015 and graduated from the academy in October 2015. ROA.195-196. On July 3, 2017, he was working a shift as a patrol officer. ROA.196. He responded to a call that a male at a Walgreens was attempting to print "explicit photos of children and older women." ROA.196-197. Officer Peterson's understanding was that somebody had naked pictures of children and women. ROA.197. He had not received a call like this before. ROA.197. Officer Peterson was the first officer to arrive. ROA.197. A second officer, with

even less experience than Officer Peterson, also responded to the call. ROA.197-198.

Officer Peterson arrived at the Walgreens, wearing a body camera, and made contact with Mr. Diaz. ROA.199. At the suppression hearing, the government played eight or nine minutes of the body-camera video for the court. ROA.199; *see also* Government's Exhibit No. 3; ROA.378-384 (transcript of Government's Exhibit No. 3). The video shows Officer Peterson arriving at the Walgreens, taking Mr. Diaz aside, getting his identification, and looking at the photos that Mr. Diaz had printed. Government's Exhibit No. 3 at 18:20 to 18:23:30; ROA.378. Officer Peterson did not see anything wrong with those photos. Officer Peterson left Mr. Diaz with the second officer and went to find the Walgreens employees. He informed the Walgreens employees that there was nothing wrong with the photos that had been printed. Government's Exhibit No. 3 at 18:23:30-18:24; ROA.378-379.

In a back room, a Walgreens employee explained that he saw a lot of porn on Mr. Diaz's phone, and that he saw pictures of young girls, 14 or 15 years old, who were naked. The employee said there were some pictures that had guys in them, but he wasn't sure if those were the pictures with the young girls. Government's Exhibit No. 3 at 18:24-18:26:50; ROA.379-380. A second Walgreens employee entered the back room and explained that he saw pictures from porn sites on Mr. Diaz's phone, but also some pictures he didn't think were from porn sites that were of younger girls. Government's Exhibit No. 3 at 18:26:51-18:27:33; ROA.381. At that point, Officer Peterson left the back room, returned to Mr. Diaz, and arrested him. *See* Government's Exhibit No. 3 at 18:27:34-18:27:55; ROA.381.

While talking with the Walgreens employees, Officer Peterson called in to dispatch for a warrants check using Mr. Diaz's name and date of birth. Government's Exhibit No. 3 at 18:24:22-18:25:07; ROA.379. The dispatcher reported that Mr. Diaz was a registered sex offender in the state of Texas, "there'll be no other 29s. Clear." ROA.202; Government's Exhibit No. 3 at 18:25:03-18:25:07; ROA.379.

After the video, Officer Peterson explained that "running somebody for a 29" means he is checking with dispatch to determine whether the person has any outstanding arrest warrants. ROA.200. He "very regular[ly]" does that as a patrol officer and guessed he had "run people for 29s through dispatch" over a thousand times in a year, with positive results about 50% of the time. ROA.200-201. Municipal warrants were the most common, about 80%-85% of the positive results. ROA.201. When asked to give examples of other notices not involving municipal warrants, Officer Peterson testified:

> Normally if there's a different kind of warrant, either it be something coming out of Austin for parole or a county warrant of some type, they will follow up letting us know that they were wanted and give us some sort of description on the warrant itself, what it's for, when it was issued and what county it was issued out of.

ROA.202.

Regarding Mr. Diaz, Officer Peterson testified that dispatch notified him that "the subject was a registered sex offender, read the description of the sex offender of Texas, and then followed it up with no other 29s." Specifically, dispatch told him "there be no other 29s." ROA.202. From this report, Officer Peterson thought there was a municipal court warrant. ROA.202-203. However, Officer Peterson had learned, a couple of weeks before the suppression hearing, that there was no municipal court warrant. ROA.203.

The government next asked Officer Peterson a series of "hypothetical" questions. ROA.203. Even if Officer Peterson had not arrested Mr. Diaz, he would have kept Mr. Diaz's phone, based on the employees' allegations. ROA.204. Officer Peterson would have held on to the phone "for further investigation to file a warrant." ROA.204. Even if he had not arrested Mr. Diaz for the (non-existent) municipal warrant, Officer Peterson still would have arrested Mr. Diaz for possession of child pornography. ROA.204-205. Officer Peterson found the employees to be credible. ROA.205. Even if Officer Peterson had not arrested Mr. Diaz for the (non-existent) municipal warrant, he "could have" and "probably would have arrested him for the looking at the pornography on the kiosk in front of the open public." ROA.206.

After arresting Mr. Diaz, Officer Peterson placed him in the back of his patrol car and drove to the library to meet with the CID [Criminal Investigation Division] detectives. ROA.206-207; *see* ROA.218. Officer Peterson did not participate in the interview. ROA.207. After the interview was over, Officer Peterson transported Mr. Diaz to the City Detention Center for booking on the offense of possession of child pornography. ROA.207.

On cross-examination, Officer Peterson testified that he took Mr. Diaz's cell phone from him after placing him in custody, in the Walgreens parking lot. ROA.208. Earlier, inside the Walgreens when Officer Peterson talked to Mr. Diaz about the photos he had printed, Officer Peterson reviewed those photos and nothing appeared to be illegal. ROA.209-210. The call had been about a man attempting to print explicit photos, but that turned out to be incorrect. ROA.210. Officer Peterson went to talk to the employees. ROA.210. The employees told Officer Peterson what they had seen.

Regarding the warrant report from dispatch, "the most common response" from a dispatcher to report a positive result for a municipal warrant would be "one city." ROA.211. That would mean that the person "has one city warrant." ROA.212. Officer Peterson did not hear "one city" from dispatch in response to the request he made for information on Mr. Diaz. ROA.212. The dispatcher did not say what the warrant was for. ROA.212. Officer Peterson explained why he believed Mr. Diaz had a city warrant, despite the dispatcher not saying "one city":

> Whenever dispatch referred back to me on the radio after running a subject check on him, when they responded back they gave me the information that he was a sex offender on there and then responded with "no other 29s." I believed at the time when they said "no other 29s" that gave me the assumption that there was in fact a 29 which would . . . have been a city warrant. The reason I assumed it would have been a city warrant is because it was not followed up with a description that a county warrant normally carries. So the assumption was made that it was a municipal warrant that he was wanted for.

ROA.213. On defense counsel's request, the court took judicial notice of the criminal complaint in the case. ROA.215.

Officer Peterson was familiar with the requirement that for municipal offenses, the Texas Code of Criminal Procedure requires officers to view those offenses to make an arrest. ROA.216. Officer Peterson did not see Mr. Diaz's displaying any obscene material at the Walgreens. ROA.216.

Officer Peterson told Mr. Diaz that he was being arrested for an active warrant. ROA.216. Officer Peterson told his partner to "hook him up with that," meaning to arrest him for the warrant, pending further investigation on the child pornography. ROA.216. Officer Peterson agreed that "it takes some substantial line to cross to get to child

pornography" and that "people take naked pictures of their kids all the time taking baths or doing stuff like that" and that is not child pornography. ROA.216-217. Officer Peterson further agreed that "to know for sure whether or not something's child pornography and it's more than is described by the employees, [one has] to kind of take a look at what's there." ROA.217. That was the further investigation Officer Peterson was referring to and was attempting to do when he detained Mr. Diaz in the Walgreens, but then Officer Peterson arrested Mr. Diaz before investigating any further. ROA.217.

On re-direct examination, Officer Peterson testified that, as a patrol officer, he did not "normally receive too much training as far as big cases like something involving child pornography." ROA.219. His job was "to take the information, develop the PC that we have, and then allow the detectives to do further investigation because they're going to be the ones to handle the case." ROA.219. His responsibility was "to contact the CID investigator, let them know. [He] just need[ed] to find out [if he had] probable cause to arrest for it so that they can make their determination later on upon investigation." ROA.219. Had Officer Peterson not made the "false assumption that there was an active warrant," he would have contacted his lieutenant for permission to arrest Mr. Diaz for possession of child pornography "based on what [he] had heard from the employees." ROA.220. He would have contacted CID because that was the policy, CID would do the actual investigation, and CID made "the determination if the arrest [was] going to be made for that particular offense." ROA.220-221. Officer Peterson did not call CID before arresting Mr. Diaz. ROA.221.

The final witness was Detective Alicia Escobar, a detective with the Corpus Christi

Police Department for 19 years who had been assigned to the Internet Crimes Against Children Task Force for seven years. ROA.221-223. On July 3, 2017, her captain called her in after hours because "patrol had a guy at a Walgreens . . . [who] was attempting to print out what they believed to be child pornography." ROA.223. At the time, the office was at La Remata Central Library. ROA.224. Detective Escobar testified that Government's Exhibit No. 2 was the Miranda warning form that she used in this case and that Mr. Diaz signed. ROA.225. After signing that form, Mr. Diaz told Detective Escobar that "he had approximately 40 to 50 images of child pornography on his phone." ROA.226.

After the interrogation ended, Mr. Diaz was asked for, and denied, consent to search his phone. ROA.227. At that time, Mr. Diaz was arrested for possession of child pornography. ROA.227. Officer Peterson transported Mr. Diaz to the City Detention Center for booking. ROA.228.

The government asked Detective Escobar a "hypothetical" question: what would have happened had Officer Peterson let Mr. Diaz leave the Walgreens but kept his phone? ROA.228. Detective Escobar said that the report would have been sent to her unit, they would have taken the phone from the evidence room, and they would have tried to obtain a search warrant. ROA.228. Detective Escobar testified that, based on her experience, she believed she would have been able to obtain a warrant based on the information she had. ROA.229. Had she obtained a warrant and had a forensic analysis done of Mr. Diaz's phone, she would have obtained an arrest warrant. ROA.230.

On cross-examination, Detective Escobar testified that she believed that the officers had probable cause to arrest Mr. Diaz at the Walgreens, even though the officer had not

seen a single image. ROA.233. Detective Escobar further admitted that a picture of a child taking a bath is not necessarily child pornography. ROA.233 Whether a picture of naked children qualifies as child pornography "depends" on "how those children were in that picture." ROA.233. Detective Escobar would not necessarily need to see the pictures herself, but she would need "a good description from a reliable person" to draw the conclusion that the images were child pornography. ROA.234. Detective Escobar testified, if a witness gave her a description solely that he saw pictures of naked kids, that is not child pornography, and she would have to investigate further by asking for more description to determine if there was probable cause. ROA.234.

Regarding her ability to obtain a search warrant, Detective Escobar agreed that it is "a common routine thing for [her] to get search warrants signed." ROA.236. She has the phone numbers of state and federal magistrates for that purpose. ROA.236. And it would not have been difficult to obtain a search warrant "any moment of the day." ROA.236.

C. The district court's ruling.

The district court denied the motion to suppress in a written order. ROA.95-101. In pertinent part, the court wrote:

> Diaz argues that Officer Peterson lacked probable cause to arrest him for possession of child pornography and unlawfully arrested him based on a false belief that Diaz had a warrant. Because Officer Peterson had probable cause to arrest Diaz based on the possession of child pornography, the misunderstanding about an outstanding arrest warrant is superfluous. At the time of the arrest, Officer Peterson knew of the following facts: two store clerks had seen naked photos of young girls on Diaz's phone, the clerks identified Diaz as the suspect, and Diaz was a registered sex offender. The store clerks had viewed the photos on Diaz's phone separately and both confirmed that the photos displayed noticeably young, naked girls.

> Diaz argues that Officer Peterson had no more than a bare suspicion that Diaz possessed child pornography, because the statements of the eyewitnesses are insufficient to support the belief that the pictures of the naked girls were indeed pornographic. The Court disagrees. Officer Peterson had no reason to question the credibility of the two store clerks or believe they had inaccurately described the photos.
>
> The Government cites to *United States v. Burbridge*, 252 F.3d 775 (5th Cir. 2001), for the proposition that credible eyewitness testimony can establish probable cause. In *Burbridge*, a police officer pulled over a suspect solely based on a 911 phone call made by a couple. *Id.* at 777. The husband and wife had seen the suspect carry a gun in a store parking lot, followed him in their car, and stayed on the phone with the dispatcher until the officer pulled over the suspect. *Id.* Only after the suspect was handcuffed did the police officer discover a pistol in the suspect's motorcycle. *Id.* The Fifth Circuit found that the eyewitness accounts and their identification of the suspect before the arrest provided the officer with probable cause that the suspect committed the crime. *Id.* at 778.
>
> Here, the store clerks positively identified Diaz to Officer Peterson. Diaz had not left the store before the officers arrived. Each store clerk told Officer Peterson what they had seen, and it was consistent with what they had told their manager. The second clerk was not present when Officer Peterson spoke to the first clerk, but his recollection corroborated the first statement. Officer Peterson had sufficient information to believe there was probable cause to arrest Diaz for possession of child pornography.
>
> The Court holds that Diaz's arrest by Officer Peterson was supported by probable cause and did not violate Diaz's Fourth Amendment rights.

ROA.98-99.

D. Sentencing and appeal.

On April 30, 2019, the district court sentenced Mr. Diaz to 188 months in the custody of the Bureau of Prisons, to be followed by a 10-year term of supervised release, and a $100 special assessment, but no fine or additional $5,000 special assessment. ROA.277. Mr. Diaz filed a timely notice of appeal on May 1, 2019. *See* ROA.147.

On appeal, Mr. Diaz raised one issue, arguing that the district court reversibly erred

by denying his motion to suppress evidence because the officer lacked probable cause to arrest him. The Fifth Circuit affirmed the district court's denial of the motion to suppress evidence. *See* Appendix A.

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BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

> The Fourth and Fifth Circuits have entered conflicting decisions on the same important matter, namely, whether an officer has probable cause to obtain a search warrant or to make a warrantless arrest for the offense of possession of child pornography based on a report that a person possessed images of nude minors.

The Fourth Circuit has held an officer lacked probable cause to obtain a search warrant based on a reliable report that a person possessed images of nude minors. The Fifth Circuit, in petitioner's case, has reached the opposite result, upholding a warrantless arrest of petitioner based a similar report. This Court's intervention is necessary to resolve this conflict on an important question implicating both the First and Fourth Amendments.

I. Legal principles.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "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. IV. "Warrantless seizures are 'per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *United States v. Alvarado-Zarza*, 782 F.3d 246, 249 (5th Cir. 2015) (quoting *United States v. Hill*, 752 F.3d 1029, 1033 (5th Cir. 2014)). "A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

"Probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Turner v. Lieutenant Driver*, 848 F.3d 678, 694 (5th Cir. 2017) (quoting *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004)). "Arrest on mere suspicion collides violently with the basic human right of liberty." *Henry v. United States*, 361 U.S. 98, 101 (1959) (citation omitted).

Whether an officer had probable cause to arrest is a legal conclusion subject to *de novo* review. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The government bears the burden to justify a warrantless arrest. *United States v. Ho*, 94 F.3d 932, 937 (5th Cir. 1996); *United States v. Roch*, 5 F.3d 894, 897 (5th Cir. 1993).

It is well-established under this Court's First Amendment precedents that the mere possession of naked images, even of minors, is protected expression. Decades ago, this Court held that "depictions of nudity, without more, constitute protected expression" under the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982)). Something more than mere nudity is required, such as "nudity [that] constitutes a lewd exhibition or involves a graphic focus on the genitals." *Id.* at 113.

State criminal statutes toe this constitutional line by defining the offense of possession of child pornography to require more than nudity. The Texas Penal Code, for example, makes it an offense for a person to "knowingly or intentionally possess[] . . . visual material that visually depicts a child younger than 18 years of age at the time the

image of the child was made who is engaging in sexual conduct." Tex. Penal Code § 43.26(a)(1) (emphasis added). "Sexual conduct" is further defined as "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." Tex. Penal Code § 43.25(a)(2); *see also* Tex. Penal Code § 43.26(b)(2) (adopting this definition).

II. The Court should resolve the circuit split on whether a report that a person possessed images of nude minors provides probable cause to obtain a search warrant or make a warrantless arrest for the offense of possession of child pornography.

In *United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011), the Fourth Circuit found probable cause lacking in a case involving a Virginia statute that, like Texas's statute, did not prohibit "mere presence of nudity in a photograph, even child nudity" but required the picture to "contain a 'lewd exhibition' of nudity." *Id.* at 473 (quoting the Virginia statute). In that case, an officer applied for a search warrant to look for child pornography in Doyle's house. *Id.* at 464. The information in the search warrant affidavit included statements from two minors that Doyle had sexually assaulted them, and a statement from the step-uncle of one of the minors that his step-nephew had told him that Doyle showed the step-nephew "pictures of nude children."[2] *Id.* at 464, 467-68. The Fourth Circuit assumed that the step-uncle was credible and the allegation was true, but found that the affidavit "lacked probable cause to justify a search of Doyle's home for child pornography" because "nothing in the

[2] These are the facts after the appellate court corrected errors in the search warrant application. *See id.* at 467-68.

affidavit supports a belief that the alleged pictures showed a 'lewd exhibition of nudity' in violation of the Virginia statute." *Id.* at 473.

In fact, the Fourth Circuit found that the warrant application was so deficient that the officers' reliance on the warrant was unreasonable. The Fourth Circuit rejected the argument that "the legal distinction between mere nudity and child pornography is not something that a reasonable law enforcement officer in Virginia should have known" because "officers generally have a duty to know the basic elements of the laws they enforce." *Id.* at 473. And given that "possessing nude pictures of children is not per se illegal, reasonable officers should at least obtain a description of the photographs before relying on them to justify entry into a residence." *Id.* at 473-74.

The Fifth Circuit, however, has entered a decision that conflicts with the Fourth Circuit's decision in *Doyle*. In petitioner's case, the Fifth Circuit upheld the officer's arrest of petitioner for possession of child pornography, even though the officer relied on a report that petitioner had images of nude minors on his phone. The officer who arrested petitioner reported to Walgreens pursuant to a call that a man was attempting to print photographs of naked women and children. As shown on the officer's body-camera video, when he arrived at the Walgreens, the officer took petitioner aside, got his identification, and looked at the photos petitioner had printed. There was nothing illegal about those photos. So the officer left petitioner with another officer and went to find the Walgreens employees. He informed the Walgreens employees that there was nothing illegal about the photos that had been printed.

In a back room, a Walgreens employee explained that he saw a lot of porn on

petitioner's phone, and that he saw pictures of young girls, 14 or 15 years old, who were naked. The employee said there were some pictures that had guys in them, but he wasn't sure if those were the pictures with the young girls. A second Walgreens employee entered the back room and explained that he saw pictures from porn sites on petitioner's phone, but also some pictures he didn't think were from porn sites that were of younger girls.

At that point, the officer left. He asked no follow-up questions of either of the employees who had seen the pictures on petitioner's phone. He did not ask for any additional description of the photos the employees had seen.

While talking with the Walgreens employees, the officer called in to dispatch for a warrants check using petitioner's name and date of birth. The dispatcher reported that Mr. Diaz was a registered sex offender in the state of Texas, "there'll be no other 29s. Clear."

Petitioner argued in the Fifth Circuit that this information known to the officer at the time of the arrest did not amount to probable cause that petitioner had committed or was committing the offense of possession of child pornography. He contended that the officer lacked sufficient information that the images the Walgreens employee saw on his phone qualified as child pornography, as opposed to legal images of naked minors. But the Fifth Circuit rejected these arguments, holding that petitioner's arrest was valid because the report from the Walgreens employees was reliable. *See* Appendix A. This decision contradicts the Fourth Circuit's decision in *Doyle*, where that court held that a report of possession of images of mere nudity is insufficient to establish probable cause of possession of child pornography, even if that report is reliable. *Doyle*, 650 F.3d at 473.

Given this conflict among the circuits on whether a report of protected expression

under the First Amendment can provide probable cause to search or arrest, this Court's intervention is necessary to restore uniformity. This Court's First Amendment precedents require states to strike a careful constitutional balance between conduct that constitutes protected expression under the First Amendment and conduct that a state may penalize. *See Osborne*, 495 U.S. at 112-13. The Fifth Circuit's upholding of the officer's arrest of petitioner based on a report of images depicting mere nudity upsets this careful balance, and in effect allows officers to make arrests based on protected First Amendment expression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: January 4, 2021

Respectfully submitted,

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