No. 20–_____

In the
Supreme Court of the United States

Lavellous Purcell,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a search warrant ordering Facebook to hand over the defendant's entire account to law enforcement for review, without limiting either Facebook or law enforcement as to what to look for or seize, is a plainly unconstitutional "[I]nternet-era version of a general warrant." United States v. Blake, 866 F.3d 960, 974 (11th Cir. 2017).

2. Whether a defendant "transports an[] individual" in interstate commerce for prostitution, in violation of the Mann Act, 18 U.S.C. § 2421(a), merely by arranging job opportunities for the victim that she then availed herself of by crossing state lines of her own accord, as the court below and the Fifth and Ninth Circuits have held, or whether the defendant (or an agent) must be involved in arranging the victim's interstate transportation, as the D.C., First, and Eighth Circuits have held.

3. Whether a witness's prior out-of-court "statement," which contradicts the witness's trial testimony, is nonetheless admissible as a "prior consistent statement" under Federal Rule of Evidence 801(d)(1)(B), because the contradictory statement was embedded in a broader narrative that was "largely consistent with" the story the witness told at trial.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 967 F.3d 159 (2d Cir. 2020) and appears at Pet. App. 01-86. The Second Circuit's order denying panel rehearing and rehearing *en banc* appears at Pet. App. 89.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment of conviction on February 26, 2019. The Second Circuit had jurisdiction under 28 U.S.C. § 1291, affirmed on July 23, 2020, and denied a timely petition for panel rehearing and rehearing en banc on October 15, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This petition is timely under Supreme Court Rule 13.1 and the Court's miscellaneous order of March 19, 2020, extending the deadline to file a petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing.

RELEVANT STATUTORY PROVISIONS

The **Fourth Amendment** to the United States Constitution states:

> 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.

The **Mann Act, 18 U.S.C. § 2421**, states in relevant part:

> (a) Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both

Rule 801(d)(1)(B) of the Federal Rules of Evidence states:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> . . .
> (B) is consistent with the declarant's testimony and is offered:
>
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground;

STATEMENT OF THE CASE

1. Overview

The Government accused Lavellous Purcell of being a pimp who prostituted women across the country. "At trial [before a jury in the Southern District of New York] the government relied extensively on evidence that had been seized from Purcell's Facebook account pursuant to warrants obtained by the New York County District Attorney's Office." Pet. App. 03. Construed most favorably to the

prosecution, the evidence showed that he used his Facebook account to promote his business and recruit women as sex workers; communicated on Facebook with co-defendant Gloria Palmer, a cousin who worked for a hotel chain, to reserve rooms nationwide for women to engage in prostitution; and posted ads for commercial sex on a web-based classifieds site.

The jury found Mr. Purcell guilty on five counts: (1) persuading three women to travel in interstate commerce to engage in prostitution, in violation of 18 U.S.C. § 2422(a); (2) transporting one woman -- Samantha Vasquez -- across state lines to engage in prostitution, in violation of 18 U.S.C. § 2421(a);[1] (3) using facilities of interstate commerce to promote prostitution, in violation of 18 U.S.C. § 1952(a)(3); (4) conspiring to use facilities of interstate commerce to promote prostitution, in violation of 18 U.S.C. § 371; and (5) forcible sex trafficking of one woman -- Marie Ann Wood[2] -- in violation of 18 U.S.C. § 1591.

At sentencing the Guidelines range was 188 to 235 months' imprisonment, though the § 1591 conviction on Count Five alone carried a mandatory minimum of 15 years. The district court sentenced Mr. Purcell to 216 months' imprisonment.

He timely appealed to the Second Circuit arguing among other things that (1) a new trial was warranted on all counts because the warrants to Facebook were overbroad and not particularized, in violation of the Fourth Amendment; (2) Count One must be vacated because venue for that offense did not lie in the Southern

[1] The jury acquitted Mr. Purcell on Count Two of transporting another woman, Sharon Alwell.
[2] The jury acquitted Mr. Purcell on Count Five of forcibly trafficking another woman, Kristin Prieur.

District of New York; (3) the Mann Act conviction on Count Two must be vacated because there was no evidence of how Vasquez traveled across state lines (and thus no evidence that defendant "transport[ed]" her); and (4) the § 1951 conviction on Count Five must be vacated because (a) evidence of "coercion" was insufficient and (b) the trial court erred in admitting into evidence out-of-court statements that the victim-witness (Wood) made to police in 2012.

The Second Circuit vacated the conviction on Count One for lack of venue. Pet. App. 01-86. It rejected appellant's other arguments. Id.

Mr. Purcell timely petitioned for panel rehearing and rehearing en banc. The Circuit denied the petition without comment on October 15, 2020. Pet. App. 89.

2. The Facebook search warrants

This case originated in the New York County District Attorney's Office. The DA obtained three search warrants for Mr. Purcell's "Mike Hill" Facebook account from local judges -- in August 2016, November 2016, and September 2017.[3] All were supported by affidavits from Senior Investigator Ariela DaSilva. The DA then gave the fruit of the warrants to federal prosecutors; all Facebook evidence against Mr. Purcell came from the warrants.

[3] Mr. Purcell averred without objection that "I used my Facebook account for private communications, and understood anything that was not public on my Facebook page was private. When using Facebook, I understood that by keeping certain items private, including 'tagged' photos, they would not be visible to the public at large, but only to my friends. When using Facebook.com to communicate, I understood that Facebook messages & chats were private and not accessible by anyone other than the recipient." A.33.

The Government later disclaimed reliance on the August 2016 warrant. Pet. App. 27.

A. The November 2016 warrant

Investigator DaSilva submitted an affidavit in support of the November 2016 warrant. She relied principally on her prior affidavit (submitted in support of the August 2016 warrant), which claimed that there was "reasonable cause to believe that evidence of commission of the crime of Promoting Prostitution in third Degree, P.L. § 230.25, Prostitution, P.L. § 230.00 and an attempt or conspiracy to commit those crimes, and related crimes, will be found in" the "Mike Hill" Facebook account because she saw about ten public posts on that account discussing and promoting prostitution. Appendix ("A.") 46-52.[4] Additionally she claimed that "numerous photographs that have been uploaded" or "posted" to the account "depict various women in different stages of undress and posing in compromising positions," and that "many of the photographs have been utilized in Backpage.com advertisements in the 'escorts' section of th[at] website." A.63-64.

A Criminal Court judge issued the November 2016 warrant. A.81-83. It was drafted by DaSilva and set no temporal limit. It did not incorporate her affidavit. Id.

The warrant ordered Facebook to seize and transmit to law enforcement 24 categories of information from Mr. Purcell's account. It stated that "there is reasonable cause to believe" that this "property constitutes evidence and tends to

[4] Appendix (or "A.") refers to the appendix filed with the Second Circuit.

demonstrate that an offense was committed, including, but not limited to Promoting Prostitution in the Third Degree, P.L. § 230.25, Prostitution, P.L. § 230.00 . . . ." A.82.

The 24 categories encompass nearly everything that could be found in a social-media account: All subscriber information; all "account status history, . . . wall and timeline postings, friend listings, including deleted or removed friends, [and] . . . the names of all users listed as 'followers' or 'following'; a user 'photo-print', including all undeleted or saved photos, photos in which a user has been 'tagged' . . . , and all associated metadata or EXIF data with any such photos"; all information regarding "Groups" that the target belonged to; "[a]ny public or private messages, including any attached documents, images, or photos"; "all notes written and published to the account"; "all chat history"; "all check-in data"; "IP logs . . . and IP source information, login and logout data, and active sessions data";3 "all check-in data"; "all Connection data, including . . . all users who have liked" any aspect of the target account; "all stored credit card numbers"; "all events data"; "all Friend Requests data"; "all 'Likes on Other's Posts,' 'Likes on Your Posts from others,' and 'Likes on Others Sites' data"; "a list of all linked accounts"; "all Physical Tokens data"; "all Pokes data"; "all Recent Activities data"; "all Searches data": "all Shares data"; and "all videos posted to the target account[]." A.56-57.

As the DA's office told Facebook, the warrant required the company to transmit "the full contents and activity of the account (including pictures, videos,

messages, etc.)" to law enforcement: "[W]e are looking for any and all records associated with the user's account for its whole lifespan." A.123-24.

B. The September 2017 warrant

The DA sought another warrant for the same information in September 2017. A.108-11. DaSilva again submitted an affidavit, which attached her prior affidavits, and added that after reviewing private conversations on this account, obtained through the prior warrants, there was reason to believe that the account holder "used [it] to send private messages to numerous female individuals to recruit those individuals to come work in prostitution for him." A.85-92.

A different Criminal Court judge issued the September 2017 warrant. A.108-11. Once again, it did not incorporate DaSilva's affidavit or include a temporal limit.

And it commanded Facebook to transmit the same 24 categories of information to law enforcement -- but failed to specify an offense. The warrant stated only that "there is probable cause to believe that the above-described property" -- the 24 categories -- "constitutes evidence and tends to demonstrate that an offense was committed, that a particular person participated in the commission of an offense, and that the above-described property has been used . . . to commit or conceal the commission of an offense." A.109-11.

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Both warrants stated that they would be "deemed 'executed' when [] served upon Facebook, Inc." and that the "subsequent review" by law enforcement "is deemed analysis." Pet. App. 42. Given this structure, the Second Circuit explained, "the 'search' contemplated and authorized by the warrant[s] was performed not by law enforcement, but rather by Facebook, Inc., . . . and the 'seizure' was law enforcement's receipt of material handed over by Facebook . . . ." Id.

Law enforcement's subsequent "analysis" of the material was, accordingly, neither a search nor a seizure within the Fourth Amendment. Rather it was merely "a review of evidence that had already been seized pursuant to the warrant[s'] terms, and as such it was not directly dependent on those terms." Pet. App. 44.

At the front end, the warrants left Facebook "without room to exercise discretion in collecting responsive material." Pet. App. 44. They "authorized and directed Facebook to turn over the specified categories of data from the specified account without exercising its own judgment about whether the data tended to demonstrate that any offense, let alone any particular offense, had been committed." Pet. App. 43. "Execution of the warrant did not require employees of Facebook, Inc. to personally cull the data for evidence of prostitution and trafficking, and there is nothing in the record to indicate that they searched in this manner." Id.

C. The Second Circuit assumes that both warrants are unconstitutional but rules that officers reasonably relied on them

Mr. Purcell moved to suppress the Facebook evidence on the ground that the warrants were overbroad (in ordering Facebook to transmit his entire account to law enforcement for review) and not particularized (in failing to specify the offense for which probable cause existed or to otherwise limit what law enforcement could look for). The district court denied the motion.

The Second Circuit affirmed and declined to suppress. It acknowledged that "[t]he September 2017 warrant's constitutional deficiency is not in dispute" (because it failed to specify any offense), Pet. App. 39, and assumed that the November 2016 warrant similarly violated the Constitution's particularity requirement, Pet. App. 51-52, but concluded that "the officers' reliance on the disputed warrants was objectively reasonable" and thus that suppression was unwarranted under United States v. Leon, 468 U.S. 897, 922 (1984).

This was so, the Circuit claimed, because the warrants' failure to specify the items to be seized had no real-world effect. Given their "unusual" and "non-traditional" structure, neither Facebook (which was required to transmit Mr. Purcell's entire account, without first culling through it) nor law-enforcement officials (who simply "reviewed" evidence already "seized" from Facebook) had any reason to consult the warrants. Thus, the warrants' failure to particularize "did not broaden or otherwise affect the scope of the search and seizure." Pet. App. 47.

Though the requirement of particularity is "constitutionally indispensable," it was "functionally unnecessary" here. Id.

The Circuit rejected Mr. Purcell's claim of overbreadth, claiming that the DA was entitled to seize and rummage through his entire account because there was probable cause to believe that it was used to promote prostitution. Relying on an earlier decision upholding the search of an entire laptop, upon probable cause that defendant used it in his crime, the Court ruled that "warrants which authorize broad searches of both digital and non-digital locations may be constitutional, so long as probable cause supports the belief that the location to be searched – be it a drug dealer's home, an office's file cabinets, or an individual's laptop – contains extensive evidence of suspected crimes." Pet. App. 41 (citing United States v. Ulbricht, 858 F.3d 71, 102-03 (2d Cir. 2017)); see id. at 102 ("Ulbricht used his laptop to commit the charged offenses by creating and continuing to operate Silk Road. Thus, a broad warrant allowing the government to search his laptop for potentially extensive evidence of those crimes does not offend the Fourth Amendment . . . .").

3. The Mann Act conviction

Count Two accuses Mr. Purcell of "transport[ing]" Samantha Vasquez across state lines for purposes of prostitution in violation of § 2421, the Mann Act. Vasquez did not appear at trial. The only evidence concerning her were chats between Mr.

Purcell and Palmer reserving hotel rooms for her (and sometimes him) around the country and his Backpage ads (and Facebook posts) featuring her.

No evidence showed how Vasquez traveled. There was no evidence that Mr. Purcell (or an agent) drove her across state lines. Nor was there evidence that he (or an agent) purchased bus, train, or airline tickets for her, or otherwise funded or arranged her travel.

Mr. Purcell thus argued that the evidence was insufficient, since it showed at most that he provided opportunities for prostitution that Vasquez then availed herself of by traveling across state lines. That does not establish that he "transport[ed]" her. See, e.g., United States v. Jones, 909 F.2d 533, 540 (D.C. Cir. 1990) (vacating § 2421 conviction where defendant provided opportunity and incentive for victim to cross state line, but victim "travel[ed] under her own steam, without need of anyone to 'transport' her").

The Second Circuit agreed with Mr. Purcell about the evidence: "[T]he record is silent as to the manner in which Vasquez traveled between different cities and states while working for Purcell. The government presented no evidence that directly indicates what mode of transportation Vasquez used, who arranged her transportation, who paid for her transportation, or whether she and Purcell traveled together." Pet. App. 67.

The Circuit nonetheless affirmed because "Purcell determined where and when Vasquez engaged in prostitution" and "required Vasquez to travel to and from

specific locations on specific dates." Id. This sufficed under § 2421: "[A]rranging Vasquez's accommodations was tantamount to arranging her travel." Id.

The Court rejected Jones: "Contrary to the D.C. Circuit's decision in Jones, . . . [we hold] that inducing an individual to travel for purposes of engaging in prostitution, at least where such inducement takes the form of 'agreeing . . . to provide a prostitution job . . . and [] coordinating and prearranging the date and time' of her travel, is effectively 'transporting' the individual under Section 2421." Pet. App. 68 n. 17 (quoting United States v. Mi Sun Cho, 713 F.3d 716, 720 (2d Cir. 2013)).

4. Wood's 2012 statements to the police

Count Five accuses Mr. Purcell of forcibly sex trafficking Marie Ann Wood, in violation of § 1591. A person violates § 1591 when he (1) recruits or entices a person; (2) "knowing . . . that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means, will be used to cause the person to engage in a commercial sex act"; and (3) the "offense was effected by means of force, threats of force, fraud, or coercion . . . ." 18 U.S.C. § 1591(a) & (b)(1). Because there was no evidence that Mr Purcell used force, threats of force, or fraud against Wood, the focus was on whether he "coerc[ed]" her during their 3-day relationship in December 2012.

A. Wood's testimony on coercion

Wood was a longtime prostitute when she met Mr. Purcell. She claimed that she "felt" coerced when (1) Mr. Purcell met her in her hotel room and asked her to leave with him as part of his crew, and (2) Mr. Purcell asked her to prostitute herself in State College, Pennsylvania, two days later.

Wood admitted on cross examination, however, that Mr. Purcell "never physically harmed you," "[n]ever threatened you," and "[n]ever yelled at you." A.395-96. "[H]e didn't do nothing to me." A.395. She even said that Mr. Purcell was "nice" to her and that "we kept it cordial." Id.

The Second Circuit agreed that evidence of coercion was not strong: "The evidence presented at trial gave no indication that Purcell used force against Wood, used force or discussed the use of force against other individuals in her presence, or expressly threatened her with force or harm while she was in his company. . . . Wood acknowledged, on cross-examination, that Purcell 'didn't do [any]thing to [her]' and behaved in a 'cordial' manner." Pet. App. 72.

Two aspects of Wood's testimony are particularly relevant here.

First, she could not recall stopping at a Walmart during that time. A.399. Second, she admitted that she "gave Mr. Purcell [her hotel] room number" before they met, "let him in the room" when he arrived, and "did not feel like I was being taken" when she left the hotel. A.345-346 & 360.

B. Officer Royer's testimony about Wood's 2012 statements

After Wood testified, the Government called Police Officer Heather Royer of the State College Police Department. Royer interviewed Wood at her precinct in December 2012, after Wood fled from the hotel where she and Purcell were staying. Royer recounted most of that interview to the jury.

Royer specifically told the jury two things that contradicted or added to what Wood said at trial.

First, Royer testified that "[Wood] told me that . . . she had been in New York City in the Queens Area staying at a hotel. She received a call from a male. She would meet people on the floor of her hotel room. She wouldn't tell them the exact number. And when she met this male, he came into her room before she could go

out to meet him when they were in the hallway, and he told her that she chose up and that she was coming with him. He made her check out of the hotel . . . ." A.529. Second, Royer testified that "Wood told [her] about [going to] the Wal-Mart" with Mr. Purcell. In particular, Wood said that "[w]hen they were there, the two females that were with them had gone in to buy some stuff, and [Wood] waited in the vehicle [and] the defendant told her that he was going to wait in the vehicle with her because she was new and he didn't want her to leave." A.530.

C. The Second Circuit upholds Royer's testimony

Mr. Purcell argued that the trial judge erred in letting Officer Royer testify about Wood's 2012 precinct interview. This was inadmissible hearsay, among other things.

The Second Circuit disagreed, concluding on plain-error review that Wood's 2012 statements were properly admitted under Rule 801(d)(1)(B) as prior consistent statements offered to rehabilitate her credibility, which defense counsel had challenged on cross examination. It concluded: "By introducing Royer's testimony, which recounted Wood's statements to police in full and largely matched the version of events that Wood had recounted at trial, the government plainly sought to rebut the charge of inconsistency and to rehabilitate Wood's credibility by placing the alleged discrepancies in context." Pet. App. 84.

REASONS FOR GRANTING THE WRIT

This petition presents three important and recurring questions of federal law, two of which have divided the lower courts and all of which require this Court's intervention. And the court below answered them incorrectly.

First, the Court's intervention is required because courts are divided about how the Fourth Amendment applies to search warrants directing a social-media company, such as Facebook, to seize and turn over a person's entire account to law

enforcement. Although some courts have imposed ex ante constraints (such as targeted keyword searches or subject-matter filters) or ruled ex post that a warrant without topical or temporal constraints was overbroad and/or un-particularized, other courts (like the Second Circuit here) have upheld warrants directing Facebook to turn over entire accounts without any limit. Given that over 200 million Americans use social media, and given additionally law enforcement's reliance on social-media evidence to investigate crimes, see, e.g., Yuval Simchi-Levi, Search Warrants in the Digital Age, 47 Hofstra L. Rev. 995, 995 (2019) ("[A] survey of law enforcement officials [found] that over eighty percent of those surveyed reported solving crimes with the aid of social media."), this Court should grant review and resolve the conflicts in the lower courts.

Second, the Court should resolve the Circuit split regarding the meaning of "transport" in the Mann Act, 18 U.S.C. § 2421. While the First, Eighth, and D.C. Circuits read this term to encompass only situations where the defendant actually (or through an agent) "transport[ed]" the victim across state lines, and not where the victim travels on or of her own accord, the Second, Fifth, and Ninth Circuits broadly construe the same term and find it met when a victim travels across state lines under her own steam in order to avail herself of opportunities or enticements offered by the defendant. See infra. The Court should reject the latter reading, as it flouts the plain meaning of "transport" and renders redundant a companion statute (18 U.S.C. § 2422) barring defendants from enticing or inducing a victim to travel across state lines to engage in prostitution.

Finally, the Court should grant review because the Second Circuit's construction of Rule 801(d)(1)(B) of the Federal Rules of Evidence flouts this Court's decision in Williamson v. United States, 512 U.S. 594 (1994). The Circuit ruled that two specific out-of-court statements, both of which contradict the declarant's trial

testimony, are nonetheless admissible as "prior consistent statement[s]" because they were embedded within an extended narrative that was "largely consistent" with the general story she told at trial. This violates Williamson, which ruled that "statement" in Rule 801 means "'a single declaration or remark" rather than "a report or a narrative." The statements here were therefore inadmissible against Mr. Purcell.

I. Courts are divided over whether a search warrant to Facebook (and other Internet-based holders of private electronic information) that allows the Government to obtain the entire account, based simply on a showing of probable cause, is overbroad and violates the particularity requirement of the Fourth Amendment.

Social-media sites are very popular. "[I]n 2019, 79 percent of the population in the United States had a social networking profile . . . . This equals approximately 247 million U.S. social media users . . . ." See https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/. A user's profile on such sites provides "a single window through which almost every detail of a person's life is visible. Indeed, Facebook is designed to replicate, record, and facilitate personal, familial, social, professional, and financial activity and networks." United States v. Shipp, 392 F. Supp. 3d 300, 307 (E.D.N.Y. 2019).

Facebook, "like many other popular Internet services, retains data on nearly every interaction a user has with the site. The comprehensive range of data Facebook retains includes, but is not limited to: credit card data, friend requests, Internet Protocol addresses showing a user's physical location when logging into the site, content of messages sent and received via the site's messaging service, all searches queried on the site, membership in groups, events, religious and political views, and wall posts. The universe of information is often hundreds of pages thick and can provide a detailed view of an individual's life online and offline." Reid Day, Comment, Let the Magistrates Revolt: A Review of Search Warrant Applications for

Electronic Information Possessed by Online Services, 64 U. Kan. L. Rev. 491, 496 (2015). Just as with a cellphone, "[t]he sum of an individual's private life" can be found in Facebook's servers. Riley v. California, 573 U.S. 373, 394 (2014); see United States v. Hamilton, 2019 WL 4455997, at *3 (E.D. Ky. Aug. 30, 2019) ("Facebook collects a massive amount of information about its users. This information can include personal identifiers, contact information, lists of connections the user has to other individuals through 'friend' lists and groups, events the user may attend, locations the user has visited, items the user has bought or sold through Facebook Marketplace, and much more. Facebook also maintains the 'status updates' and photographs or videos the user posts.").

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A search warrant directing Facebook to hand over all the information in a user's account to law enforcement therefore implicates significant constitutional concerns. Unfortunately, "[a]pplication of the Fourth Amendment to the Internet is an unsettled area of law," Day, supra, at 498, and "[c]ourts across the nation have struggled to apply Fourth Amendment principles to digital searches to ensure the searches do not expand into exploratory hunts that threaten individual privacy," Lily R. Robinton, Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence, 12 Yale J. L. & Tech. 311, 315 (2009).

Most courts, like the Second Circuit, believe that upon a simple probable-cause showing that evidence of criminality may be found therein, the Government may obtain a user's entire social-media account. See, e.g., United States v. Liburd, 2018 WL 2709199, at *4 (E.D.N.Y. June 5, 2018) ("[B]ecause of the nature of digital media searches, it was proper for the search warrant to allow the FBI to search the entire contents of Defendant's Facebook account . . . ."); United States v.

Chalavoutis, 2019 WL 6467722, at *5 (E.D.N.Y. Dec. 2, 2018) ("[E]very case of which we are aware . . . has upheld the Government's ability to obtain the entire contents of the email account to determine which particular emails come within the search warrant."); Robinton, supra, at 329 (courts generally "allow investigators to open and scan all digital files to ascertain the responsiveness of the data"). These courts analogize a social-media account to a computer or a hard-drive storage, and hold that because there is no way to know where the relevant information is located within an account (or a computer), the Government is entitled to look through its entirety in search of relevant evidence. Cf. Laurent Sacharoff, The Fourth Amendment Inventory as a Check on Digital Searches, 105 Iowa L. Rev. 1643, 1654 (2020) ("[I]n the execution of the warrant, law enforcement ends up searching nearly every part of a device, with the right to open nearly every file. Courts almost uniformly allow agents to seize entire devices and take them back to the lab for comprehensive forensic review.") A search warrant therefore need only specify the "location" to be searched -- i.e., a specific person's Facebook account or a particular laptop -- to comply with the particularity requirement. See, e.g., Pet. App. 41 ("Our case law makes clear that warrants which authorize broad searches of both digital and non-digital locations may be constitutional, so long as probable cause supports the belief that the location to be searched – be in a drug dealer's home, an office's file cabinets, or an individual's laptop -- contains extensive evidence of suspected crimes."); accord United States v. Ulbricht, 858 F.3d 71, 100 (2d Cir. 2017) (equating Facebook account with laptop and upholding search warrants authorizing agents to look through entire laptop and account because "[f]iles and documents can easily be given misleading or coded names").

Other courts hold that such warrants violate the Fourth Amendment. The Eleventh Circuit, for instance, called a warrant requiring Facebook to disclose the

entirety of the defendant's account to law enforcement the "[I]nternet-era version of a general warrant." United States v. Blake, 866 F.3d 960, 974 (11th Cir. 2017). There, as here, the warrant to Facebook "required disclosure to the government of virtually every kind of data that could be found in a social media account." This was too broad: "With respect to private instant messages, for example, the warrants could have limited the request to messages sent to or from persons suspected at that time of being prostitutes or customers."

Or "the government [should have sent] a request [to Facebook] with the specific data sought." Id. Some courts have followed this advice by (ex ante) "mandat[ing] service providers to conduct an initial screening" based on "keyword queries or filtering tools." Sarah J. Dennis, Note, Regulating Search Warrant Execution Procedure for Stored Electronic Communications, 8 Ford. L. Rev. 2993, 3007 (2018); see, e.g., United States v. Chavez, 2019 WL 5849895, at *9 (W.D.N.C. Nov. 7, 2010) ("[W]arrants for social media accounts should be tailored in time or to relevant persons to prevent a general rummaging.").

Other courts have ruled, after the fact, that a broad warrant to Facebook violates the Fourth Amendment. Such a warrant was "akin to a general warrant rummaging through any and all of Defendant's electronic belongings in Facebook. Thus, the warrant [] was overly broad and general." United States v. Irving, 347 F. Supp. 3d 615, 624 (D. Kan. 2018); see United States v. Burkhow, 2020 WL 589536, at *10 (N.D. Iowa Feb. 6, 2020) ("[P]ermitting the search of defendant's entire Facebook account was broader than the probable cause on which the warrant was based."); Hamilton, 2019 WL 4455997, at *4 ("[T]he search warrant for ten months of activity in Hamilton's entire Facebook account was overbroad."); see also Shipp, 392 F. Supp. 3d at 311 ("[T]he court is concerned that Facebook warrants of the kind at issue here unnecessarily authorize precisely the type of exploratory

rummaging the Fourth Amendment protects against."). These courts reject the analogy between a computer and a social-media account because "[t]he means of hiding evidence on a hard-drive – obscure folders, misnamed files, encrypted data – are not currently possible in the context of a Facebook account." Blake, 868 F.3d at 974; see also Shipp, 392 F. Supp. 3d at 309 ("Facebook is different from hard drives or email accounts in many ways including that the information associated with the account is categorized and sorted by the company – not by the user.").

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Only this Court can resolve this fundamental disagreement among the lower courts on a constitutional question of broad application. And, on the merits, the Second Circuit was plainly wrong: The two Facebook warrants, which fail to specify the offense for which there was probable cause but allow the Government to seize Mr. Purcell's whole account, are not sufficiently particularized and are overbroad, in violation of the Fourth Amendment.

Both the particularity requirement and the doctrine of overbreadth arise from "the central concern underlying the Fourth Amendment [--] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." Arizona v. Gant, 556 U.S. 332, 345 (2009). "The Fourth Amendment was a response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown." Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

"[T]he problem posed by the general warrant is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. . . . The Fourth Amendment addresses the problem by requiring a 'particular description' of the things to be seized." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). This

requirement " 'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " Andresen v. Maryland, 427 U.S. 463, 480 (1976) (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)).

Relatedly, the Amendment's probable-cause requirement "limit[s] the authorization to search to the specific areas and things for which there is probable cause to search." Maryland v. Garrison, 480 U.S. 79, 84 (1987). This "ensures that the search will be carefully tailored to its justification, and will not take on the character of the wide-ranging exploratory searches the Framers intend to prohibit." Id.; see Berger v. New York, 388 U.S. 41, 59 (1967) ("The purpose of the probable cause requirement . . . [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed.") A warrant authorizing the search or seizure of items beyond the probable-cause showing is unconstitutionally overbroad. Messerschmidt v. Millender, 565 U.S. 535 (2012).

The Facebook warrants here plainly violate the Fourth Amendment. Upon a mere showing of probable cause that evidence of criminality may be found in Mr. Purcell's Facebook account, the warrants command Facebook to seize and transmit to prosecutors his entire account, including aspects having nothing to do with the crimes. This seizure -- "law enforcement's receipt of material handed over by Facebook," Pet. App. 42 -- was plainly overbroad.

The Second Circuit's belief that officers must be allowed to look through the entire account is based on a false analogy with computers (or file cabinets): "The means of hiding evidence on a hard-drive – obscure folders, misnamed files, encrypted data – are not currently possible in the context of a Facebook account."

Blake, 868 F.3d at 974. The warrant should have asked Facebook to hand over only information relevant to Mr. Purcell's criminal activities.

Nor did the warrants constrain law-enforcement officials about what to look for as they rummage through that data. The warrants were indeed the "[I]nternet-era version of a general warrant." Simply re-naming that search an "analysis" or "a review of evidence that had already been seized pursuant to the warrant[s'] terms," Pet. App. 44, does not cure this constitutional problem.

Finally, no reasonable officer would have relied on these facially deficient warrants. More than five decades have passed since this Court announced that a warrant that fails to state "what specific crime has been or is being committed" violates the particularity requirement. Berger, 388 U.S. at 55 (striking law authorizing eavesdropping warrant simply upon showing that "evidence of crime may be obtained by the eavesdrop" and "lay[ing] down no requirement for particularity in the warrant as to what specific crime has been or is being committed"). And the rule that police may seize under a warrant only what is within the probable-cause showing, and no more, is of even more ancient vintage. These were "glaringly deficient warrant[s]" that "[n]o reasonable officer" would have presumed valid. Leon, 468 U.S. at 923.

The Second Circuit's finding of good faith flouts Groh v. Ramirez, 540 U.S. 551 (2004), holding that an officer was not entitled to qualified immunity -- an inquiry identical to Leon's good-faith test, see id. at 565 n.8 -- when he executed a search warrant that was similarly deficient regarding the particularity requirement. Because "the warrant [there] did not describe the items to be seized at all," the Court held, it "was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." Id. at 558. And a "'basic principle of Fourth Amendment law' [is] that searches and seizures inside a home without a

warrant are presumptively unreasonable.'" Id. at 559 (quoting Payton v. New York, 445 U.S. 573, 586 (1980)). That presumption could not be overcome where the warrant is facially deficient: "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." Groh, 540 U.S. at 563.

The same here. No reasonable officer would believe that the Facebook warrants, directing the company to transmit Mr. Purcell's entire account to law enforcement and authorizing the latter to rummage through it without constraint, complied with the Fourth Amendment's particularity and probable-cause requirements.

II. The Circuits have split on the meaning of "transport" in the Mann Act, 18 U.S.C. § 2421.

Section 2421(a) of Title 18, the core of the original Mann Act, is violated when a defendant "knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution . . . ." Courts have split on how to construe the statute's actus reus – to "transport". In particular, the Circuits disagree about whether a § 2421 conviction can stand when, as in this case, the evidence did not show how the victim traveled across state lines but merely that the defendant induced her to do so by "agreeing . . . to provide a prostitution job . . . and [] coordinating and prearranging the date and time' of her travel." Pet. App. 68 n. 17.

Some courts agree with the Second Circuit that the defendant has "transport[ed]" the victim under such circumstances. See Wagner v. United States, 171 F.2d 354 (5th Cir. 1948) (upholding Mann Act conviction where defendant made "attractive" job offers to victim prostitutes, which "cause[d]" them to cross state

lines to accept those offers). And the Ninth Circuit agreed in construing the same word in § 2423(a), which targets anyone "who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution." United States v. Johnson, 132 F.3d 1279 (9th Cir. 1997). The defendant "transport[ed]" the minor victim, the Ninth Circuit held, by informing an educational agency that he wanted to host a foreign-exchange student, who then traveled to the defendant's California home. Id. at 1281 & 1285.

Other Circuits reject this reading of "transport." The D.C. Circuit, for instance, vacated the § 2421 conviction of a telephone dispatcher for a prostitution service, who took "telephone orders for escorts from customers," asked the customer "the desired physical appearance and age of the [desired] escort[]," "select[ed] an escort," and then "notif[ied] [the escort] by telephone of the name and address of the customer." Jones, 909 F.2d at 536. The escorts then traveled from Maryland or Virginia to meet customers in the District of Columbia. The "escorts made their own travel arrangements and, in a literal sense, transported themselves interstate, by car or subway." Id. at 540.

This was insufficient to show that the defendant "personally or through an agent . . . performed the proscribed act of transporting." Id. For "cases [like this one] in which the defendant provides the motivation, ranging from persuasion to coercion, but the person then 'travels' under her own steam, without need of anyone to'transport' her," Section 2422 is the proper statute. This companion statute, which also originated in the Mann Act, applies to anyone who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, . . . to engage in prostitution." If the dispatcher's conduct violated § 2421, Jones explained, "then § 2422 would be redundant." 909 F.2d at 540.

The First and Eight Circuits agree with the D.C. Circuit. See United States v. Camuti, 950 F.2d 72, 76-77 (1st Cir. 1991) (adopting Jones's distinction between § 2421 and § 2422 and holding that a defendant who "motivat[ed]" the victim to travel across state lines by offering her a prostitution opportunity did not "transport" her); United States v. Sabatino, 943 F.2d 94, 99 n.2 (1st Cir. 1991) (agreeing with Jones's reading of § 2421 because "[r]eading it any other way would render [] § 2422 . . . redundant"); LaPage v. United States, 146 F.2d 536, 537 (8th Cir. 1945) (vacating Mann Act "transport" conviction where "the only act of accused is that of persuading or inducing an interstate trip [by the victim] . . . for immoral purposes"); Hill v. United States, 150 F.2d 760, 761 (8th Cir. 1945) (same where defendant merely "asked [victim who was then residing in Minnesota] to return to defendant's establishment" in North Dakota, where she formerly worked).

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Only this Court can resolve the Circuit split on the meaning of the Mann Act. And, on the merits, the Second Circuit got it wrong.

Allowing a § 2421 conviction absent evidence that the defendant "transport[ed]" the victim, simply because he provided attractive opportunities across state lines for her, flouts the text. "Transport" is a transitive verb that takes a direct object. To "transport" something (or someone) means to carry, move, or convey that thing (or person) from one place to another. That does not occur when a person moves herself across state lines, whether or not someone else provided the motivation for her travel. To say otherwise contradicts plain English and "undermines the assumption of free will that supports the concept of criminal responsibility." Jones, 909 F.2d at 541.

Such a reading also renders § 2422 redundant. If a defendant "transport[s]" a victim under § 2421 simply by providing opportunities for prostitution across state

lines, or by otherwise making such travel attractive to the victim, it is hard to see the point of § 2422. As Jones put it, allowing a "conviction under § 2421" where the victim travels under her own steam "would give the Government complete discretion in charging future defendants under either § 2421 or § 2422." Id. This "is [] unreasonable under the canons of statutory construction." Id.

III. The Second Circuit's reading of Federal Rule of Evidence 801(d)(1)(B) contradicts Williamson v. United States, 512 U.S. 594 (1994).

In Williamson v. United States, 512 U.S. 594 (1994) the Court was confronted with the question of whether non-self-inculpatory "statement[s]" embedded within a broader narrative that was self-inculpatory overall, were properly admitted at trial under the hearsay exception set forth in Rule 804(b)(3), which renders admissible "statement[s] which ... at the time of [their] making ... so far tended to subject the declarant to ... criminal liability ... that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true." To answer this question, the Court had to "first determine what the Rule means by 'statement,' which Federal Rule of Evidence 801(a)(1) defines as 'an oral or written assertion.'" Id. at 599.

The Court acknowledged that "[o]ne possible meaning, 'a report or narrative,' Webster's Third New International Dictionary 2229, defn. 2(a) (1961), connotes an extended declaration." Under this reading of "statement," "Harris' entire confession -- even if it contains both self-inculpatory and non-self- inculpatory parts -- would be admissible so long as in the aggregate the confession sufficiently inculpates him." 512 U.S. at 599.

But "[a]nother meaning of 'statement' [is] 'a single declaration or remark,' ibid., defn. 2(b)." This reading "would make Rule 804(b)(3) cover only those

declarations or remarks within the confession that are individually self-inculpatory." 512 U.S. at 599.

The Court adopted this construction over the broader one: "[T]he principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading." Id. As the Court explained, "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." Id. at 599-600.

Although this case concerns a different hearsay exception, Williamson controls because both rules dependent on the meaning of "statement" in Rule 801(a)(1). Rule 801 generally sets forth the "definitions [that] apply under this article," and Rules 804(b)(3) and 801(d)(1)(B) both fall under "Article VIII ("Hearsay") of the Federal Rules of Evidence. What Williamson said about statement" in Rule 801(a)(1) thus applies throughout the hearsay rules. And that definition is "a single declaration or remark," rather than "an extended declaration" or "narrative."

The Second Circuit thus got it wrong. That Wood's 2012 police-station interview "largely matched the version of events that Wood had recounted at trial," Pet. App. 84, did not render admissible specific statements made during that interview that were not "consistent with" her testimony, as Rule 801(d)(1)(B) requires. The Circuit's misreading led to the admission of two critical out-of-court statements that either contradicted or supplemented Wood's testimony: Her claim that Mr. Purcell said that he would stay with her when others went inside a Walmart "because she was new and he didn't want her to leave," A.530; and her claim that Mr. Purcell "came into her room before she could go out to meet him

when they were in the hallway, and he told her that she chose up and that she was coming with him [and] made her check out of the hotel . . . ." A.529. Conviction on Count Five was unlikely absent these statements in light of the paucity of evidence on coercion

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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