No. _____

# In the Supreme Court of the United States

STEPHEN SCOTT MEALS, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

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

**PETITION FOR A WRIT OF CERTIORARI**

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**U.S. CONSTITUTION, STATUTES AND RULES**

## QUESTIONS PRESENTED FOR REVIEW

Whether the Government's warrantless review of Mr. Meals's private written communications on Facebook's Messenger application constitutes a physical intrusion of Mr. Meals's papers and effects in violation of the Fourth Amendment.

Whether the Fifth Circuit Court of Appeals erred in affirming the district court's denial of Mr. Meals' motion to suppress.

## LIST OF PARTIES

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

## OPINION BELOW

The opinion of the court of appeals can be found at *United States v. Meals*, 21 F4th 903 (5th Cir. 2022). A copy of said opinion is also attached to this petition as Appendix A. A copy of the order denying Mr. Meals's petition for panel rehearing is also attached to this petition as Appendix B, and a copy of Mr. Meals's Brief of Appellant that was filed in the United States Court of Appeals for the Fifth Circuit is also attached to this petition as Appendix C.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 30, 2021. The United States Court of Appeals for the Fifth Circuit denied Mr. Meals's Petition for Panel Rehearing by order filed on

March 3, 2022. Thus, this petition is filed within 90 days after March 3, 2022, the date of the denial of rehearing. *See* SUP. CT. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides in pertinent part that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

## STATEMENT OF THE CASE

The charges against Mr. Meals are based on private chats that took place in October 2018 on Facebook Messenger, (hereinafter "the Private Chats"). (ROA 810-815, 854).[1] Facebook reviewed the Private Chats, and on November 6, 2018 reported them to the National Center for Missing and Exploited Children ("NCMEC"), in what is referred to as a CyberTip. ROA. 540. NCMEC, a government agency,[2] reviewed the Private Chats without obtaining a warrant.

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1. References to "ROA." are to the appellate record from the United States Court of Appeals for the Fifth Circuit.

2. The Government took no position on whether NCMEC is or is not a government actor. ROA. 633-634. The district court assumed NCMEC is a government agent. ROA. 544.

The CyberTip further provided the Facebook accounts, usernames, dates of birth, genders, emails, addresses, telephone numbers, and IP addresses of those associated with the Private Chats. ROA. 540.

The CyberTip further reported to the NCMEC that the Private Chats contained sexually explicit conversations that appeared to be between an adult male in his thirties and a minor female who had expressed in the Private Chats to have engaged in sexual activity and were planning to do so again. ROA. 540, 854. NCMEC then sent the CyberTip to the Texas Attorney General, who then forwarded it to the Corpus Christi Police Department ("CCPD") on November 7, 2018. ROA. 540. Based on the CyberTip, the CCPD applied for and obtained search warrants which yielded evidence against Mr. Meals including photographs found on his cellphone. ROA. 541.

Mr. Meals moved to suppress the evidence obtained against him on the basis that the Government's search of the Private Chats constitutes an unreasonable search and seizure in violation of the Fourth Amendment. ROA. 54-59. The district court denied his motion to suppress. ROA. 590, 635. Pursuant to a written plea agreement, Mr. Meals entered a conditional guilty plea to Counts One (production of child pornography) and Five (possession of child pornography), reserving the right to appeal the denial of his motion to suppress. ROA. 644, 662, 869. The Fifth Circuit Court of Appeals affirmed the district

court's denial of his motion to suppress. Mr. Meals is serving a 600 month term of imprisonment. ROA. 560.

## BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was originally brought as a federal criminal prosecution under 21 U.S.C. § 846. The district court therefore has jurisdiction pursuant to 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE WRIT

### A. THE FIRST QUESTION PRESENTED RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET RESOLVED BY THE SUPREME COURT.

The case at bar presents an opportunity for the Supreme Court to decide whether the chattel trespass test required by *United States v. Jones*, 565 U.S. 400 (2012) applies to determine whether NCMEC needed to obtain a warrant to view the Private Chats–Mr. Meals's private papers and effects. The Tenth Circuit raised the prospect of *Jones's* potential applicability when the Government intrudes on a constitutionally protected area such as a person's private papers and effects:

> *Jones* explained that government conduct can constitute a Fourth Amendment search *either* when it infringes on a reasonable expectation of privacy *or* when it involves a physical intrusion (a trespass) on a constitutionally protected space or thing ("persons, houses, papers, and effect") for the purpose of obtaining information.

*United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016.)

*Ackerman* determined that NCMEC violated the Fourth Amendment when it reviewed private emails under the reasonable expectation of privacy test pursuant to *United States v. Jacobsen*, 466 U.S. 109, 119-20 (1984) because it was not virtually certain that the email itself and the other three attachments contained child pornography: "Indeed, when NCMEC opened Mr. Ackerman's email it could have learned any number of private and protected facts...." *Id*. at 1306. It bears noting however, that *Ackerman* further questioned whether *Jacobsen's* reasonable expectation of privacy analysis still applied in light of *Jones*:

> Given the uncertain status of *Jacobsen* after *Jones*, we cannot see how we might ignore *Jones's* potential impact on our case. And its impact here seems even cleaner than in *Jacobsen*. After all, we are not dealing with a governmental drug test that destroyed but a trace amount of potential contraband. We are dealing instead with the warrantless opening and examination of (presumptively) private correspondence that could have contained much besides potential contraband for all anyone knew. And that seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment.

*Id*. at 1307.

*Ackerman* further determined that the application of the *Jones* chattel trespass test further yielded the same conclusion–that NCMEC violated the Fourth Amendment when it opened and viewed Mr. Ackerman's email without a search warrant. *Id*. at 1308. *Ackerman* noted that email and regular mail are the same in terms of having Fourth Amendment protection and further noted

and cited "many courts that have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications. *Id*. Since Facebook Messenger is akin to email in that they both constitute electronic papers and effects worthy of Fourth Amendment protection, there is no reason not to apply *Ackerman's* and *Jones'* reasoning and holding to the case at bar. *See id.*

Since Ackerman possessed a physical property right to his emails, *Jones* requires NCMEC to have obtained a warrant to have and review Ackerman's emails to be in compliance with the Fourth Amendment. Similar to Ackerman, NCMEC also needed to obtain a warrant to have and review the Private Chats, Mr. Meals's papers and effects. As this Court determined in *Jones*, Mr. Meals's Fourth Amendment rights do not rise or fall on *Katz's* reasonable expectation of privacy approach:

> The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e]" preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." .... As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding.

*United States v. Jones*, 565 U.S. at 406-407. (footnote omitted) (internal citation to *Kyllo* omitted). In conclusion, NCMEC conducted a warrantless search of Mr. Meals's papers and effects, and in doing so violated the Fourth Amendment under the *Jones*' trespass to chattel theory. Accordingly, Mr. Meals's motion to suppress should have been granted.

### B. THE FIFTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S DENIAL OF MR. MEALS'S MOTION TO SUPPRESS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THE COURT'S SUPERVISORY POWER.

The second question presented is whether the Fifth Circuit Court of Appeals erred in affirming the district court's denial of his motion to suppress on the basis that the private search doctrine applied to NCMEC's search of the Private Chats. The district court erred in this regard because the district court relied upon case law that is materially distinguishable to the case at bar. The case law relied upon by the district court is materially distinguishable because those cases involved the online distribution of child pornography and not private chats sent on Facebook Messenger as in the case at bar. The Court should grant certiorari because the decision of the Fifth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of the Court's supervisory powers." SUP. CT. R. 10(a).

To show a Fourth Amendment violation, a defendant must first establish that the search invaded a legitimate expectation of privacy that society recognizes as reasonable. *See Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990). The Supreme Court has admonished that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions.'" *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967). And the exceptions are to be "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958).

Federal courts have acknowledged the following facts regarding Facebook and Facebook Messenger:

> Facebook operates one of the largest social media platforms in the world, with over one billion active users. About seven in ten adults in the United States use Facebook. Facebook has a messenging function on its platform that allows users to send electronic messages to one or more users. Facebook explains on its website that these messages are "private" because their contents and history are viewable only to the sender and his or her chosen recipients—in contrast to, for example, posts shared with a broader audience, such as all of the user's Facebook friends.

*Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1111-1112 (9th Cir. 2020). (Citations omitted). Since messages sent on Facebook Messenger are private communications as Facebook publicly represents to its users, Facebook

Messenger is essentially the same as e-mail communications, which have Fourth Amendment protection from warrantless searches and seizures. *See United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010). (Emails have Fourth Amendment protection because email "is the technological scion of tangible mail, and it plays an indispensable part in the Information Age."); *see also City of Ontario v. Quon*, 130 S.Ct. 2619, 2631 (2010) (implying that "a search of [an individual's personal e-mail account" would be just as intrusive as "a wiretap on his home phone line."). Given the stark similarities between email communications and Facebook Messenger communications, it would be non-sensical not to afford Facebook Messenger communications Fourth Amendment protections on par with emails. Indeed, even the Government stipulated that Mr. Meals had a reasonable expectation of privacy in the Private Chats. ROA. 626 ("[The Court] can assume, as the 5th Circuit did in *Reddick*, that [Mr. Meals] did enjoy a legitimate expectation of privacy in these messages."). In light of the Government's stipulation, the district court agreed that Mr. Meals had a reasonable expectation of privacy in the Private Chats. ROA. 542.

The district court erred in deciding that NCMEC did not violate the Fourth Amendment because of the private search doctrine. The district court erred because *United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001) and Supreme Court precedent actually supports Mr. Meals's position that the private search doctrine does not apply and does not absolve NCMEC from obtaining a warrant.

In its analysis of the private search doctrine, the district court failed to consider or scrutinize in any way the level of certainty NCMEC could have had that the Private Chats were actually what they purported to be.

The district court erred because in order for NCMEC to conduct a warrantless search pursuant to the private search doctrine it needed to have been "virtually" or "substantially certain" that the Private Chats were in fact a communication between an adult male and a minor planning a sexual encounter. *See United States v. Jacobsen*, 466 U.S. at 119-20; *Runyan*, 275 F.3d at 463 (5th Cir. 2001) ("[O]pening a container that was not opened by private searchers would not necessarily be problematic *if the police knew with substantial certainty* ... what would be inside.") (emphasis added); *see also United States v. Lichtenberger*, 786 F.3d 478, 485-86 (6th Cir. 2015)("Under the private search doctrine, the critical measures of whether a governmental search exceeds the scope of the private search that preceded it are how much information the government stands to gain when it re-examines the evidence and, relatedly, *how certain it is regarding what it will find*."). (Emphasis added).

NCMEC could not have known with any reasonable degree of certainty that the Private Chats were only limited to such improper communications and were in fact what they purported to be because the evidentiary record indicates it only *appeared* to Facebook that the Private Chats were communications between an adult male and a minor female. The only evidence submitted with respect to

what Facebook did and did not do regarding the Private Chats is contained in the affidavit of Raquel Morgan, an employee of Facebook, Inc. ROA. 853-855. Said affidavit states *inter alia*: "On November 6, 2018, after a person had reviewed the interactions, Facebook submitted CyberTipline Report 42808969 to NCMEC, which reported that an adult male *appeared to be* enticing a minor female to engage in sexual activity." ROA. 854. (Emphasis added).

Unlike cases involving pornagraphic images such as *Reddick* that involved government review of only illegal images, there is no evidence that Facebook took any measures to limit its review of only improper communications and that it did not delve into private communications beyond that. There is also no evidence Facebook did anything to verify that the relevant Facebook accounts were in fact what they purported to be including but not limited to doing anything to rule out that said accounts were not hacked or fake or that the participants in the Private Chats were actually not consenting adults engaging in role-playing. It further bears noting that the district court was informed of the uncertainty aspects of the Private Chats before it denied Mr. Meals' motion to suppress. ROA. 609-611, 631. The Government even went as far as to emphasize to the district court the significance of the "substantially certain" requirement of the private search doctrine:

> [T]he question there in *Reddick* was, well, by opening the image, did the Corpus Christi Police Detective, did he exceed the scope of the private search and the 5th Circuit answered no based on Supreme Court

> president [*sic*], namely *United States versus Jacobson*, [*sic*] because the officer could be *substantially certain* of what he would find inside of that image.

ROA. 623. (Emphasis added).

It is further worth mentioning that in September 2018, the month before the Private Chats occurred, Facebook reported that cyber attackers breached its computer network which allowed the attackers to gain access to user accounts and take control of them. The attack was the largest in Facebook's history which exposed the personal information and accounts of nearly fifty million users.[3] The fact that Facebook had just experienced its largest attack in its history the month before the Private Chats occurred—which made its user accounts vulnerable to being hacked—further bolsters the point that NCMEC could not have been virtually certain that the Private Chats were actually what they purported to be.

The applicable case law relied upon by the district court in denying Mr. Meals' motion to suppress, including *Jacobsen* and *Reddick* are materially distinguishable because the case at bar involves private chats and not the online distribution of child pornography. When child pornography is distributed online, private companies like Facebook rely on hash value matching technology to

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3. *See* Isaac, M. and Frenkel, S., (2018, Sept. 28). Facebook Security Breach Exposes Accounts of 50 Million Users, *New York Times*. Retrieved from http://www.nytimes.com

identify such content without relying on human searchers or intruding into the privacy of its users regarding other matters. *See United States v. Reddick*, 900 F.3d 636, 636-37, 639 (5th Cir. 2018). ("[O]pening the file [by the government] merely confirmed that the flagged file was indeed child pornography, as suspected. As in *Jacobsen*, 'the suspicious nature of the material made it *virtually certain* that the substance tested was in fact contraband.'"). (Emphasis added).

In other words, *Reddick* is distinguishable because the case at bar does not involve the distribution of child pornographic content. And because it does not do so, it is erroneous to conclude, as the district court did, that NCMEC's review of the Private Chats was virtually certain to reveal the online solicitation of a minor and that its review was limited to only that. NCMEC's review of the Private Chats was not virtually certain to so reveal because, as established *supra*, there is no evidence that Facebook did anything to verify that the relevant Facebook accounts were in fact what they purported to be including but not limited to doing anything to rule out that said accounts were not hacked or fake or that the participants in the Private Chat were actually not consenting adults engaging in role-playing.

There is also no evidence that Facebook made any effort to determine if the relevant Facebook accounts had in fact been hacked as part of the largest cyber attack Facebook reported to have occurred in September 2018. Because it is

irrefutable that the Private Chats could not have been virtually certain to have been what they purported to be at the time NCMEC received the CyberTip from Facebook, or that Facebook limited its search to only such communications, NCMEC, a government actor, cannot rely on the private search doctrine for the search it conducted of the Private Chats without a warrant. Accordingly, NCMEC's warrantless search constituted a search and seizure in violation of the Fourth Amendment.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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