No. 21-8017

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN SCOTT MEALS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the National Center for Missing and Exploited Children (NCMEC) violated petitioner's Fourth Amendment rights, and triggered application of the exclusionary rule, when it reviewed petitioner's sexually explicit Facebook conversations with a minor, where Facebook itself had already examined those communications and then forwarded them to NCMEC.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Meals, No. 19-cr-36 (Oct. 30, 2020)

United States Court of Appeals (5th Cir.):

United States v. Meals, No. 20-40752 (Dec. 30, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 21 F.4th 903.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2021. A petition for rehearing was denied on March 3, 2022 (Pet. App. 11a). The petition for a writ of certiorari was filed on May 26, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of sexually exploiting a minor by producing sexually explicit visual or printed material, in violation of 18 U.S.C. 2251(a) and (e), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Judgment 1. The district court sentenced petitioner to 600 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-10a.

1. In 2018, petitioner "engaged in a sexual relationship with" A.A., "a fifteen year-old female." Stipulation of Fact in Support of Defendant's Plea 2 (Stipulation). They had repeated sexual encounters, Pet. App. 1a, and petitioner took multiple sexually explicit photos of A.A., Stipulation 3. Petitioner and A.A. often "used a Facebook messaging application to discuss * * * their previous sexual encounters and their plans for future encounters." Pet. App. 1a.

Facebook voluntarily monitors its platform for content concerning the sexual exploitation of children. Pet. App. 2a; D. Ct. Doc. 55, at 2 (Feb. 21, 2020) (order denying motion to suppress). In November 2018, it detected and examined petitioner's communications with A.A. and determined that petitioner likely violated federal law. Pet. App. 2a. Facebook sent excerpts of the messages to the National Center for Missing and Exploited

Children (NCMEC) -- a private nonprofit entity, see, e.g., 18 U.S.C. 2258D(a); Pet. App. 8a -- which reviewed the messages and forwarded them to law enforcement. Pet. App. 2a.

In reliance on those messages, law enforcement sought and obtained a search warrant for petitioner and A.A.'s Facebook accounts and discovered more sexually explicit communications between them. Pet. App. 2a. A search of petitioner's electronic devices pursuant to a second warrant revealed that his phone contained pornographic images of A.A. Id. at 2a-3a.

2. A federal grand jury in the Southern District of Texas returned a superseding indictment charging petitioner with four counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Superseding Indictment 2-5; see Pet. App. 3a. Petitioner moved to suppress all of the evidence in this case. See Pet. App. 3a. He asserted that "he had an expectation of privacy in his Facebook" messages; that "Facebook and NCMEC violated his Fourth Amendment rights as government agents when they searched his messages without a warrant"; and that "the exclusionary rule's good-faith exception was inapplicable." Ibid.

The district court denied the suppression motion. D. Ct. Doc. 55, at 1-7. The court explained that the Fourth Amendment constrains only the government and government agents, and that the evidence in the record showed that Facebook was neither. Id. at

4-6. The court then assumed for the sake of argument that "NCMEC was a government agent" and that petitioner "had a reasonable expectation of privacy in his Facebook messages," but explained that under "the private search doctrine, the government does not violate the Fourth Amendment if, after a private party conducts a search, the government conducts the same search and the government's later search is 'confined to the scope and product of the initial search.'" Id. at 6 (citation omitted). The court found that NCMEC's review of petitioner's messages did not exceed the scope of Facebook's initial private examination and thus did not violate petitioner's Fourth Amendment rights. Id. at 7.

Petitioner subsequently entered a conditional plea of guilty to the possession count and to one of the production counts in return for the government's agreement to dismiss the other three production counts, reserving his right to appeal the district court's denial of his motion to suppress. See Judgment 1; Pet. App. 3a. The court sentenced petitioner to 600 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court observed that Facebook did not act as a government agent when it examined petitioner's Facebook messages with A.A., noting that it did so voluntarily and without any statutory compulsion. Id. at 6a-7a. Like the district court, the court of appeals then assumed for the sake of argument that NCMEC was a government agent,

but found that NCMEC "merely review[ed] the identical evidence that Facebook reviewed" and thus "did not exceed the scope of Facebook's search." Id. at 8a. And citing, among other things, this Court's decision in United States v. Jacobsen, 466 U.S. 109 (1984), the court of appeals explained that "NCMEC's review of Facebook's cyber tip did not violate [the] Fourth Amendment." Pet. App. 9a; see id. at 8a-9a.

The court of appeals explained that this case was unlike United States v. Ackerman, 831 F.3d 1292 (2016), in which the Tenth Circuit had concluded that NCMEC exceeded the scope of a private search in circumstances involving NCMEC's opening of three e-mail attachments that the private party had not opened, because here NCMEC had reviewed only "the content reviewed and forwarded by a Facebook employee." Pet. App. 8a-9a (citing Ackerman, 831 F.3d at 1306-1307). And the court disagreed with petitioner's assertion that "the chattel trespass test, as set forth in United States v. Jones, 565 U.S. 400, 132 S. Ct. 945 (2012)," nonetheless required suppression. Id. at 9a-10a.

ARGUMENT

Petitioner renews his contentions that the courts below "erred in deciding that NCMEC did not violate the Fourth Amendment because of the private search doctrine," Pet. 9, and that the "chattel trespass test" set forth in United States v. Jones, 565 U.S. 400 (2012), required NCMEC to obtain a warrant before reviewing the messages that Facebook had already examined, Pet. 4.

The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, the applicability of the good-faith exception to the exclusionary rule means that petitioner's Fourth Amendment arguments would not change the result in this case. This Court has denied review in other cases involving similar questions and circumstances. See, e.g., Ringland v. United States, 141 S. Ct. 2797 (2021) (No. 20-1204); Miller v. United States, 141 S. Ct. 2797 (2021) (No. 20-1202); Reddick v. United States, 139 S. Ct. 1617 (2019) (No. 18-6734); Powell v. United States, 139 S. Ct. 616 (2018) (No. 18-6505). It should follow the same course here.

1. The Fourth Amendment's protection against unreasonable searches and seizures applies only to intrusions by government actors, not to searches conducted by private parties. See Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Accordingly, in United States v. Jacobsen, 466 U.S. 109 (1984), the Court held that a government search that follows a private search of the same effects comports with the Fourth Amendment so long as it does not exceed the scope of the private search. Id. at 115-118. The court of appeals correctly applied that principle in affirming the denial of petitioner's suppression motion.

a. In Jacobsen, Federal Express employees opened a damaged cardboard box and found crumpled newspaper covering a tube containing "a series of four zip-lock plastic bags, the outermost

enclosing the other three and the innermost containing about six and a half ounces of white powder." 466 U.S. at 111. After notifying federal agents of their discovery, the employees put the plastic bags back inside the tube and placed the tube and newspapers back into the box. Ibid. When the first federal agent arrived, he removed the bags from the tube and saw the white powder. Ibid. The agent then opened each of the plastic bags and removed a trace of the white powder, which a field test confirmed was cocaine. Id. at 111-112.

In holding that the agent's actions and the field test were constitutionally permissible, the Court began with the proposition that the "initial invasions of [the] package were occasioned by private action" and therefore did not implicate the Fourth Amendment. Jacobsen, 466 U.S. at 115. The Court then explained that, once the private search had occurred, "[t]he additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." Ibid. And the Court found that "[e]ven if the white powder was not itself in 'plain view' because it was still enclosed in so many containers and covered with papers, there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell [the agent] anything more than he already had been told." Id. at 118-119.

The Court accordingly held that "the removal of the plastic bags from the tube and the agent's visual inspection of their contents" was not a Fourth Amendment search because those actions "enabled the agent to learn nothing that had not previously been learned during the private search." Jacobsen, 466 U.S. at 120. The Court observed that "the package could no longer support any expectation of privacy," in part because "[t]he agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see." Id. at 121. And the Court further determined that the field test of the white powder did not constitute a Fourth Amendment search. Id. at 122-126.

b. As the court of appeals recognized, the private-search doctrine resolves this case. Pet. App. 8a-9a. Facebook, whose status as a private actor is no longer contested, voluntarily examined petitioner's messages with A.A., id. at 2a, meaning that the "initial invasions of" petitioner's assumed privacy interest "were occasioned by private action" and therefore did not implicate the Fourth Amendment, Jacobsen, 466 U.S. at 115. Facebook then forwarded excerpts of those incriminating messages to NCMEC, Pet. App. 2a, whose review "enabled [it] to learn nothing that had not previously been learned during [Facebook's] private search," Jacobsen, 466 U.S. at 120. Accordingly, even if NCMEC were a government agent, its review "infringed no legitimate expectation of privacy" and did not amount to a search under the Fourth

Amendment. Ibid.; accord Pet. App. 9a; United States v. Powell, 925 F.3d 1, 6 (1st Cir.) (recognizing that the private search doctrine applied because "[t]he images of the screenshots that NCMEC viewed * * * were precisely the ones that had already been viewed by the private actor"), cert. denied, 139 S. Ct. 616 (2018).

Petitioner errs in contending that NCMEC's review falls outside the private-search doctrine on the theory that NCMEC could not be "'virtually' or 'substantially certain'" of the contents of his messages before reviewing them. Pet. 10; see Pet. 10-14. Any such requirement would apply only if NCMEC were deemed to have exceeded the scope of the previous private search. See Pet. App. 8a; see also Jacobsen, 466 U.S. at 119-120 & n.17. Here, however, NCMEC examined "only the content [previously] reviewed and forwarded by a Facebook employee" and thus "did not and could not open any non-existent unopened containers, emails, or attachments." Pet. App. 8a-9a.

c. Petitioner identifies no circuit that has found a Fourth Amendment violation when, as here, the governmental search does not exceed the scope of the private search. Petitioner's reliance on the Tenth Circuit's decision in United States v. Ackerman, 831 F.3d 1292 (2016), is misplaced. There, a government agent opened an e-mail containing four attachments and viewed all four attachments, only one of which had been identified by a private party as child pornography. Id. at 1306. The Tenth Circuit concluded that "opening the email and viewing the three other

attachments[] was enough to risk exposing private, noncontraband information that AOL had not previously examined," and relied on that conclusion to find a Fourth Amendment violation. Id. at 1306-1307. As the court of appeals explained, this case differs from Ackerman because the facts do not support any claim that NCMEC exceeded the scope of the previous search by a private entity (Facebook). Pet. App. 9a.

2. Petitioner separately contends (Pet. 4-7) that the Court should grant his petition for a writ of certiorari to consider whether this Court's decision in Jones, supra, has abrogated Jacobsen. That contention lacks merit.

Jones held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitute[d] a 'search'" under the Fourth Amendment. 565 U.S. at 404 (footnote omitted). The Court emphasized that it was "important to be clear about what occurred in th[e] case: The Government physically occupied private property for the purpose of obtaining information." Ibid. And the Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." Id. at 404-405.

The Court in Jones did not, however, extend its holding beyond "physical intrusion of a constitutionally protected area," 565 U.S. at 407 (citation omitted), to encompass electronic searches. The Court noted that "[i]t may be that [surveillance] through

electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy," but stated that the case "d[id] not require [the Court] to answer that question." Id. at 412. The Court later did address such an issue in Carpenter v. United States, 138 S. Ct. 2206 (2018), in which it held that under a reasonable-expectation-of-privacy approach, the government's acquisition of historical cell-site location information created and maintained by a cell-service provider is a Fourth Amendment search. Id. at 2217 & n.3. But although the Court noted that in separate concurrences in Jones, "[a] majority of th[e] Court ha[d] already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements," id. at 2217 (citing Jones, 565 U.S. at 430 (Alito, J., concurring in the judgment), and Jones, 565 U.S. at 415 (Sotomayor, J., concurring)), it did not apply Jones's physical-trespass analysis to the electronic search at issue, id. at 2214 & n.1.

In any event, even assuming that viewing an electronic copy of a Facebook message could be deemed materially identical to a physical trespass, Jones does not cast doubt on the decision below. Petitioner provides no basis for concluding that he had a constitutionally protected property interest in the electronic copies of his Facebook conversations when NCMEC opened them. He also does not dispute Facebook's authority to review and send copies of the conversations to NCMEC. He thus cannot show the control or authority over the conversations that would be a

prerequisite to any claim of common-law trespass. See, e.g., Oliver v. United States, 466 U.S. 170, 183 n.15 (1984) ("The law of trespass recognizes the interest in possession and control of one's property."); Restatement (Second) of Torts § 217, at 417 (1965) ("A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.").

Petitioner identifies no circuit that has applied Jones to a case like this. Cf. United States v. Miller, 982 F.3d 412, 433 (6th Cir. 2020) (explaining that "[t]he rule that the Fourth Amendment does not protect against private searches precedes the expectation-of-privacy test applied in Jacobsen by decades, so the Court was using the earlier 'common-law trespass' approach when it adopted" the private search doctrine) (citation omitted), cert. denied, 141 S. Ct. 2797 (2021) (No. 20-1202). The Tenth Circuit's decision in Ackerman suggested that after Jones, "it seems at least possible" that this Court would now conclude that the drug test in Jacobsen, which required the officers to "exceed[] the scope of the search previously performed by the private party and remove[] and destroy[] a small amount of powder," constituted a Fourth Amendment search. 831 F.3d at 1307. But Ackerman did not take the view that Jones had undercut Jacobsen's determination that the Fourth Amendment allows a federal agent to replicate a private search without exceeding its scope, as petitioner urges here. See id. at 1307-1308.

3. In any event, this case would be an unsuitable vehicle for reviewing the question presented because irrespective of how that question might be resolved, the evidence in this case would not be suppressed because the good-faith exception to the exclusionary rule applies. The government asserted the good-faith exception in both courts below. D. Ct. Doc. 34, at 21-24 (Jan. 14, 2020); Gov't C.A. Br. 29-33. And appellate courts generally "have discretion to affirm on any ground supported by the law and the record." Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018); see Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982).

The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). The rule does not apply "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Id. at 919. Instead, to justify suppression, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" for the exclusion of probative evidence. Herring v. United States, 555 U.S. 135, 144 (2009). "[E]vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was

unconstitutional under the Fourth Amendment." Leon, 468 U.S. at 919 (citation omitted).

Assuming for the sake of argument that NCMEC was a government agent, it would have been reasonable for it to have believed that the Fourth Amendment allowed it to review petitioner's communications with A.A. after Facebook, a private party, had already done so and had forwarded those communications to NCMEC. Local law enforcement reasonably believed the same. Indeed, the officers' actions here were supported by preexisting circuit precedent indicating that NCMEC's actions were permissible. See United States v. Reddick, 900 F.3d 636 (5th Cir. 2018) (applying the private-search doctrine to NCMEC's review of images forwarded by Microsoft), cert. denied, 139 S. Ct. 1617 (2019) (No. 18-6734); see also Pet. App. 9a (citing Reddick); cf. 2/4/20 Suppression Hr'g Tr. 14 (officer testimony noting familiarity with Reddick). "[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Davis v. United States, 564 U.S. 229, 232 (2011). Moreover, it was reasonable for the officers to rely on the issuance of search warrants by state judges who had been fully apprised of the relevant circumstances. See Leon, 468 U.S. at 918-921; see also D. Ct. Doc. 34-1, at 23-33, 38-50 (search warrant applications). Suppression of the evidence in this case under the exclusionary rule would thus be inappropriate regardless of the resolution of the question presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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