No. 23-5429

IN THE SUPREME COURT OF THE UNITED STATES

TYWAN SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

W. CONNOR WINN
Attorney

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

QUESTIONS PRESENTED

1. Whether Facebook, a private company, acted as an agent of the government when it monitored and reviewed petitioner's sexually explicit conversations with a minor on Facebook's messaging platform, which Facebook then reported to the National Center for Missing and Exploited Children.

2. Whether petitioner's Tennessee convictions for statutory rape and aggravated statutory rape qualify as offenses "relating to the sexual exploitation of children" for purposes of the second sentencing enhancement in 18 U.S.C. 2251(e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Tenn.):

United States v. Sykes, No. 18-cr-178 (Nov. 10, 2021)

United States Court of Appeals (6th Cir.):

United States v. Sykes, No. 21-6067 (Apr. 24, 2023)

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-5429

TYWAN SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 65 F.4th 867.[1] The order of the district court denying petitioner's motion to suppress is not published in the Federal Reporter but is available at 2021 WL 165122. The district court's order overruling petitioner's objection to the recidivist sentencing enhancement under 18 U.S.C. 2251(e) is unreported.

---

[1] As filed on the Court's electronic docket, the appendix to the petition for a writ of certiorari ("Appendix 1") is not separately labeled. In addition, the appendix does not contain the entirety of the court of appeals' opinion and does not contain the opinion of the district court regarding the motion to suppress. For ease of reference, this brief refers to the reported version of those opinions throughout.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2023. A petition for rehearing was denied on June 16, 2023 (2023 WL 4111475). The petition for a writ of certiorari was filed on August 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of enticing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. 2251(a); one count of attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); one count of committing a felony offense against a minor while subject to a requirement to register as a sex offender, in violation of 18 U.S.C. 2260A; and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Judgment 1-2. The district court sentenced petitioner to 45 years of imprisonment, to be followed by 30 years of supervised release. Judgment 3-4. The court of appeals affirmed. 65 F.4th 867.

1. In 2018, petitioner entered into a sexual relationship with a 15-year-old girl named M.D. 65 F.4th at 873, 882; Presentence Investigation Report (PSR) ¶ 18. They had multiple sexual encounters, and at petitioner's request, M.D. sent him

several sexually explicit photographs of herself. 65 F.4th at 873-875, 881-882. Petitioner and M.D. often discussed their past encounters and future plans through text messages and through private messages sent over the Facebook messaging platform. Id. at 873, 881-882.

Facebook monitors its online platform for harmful content involving children, including child pornography, for the "business purpose" of "keeping its platform safe and free from harmful content and conduct." 2021 WL 165122, at *6; see D. Ct. Doc. 56 (Aug. 17, 2020) (declaration from Facebook employee). Federal law requires Facebook and other "electronic communication service provider[s]" who become aware of content indicating a violation of certain federal offenses involving children to report that content to the National Center for Missing and Exploited Children (NCMEC), a private, nonprofit entity. 18 U.S.C. 2258E(6); see 18 U.S.C. 2258A(a), 2258D(a). NCMEC then makes a report to a federal, state, or local law enforcement agency. 18 U.S.C. 2258A(c). The law, however, disclaims any "require[ment]" that a service provider "monitor any user, subscriber, or customer," "monitor the content of any" of those persons' "communication[s]," or "affirmatively search" for any apparent or planned violations of federal law. 18 U.S.C. 2258A(f).

In October 2018, Facebook detected and then manually reviewed petitioner's communications with M.D. and determined that petitioner had possibly committed federal crimes against children.

65 F.4th at 873. Facebook sent the messages to NCMEC, which examined the messages and forwarded them to local law enforcement. Ibid. Law enforcement officers then interviewed M.D., executed search warrants on M.D.'s and petitioner's Facebook accounts and petitioner's cell phone, and arrested petitioner. Id. at 873, 878.

2. A federal grand jury in the Eastern District of Tennessee charged petitioner with one count of enticing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. 2251(a); one count of attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); one count of committing a felony offense against a minor while subject to a requirement to register as a sex offender, in violation of 18 U.S.C. 2260A; and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). 65 F.4th at 873-874. Petitioner moved to suppress the evidence obtained as a result of Facebook's review of his Facebook account on the theory that NCMEC is a government entity and that Facebook acted as a government agent when reviewing his account without a warrant. 2021 WL 165122, at *2.

The district court denied the suppression motion. 2021 WL 165122, at *2-*7, *9. It assumed without deciding that NCMEC is a government entity. Id. at *3. But the court applied Sixth Circuit precedent in United States v. Miller, 982 F.3d 412 (2020), cert. denied, 141 S. Ct. 2797 (2021), to find that Facebook acted

as a private actor when it detected, reviewed, and forwarded petitioner's and M.D.'s sexually explicit messages. 2021 WL 165122, at *3-*6. The court accordingly found no Fourth Amendment violation in Facebook's initial review, or in NCMEC's and law enforcement's subsequent review, of those messages. Id. at *6-*7.

3. After a jury trial, petitioner was convicted on all counts. 65 F.4th at 875.

One of petitioner's counts of conviction, 18 U.S.C. 2251, has a sentencing provision setting forth a default statutory sentencing range of 15-30 years of imprisonment. See 18 U.S.C. 2251(e). Section 2251(e) also contains two enhancements that apply based on a defendant's criminal history. The first enhancement provides that if the defendant:

> has one prior conviction under this chapter [chapter 110 of title 18], section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years[.]

18 U.S.C. 2251(e). The second enhancement states that if the defendant:

> has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined

> under this title and imprisoned not less than 35 years nor more than life.

Ibid.

In this case, the Probation Office determined that petitioner had two prior state offenses relevant to Section 2251(e)'s recidivist enhancements. In 1998, petitioner was convicted of statutory rape under Tenn. Code Ann. § 39-13-506(a) (1997), after he had sex with a minor more than four years his junior. PSR ¶ 67; see 65 F.4th at 875, 888. And in 2012, petitioner was convicted of aggravated statutory rape under Tenn. Code Ann. § 39-13-506(c) (Supp. 2008), after he had sex with a minor more than ten years his junior. PSR ¶ 82; see 65 F.4th at 875, 888. Based on those convictions, the Probation Office recommended that petitioner be subject to Section 2251(e)'s second enhancement. PSR ¶ 111. Petitioner objected on the theory that his Tennessee convictions were not for offenses "relating to the sexual exploitation of children," which in his view was limited solely to state offenses relating to the production of child pornography. Sent. Tr. 7-9, 25.

The district court overruled petitioner's objection and applied Section 2251(e)'s second enhancement, noting that multiple courts of appeals had rejected the narrow construction that petitioner proposed. Sent. Tr. 23-28. The court ultimately sentenced petitioner to a total of 45 years of imprisonment, to be followed by 30 years of supervised release. Id. at 39-40.

Specifically, the court imposed two concurrent 35-year prison terms for petitioner's Sections 2251 and 2422(b) convictions; a concurrent 10-year prison term for his Section 2252A conviction; and a mandatory, consecutive ten-year term of imprisonment for his Section 2260A conviction. Id. at 43.

4. The court of appeals affirmed petitioner's convictions and sentence. 65 F.4th 867.

a. The court of appeals determined that the district court correctly denied petitioner's motion to suppress the evidence derived from Facebook's review of his Facebook account. 65 F.4th at 876-877. Like the district court, the court of appeals assumed without deciding that NCMEC is a governmental entity, but nonetheless found that "Facebook's private search was not attributable to the government." Id. at 876. The court applied three alternative state-action tests outlined in its prior decision in Miller -- "a function test," "a compulsion test", and "a nexus test" -- to determine whether Facebook had acted as an agent of the government in reviewing the contents of petitioner's account on Facebook's platform. Id. at 876-877 (citations and internal quotation marks omitted). The court concluded that Facebook had conducted a private search under any of these tests, because its review of petitioner's account was not carrying out "a 'traditional and exclusive' government function," not compelled by the reporting requirement in 18 U.S.C. 2258A, and not the product of anything other than Facebook's "independent business purpose

[of] keeping its platform safe and free of child-exploitation content." 65 F.4th at 877.

b. The court of appeals also agreed with the district court that the second recidivist enhancement in Section 2251(e) applied. 65 F.4th at 884-889. Noting that the phrase "sexual exploitation of children" is not defined for purposes of Section 2251's sentencing provision or otherwise, see id. at 885, the court observed that the "plain meaning of 'sexual exploitation' is broad and covers 'the use of a person, esp[ecially] a child, in prostitution, pornography, or other sexually manipulative activity.'" Id. at 887 (quoting Black's Law Dictionary (11th ed. 2019)) (brackets in original).

The court of appeals also found that statutory structure supports reading the phrase to encompass more than child-pornography crimes, observing that the listed federal predicates that likewise subject a defendant to the second enhancement include "a variety of sexual abuse offenses," including rape and sexual assault. 65 F.4th at 887. The court reasoned that such a "broad list of federal offenses * * * suggests a congressional intent to focus on a broad array of state sexual offenses" as well. Ibid. The court also observed that, among other relevant features of Section 2251(e)'s background and history, Congress had amended Section 2251(e) in other respects in 2006, while leaving the relevant phrase intact, and that elsewhere in the same 2006 legislation, Congress had defined the term "offenses relating to

the sexual exploitation of children" to include "sexual abuse of a minor" and other "offenses that go beyond the production of child pornography." Id. at 888.

The court of appeals thus recognized that offenses "relating to the sexual exploitation of children" include "child-sexual-abuse offenses" like petitioner's Tennessee rape convictions. 65 F.4th at 889; see ibid. (noting that such crimes entail "tak[ing] sexual advantage of a child or early teen") (citation omitted). In doing so, the court aligned itself with the Third, Fourth, and Eighth Circuits. Id. at 885, 887-888 & n.6; see United States v. Winczuk, 67 F.4th 11, 17-18 (1st Cir. 2023) (adopting similar definition of statutory phrase), petition for cert. pending, No. 23-5619 (filed Sept. 14, 2023); United States v. Moore, 71 F.4th 392, 399 (5th Cir. 2023) (same), petition for cert. pending, No. 23-219 (filed Sept. 5, 2023). And while the court acknowledged that the Ninth Circuit had adopted the narrow reading that petitioner favored, see United States v. Schopp, 938 F.3d 1053, 1069 (2019), it found the Ninth Circuit's analysis -- and in particular that court's heavy reliance on Section 2251's title, notwithstanding other relevant indications of statutory meaning -- unpersuasive. See 65 F.4th at 886-887.

ARGUMENT

Petitioner seeks review of whether NCMEC is a governmental entity and whether, "[i]f the NCMEC is a Governmental Entity," an internet service provider should itself be treated as a government

agent for Fourth Amendment purposes when the provider reviews content on its platform to detect child pornography and other harmful content. Pet. A; see Pet. 12-21. But the court of appeals did not decide the former question, and its determination that Facebook acted as a private actor in reviewing petitioner's Facebook messages is correct and does not conflict with any decision of this Court or another court of appeals. This Court has denied review in other cases presenting similar Fourth Amendment questions, see Rosenow v. United States, 143 S. Ct. 786 (2023) (No. 22-609); Powell v. United States, 139 S. Ct. 616 (2018) (No. 18-6505); Richardson v. United States, 562 U.S. 982 (2010) (No. 10-352), and it should follow the same course here.

Petitioner also renews his contention (Pet. 21-27) that the second enhancement in 18 U.S.C. 2251(e) applies only to convictions for state offenses involving the production of child pornography. Petitioner's arguments are similar to those raised in the petition for a writ of certiorari in Moore v. United States, No. 23-219 (filed Sept. 5, 2023). For the reasons explained in the government's brief in opposition in Moore, those contentions lack merit and this question presented does not warrant further review. See Br. in Opp. at 6-16, Moore, supra (No. 23-219).[2]

[2] We have served petitioner with a copy of the government's brief in opposition in Moore. The same question is also presented in the pending petition in Winczuk v. United States, No. 23-5619 (filed Sept. 14, 2023).

1. Petitioner first contends (Pet. 13-15) that this Court should grant certiorari to decide whether NCMEC is a governmental entity. As he acknowledges, however (Pet. 12), the court of appeals did not decide that question. See 65 F.4th at 876; see also 2021 WL 165122, at *3 (district court likewise declining to decide that issue). That is because, even assuming that NCMEC is a government actor, the private-search doctrine would still foreclose petitioner's Fourth Amendment claim so long as Facebook is held to be a private actor. See generally United States v. Jacobsen, 466 U.S. 109 (1984); see also United States v. Miller, 982 F.3d 412, 426 (6th Cir. 2020), cert. denied, 141 S. Ct. 2797 (2021).

Facebook was the first entity to examine petitioner's messages with M.D., 65 F.4th at 873, such that (so long as Facebook was not acting as a government agent, see pp. 12-15, infra) 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 those messages to NCMEC, whose review "enabled [it] to learn nothing that had not previously been learned during [Facebook's] private search." Id. at 120. Accordingly, even if NCMEC were a governmental entity, its review would have "infringed no legitimate expectation of privacy" and would not have amounted to a Fourth Amendment search. Ibid.; see United States v. Powell, 925 F.3d 1, 6 (1st Cir.) (holding that the private search doctrine

applied where "[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).

Because the court of appeals had no need to decide the question of NCMEC's governmental status, and did not do so, this Court's review is unwarranted. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. Petitioner further contends (Pet. 15-21) that Facebook acted as a government agent when it viewed his sexually explicit messages with M.D. As framed in the petition, however (Pet. A), petitioner expressly hinges resolution of that second issue on a prior resolution in his favor on the question whether NCMEC is a government entity -- a question that, for reasons just discussed, does not warrant this Court's review. See pp. 10-12, supra. In any event, the court of appeals, which assumed without deciding that NCMEC was a governmental entity, 65 F.4th at 876, correctly rejected his contention that Facebook was a state actor when it discovered his messages, and the court's determination of that issue does not warrant this Court's review.

a. While the Fourth Amendment does not apply to searches or seizures conducted by a private party on its own initiative, see, e.g., Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602, 614 (1989), it does protect against such searches "if the private party acted as an instrument or agent of the Government." Ibid. The

determination of whether a private party should be deemed an agent of the government for Fourth Amendment purposes "necessarily turns on the degree of the Government's participation in the private party's activities, * * * a question that can only be resolved 'in light of all the circumstances.'" Ibid. (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)) (citations omitted).

Nothing in this case suggests that Facebook acted as a government agent when it reviewed petitioner's messages on its platform. Like "shopkeepers investigating theft by shoplifters," Miller, 982 F.3d at 423, Facebook monitored petitioner's account based on its independent business purpose of "keeping its platform safe and free of" criminal activity -- here, "child-exploitation content," 65 F.4th at 877; see D. Ct. Doc. 56 (declaration from Facebook employee). And the company engaged in that monitoring before law enforcement's involvement in this matter. See ibid. Facebook therefore acted appropriately and "wholly on [its] own initiative," Coolidge, 403 U.S. at 487, in reviewing petitioner's communications. See, e.g., United States v. Rosenow, 50 F.4th 715, 732-734 (9th Cir. 2022) (finding no government involvement in Yahoo's and Facebook's privately initiated searches for the business purpose of creating safe and desirable platforms), cert. denied, 143 S. Ct. 786 (2023).[3]

[3] Accord United States v. Bebris, 4 F.4th 551, 561-562 (7th Cir.), cert. denied, 142 S. Ct. 489 (2021); Miller, 982 F.3d at 425-426; United States v. Ringland, 966 F.3d 731, 736 (8th Cir. 2020), cert. denied, 141 S. Ct. 2797 (2021); United States v. Cameron, 699 F.3d 621, 637-638 (1st Cir. 2012), cert. denied, 569

b. Petitioner appears to contend (Pet. 15-17, 20) that Facebook should be deemed a government agent because 18 U.S.C. 2258A requires Facebook to report apparent instances of federal crimes involving children to NCMEC and, in his view, encourages Facebook to conduct private searches that trigger this obligation. That contention is mistaken.

Section 2258A imposes a limited reporting obligation on internet service providers like Facebook: when they learn of "apparent violation[s]" of certain federal laws, they must report the known facts and circumstances of those crimes to NCMEC. 18 U.S.C. 2258A(a)(2)(A); see 18 U.S.C. 2258A(a)(1). Providers also "may" report facts and circumstance that "indicate" a "planned or imminent" violation of those laws. 18 U.S.C. 2258A(a)(1)(A)(ii) and (2)(B). But as the court of appeals observed below, Section 2258A explicitly "disclaims any duty on the part of service providers to 'monitor any user, subscriber, or customer of that provider,' 'monitor the content of any communication of any [user, subscriber, or customer],' or 'affirmatively search, screen, or scan for [offending content].'" 65 F.4th at 877 (quoting 18 U.S.C. 2558A(f)) (brackets in original). As other lower courts have recognized, such a limited reporting obligation, devoid of any monitoring or searching requirement, does not convert a private

---

U.S. 939 (2013); United States v. Richardson, 607 F.3d 357, 364-365 (4th Cir.), cert. denied 562 U.S. 982 (2010).

party into a government actor for purposes of the Fourth Amendment. See Rosenow, 50 F.4th at 730-731 (collecting cases).

3. Petitioner provides no sound reason to review the decision below. Although he suggests (Pet. 13) a circuit conflict between the decision below and the Tenth Circuit's decision in United States v. Ackerman, 831 F.3d 1292 (2016), on whether NCMEC is a governmental entity, that is not an issue that the decision below resolves. See 65 F.4th at 876; see also Pet. 13.

Moreover, the overall result of the decision below is consistent with Ackerman. There, a NCMEC analyst opened an e-mail containing four attachments and viewed all four attachments, only one of which a private party (AOL) had indicated to contain child pornography. Ackerman, 831 F.3d at 1294. The Tenth Circuit took the view that NCMEC was a government entity, id. at 1295-1299, and then concluded that a Fourth Amendment violation had occurred on the ground that "opening the email and viewing the three other attachments" – i.e., the ones that AOL had not viewed -- "was enough to risk exposing private, noncontraband information that AOL had not previously examined." Id. at 1306-1307. But the Tenth Circuit expressly declined to resolve the ultimate question at issue in this case: whether a government agent violates the Fourth Amendment by opening an image after a private party already has determined the file's contents. Id. at 1306-1308.

4. At all events, irrespective of how petitioner's first two questions presented are resolved, suppression would not be

warranted because the good-faith exception to the exclusionary rule would apply. The government invoked the good-faith exception below. D. Ct. Doc. 50, at 10-11 (Aug. 7, 2020); Gov't C.A. Br. 33-34. 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).

In this case, it would have been reasonable for an officer to believe -- like the district court and the court of appeals --

that the Fourth Amendment did not prohibit Facebook, NCMEC, or law enforcement from reviewing petitioner's communications with M.D. "[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). And here, preexisting circuit precedent indicated that the actions at issue were permissible. See Miller, 982 F.3d at 421-431 (applying the private-search doctrine to NCMEC's and law enforcement's review of images forwarded by Google); see also 65 F.4th at 876 (stating that "Miller controls [the] analysis here"). Suppression of the evidence would therefore be inappropriate in this case regardless of the answer to petitioner's first two questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

W. CONNOR WINN
Attorney

NOVEMBER 2023