No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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ZODIAC AZUCENAS,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

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

Whether the Ninth Circuit Court of Appeals erred in affirming the district court's denial of Mr. Azucenas's motion to suppress?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, *United States v. Zodiac Azucenas,* 19cr02688-JLS. The district court entered the judgment on May 5, 2023. *See* Appendix B.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Zodiac Azucenas*, No. 23-783. *See* Appendix A.

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Petitioner, Zodiac Azucenas, respectfully petitions for a writ of certiorari to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit issued on October 8, 2024.

OPINION BELOW

In an unpublished memorandum decision, the United States Court of Appeals for the Ninth Circuit affirmed the sentence imposed by the district court. Appendix A.

JURISDICTION

The Court of Appeals issued a memorandum decision on October 8, 2024. No petition for rehearing was filed. This petition is being filed within the 90-day time limit for certiorari petitions. The Court has jurisdiction under 28 U.S.C. §1254(1).

INVOLVED FEDERAL LAW

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. Azucenas are based on private chats that took place in December 2016 and January 2017 on Facebook Messenger, (hereinafter "the Private Chats"). On December 30, 2016, at 21:48:27 UTC, Facebook, Inc. (Facebook) submitted CyberTip 16230562 to the National Center of Missing and Exploited Children (NCMEC). [3-ER-270.][1] That CyberTip detailed the contents of messages sent through private chat and also what was categorized as child exploitation imagery ("CEI"). [3-ER-270.] On January 10, 2017 at 20:20:28 UTC,

[1]References to the "ER" are to the excerpts of record filed with the United States Court of Appeals for the Ninth Circuit.

Facebook submitted CyberTip 16402868. [3-ER-279.] That CyberTip again detailed the contents of messages sent through private chat and CEI. [3-ER-279.]

Several hours later on the same day, Facebook sent a supplemental report in CyberTip 16405010 to the NCMEC. [3-ER-286.] That CyperTip stated that a 37 year old male requested and received nude images from a 15 year old female in exchange for money. [3-ER-286.] The report further noted that the Facebook location and IP address of the female was in the Phillipines. [3-ER-286.] The report indicated a search was conducted and a possible Flickr profile was located which used the same email address as the Facebook account. [3-ER-297.] The report states an image was located in the Flickr account and saved to the Electronic Filing System. [3-ER-297] The report noted the IP address and Flickr profile indicated a location in San Diego, California. [3-ER-297.] The NCMEC then provided the reports to the ICE Field Office in the Philippines and the San Diego Police Department. [3-ER-298.]

Based on the CyberTip, Special Agent William Thompson applied for and obtained a search warrant for the Facebook account. [3-ER-225.] Based on the information discovered from this warrant, SA Thompson applied for and obtained a warrant to search the home where Mr. Azucenas lived. [3-ER-239.] Homeland Security Investigations (HSI) and the San Diego Police Department executed the warrant on January 9, 2018. [3-ER-269.] SA Thompson interviewed Mr. Azucenas

on the scene and investigators seized the following: a Huawei cell phone, a tower computer, an Acer Laptop, a Western Digital Loose Hard Drive, a Western Digital External Hard Drive, and a LG cell phone. [3-ER-209, 269.] The government arrested Mr. Azucenas and charged him with violations of 18 U.S.C. § 2252(a)(2), Receipt of Images of Minors Engaged in Sexually Explicit Conduct (Count 1) and 18 U.S.C. § 2252(a)(4)(b), Possession of Images of Minors Engaged in Sexually Explicit Conduct (Count 2). [2-ER-146, 149.]

Mr. Azucenas moved to suppress the evidence obtained against him on the basis that the Government's search of the Private Chats constituted an unreasonable search and seizure in violation of the Fourth Amendment. [2-ER-111.] The district court denied his motion to suppress. [1-ER-57-58, 65.] Mr. Azucenas proceeded to trial and the jury convicted him on both counts. [2-ER-79.] Mr. Azucenas is serving a 90 month term of imprisonment. [1-ER-17.]

On April 24, 2023, Mr. Azucenas filed a notice of appeal and on May 15, 2023 he filed an amended notice of appeal. [2-ER-155-56.] On appeal, Mr. Azucenas argued that the district court improperly denied his motion to suppress. The Ninth Circuit affirmed the district court's denial of Mr. Azucenas's motion to suppress. (App. A.)

This petition follows.

REASONS TO GRANT THE WRIT

THE GOVERNMENT'S WARRANTLESS REVIEW OF MR. AZUCENAS'S PRIVATE WRITTEN COMMUNICATIONS ON FACEBOOK'S MESSENGER CONSTITUTES A PHYSICAL INTRUSION OF MR. AZUCENAS'S PAPERS AND EFFECTS IN VIOLATION OF THE FOURTH AMENDMENT AND RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET RESOLVED BY THIS COURT.

The case at bar presents an opportunity for this Court to decide whether the chattel trespass test required by *United States v. Jones*, 565 U.S. 400 (2012) applies to determine whether the NCMEC needed to obtain a warrant to view the Private Chats–Mr. Azucenas's private papers and effects. The Tenth Circuit previously 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 the 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 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 the 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 the NCMEC to have obtained a warrant to have and review Ackerman's emails to be in compliance with the Fourth Amendment. Like *Ackerman*, here the NCMEC also needed to obtain a warrant to have and review the Private Chats, Mr. Azucenas's papers and effects. As this Court determined in *Jones*, Mr. Azucenas'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, the NCMEC conducted a warrantless search of Mr. Azucenas's papers and effects, and in doing so violated the Fourth Amendment

under the *Jones*' trespass to chattel theory. Accordingly, Mr. Azucenas's motion to suppress should have been granted.

THE NINTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S DENIAL OF MR. AZUCENAS'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 THIS COURT'S SUPERVISORY POWER.

The second question presented is whether the Ninth 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 the 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 from the case at bar. The case law relied upon by the district court involved the online distribution of child pornography and not private chats sent on Facebook Messenger. This Court should grant certiorari because the decision of the Ninth 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). This 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 messaging 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.

The district court erred in deciding that the NCMEC did not violate the Fourth Amendment because of the private search doctrine. The district court erred because this Court's precedent actually supports Mr. Azucenas's position that the private search doctrine does not apply and does not absolve the 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 the NCMEC could have had that the Private Chats were actually what they purported to be.

The district court erred because in order for the 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. *See United States v. Jacobsen*, 466 U.S. at 119-20; *United States v. Runyan*, 275 F.3d 449, 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).

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.. 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. 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 the NCMEC received the CyberTip from Facebook, or that Facebook limited its search to only such communications, the NCMEC, a government actor, cannot rely on the private search doctrine for the search it

conducted of the Private Chats without a warrant. Accordingly, the NCMEC's warrantless search constituted a search and seizure in violation of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Mr. Azucenas respectfully requests that this Court grant his petition for a writ of certiorari.

Dated: January 6, 2025

Respectfully submitted,
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