No. 12-429

In the Supreme Court of the United States

ADAM WAYNE LEBOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the information submitted to the issuing magistrate established probable cause to search petitioner's residence for child pornography.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-28a) is reported at 676 F.3d 1000. The order of the district court (Pet. App. 29a-64a) is reported at 647 F. Supp. 2d 1336.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2012. A petition for rehearing was denied on July 9, 2012 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 8, 2012 (Monday). 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 Northern District of Georgia, petitioner was convicted on one count of sexual exploitation of a

minor, in violation of 18 U.S.C. 2251(a) and (e), and one count of attempted coercion and enticement of a minor, in violation of 18 U.S.C. 2422(b). Pet. App. 3a. He was sentenced to 320 months of imprisonment, to be followed by a life term of supervised release. *Ibid.*; 07-cr-00195 Docket entry No. 168 (N.D. Ga. July 12, 2010). The court of appeals affirmed. Pet. App. 2a-28a.

1. a. In October 2006, petitioner contacted, K.S., a 15-year-old male, through K.S.'s MySpace account. Pet. App. 3a. When K.S. registered with MySpace, he claimed to be 21 so that his profile would be public, but the on-line profile he created suggested that he was 17 or 18 years old. *Ibid.* After petitioner gave K.S. his contact information, they engaged in on-line chats and exchanged email. *Ibid.* In one of the initial chats, K.S. informed petitioner that he was 15 years old. The chats were "sexual in nature" and petitioner "sent K.S. nude photographs of himself." *Ibid.* K.S. informed his mother about his correspondence with petitioner. *Id.* at 4a. After finding petitioner's phone number in an email to K.S., she phoned petitioner, threatening to kill him if he did not stop contacting her son. *Ibid.* Petitioner nevertheless sent K.S. a chat message asking if anything was wrong. *Ibid.*

After contacting law enforcement, K.S. and his mother agreed that K.S. would continue his correspondence with petitioner "to determine [petitioner's] intentions." Pet. App. 4a. At the instruction of the investigator, K.S. again mentioned that he was 15 years old in subsequent email and recorded telephone conversations. *Ibid.* In his last phone call with K.S., despite acknowledging K.S.'s age, petitioner arranged to meet with K.S. at his home and discussed having sex with him. *Id.* at 4a-5a; see *id.* at 5a (noting that petitioner asked K.S. "if it was

safe to meet because he did not 'want to get arrested or anything.'"). A law enforcement officer arrested petitioner when he arrived at K.S.'s house. *Id.* at 5a. When she searched his car, the officer found a backpack in the front seat containing condoms and lubricants. *Ibid.* She also found two sleeping bags and two towels. *Ibid.*

b. After arresting petitioner, the officer obtained a warrant to search petitioner's home. Pet. App. 5a. In the warrant application, the officer explained that petitioner had been "arrested for criminal attempt to commit aggravated child molestation and enticing a child for indecent purposes." *Id.* at 70a-71a. She further stated that petitioner "contacted the victim from his home computer, via the internet, to send nude photos of himself and emails to discuss" sex with K.S. *Id.* at 71a. The officer explained that petitioner drove to K.S.'s home "with the intentions [*sic*] of having sex with the victim," which was demonstrated by the "bag with two unsealed personal lubricants and a large amount of condoms" petitioner had with him in his car. *Ibid.* The application requested a warrant to search petitioner's home for "tangible evidence of the commission" of the crimes described; for evidence of items "designed" or "intended" for use in the commission of the crimes described or that had been used in the commission of the crimes; and for "contraband, the possession of which is unlawful." *Id.* at 35a.

A magistrate judge issued a search warrant, authorizing seizure of a variety of specified items, including "[p]ornographic material(s), computer(s), * * * [c]amera(s), video equipment, any photographic form, slides, prints, negatives, video tapes, motion pictures * * * [and] any items commonly found in child pornogrphie [*sic*] cases." Pet. App. 71a-72a. Law en-

forcement officers executed the search warrant and seized, among other things, three computers and VHS tapes, including a VHS tape labeled "XXX" that contained video images of petitioner engaging in sexual acts with two teenage males. *Id.* at 5a. The officers discovered still images from the video on one of petitioner's computers "stored in a manner indicating that the images had been distributed over the internet." *Id.* at 5a-6a; see 2/19/10 Trial Tr. 674-678 (testimony that video and photographs were located in petitioner's "sent" folder and that images also were located in petitioner's file-sharing folder).

2. a. A grand jury indicted petitioner on two counts of producing child pornography, in violation of 18 U.S.C. 2551(a) and (e), and one count of attempting to entice a child to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Pet. App. 6a, 30a.

Petitioner filed a pretrial motion (Pet. App. 65a-84a) to suppress the evidence seized from his home, arguing, in part, that the search warrant was overbroad and did not "set forth probable cause for seizure of the vast quantity of material described in the warrant" (*id.* at 72a). Petitioner argued that the affidavit supporting the application for the search warrant "could at most justify a search for digital or other storage media containing copies" of his communications with K.S. *Id.* at 73a. A federal magistrate judge recommended denying the suppression motion. *Id.* at 33a-64a. The magistrate judge concluded that the bulk of the items identified in the search warrant "could reasonably contain evidence of the offenses specified on the face of the warrant" and that, therefore, probable cause supported seizure of those items. *Id.* at 54a.

Although the magistrate judge found the warrant's authorization to search for "pornographic material(s)" and for "any items commonly found in child pornogr[a]phic cases" a "closer question," Pet. App. 56a (quoting warrant) (brackets in original), she concluded that probable cause existed to search for those items, given the "well known and recognized links between pedophilic behavior" and possession of child pornography. *Id.* at 60a; see *id.* at 57a-59a (discussing cases). The magistrate judge also found that, even if the affidavit failed to establish probable cause, suppression was not warranted under the good-faith exception to the exclusionary rule. *Id.* at 60a-64a. The district court adopted the magistrate judge's recommendation in full and denied petitioner's suppression motion. *Id.* at 29a-33a.

A jury found petitioner guilty of one count of sexual exploitation of a minor, in violation of 18 U.S.C. 2251(a) and (e), but it found him not guilty of the second count. Pet. App. 8a. It also found him guilty of one count of attempted coercion and enticement of a minor, in violation of 18 U.S.C. 2422(b). Pet. App. 8a.

b. The court of appeals affirmed (Pet. App. 2a-28a), upholding the district court's rejection of petitioner's motion seeking suppression of the video tape found in petitioner's home (*id.* at 15a-16a). The court of appeals did not decide whether probable cause supported the inclusion of child pornography in the warrant. *Ibid.* Instead, it held that even accepting petitioner's contention that probable cause was lacking for a search of "pornographic material" and "items commonly found in child pornogrphic [sic] cases," *id.* at 15a (quoting search warrant) (alteration in original), the seizure of the video tape was permitted under "the good-faith exception to the exclusionary rule," which instructs courts not to

"exclude evidence obtained by police officers acting in reasonable reliance on a search warrant," *ibid.* (citing *United States* v. *Leon*, 468 U.S. 897, 922 (1984)). The court of appeals observed that the good-faith exception may not be applied only in "four limited sets of circumstances" but, it concluded, "[n]one are applicable here." *Ibid.* (citing *United States* v. *Martin*, 297 F.3d 1308, 1313 (11th Cir.), cert. denied, 537 U.S. 1076 (2002)). Alternatively, the court of appeals held that the seizure of the video tape was authorized by the warrant's separate authorization for seizure of "video tapes," which the court of appeals concluded petitioner "does not challenge." *Id.* at 16a n.4.

ARGUMENT

Petitioner seeks this Court's review (Pet. i.) of the question whether "a showing of probable cause for the offense of attempted child molestation or enticement" is sufficient to authorize "home searches for child pornography." The court of appeals did not address that question, instead upholding the seizure of the incriminating video tape on the basis of the good-faith exception to the exclusionary rule. That decision does not conflict with any decision of this Court or any other courts of appeals, and this Court's review of the question presented would have no practical effect because petitioner does not challenge the court of appeals' application of the good-faith exception. Further review is not warranted.

1. Petitioner contends (Pet. 6-17) that the warrant to search his home was overbroad in authorizing the seizure of child pornography and that this Court should grant certiorari to decide "how the molestation-to-pornography link is to be established." Pet. 16-17. But that is not an issue the court of appeals addressed. Instead, the court assumed the correctness of petition-

er's contention that probable cause did not support a search for pornography and held that the seizure of the video tape was nevertheless permissible under the good-faith exception. Pet. App. 15a ("Even if we were to accept [petitioner's] argument that probable cause did not support inclusion of 'pornographic material' and 'any items commonly found in child pornogrphic [sic] cases' in the warrant, we find that the good-faith exception to the exclusionary rule would apply.") (alteration in original). Petitioner concedes as much. Pet. 17 ("It is true, of course, that the Eleventh Circuit panel that affirmed Petitioner's convictions went straight to good faith analysis rather than parsing the probable cause issue.").

The settled practice of this Court is to decline review of questions not passed on by the lower court. See *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (declining to resolve an issue because Court was "without the benefit of thorough lower court opinions to guide our analysis of the merits"); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). *F. Hoffmann-La Roche Ltd* v. *Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals * * * did not address this argument and, for that reason, neither shall we.") (internal citation omitted); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). Petitioner offers no reason to depart from that rule in this case, and there is none.

2. Further review is unwarranted for the additional reason that petitioner does not seek review of the actual ground for the court of appeals' decision, which was also an alternative basis for the district court's ruling. See *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 465 n.5 (1962) (dismissing writ of certiorari where appeals court's

judgment was supported by two different grounds "and the petitioner did not seek certiorari as to the second and independent ground"). Both the court of appeals (Pet. App. 15a-16a) and the district court (*id.* at 60a-64a) held that, even assuming that probable cause was lacking for a search for pornographic material, the video tape petitioner sought to suppress was admissible pursuant to the good-faith exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 897, 921, 923 (1984) (holding that suppression of evidence seized pursuant to a warrant is appropriate where, among other things, the "warrant [is] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or "where the issuing magistrate wholly abandoned his judicial role"). The lower courts correctly applied the good-faith exception to the facts of this case. Pet. App. 15a-16a, 60a-64a; see *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1246 (2012) (holding that "[e]ven if the scope of the warrant were overbroad in authorizing a search for all guns when there was information only about a specific one" in affidavit supporting warrant, officer reasonably relied on warrant in light of the circumstances); *Herring* v. *United States*, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, 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 judicial system.").

Petitioner does not seek review of the court of appeals' conclusion that the *Leon* exception to the exclusionary rule was applicable in this case. Instead, he seeks this Court's decision on whether "a showing of probable cause for the offense of attempted child molestation or enticement" is sufficient to support a warrant

authorizing a search for pornography. Pet. i. Petitioner suggests, in passing, that resolving the question presented "goes far" in determining whether the exclusionary rule should apply because the affidavit supporting a warrant is so deficient as to render unreasonable any belief in the existence of probable cause. Pet. 17 (citing *Virgin Islands* v. *John*, 654 F.3d 412, 419 (3d Cir. 2011)). Petitioner contends that "[t]he same logic must be applied, and the same matters considered, whether one is conducting a plenary review of the warrant or simply determining whether it was worthy of reasonable reliance." *Ibid.* But that is incorrect.

Whether a warrant is invalid because it was supported by insufficient probable cause does not resolve the question of whether the warrant is "so facially deficient * * * that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923. The latter question is not "fairly included," Sup. Ct. R. 14.1(a), in the former. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) ("A question which is merely complementary or related to the question presented in the petition for certiorari is not fairly included therein.") (internal quotation marks omitted). The petition thus does not seek review of the ground on which the court of appeals affirmed the district court's denial of petitioner's suppression motion.[*]

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[*] This case, in any event, would be a poor vehicle for addressing the question presented because resolution of that question in petitioner's favor would not affect the outcome. A search of petitioner's computer revealed still images from the video tape and the full video itself. 2/19/10 Trial Tr. 663-664, 674-678. The search also disclosed petitioner's online chats that discussed his relationship with the teenage males depicted in the photographs and that referred to the video. *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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at 692-699. Accordingly, the video tape was admissible under the inevitable discovery doctrine. See *Nix* v. *Williams*, 467 U.S. 431, 443-444 & n.4 (1984).