STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024AP469-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREAS W. RAUCH SHARAK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION,
ENTERED IN JEFFERSON COUNTY CIRCUIT COURT,
THE HONORABLE WILLIAM F. HUE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
conwaymj@doj.state.wi.us

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INTRODUCTION

Andreas W. Rauch Sharak appeals the denial of his motion to suppress following his plea of no contest to five charges of possessing child pornography. The investigation that led to Rauch Sharak's arrest was initiated by a CyberTip generated by Google after Google detected four files of child sexual abuse material (CSAM) in Rauch Sharak's Google Photos account. Police prepared and executed a search warrant for Rauch Sharak's home and electronic devices, leading to the recovery of 15 CSAM files on his cell phone.

In this appeal, Rauch Sharak argues that the circuit court erred in denying his motion to suppress these CSAM files because it erroneously determined that Google acted in a private capacity, rather than as a government agent, when it scanned his account for CSAM. The circuit court did not err in concluding that Google conducted a private search.

It is undisputed that Google scanned Rauch Sharak's account independently without government involvement or assistance. Google scanned his account pursuant to its own policies to further its own business interests. It is also undisputed that, while this is an issue of first impression in Wisconsin, all other courts to address this issue have concluded that electronic service providers like Google conduct a private search when scanning a user's account for CSAM.

Rauch Sarak nevertheless asks this Court to depart from every other court based on his theory that an intricate web of federal statutes implicitly encourages Google to search for CSAM. However, Rauch Sharak overstates or mischaracterizes the effects of his cited laws. None of his cited laws encouraged Google to scan Rauch Sharak's account, and multiple federal courts have already rejected Rauch Sharak's theory. Most importantly, Rauch Sharak cannot reconcile his theory of implicit encouragement with the fact that federal

law explicitly tells electronic service providers that they have no affirmative obligation to search for CSAM on their platforms. Moreover, this Court has two additional bases on which to affirm.

First, this Court can decline to decide whether Google conducted a government or private search by concluding that Rauch Sharak lacked a reasonable expectation of privacy in the four CSAM files. The circuit court erred in concluding that he did. The circuit court failed to appreciate that Google's policies unambiguously informed Rauch Sharak that Google bars CSAM from its platform, scans user accounts for CSAM, and notifies law enforcement of discovered CSAM. Given those policies, Rauch Sharak had no reasonable expectation of privacy in CSAM stored in his Google Photos account.

Second, this Court may affirm by applying the good faith exception to the exclusionary rule. This is an issue of first impression in Wisconsin law; law enforcement acted in accordance with the law in other jurisdictions; and no law enforcement misconduct occurred. Thus, the exclusionary rule would not serve as a deterrent.

ISSUES PRESENTED

1. Did Rauch Sharak prove that he had a reasonable expectation of privacy in CSAM in his Google Photos account?

The circuit court answered: Yes.

This Court should answer: No.

2. Did the government encourage Google's search of Rauch Sharak's account such that Google acted as an agent of the government?

The circuit court answered: No.

This Court should answer: No.

3. If a Fourth Amendment violation occurred, should the good faith exception to the exclusionary rule apply to this novel issue of Wisconsin law?

The circuit court answered: No.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is appropriate because this case raises an issue of first impression in Wisconsin law and concerns a recurring fact pattern. The decision will therefore "[e]nunciate a new rule of law" and dispose of a "case of substantial and continuing public interest." Wis. Stat. § (Rule) 809.23(1)(a)1., 5. The State does not request oral argument because the parties' briefs adequately address the issues.

STATEMENT OF THE CASE

The material facts underlying Rauch Sharak's convictions are not disputed. (R. 36:1.) Google sent a CyberTip to the National Center for Missing and Exploited Children (NCMEC), reporting four files containing CSAM that Rauch Sharak had uploaded to his Google Photos account. (R. 31:5–7, 9.) The CyberTip stated that a Google employee had opened the files and reviewed them "to the extent necessary to confirm that [they] contained apparent child pornography." (R. 31:6.) The CyberTip also provided Rauch Sharak's Google email address. (R. 31:4.) The IP address used for the photo uploads was traced to Palmyra, Wisconsin. (R. 31:8.) NCMEC referred the CyberTip to the Wisconsin Department of Justice. (R. 31:13.)

The Wisconsin Department of Justice issued an administrative subpoena to Rauch Sharak's internet service provider and assigned the CyberTip to the Jefferson County

Sheriff's Office. (R. 31:14, 18–21.) The administrative subpoena returned an address for the internet subscriber located in Palmyra. (R. 31:23.) State records revealed that Rauch Sharak resided at that address. (R. 31:40.)

A detective with the Jefferson County Sheriff's Office prepared a search warrant for Rauch Sharak's residence and his personal digital devices. (R. 31:25–47.) The search warrant was executed, and officers recovered a Samsung Galaxy S7 belonging to Rauch Sharak. (R. 36:2.) The phone held 15 files depicting CSAM. (R. 36:2.) The State charged Rauch Sharak with 15 charges of possessing child pornography for these 15 files. (R. 2.)

Rauch Sharak moved to suppress the 15 CSAM files. (R. 25.) In the claim germane to this appeal, Rauch Sharak argued that Google acted as an agent of the government when it scanned his Google Photos account, which presented an issue of first impression in Wisconsin law. (R. 25:26–37.) Rauch Sharak acknowledged that every other court to consider the issue had concluded that an electronic service provider (ESP) like Google did not act as a government agent. (R. 25:30 & n.24.) Nevertheless, he maintained that these other courts had erred by failing to recognize that a constellation of federal statutes "functionally compelled" Google to scan for CSAM and report it to law enforcement. (R. 25:28.) Because these federal laws compelled Google to scan for and report CSAM, he argued, it acted as a government agent. (R. 25:31–35.)

The State filed a brief in opposition. The State argued as an initial matter that Rauch Sharak lacked a reasonable expectation of privacy in the CSAM files uploaded to his Google Photos account. (R. 29:3–7.) In support, the State attached and cited Google's Terms of Service and other policies that Rauch Sharak accepted by creating his Google account. Those terms barred users from uploading CSAM to Google's platform, advised users that Google scans content to

ensure compliance with its terms, and advised users that Google would report CSAM to NCMEC. (R. 31:72–74, 81.)

The State also argued that, even if Rauch Sharak did have a reasonable expectation of privacy, Google did not act as a government agent. (R. 29:9–12.) Further, even if Google conducted a government search that violated the Fourth Amendment, the State argued that exclusion of the evidence was unwarranted. Because this claim raised a novel issue of law in Wisconsin and because there was no evidence of reckless misconduct by law enforcement, the State argued that the circuit court should apply the good-faith exception to the exclusionary rule. (R. 29:14–16.)

The circuit court denied Rauch Sharak's motion to suppress without holding a hearing. (R. 36.) The circuit court initially concluded that Rauch Sharak had a reasonable expectation of privacy in all files on his Google account. (R. 36:7.) But the circuit court concluded that Rauch Sharak had failed to satisfy his burden of proving that Google acted as a government agent when it searched his Google Photos account. (R. 36:8–21.) The court accepted Rauch Sharak's argument that the federal laws he cited amounted to government encouragement for ESPs to search for CSAM. (R. 36:11–16.) However, it concluded that, under the totality of the circumstances, Google's search was still a private search. (R. 36:17–21.) The circuit court's reasoning will be detailed more closely in the relevant portion of the Argument section.

The circuit court addressed the State's good faith argument, although it was not necessary to its disposition. It agreed with the State that law enforcement reasonably relied on and conformed with existing caselaw outside of Wisconsin. (R. 36:26.) It found that there no was police misconduct. (R. 36:26.) Nevertheless, the circuit court determined that if its denial of the motion to suppress were reversed on appeal,

then it would apply the exclusionary rule to address an issue of recurring or systemic negligence. (R. 36:26.)

After the circuit court denied his motion to suppress, Rauch Sharak pleaded guilty to 5 of the 15 counts. (R. 56:1.) The other 10 counts were dismissed and read in at sentencing. (R. 56:5.) The circuit court imposed a 6-year sentence, bifurcated into 3-year terms of initial confinement and extended supervision. (R. 56:1–2.) The court stayed the sentence pending Rauch Sharak's present appeal. (R. 56:1–2.)

Rauch Sharak now appeals, challenging the circuit court's conclusion that Google conducted a private search of his Google Photos account and contending that the good faith exception to the exclusionary rule should not apply.

ARGUMENT

I. This Court can affirm on the alternative basis that Rauch Sharak lacked a reasonable expectation of privacy in the four files of child sexual abuse material in his Google Photos account.

This Court can affirm the order denying suppression on an alternative basis raised by the State below. *See State v. Benton*, 2001 WI App 81, ¶ 11 n.2, 243 Wis. 2d 54, 625 N.W.2d 923 ("[This Court] may, of course, affirm the trial court for any reason."). The circuit court erroneously concluded that Rauch Sharak satisfied his burden to prove a reasonable expectation of privacy in the four CSAM files that he uploaded to his Google Photos account. Rauch Sharak cannot satisfy that burden when he agreed to Google's Terms of Service, which barred CSAM and informed him that Google searched for and reported CSAM to law enforcement.

The Fourth Amendment to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution protect against "unreasonable searches and seizures." *State v. Post*, 2007 WI

60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. To challenge a search, "a defendant must have 'a legitimate expectation of privacy' in the area or items subjected to a search." *State v. Tentoni*, 2015 WI App 77, ¶ 7, 365 Wis. 2d 211, 871 N.W.2d 285 (citation omitted). This Court reviews the ultimate legal determination on this issue *de novo* and any underlying factual findings for clear error. *Id.* ¶ 6.

A defendant bears the burden of establishing a reasonable expectation of privacy. *State v. Bruski*, 2007 WI 25, ¶ 22, 299 Wis. 2d 177, 727 N.W.2d 503. The defendant must establish two elements by a preponderance of the evidence: (1) that he or she has an actual or subjective expectation "in the area searched and the item seized"; and (2) that society is willing to recognize that expectation of privacy as reasonable. *Id.* ¶ 23. Failure on either element dooms the defendant's motion to suppress. *See State v. Baric*, 2018 WI App 63, ¶ 18 n.5, 384 Wis. 2d 359, 919 N.W.2d 221. "[T]he reasonableness of an expectation of privacy in digital files shared on electronic platforms is determined by considering the same factors as in any other Fourth Amendment context." *Id.* ¶ 19.

While a user has a reasonable expectation of privacy in an ESP account generally, that expectation of privacy is not unlimited. Then-Judge Gorsuch explained this limitation in *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016). There, AOL had detected CSAM images in an email of the defendant's and forwarded it to NCMEC. *Id.* at 1294–95. The district court assumed that the defendant had a reasonable expectation of privacy in the email, but Judge Gorsuch invited a second look. *Id.* at 1305. He directed the district court to consider "Mr. Ackerman's subjective expectations of privacy or the objective reasonableness of those expectations *in light of the parties' dealings* (e.g. the extent to which AOL regularly accessed emails and the extent to which users were aware of or acquiesced in such access)." *Id.* (emphasis added). On

remand, the district court concluded that AOL's terms of service precluded the defendant from establishing an objectively reasonable expectation of privacy in CSAM. *United States v. Ackerman*, 296 F. Supp. 3d 1267, 1272–73 (D. Kan. 2017).[1] Since *Ackerman*, other federal appellate courts have accepted *Ackerman*'s assertion that a user's expectation of privacy turns on the "dealings" between the ESP and the user memorialized in the terms of service, without deciding the issue. *See United States v. Reddick*, 900 F.3d 636, 638 n.1 (5th Cir. 2018); *United States v. Miller*, 982 F.3d 412, 426–27 (6th Cir. 2020); *United States v. Bebris*, 4 F.4th 551, 557, 562 (7th Cir. 2021).

In the present case, Google's Terms of Service and associated policies outline its "dealings" with Rauch Sharak. The Terms of Service required Rauch Sharak to obey the law, generally. (R. 31:59.) They informed him that Google had the right to remove content that violated the law or Google's policies, including "child pornography." (R. 31:67.) Google's Privacy Policy advised Rauch Sharak that Google would "analyze [his] content to help [Google] detect abuse such as spam, malware, and illegal content." (R. 31:81.) Google Photos has a policy entitled "Abuse Program Policies and Enforcement" with a subsection called "Child Sexual Abuse and Exploitation." (R-App. 3.)[2] That subsection states, "Do not

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[1] The Tenth Circuit affirmed this decision in an unpublished opinion on the basis of the good faith exception to the exclusionary rule. *See United States v. Ackerman*, 804 F. App'x 900, 905 (10th Cir. 2020).

[2] In its briefing below, the State erroneously submitted the "Abuse Program Policies and Enforcement" applicable to Google Drive rather than Google Photos. The State regrets the error and has attached Google Photos' policy of the same name as an Appendix. Because this policy is publicly available, the State requests that this Court take judicial notice of it. Moreover, Rauch Sharak will not be prejudiced by this correction because the "Child

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create, upload, or distribute content that exploits or abuses children," which "includes all child sexual abuse materials." (R-App. 3.) Google further advises users that it will remove CSAM and "take appropriate action, which may include reporting to [NCMEC]." (R-App. 4.) In light of these policies, Rauch Sharak cannot establish either his subjective or objective expectation of privacy.

These policies preclude Rauch Sharak from proving his subjective expectation of privacy. He cannot credibly claim that he had a subjective expectation of privacy in CSAM when he knew of and accepted Google's prohibition on such content and was informed that Google would search his account for compliance with that content restriction.

Even assuming that Rauch Sharak had a subjective expectation of privacy, however, he cannot prove that it was objectively reasonable. This inquiry turns on the totality of the circumstances, including the following non-exhaustive factors:

> (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; [and] (6) whether the claim of privacy is consistent with historical notions of privacy.

Bruski, 299 Wis. 2d 177, ¶ 24 (citation omitted).

In *State v. Bowers*, 2023 WI App 4, 405 Wis. 2d 716, 985 N.W.2d 123, this Court reviewed all six of these factors and concluded that the defendant had a reasonable expectation of privacy in confidential case files that he stored in his account

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Sexual Abuse and Exploitation" policies for Google Drive and Google Photos are identical. (*See* R. 31:72; R-App. 3–4.)

with Dropbox, a cloud storage service. *Id.* ¶¶ 1, 20–26, 45. *Bowers* does not compel the same conclusion in the present case.

Rauch Sharak cannot establish an objective reasonable expectation of privacy based on two key facts. First, he violated the law by uploading CSAM. Second, Google specifically barred CSAM from its platform and advised users that it scanned their accounts for CSAM. Due to these twin facts, Rauch Sharak's claimed expectation of privacy in his four CSAM files was objectively unreasonable, whether measured by the enumerated six factors or the totality of the circumstances, generally.

In *Bowers*, the State conceded that the first two factors favored the defendant: the defendant had a property interest in his account, and he maintained his account lawfully. *Id.* ¶ 20. Those concessions do not apply to Rauch Sharak. Google's policies limited Rauch Sharak's property interest in the account by explicitly denying him a property interest in CSAM, and Rauch Sharak violated the law by uploading four CSAM files. Therefore, unlike in *Bowers*, these factors weigh against Rauch Sharak.

The analysis follows a similar course for the other four factors. By agreeing to Google's policies and relinquishing his right to exclude Google from his account when it came to CSAM, Rauch Sharak agreed that his dominion and control did not extend to CSAM. These policies also rendered any precautions Rauch Sharak took to secure his privacy irrelevant. Even with those precautions, Google retained the right to scan Rauch Sharak's account for CSAM. And because Google retained that right to scan, Rauch Sharak could not use his Google Photos account for the private purpose of storing or uploading CSAM. Finally, there is no historical notion of privacy for items that have no lawful purpose like CSAM. *See Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005)

("We have held that any interest in possessing contraband cannot be deemed 'legitimate.'" (citation omitted)).

This Court has already ruled that a defendant does not have an objective expectation of privacy in CSAM he knowingly and indiscriminately shares electronically via a peer-to-peer file sharing network. *Baric*, 384 Wis. 2d 359, ¶ 21 & n.6. Just as defendant Baric "did not have any dominion or control over the files" after he made them publicly available, Rauch Sharak had no dominion or control over CSAM files that he knew would be scanned while in his account and reported to the authorities. *Id.* ¶ 21.

In sum, Rauch Sharak cannot prove an objectively reasonable expectation of privacy in contraband that he stored on his Google Photos account in violation of both the law and Google's policies. His claimed privacy interest is "illegitimate and unjustifiable." *Bruski*, 299 Wis. 2d 177, ¶ 38.

In concluding that Rauch Sharak had a reasonable expectation of privacy, the circuit court misapprehended federal court decisions. It relied principally on *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). (R. 36:5–6.) *Warshak* held that the defendant's assent to his *internet service provider's* (ISP) terms of service did not vitiate his expectation of privacy in the content of his *emails*. *Warshak*, 631 F.3d at 288. The ISP's terms of service were too attenuated from the defendant's separate email service provider to reduce the defendant's expectation of privacy in his emails. *See id.* at 286–88. The emails at issue also concerned communications, not contraband. *Id.* at 277–81, 283. *Warshak*, however, was "unwilling to hold that a subscriber agreement will *never* be broad enough to snuff out a reasonable expectation of privacy." *Id.* at 287. As a prior Sixth Circuit panel had noted, "if the ISP expresses an intention to 'audit, inspect, and monitor' its subscriber's emails, that might be enough to render an expectation of privacy unreasonable." *Id.* (citation omitted).

The present case is materially distinct from *Warshak*. Here, it is Google's policies, not Rauch Sharak's ISP's policies, that vitiated his expectation of privacy in CSAM stored in his Google Photos account. Further, the four CSAM files at issue are undisputedly contraband unlike the communications in *Warshak*. Finally, *Warshak* even anticipated *Ackerman* in its expectation that a provider's terms of service can cabin a user's expectation of privacy. Due to these distinctions, *Warshak* does not help Rauch Sharak establish an objectively reasonable expectation of privacy in the four CSAM files.

The circuit court also relied on two inapt district court cases. First, it discussed *United States v. Irving*, 347 F. Supp. 3d 615 (D. Kan. 2018). (R. 36:6.) In *Irving*, the district court rejected the government's argument that the defendant lacked a reasonable expectation of privacy in his Facebook account. *Id.* at 620. However, the government in *Irving* relied on much broader language in Facebook's terms about Facebook's general right to collect information and delete content in violation of its policies. *Id.* at 621. Critically, those terms did "not have explicit terms about monitoring user's accounts for illegal activities and reporting those activities to law enforcement." *Id.* In the present case, on the other hand, Google's policies explicitly advised Rauch Sharak that his account would be monitored for CSAM and that any CSAM would be reported to law enforcement. (R. 31:67, 81; R-App. 3–4.)

Second, the circuit court drew support from *United States v. DiTomasso*, 56 F. Supp. 3d 584, 592 (S.D.N.Y. 2014), *aff'd on other grounds*, 932 F.3d 58 (2d Cir. 2019). (R. 36:6.) In *DiTomasso*, the district court held both that AOL's terms of service could not deprive the defendant of a reasonable expectation of privacy and that the defendant consented to being monitored and searched by AOL by agreeing to those same terms. *Id.* at 592, 597. These arguably contradictory holdings turn on a distinction without a difference. If the user

can consent to an ESP's search of his or her account by agreeing to the ESP's terms of service, then the terms of service can limit the scope of the user's expectation of privacy on the platform.

More persuasive authority comes from more recent federal district court opinions. In *United States v. Lowers*, the district court concluded that Google's terms of service prevented the defendant from proving his objectively reasonable expectation of privacy in CSAM stored in his Google Drive account. *United States v. Lowers*, --- F.3d ---, 2024 WL 418626, at *6, (E.D.N.C. Feb. 5, 2024). It noted that two other district courts had reached the same conclusion. *Id.* This Court should opt to follow these more recent decisions addressing the precise factual circumstances raised in the present case.

For these reasons, the circuit court erred in concluding that Rauch Sharak had a reasonable expectation of privacy in the four CSAM files that he uploaded to Google Photos. On this alternative basis, this Court may affirm.

II. The circuit court correctly concluded that Google did not act as a government agent.

This Court can also affirm the circuit court's order because it correctly concluded that Google did not act as a government agent when it scanned Rauch Sharak's Google Photos account.

A. Rauch Sharak erroneously characterizes the circuit court's statutory interpretation as factual findings.

Whether a private actor acted as a government agent in conducting a search presents a mixed question of law and fact. This Court will not overturn the circuit court's factual findings unless they are clearly erroneous, but it will independently determine the ultimate legal question of

whether the search constituted a government search. *State v. Payano-Roman*, 2006 WI 47, ¶ 16, 290 Wis. 2d 380, 714 N.W.2d 548. The defendant bears the burden of proving that government involvement in a private search triggered the Fourth Amendment. *Id.* ¶ 23.

Rauch Sharak contends that the circuit court's interpretation of the federal statutes are factual findings that were not clearly erroneous. (Rauch Sharak's Br. 23–24.)[3] He is incorrect. Rauch Sharak's theory of government encouragement that the circuit court accepted turned on his interpretation of federal statutes. (*See* R. 25:31–35; 36:14.) It is well-established that questions of statutory interpretation are issues of law reviewed *de novo*. *State v. Stewart*, 2018 WI App 41, ¶ 18, 383 Wis. 2d 546, 916 N.W.2d 188. Indeed, this Court has contrasted the clearly erroneous standard for a trial court's findings with the *de novo* standard for issues of statutory interpretation. *See In re C.R.*, 2016 WI App 24, ¶ 15, 367 Wis. 2d 669, 877 N.W.2d 408. Accordingly, the propriety of the circuit court's construction of federal law should be reviewed independently by this Court.

Were Rauch Sharak correct, legal instability would result. The clearly erroneous standard affirms factual findings "even if contrary findings could also reasonably be made based on the same evidence." *Hennessy v. Wells Fargo Bank, N.A.*, 2020 WI App 64, ¶ 16, 394 Wis. 2d 357, 950 N.W.2d 877. Applying this standard of review to statutory interpretations would allow for two different circuit court judges to reach "contrary" interpretations of the same statute and yet both be affirmed. If this Court blessed opposing interpretations of law, litigants would be confused about the state of the law, and cases would turn on the idiosyncrasies of individual circuit judges rather than the rule of law. That

[3] The State cites to the electronically stamped page numbers of Rauch Sharak's brief.

cannot be the correct outcome. Rauch Sharak cannot usurp this Court's role to determine what the law says by labeling the circuit court's legal conclusions as findings of fact.

B. This Court is barred by its prior precedent from interpreting *Payano-Roman* as Rauch Sharak wishes.

Rauch Sharak's primary argument turns on paragraph 18 in *Payano-Roman* (Paragraph 18). Paragraph 18 identifies three factors to consider when evaluating whether a private party's search amounted to a government search:

> (1) The police may not initiate, encourage or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purposes; and (3) the private entity must not conduct the search for the purpose of assisting governmental efforts.

Payano-Roman, 290 Wis. 2d 380, ¶ 18 (citation omitted).

The circuit court determined that factor one had not been satisfied because it agreed with Rauch Sharak that federal law "encouraged" Google's search. (R. 36:15–16.) However, the circuit court still concluded that Google did not conduct a government search based on the totality of the circumstances. (R. 36:21.) It read *Payano-Roman* as directing courts to consider the totality of the circumstances in light of those three factors, not prescribing a strict three-factor test. (R. 36:17–19.) Even though factor one had not been satisfied, the circuit court still concluded that Google conducted a private search under the circumstances. (R. 36:18–19.)

Rauch Sharak argues that the circuit court erred by considering the totality of the circumstances independent of the three factors. He maintains that all three factors are necessary for a search to be private. Accordingly, he asserts that the circuit court was bound to conclude that Google conducted a government search after determining that factor one had not been satisfied. (Rauch Sharak's Br. 17–22.)

This Court cannot resolve these two conflicting interpretations of *Payano-Roman* because this Court has endorsed *both* readings. *Compare State v. Berggren*, 2009 WI App 82, ¶ 14 320 Wis. 2d 209, 769 N.W.2d 110 (reading *Payano-Roman*'s Paragraph 18 as providing "three requirements [that] must be met"); *State v. Cameron*, 2012 WI App 93, ¶¶ 24–25, 344 Wis. 2d 101, 820 N.W.2d 433 (applying the three "requirements" from Paragraph 18), *with State v. Cole*, 2008 WI App 178, ¶¶ 12, 19, 315 Wis. 2d 75, 762 N.W.2d 711 (attributing to *Payano-Roman* an analysis based on the "totality of the circumstances" without mentioning the three factors in Paragraph 18). Complicating matters further, this Court stated in *State v. Butler* that a private search could be attributed to the government *either* through the three factors in Paragraph 18 *or* by showing that the search was a "joint endeavor." *State v. Butler*, 2009 WI App 52, ¶ 13, 317 Wis. 2d 515, 768 N.W.2d 46 (citation omitted).

Due to this split in authority, this Court cannot rule as Rauch Sharak desires. This Court cannot "overrule, modify or withdraw language from" its own published opinions. *Cook v. Cook*, 208 Wis. 2d 166, ¶ 53, 560 N.W.2d 246 (1997). Yet this Court would be required to overrule, modify, or withdraw language from *Cole* and possibly *Butler* in order to accept Rauch Sharak's argument. Conversely, this Court appears to be precluded from affirming the circuit court's reasoning because such a holding would run contrary to *Berggren* and *Cameron*. Only the Wisconsin Supreme Court can harmonize this Court's precedent as it is "the unifying law defining and law development court." *Cook*, 208 Wis. 2d 166, ¶ 53.

However, this Court can still decide this appeal while avoiding this split in authority. This Court can affirm the circuit court's decision while assuming that Rauch Sharak's reading of *Payano-Roman*'s Paragraph 18 is correct. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that "cases should be decided on the narrowest

possible ground"). Rauch Sharak cannot satisfy his burden on any of the three factors in Paragraph 18, and the circuit court erred in concluding that he met his burden on factor one. Therefore, Rauch Sharak's argument fails on his own terms.[4]

C. Rauch Sharak cannot show that any of the three *Payano-Roman* factors apply to render Google's search a government search.

Before addressing the three factors in Paragraph 18, it bears noting that courts in several other jurisdictions have already addressed whether an ESP acts as a government agent when scanning a user's account for CSAM. As Rauch Sharak acknowledged in the circuit court, these courts have universally held that the ESP's search was a private search. (R. 25:30 & n.24.)

The courts ruling in this manner include eight federal courts of appeals. *See United States v. Cameron*, 699 F.3d 621, 637–38 (1st Cir. 2012); *United States v. Richardson*, 607 F.3d 357, 366–67 (4th Cir. 2010); *United States v. Meals*, 21 F.4th 903, 907 (5th Cir. 2021); *Miller*, 982 F.3d at 424–25; *United States v. Sykes*, 65 F.4th 867, 877 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 576 (2024); *Bebris*, 4 F.4th at 561–62 (7th Cir 2021); *United States v. Stevenson*, 727 F.3d 826, 828–30 (8th Cir. 2013); *United States v. Ringland*, 966 F.3d 731, 736–37 (8th Cir. 2020); *United States v. Rosenow*, 50 F.4th 715, 729–31 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 786 (2023); *Ackerman*, 831 F.3d at 1306 (10th Cir. 2016) (Gorsuch, J.).

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[4] In addition, this Court would not need to address *Payano-Roman* if it affirms the circuit court's order on the basis that Rauch Sharak failed to establish his reasonable expectation of privacy, as the State argues in Section I, or that the good-faith exception applies, as the State argues in Section III.

Six published federal district court opinions have reached the same conclusion. *See United States v. Green*, 857 F. Supp. 2d 1015, 1018–19 (S.D. Cal. 2012); *United States v. Keith*, 980 F. Supp. 2d 33, 40 (D. Mass. 2013); *United States v. Stratton*, 229 F. Supp. 3d. 1230, 1238 (D. Kan. 2017); *United States v. Coyne*, 387 F. Supp. 3d 387, 398 (D. Vt. 2018); *United States v. Bohannon*, 506 F. Supp. 3d 907, 914–15 (N.D. Cal. 2020); *United States v. Clark*, 673 F. Supp. 3d 1245, 1255 (D. Kan 2023).

In state courts, two state supreme courts and four intermediate appellate state courts have concluded that the ESP's search was a private search. *See State v. Lizotte*, 197 A.3d 362, 372 (Vt. 2018); *State v. Pauli*, 979 N.W.2d 39, 51–52 (Minn. 2022); *Burwell v. State*, 576 S.W.3d 826, 832 (Tex. Ct. App. 2019); *People v. Wilson*, 270 Cal.Rptr.3d 200, 218 (Cal. Ct. App. 2020); *State v. Fristoe*, 489 P.3d 1200 (Ariz. Ct. App. 2021); *State v. Ingram*, 662 S.W.3d 212, 228 (Mo. Ct. App. 2023).

This Court should join these courts in holding that an ESP's search of a user's account for CSAM does not amount to a government search. Rauch Sharak cannot show that any of the three factors from *Payano-Roman*'s Paragraph 18 apply.

1. The government did not initiate, encourage, or participate in Google's search.

Rauch Sharak fails to show that the government initiated, encouraged, or participated in Google's search of Rauch Sharak's account as factor one of Paragraph 18 requires. *See Payano-Roman*, 290 Wis. 2d 380, ¶ 18.

Google conducted the search on its own initiative, consistent with its Terms of Service, without the involvement of law enforcement. The government did not compel or encourage Google to search Rauch Sharak's account or to scan

user accounts for CSAM as a matter of policy. Wisconsin law enforcement only learned of Google's search upon receiving the CyberTip from NCMEC after Google had completed its search. (R. 31:13–14.) On these undisputed facts, the government did not initiate, encourage, or participate in Google's search. *See Cameron*, 699 F.3d at 637–38 (concluding that similar facts weighed in favor of deeming the search a private search); *Ringland*, 966 F.3d at 736 (noting that law enforcement was unaware of Google's search until Google reported the results of the search); *Richardson*, 607 F.3d at 365 (observing that, based on similar facts, the defendant was "essentially forced to concede that there is little evidence" with which to establish "a *de facto* agency relationship between AOL and the Government"). Even if Wisconsin law enforcement had general awareness of Google's scanning policies, that awareness does not constitute assistance or encouragement. *See Rosenow*, 50 F.4th at 732–33 (concluding that FBI's awareness, alone, of ESP's internal investigation into use of platform for child sex tourism did not transform that internal investigation into a government investigation).

Crucially, as nearly every court to consider this issue has noted, ESP's are *not* required by law to search their platforms for CSAM. In fact, the law specifically advises ESPs that they have no legal obligation to search for CSAM on their platforms. 18 U.S.C. § 2258A(f)(1–3); *see Stevenson*, 727 F.3d at 830. The law requires only that ESP's report CSAM "after obtaining actual knowledge" of it. 18 U.S.C. § 2258A(a)(1)(A)(i); *see Miller*, 982 F.3d at 424. All courts to consider this reporting requirement have concluded that it does not transform ESPs into government agents. *See Rosenow*, 50 F.4th at 730–31 (collecting cases).

Several courts have addressed whether the reporting requirement at 18 U.S.C. § 2258A(a) is akin to the railroad regulations that turned private railroads into government actors in *Skinner v. Railway Labor Executives Assoc.*, 489 U.S.

602, 614 (1989). In *Skinner*, the regulations effectively mandated drug tests for employees of private railroads, which turned those private drug tests into government action. The regulations achieved this effect by removing "all legal barriers to testing." *Id.* at 615. Specifically, the regulations preempted any collective bargaining agreement that did not provide for the drug tests, prohibited railroads from negotiating away the right to conduct drug tests, provided for employee discipline if an employee refused a required drug test, and authorized the government to obtain the results of any drug test. *Id.*

Courts have persuasively explained that the coercive elements of the regulations in *Skinner* are simply not replicated in 18 U.S.C. § 2258A(a). Federal law does not invest ESP's with authority that they otherwise lacked to scan their users' accounts. *Stevenson*, 727 F.3d at 830. The reporting requirement does not preempt terms of service that forbid such scans, bar ESP's from negotiating away the right to conduct scans, or dictate consequences for users who refuse to submit to scans. *Id.*; *see also Rosenow*, 50 F.4th at 730–31 (collecting cases rejecting the comparison to *Skinner*). Most importantly, the same statute that sets forth the reporting obligation also states that ESPs have no affirmative obligation to search for CSAM in the first place. 18 U.S.C. § 2258A(f). These substantial differences between the railroad regulations in *Skinner* and the reporting requirement at 18 U.S.C. § 2258A(a) make *Skinner* inapt. The circuit court correctly recognized these distinctions. (R. 36:19–21.)

Rauch Sharak makes two arguments pertinent to *Payano-Roman*'s first factor. His first and principal argument is that a confluence of federal laws amount to implicit government encouragement for ESPs to scan for CSAM. The State addresses that argument in the next section.

Rauch Sharak's second argument is that Google's search required the participation of NCMEC and that NCMEC's support amounted to government support. (Rauch Sharak's Br. 24–27.)[5] This second argument is unavailing because NCMEC was not involved in Google's search of Rauch Sharak's account. Google conducted the search independently. Before sending the files to NCMEC, a Google employee manually reviewed the files to confirm that they contained CSAM. (R. 31:5–6.) Google reported the four CSAM files to NCMEC because that is how federal law directs ESPs to fulfill their reporting mandate. 18 U.S.C. § 2258A(a)(1)(B)(i). But Google's duty to report was triggered by its "actual knowledge" of the four CSAM files, not by anything that NCMEC did. 18 U.S.C. § 2258A(a)(1)(A). Had Google not independently obtained actual knowledge of those files, it would have had no reporting obligation and no interaction with NCMEC.[6] *See State v. Silverstein*, 2017 WI

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[5] Federal courts are divided over whether NCMEC is a government agent. *Compare Ackerman*, 831 F.3d at 1295–1300 (categorizing NCMEC as a government entity) *with Meals*, 21 F.4th at 908–09 (deeming NCMEC a non-government entity). Whether NCMEC is a government entity is immaterial in the present case because it did not expand Google's search. It only forwarded files flagged and opened by Google to law enforcement without viewing them. (R. 31:1, 5–6.) Thus, Rauch Sharak's appeal rises and falls on whether Google's initial search was a private or government search. *See Bebris*, 4 F.4th at 558 (noting that whether NCMEC was a government agent was immaterial since NCMEC only forwarded images flagged by an ESP to law enforcement).

[6] The circuit court asserted that "Google's search would not be possible without access to NCMEC's hash lists." (R. 36:15.) This finding is clearly erroneous—at least in the present posture. Because the circuit court did not hold a hearing, the record is bare regarding how Google scanned Rauch Sharak's account. The limited record does not even suggest what hash list Google used in scanning Rauch Sharak's account or the origin of any list. *Miller* reported that Google had been using a proprietary software to scan

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App 64, ¶ 5, 378 Wis. 2d 42, 902 N.W.2d 550 (describing NCMEC as the "clearinghouse" for CyberTips).

For these reasons, Rauch Sharak did not satisfy his burden on factor one of *Payano-Roman*'s Paragraph 18 because Google voluntarily searched Rauch Sharak's Google Photos account without government involvement, support, or coercion. His argument that federal law amounted to implicit encouragement, addressed next, does not compel a contrary conclusion.

2. Federal law does not implicitly encourage ESPs to search for child sexual abuse material.

Rauch Sharak argues that this Court should depart from every other court and deem Google a government agent based on several federal laws. He argues that Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, incentivizes ESPs to search for CSAM by immunizing them from publisher liability in defamation suits. He argues that subsequent statutory enactments in the Trafficking Victims' Protection Act (TVPA), the Protect Our Children Act of 2008, and the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), provided further encouragement by removing legal barriers to search for CSAM and expanding criminal liability for ESPs related to CSAM. (Rauch Sharak's Br. 23–24.) Rauch Sharak's argument fails because it depends on an erroneous understanding of these federal laws.

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and tag CSAM since 2008, which would undermine the circuit court's bald assertion of Google's total reliance on NCMEC. *Miller*, 982 F.3d at 419. If this Court deems this fact potentially dispositive, the appropriate ruling would be a remand for a suppression hearing.

Initially, Rauch Sharak proceeds from the erroneous premise that Section 230 of the Communications Decency Act encourages ESPs to search for and root out CSAM on their platforms. (Rauch Sharak's Br. 23); (R. 25:21–22.) This assertion does not withstand scrutiny.

The provisions of Section 230 "bar plaintiffs from holding [ESPs] legally responsible for information that third parties created and developed." *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *see* 47 U.S.C. § 230(c)(1). "Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). *Zeran*, one of the earliest cases applying Section 230, divined two purposes for this immunity.

First, Section 230 aimed "to maintain the robust nature of Internet communication, and, accordingly, to keep government interference in the medium to a minimum." *Zeran*, 129 F.3d at 330. Congress codified this purpose in Section 230, stating that "[i]t is the policy of the United States . . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). If ESPs could be liable as publishers "for each message republished by their services," they "might choose to severely restrict the number and type of messages posted." *Zeran*, 129 F.3d at 331. "Congress considered the weight of the speech interest implicated and chose to immunize service providers to avoid any such restrictive effect." *Id.*

Second, "Congress enacted § 230 to remove the disincentives to self-regulation created by" *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Super. Ct. May 24, 1995). *Zeran*, 129 F.3d at 331. In *Stratton Oakmont*, the court deemed the ESP a "publisher" because it screened

and edited content. *See Zeran*, 129 F.3d at 331. By enacting Section 230, Congress hoped to eliminate "the specter of liability" that would "deter service providers from blocking and screening offensive material." *Id.* To that end, Section 230 states that it aims to remove "disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4).

In realizing these two purposes, Section 230 does not encourage ESPs to search for CSAM. The first purpose of Section 230—the loosening of online content restrictions—arguably runs counter to such a directive. To be clear, Section 230 does not condone the distribution of CSAM as legitimate internet activity, and it states that it does not alter criminal law. 47 U.S.C. § 230(e). But it strains credulity to assert that a statute designed to discourage restrictive content moderation encourages ESPs to search for CSAM merely because the statute notes that criminal law applies to the internet. Moreover, Section 230 can hardly amount to government encouragement when it openly declares the U.S. government's policy to keep the internet "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Rauch Sharak does not and cannot spin Section 230's commitment to relaxed moderation policies and deregulation as the government encouraging ESPs to enforce criminal law by searching for CSAM.

Instead, Rauch Sharak focuses entirely on the second purpose of the statute, arguing that Section 230 encourages ESPs to search for CSAM because it enabled ESPs to moderate content without fear of publisher liability. (Rauch Sharak's Br. 23); (R. 25:22–23.) However, this purpose does not extend to searching for CSAM.

For one, Rauch Sharak disregards the fact that Section 230 "remove[d] the disincentives to *self[-]regulation*." *Zeran*, 129 F.3d at 331 (emphasis added). Section 230 does not prescribe how or what ESPs should regulate. Rather, it seeks to make it possible for ESPs to regulate themselves as they see fit without "the specter of liability." *Zeran*, 129 F.3d at 331. Section 230's commitment to helping parents control what their children viewed online is consistent with that hands-off approach by the government. 47 U.S.C. § 230(b)(4). While Section 230 promoted self-regulation, it took no position on the content of that regulation. It therefore could not have encouraged ESPs to prioritize searching for and deleting CSAM.

Rauch Sharak also erroneously assumes that the "offensive material" to be self-regulated necessarily includes CSAM. *Zeran*, 129 F.3d at 331. *Zeran* cited § 230(b)(4) as the source of this second purpose, which addresses enabling "parents to restrict their children's access to objectionable or inappropriate online material." *Zeran*, 129 F.3d at 331. However, CSAM is not content that some parents might deem "objectionable or inappropriate" for their children. It is illegal and serves no legitimate purpose for any child or adult. For that reason, it appears to be covered by the next subsection, which declares that the "vigorous enforcement of Federal criminal laws to deter and punish trafficking in *obscenity*, stalking, and harassment by means of computer" is also a U.S. policy. 47 U.S.C. § 230(b)(5) (emphasis added). Thus, in articulating U.S. policy with respect to the internet, Section 230 distinguishes between content that is merely objectionable or inappropriate for children that will be addressed by a partnership between ESPs and parents, and content that is obscene, like CSAM, that will be addressed by federal law enforcement. Accordingly, to the extent that Section 230(b)(4) aimed to encourage ESPs to moderate their platforms, that encouragement did not extend to enforcing

criminal law. *See Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 17, 359 Wis. 2d 385, 856 N.W.2d 874 ("When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings.").

In sum, Section 230 disavowed government regulation of the internet, aimed to promote relaxed content moderation policies, and encouraged ESPs to self-regulate "objectionable or inappropriate"—but not "obscene"—content.[7] None of these effects bear any relation to searching for CSAM, let alone constitute government encouragement to ESPs to search for CSAM.

Federal courts have already considered and rejected Rauch Sharak's argument based on the text of Section 230. The Fourth Circuit rejected Rauch Sharak's very argument in a criminal case, concluding that Section 230 did not convert the reporting ESP into a government agent. *Richardson*, 607 F.3d at 367. The Ninth Circuit rejected a similar argument predicated on the Stored Communications Act. *See Rosenow*, 50 F.4th at 729–30. Like Section 230 of the Communications Decency Act, the Stored Communication Act immunizes ESPs from liability for searching electronic communications stored on its own servers. *Id.* at 730. As with CSAM, ESPs "are free to choose not to search their users' data." *Id.* Therefore, "the statutes do not have the 'clear indices of the Government's encouragement, endorsement, and participation' sufficient to implicate the Fourth Amendment." *Id.* (quoting *Skinner*, 489 U.S. at 615–16). *Rosenow*'s reasoning applies with equal force to Section 230.

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[7] *See also* Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639, 652 (2014) ("Congress thus sought to simultaneously promote the speech potential of a largely self-regulated Internet, while fostering the rise of Internet enterprises.").

Two district court judges in the Northern District of California have also concluded that Section 230 does not constitute government encouragement. In *Divino Group LLC v. Google LLC*, No. 19-cv-4749, 2021 WL 51715 (N.D. Cal. Jan. 6, 2021), the district court rejected the theory that Section 230 rendered Google a state actor for purpose of sustaining a lawsuit under 42 U.S.C. § 1983. It observed, "[N]othing about Section 230 is coercive. . . . Section 230 reflects a deliberate *absence* of government involvement in regulating online speech: 'Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and, accordingly, *to keep government interference in the medium to a minimum*.'" *Id.* at *6 (citation omitted). Another district court judge subsequently adopted that reasoning in rejecting a plaintiff's claim that Section 230 rendered Facebook a government actor for the purpose of *Bivens*[8] liability. *Children's Health Defense v. Facebook Inc.*, 546 F. Supp. 3d 909, 932 (N.D. Cal. 2021) ("[T]he immunity provided by Section 230 does not provide sufficient 'encouragement' to convert Facebook's private acts into state action.").

Thus, the cornerstone of Rauch Sharak's argument rests on an untenable reading of Section 230 that multiple federal courts have already rejected. The other laws cited by Rauch Sharak do not save the argument.

Rauch Sharak asserts that the Protect Our Children Act of 2008, Pub. L. No. 110–401, 122 Stat. 4229 (codified as amended in scattered sections of titles 18 and 47 of the U.S. Code), "granted NCMEC sweeping new powers, funding, and responsibilities." (Rauch Sharak's Br. 25; R. 25:11). However, the features of NCMEC are irrelevant to whether the government encouraged Google to search for CSAM. Most

[8] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

germane to this case, the Act enacted 18 U.S.C. § 2258A. Protect Our Children Act of 2008, Pub. L. No. 110–401, § 501, 122 Stat. at 4244. Accordingly, the Protect Our Children Act enacted § 2258A(f)—the provision that "disclaims any governmental mandate to search." *Rosenow*, 50 F.4th at 730. The Protect Our Children Act can hardly have encouraged ESPs to search for CSAM by assuring them that they had no legal obligation to search. *See Rosenow*, 50 F.4th at 730.

Rauch Sharak argues that the TVPA encouraged ESPs to search for CSAM by expanding the definition of human trafficking to include participating ESPs. (Rauch Sharak's Br. 23–24.) Even assuming he is correct, that fact is irrelevant. Criminal consequences for ESPs that *participate* in human trafficking do not equate to encouragement for law-abiding ESPs to monitor their users for CSAM. Complying with criminal law obviously cannot render a private actor a government agent. Otherwise, all law-abiding private actors would be government agents. The TVPA, thus, provides Rauch Sharak no support.

Finally, Rauch Sharak argues that the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115–164, 132 Stat. 1253–56 (codified at 18 U.S.C. §§ 1, 2421A, and 47 U.S.C. § 230), effectively mandated ESPs to search for CSAM on behalf of the government by amending Section 230. (Rauch Sharak's Br. 10, 23); (R. 25:24–26.) He dramatically overstates FOSTA's impact. Congress enacted FOSTA to clarify that Section 230 "was never intended to provide legal protection to websites that unlawfully *promote and facilitate* prostitution" or sex trafficking. FOSTA, Pub. L. No. 115–164, § 2(1), 132 Stat. at 1253 (emphasis added). Accordingly, FOSTA made it a crime for an ESP to promote or facilitate prostitution or sex trafficking. *Id.* § 3, 132 Stat. at 1253; *see* 18 U.S.C. § 2421A. FOSTA also amended Section 230 to clarify that it does not "impair or limit" lawsuits brought by the survivors of human trafficking against ESPs

that facilitated their trafficking. FOSTA, Pub. L. 115–164, § 4, 132 Stat. at 1254; *see* 47 U.S.C. § 230(e)(5). As with his TVPA argument, Rauch Sharak erroneously conflates consequences for ESPs that engage in human trafficking with encouragement for law-abiding ESPs to search for CSAM. They are not equivalent. Holding ESPs criminally and civilly responsible for engaging in human trafficking does not necessarily encourage law-abiding ESPs to search their users for CSAM—particularly when 18 U.S.C. § 2258A(f) assures ESPs that they have no legal obligation to do so.

For these reasons, Rauch Sharak's statutory argument is not supported by the federal law on which he relies. Ultimately, Rauch Sharak cannot overcome the clear statement in 18 U.S.C. § 2258A(f) that ESPs are not obligated to search for CSAM. His web of partially related statutes do not justify disregarding the clear terms of § 2258A(f). Had Congress wished to enact a search requirement, it would have done so expressly, not secretly through a patchwork of statutes. *See Whitman v. American Trucking Assns.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Because federal law did not implicitly encourage Google to search his account for CSAM, Rauch Sharak failed to meet his burden on factor one of *Payano-Roman*'s Paragraph 18.

3. Google searched Rauch Sharak's account for a private purpose.

Rauch Sharak cannot satisfy his burden on the second factor of Paragraph 18 of *Payano-Roman*, either. Google searched his account to further its own commercial purposes, not for a governmental purpose. *See Payano-Roman*, 290 Wis. 2d 380, ¶ 18.

Google's policies make clear that it scans user accounts for CSAM to provide each user an optimal experience on the platform. The Terms of Service require users to "comply with applicable laws" so that Google can "maintain a respectful environment for everyone." (R. 31:59.) Google reports content to law enforcement to "[p]rotect against harm to the rights, property or safety of Google, [Google's] users, or the public." (R. 31:87.) The Abuse Policy for Google Photos states that "[t]he policies play an important role in maintaining a positive experience for everyone using Google products." (R-App. 3.) As several courts have already recognized, this user-experience goal is a private purpose, not a government purpose. *See, e.g.*, *Sykes*, 65 F.4th at 877 ("Facebook's private actions to protect its platform are not attributable to the government."); *Rosenow*, 50 F.4th at 734 ("[T]he ESPs' desire to purge child pornography from their platforms and enforce the terms of their user agreements is a legitimate, independent motive apart from any interest that the ESPs had in assisting the government . . .").

This Court may also infer from these policies and decisions from other courts that Google has a commercial interest in eliminating CSAM from its platform. A positive user experience free from CSAM makes it more likely that Google will retain and attract users. *See Fristoe*, 489 P.3d at 1205. Google's inability or unwillingness to address CSAM would risk harming its reputation and, thus, its commercial prospects. *See Stevenson*, 727 F.3d at 830. *Ringland* in the Eighth Circuit and *Miller* in the Sixth Circuit have already concluded that Google, specifically, acts on this commercial interest in scanning for CSAM. *Ringland*, 966 F.3d at 736; *Miller*, 982 F.3d at 425. As *Miller* put it, Google scans users' accounts "to rid its virtual spaces of criminal activity for the same reason that shopkeepers have sought to rid their physical spaces of criminal activity: to protect their businesses." *Miller*, 982 F.3d at 425. Thus, Google's desire to

protect its bottom line by policing its products for CSAM presents an additional private purpose.

Rauch Sharak maintains that Google performed the search only to avoid civil and criminal liability. (Rauch Sharak's Br. 27–28.) This argument is meritless. As discussed at length in the prior section, Rauch Sharak fails to identify a federal law that imposes either sort of liability for not scanning, and he ignores the express statutory disclaimer of any obligation to scan at 18 U.S.C. § 2258A(f); *see Meals*, 21 F.4th at 907 (stating that "this forceful statutory disclaimer" belied the defendant's attempt to characterize the ESP "as a mandatory government agent"). Moreover, the statutory regime actually incentivizes *not* searching because intentional ignorance avoids triggering the mandatory reporting requirement. *See Ringland*, 966 F.3d at 736. The state of federal law contradicts Rauch Sharak's claim that Google searched his account to avoid liability.

Because the record establishes two private reasons for Google's scan of Rauch Sharak—to maintain a positive user experience and to further its commercial interests—the circuit court correctly determined that Rauch Sharak did not satisfy his burden on factor two of *Payano-Roman*'s Paragraph 18.

4. Google did not search Rauch Sharak's account to aid governmental efforts.

The circuit court also correctly concluded that Rauch Sharak did not satisfy his burden on the third factor in Paragraph 18 of *Payano-Roman*. Rauch Sharak did not prove that Google searched his account to aid governmental efforts. *See Payano-Roman*, 290 Wis. 2d 380, ¶ 18.

The State agrees with Rauch Sharak that the third factor largely tracks the second factor—whether Google acted pursuant to a private purpose. (Rauch Sharak's Br. 28.) Because Google acted according to two private purposes,

Rauch Sharak cannot show that it searched his account to aid governmental efforts. Indeed, law enforcement did not know of the search until Google had already completed it and manually verified that the four flagged filed depicted CSAM. (R. 31:5–6, 13–14.) Because Google acted on its private purposes before the government even knew of the search, it cannot have been aiding governmental efforts. *See Ringland*, 966 F.3d at 737 ("Google's continued actions in its own interest and the government's continued receipt of the reports does not give rise to some form of agency.").

Rauch Sharak argues that Google conducted its search to further the government's interest in prosecuting individuals with CSAM. (Rauch Sharak's Br. 28.) Rauch Sharak has merely identified an interest in eradicating CSAM shared by Google and the government. All courts have rejected this argument when presented with it. *See Bebris*, 4 F.4th at 562 (collecting cases); *Fristoe*, 489 P.3d at 1205 (collecting cases). "The unity of interest between Google and the government does not imply some acquiescence or agreement between them." *Ringland*, 966 F.3d at 737.

Thus, Rauch Sharak failed to prove the third factor of *Payano-Roman*'s Paragraph 18.

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For these reasons, this Court may affirm the order denying Rauch Sharak's suppression motion based on Rauch Shark's conception of *Payano-Roman*'s Paragraph 18. He cannot satisfy his burden to prove that one of the three factors apply. Google therefore did not act as a government agent in searching his account.

III. Even if a Fourth Amendment violation occurred, the good faith exception to the exclusionary rule should apply.

Finally, even if Rauch Sharak had a reasonable expectation of privacy in his Google Photos account and Google acted as a government agent in searching it, the good faith exception to the exclusionary rule should apply. The application of the good faith exception raises an issue of law reviewed *de novo*. *State v. Scull*, 2015 WI 22, ¶ 17, 361 Wis. 2d 288, 862 N.W.2d 562. The State bears the burden of establishing "good faith" reliance. *United States v. Leon*, 468 U.S. 897, 924 (1984).

The exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved.'" *Leon*, 468 U.S. at 906 (citation omitted). "Therefore, exclusion is warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *State v. Burch*, 2021 WI 68, ¶ 17, 398 Wis. 2d 1, 961 N.W.2d 314. "Specifically, 'the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* (citation omitted). Deterrence is not justified "when the police act with an objectively reasonable good-faith belief that their conduct is lawful." *Id.* (citation omitted).

The value of deterrence is not the sole factor in applying the exclusionary rule. *Burch*, 398 Wis. 2d 1, ¶ 18. In addition, a reviewing court "must also account for the 'substantial social costs' generated by the rule." *Id.* (citation omitted). Therefore, "society must swallow this bitter pill" of exclusion "only as a 'last resort.'" *Id.* (citation omitted).

Application of the exclusionary rule is not appropriate here because the detective who reviewed the CyberTip had an objectively reasonable, good-faith belief that no Fourth Amendment violation had occurred, and he did not engage in misconduct. Wisconsin courts have not yet addressed whether an ESP acts as a government agent when scanning a user's account for CSAM. Every other jurisdiction to consider the issue has concluded that the ESP is not a government agent in these circumstances. The detective could therefore reasonably assume that Google conducted a private search. The circuit court also found that there was no law enforcement misconduct, (R. 36:26,), and Rauch Sharak does not contend otherwise. Given the silence of Wisconsin courts, the overwhelmingly one-sided weight of authority from other jurisdictions, and the lack of misconduct, exclusion is not warranted. *See Scull*, 361 Wis. 2d 288, ¶ 30 ("Given the precedent, the commissioner's decision to grant the warrant appears to be a reasonable application of the unsettled law at the time the warrant issued."); *Burch*, 398 Wis. 2d 1, ¶ 23 (concluding that the police officers "reasonably relied on [the defendant's] signed consent form and [the officer's] narrative to conclude that [the defendant] consented to the download of the data").

In addition, the societal cost of exclusion would outweigh any deterrence effect. As in *Burch*, "there is nothing concerning under Fourth Amendment doctrine with how [the detective] conducted [himself]." *Burch*, 398 Wis. 2d 1, ¶ 25. There is simply no law enforcement misconduct to deter in future cases. Therefore, the societal cost of exclusion is too steep a price to pay. *See Burch*, 398 Wis. 2d 1, ¶ 25.

Both the circuit court and Rauch Sharak believe that failing to suppress the evidence would lead to systemic or recurring negligence. (Rauch Sharak's Br. 29–31.) They both insist that exclusion will allow for "government/society to be aware of and remedy a tremendous harm to the justice

system, *i.e.* the superseding of the Fourth Amendment through legislation converting private searches into government searches." (Rauch Sharak's Br. 30); (R. 36:26.)

This statement is difficult to parse. It appears to be directed not at the good-faith exception at all but at the private-versus-government search issue. It is clearly not directed at the exclusionary rule's purpose of deterring "*police* misconduct." *Burch*, 398 Wis. 2d 1, ¶ 17 (emphasis added). The exclusionary rule does not apply to raise awareness or precipitate legislative change. In addition, this statement does not identify any supposed recurring or systemic negligent practice that exclusion would rectify—including no allegation that law enforcement is too closely involved in ESP scans for CSAM. If anything, the circuit court and Rauch Sharak have only highlighted the novelty of the issue under Wisconsin law, which weighs in favor of applying the good faith exception rather than the exclusionary rule. Because Rauch Sharak and the circuit court cannot even identify a valid purpose to be served by the exclusionary rule, the "substantial social costs" of exclusion are not warranted. *Id.* ¶ 18 (citation omitted).

Accordingly, this Court should apply the good faith exception to the exclusionary rule if it determines that a Fourth Amendment violation occurred.

CONCLUSION

This Court should affirm the order denying suppression and the judgment of conviction.

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Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
conwaymj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,243 words.

Dated: July 2, 2024.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General