CPOA CASE SUMMARIES – APRIL 2022

CONSTITUTIONAL LAW/ POLICE CONDUCT

A. Independent reasonable suspicion to perform a criminal history check is not required because it is a negligibly burdensome precaution required for officer safety.

United States v. Hylton, 2022 U.S. App. LEXIS 9082 (9th Cir. Apr. 5, 2022)

Facts: In December 2016, police responded to a call that a vehicle was stopped in the middle of one of the busiest intersections in Las Vegas. They found Anthony Hylton non-responsive at the steering wheel, and smelled marijuana from the vehicle. Eventually, Hylton awakened but appeared to be disoriented and confused, with pills stuck to his sweatshirt. The officers believed he was under the influence of drugs. Police instructed Hylton to exit the vehicle with his license and registration. Hylton exited his car, saying that the documents were in the backseat. Though police did not locate the license or registration, an officer did find, in plain sight, a closed gun case with a gun inside. Police subsequently found crushed pills and a partly empty alcohol bottle. After Hylton failed two sobriety tests, officers performed a criminal history check using Hylton's name and date of birth, which he had provided. The criminal history check revealed that Hylton was a felon. He was arrested for being a felon in possession of a firearm, but was later released. The grips and color of the gun confiscated from Hylton matched that of a gun used in an October 2016 bank robbery. The ballistics from this gun matched the ballistics from a round fired by the robber in the October robbery. After robbing the same bank branch in January 2017, Hylton was arrested.

The District Court denied Hylton's motion to suppress the seized firearm and other evidence resulting from the traffic stop. The District Court held that the officers did not unreasonably prolong the traffic stop, and even if they had, the inevitable discovery exception applied. Hylton was convicted on two counts of armed bank robbery and two counts of using a firearm during a crime of violence. Hylton appealed, arguing in part that the District Court erred in denying his motion to suppress the evidence of the gun.

Held: The Ninth Circuit Court of Appeals affirmed. The Court initially noted that a traffic violation seizure "justifies a police investigation of that violation." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). However, a routine traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a" ticket for the violation. *Id.* at 354-55. "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Id.* at 354 (citations omitted). The Court noted that "[t]raffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at 356 (citation and internal quotation marks omitted). The Ninth Circuit believed the *Rodriguez* Court to have cited approvingly of a Tenth Circuit case that "recogniz[ed] officer safety justification[s] for criminal record and outstanding warrant checks." *Id.*[1]

[1] See also *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc) (abrogated on other grounds).

On appeal, Hylton argued that the criminal history check conducted by police was a prolongation of the stop and needed to be supported by independent reasonable suspicion. The Ninth Circuit disagreed, holding that a criminal history check is a negligibly burdensome precaution required for officer safety, and the officers thus did not need independent reasonable suspicion to perform the criminal history check.

The Court of Appeals held, alternatively, that even if the criminal history check had unreasonably extended the traffic stop, the District Court's application of the inevitable discovery doctrine was not clearly erroneous. The Ninth Circuit explained that the inevitable discovery rule is an exception to "[t]he doctrine requiring courts to suppress evidence as the tainted 'fruit' of unlawful governmental conduct." *Nix v. Williams*, 467 U.S. 431, 441 (1984). The doctrine applies if, by "following routine procedures, the police would inevitably have uncovered the evidence." *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009) (internal quotation omitted). Here, the officers had discovered the gun before any alleged prolongation began. The District Court reasoned that even if the officers had returned the gun and ended the stop before the criminal history check was completed, they still would have discovered that Hylton was a felon only two minutes later. At that point, the officers would have concluded that Hylton was a felon in possession of a gun and would have pulled him over again and seized the gun. The Ninth Circuit concluded that the lower court's application of the inevitable discovery rule was not clearly erroneous.

B. Officer's patdown search of defendant wearing baggy clothing and having a history of weapons possession was not supported by reasonable suspicion that he was armed and dangerous during traffic stop.

People v. Pantoja, 77 Cal. App. 5th 483 (1st Dist. 2022)

Facts: In January 2020, Vacaville Police Officer Chris Hill initiated a traffic stop on a vehicle. The officer had noticed that the license plate light and third brake light located at the back window of the vehicle appeared not to be working. The driver said his name was Juan Pantoja. Officer Hill later testified that he vaguely recognized Pantoja and remembered that he "had a history of violence and firearm possession…." Officer Hill had prior contact with Pantoja a few times, but did not recall having any contact with Pantoja when a crime of violence was involved. Pantoja asked if the officer wanted his license, registration, and proof of insurance. Officer Hill did not smell marijuana, saw no signs of intoxication, and did not observe any contraband in plain view. A record check showed Pantoja had a valid license and was not on probation or parole. Pantoja was cooperative throughout and made no furtive gestures or sudden movements during the stop. The officer asked if he could search the vehicle. After Pantoja declined consent to a search, Officer Hill had him exit the vehicle and conducted a patdown search. During the search, the officer found a loaded handgun, and arrested Pantoja.

A District Attorney filed a one-count felony complaint charging defendant with possession of a firearm by a felon. Pantoja filed a motion to suppress evidence of the firearm, arguing the evidence was obtained as the result of an unreasonably prolonged detention and illegal search. The trial court granted the motion and then dismissed the case. The District Attorney appealed.

Held: The First District Court of Appeal observed that the United States Supreme Court has held that there exists "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (See *King v. State of California* (2015) 242 Cal.App.4th 265, 283, quoting *Terry v. Ohio* (1968) 392 U.S. 1.) However, "[t]he officer must be able to point to specific and articulable facts together with rational inferences therefrom which reasonably support a suspicion that the suspect is armed and dangerous." (*People v. Dickey* (2nd Dist. 1994) 21 Cal.App.4th 952, 956.) "[A]n 'inchoate and unparticularized suspicion or "hunch"' is insufficient." (*In re Jeremiah S.* (1st Dist. 2019) 41 Cal.App.5th 299, 305.)

Viewing the evidence in the light most favorable to the trial court's ruling, the First District concluded that Officer Hill's pat search was not supported by reasonable suspicion. Pantoja was dressed appropriately for the weather,[2] he was cooperative during the stop, he made no furtive or sudden movements, and Officer Hill never testified that any of Pantoja's conduct suggested he was trying to hide a weapon. The Court found the officer's description of Pantoja's history of weapons was insufficient to support reasonable suspicion. Considering the evidence in the light most favorable to the trial court's ruling and deferring to the trial court's implied factual and credibility findings, the Court of Appeal concluded that the trial court properly granted Pantoja's motion to suppress, and affirmed.

C. Plaintiff's showing that the prosecution ended without a conviction is enough to support the favorable termination element of a 42 U.S.C. section 1983 Fourth Amendment malicious prosecution claim.

Thompson v. Clark, 142 S. Ct. 1332 (2022)

Facts: Larry Thompson was living with his fiancée and their newborn baby in a Brooklyn apartment in New York. In January 2014, Thompson's sister-in-law, who apparently suffered from a mental illness, also stayed there. She called 911 to report that Thompson was sexually abusing his one-week-old baby daughter. When Emergency Medical Technicians ("EMTs") arrived, Thompson denied that anyone had called 911. When the EMTs returned with four police officers, Thompson told them that they could not enter without a warrant. The police nonetheless entered and, after a brief scuffle, handcuffed Thompson. Later, medical professionals examining the baby at a hospital found no signs of abuse.

The police officers arrested Thompson for resisting their entry into his apartment. He was charged in a criminal complaint with obstructing governmental administration and resisting arrest. He was

[2] When asked by the trial prosecutor whether he believed Pantoja was armed or dangerous, Officer Hill cited Pantoja's baggy clothing that "naturally has bulges in it" and Pantoja's "history of weapons" as reasons to pat him down. Asked again, "did you believe he was presently armed and dangerous?" Hill responded, "There's a good possibility or chance, yes." The trial court found this indicated Hill's belief was "all speculative, and he didn't have any specific or articulable facts to believe that this individual was presently armed or dangerous."

detained for two days before being released. The charges against Thompson were dismissed before trial without any explanation by the prosecutor or judge.

After the dismissal, Thompson filed suit under 42 U. S. C. section 1983, alleging several constitutional violations, including a Fourth Amendment claim for malicious prosecution. To prevail on a Fourth Amendment Section 1983 claim for malicious prosecution under Second Circuit precedent established in *Lanning* v. *Glens Falls*, 908 F. 3d 19, 22 (2nd Cir. 2018), Thompson had to show that his criminal prosecution ended not merely without a conviction, but also with some affirmative indication of his innocence. The District Court, bound by *Lanning*, held that Thompson's criminal case had not ended in a way that affirmatively indicated his innocence because Thompson could not offer any substantial evidence to explain why his case was dismissed.

The Second Circuit, adhering to its precedent in *Lanning*, affirmed the dismissal of Thompson's claim. The United States Supreme Court granted certiorari to resolve a split[3] among the Courts of Appeals over how to apply the favorable termination requirement of the Fourth Amendment claim under Section 1983 for malicious prosecution.

Held: The United States Supreme Court initially noted that Section 1 of Civil Rights Act of 1871, now codified at 42 U.S.C. section 1983, created a species of federal tort liability for individuals to sue state and local officers for deprivations of constitutional rights. The Court explained that to determine the elements of a constitutional claim under Section 1983, the Supreme Court's practice is to first look to the elements of the most analogous tort as of 1871 when Section 1983 was enacted, so long as doing so is consistent with "the values and purposes of the constitutional right at issue." *Manuel* v. *Joliet*, 580 U. S. 357, 370 (2017) (Alito, J., dissenting).

Here, Thompson brought a Fourth Amendment claim under Section 1983 for malicious prosecution, which the Court noted has sometimes been referred to as a claim for unreasonable seizure pursuant to legal process. The Supreme Court stated that the most analogous tort to this Fourth Amendment claim is malicious prosecution, a determination shared by most of the Courts of Appeals to consider the question. The Court explained that the wrongful initiation of charges without probable cause is the gravamen of both the Fourth Amendment claim for malicious prosecution and the tort of malicious prosecution. One of the required elements of the malicious prosecution tort was a favorable termination of the underlying criminal prosecution.

Because the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence, the Supreme Court similarly construed Thompson's Fourth Amendment claim under Section 1983 for malicious prosecution. The Court declared that doing so was consistent with "the values and purposes" of the Fourth Amendment. *Manuel*, 580 U. S., at 370. The Court explained that questions concerning whether a criminal defendant was wrongly charged, or whether an individual may seek redress for a wrongful prosecution, cannot reasonably depend on whether the prosecutor or court happened to explain why charges were dismissed. The Court added that requiring a plaintiff to show that his prosecution ended with an affirmative indication of innocence is not necessary to protect officers from unwarranted civil suits, as officers are still protected by the

[3] See, *e.g.*, *Kossler* v. *Crisanti*, 564 F. 3d 181, 187 (3rd Cir. 2009) (en banc); *Cordova* v. *Albuquerque*, 816 F. 3d 645, 649 (10th Cir. 2016); and *Laskar* v. *Hurd*, 972 F. 3d 1278, 1282 (11th Cir. 2020).

requirement that the plaintiff show the absence of probable cause and by qualified immunity.

The Supreme Court thus concluded that to demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under Section 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction, and Thompson had satisfied that requirement here. Accordingly, The Supreme Court reversed the judgment of the Second Circuit and remanded.

Justices Alito, Thomas, and Gorsuch dissented. The dissent argued that the majority recognized a novel hybrid claim by "stitching together elements taken from two very different claims: a Fourth Amendment unreasonable seizure claim and a common-law malicious-prosecution claim." The dissent maintained this approach had no basis in the Constitution, and the Court should simply have held that a malicious-prosecution claim may not be brought under the Fourth Amendment.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 7, available at www.jones-mayer.com.

QUALIFIED IMMUNITY

Police officer was not entitled to qualified immunity as to claimed post-handcuffed punching and dog-biting.

Hughes v. Rodriguez, 2022 U.S. App. LEXIS 10788 (9th Cir. Apr. 21, 2022)

Facts: In November 2017, Corey Hughes escaped from a San Joaquin County Jail highway work crew. He was not captured until about three weeks later after agents from the California Department of Corrections and Rehabilitation's Fugitive Apprehension Team ("CDCR agents") learned that Hughes might be hiding at the Stockton home of a friend. The Stockton Police Department was contacted to participate in Hughes's extraction from the home. Officer Michael Rodriguez was one of the officers who arrived at the home. Officer Rodriguez was accompanied by Cain, a trained police dog. An entry team consisting of CDCR agents, Officer Rodriguez, and Cain gathered in the home's front entryway. Hughes and law enforcement disputed what happened thereafter, but Hughes was apprehended from the home. During his capture, Hughes sustained dog bites and bruising to his leg, and minor abrasions to his head and face.

Hughes sued Officer Rodriguez and other officers under 42 U.S.C. section 1983 for excessive force and brought related state law claims. The District Court granted the officers' motion for summary judgment on all claims. Hughes appealed, contending that even though objective bodycam footage largely disproved his testimony, (1) disputes of material fact remained as to whether excessive force was used in violation of the Eighth Amendment and state law, and (2) the officers were not entitled to qualified immunity.

Held: Applying *Scott v. Harris*, 550 U.S. 372, 378 (2007), the Ninth Circuit Court of Appeals noted that for purposes of ruling on a motion for summary judgment, a District Court may properly view the facts in the light depicted by bodycam footage and its accompanying audio, to the extent

the footage and audio "blatantly contradict[]"[4] testimonial evidence. The Court determined that in this case, the bodycam footage and audio did not blatantly contradict all of Hughes's testimony. While the bodycam footage did blatantly disprove his claim regarding the duration of his alleged beating by the entry team members, it did not blatantly disprove his claim that he was punched after he was handcuffed. Thus, while the Court viewed the facts blatantly contradicted by the bodycam footage in the light depicted by the videotape and its audio to conclude that Hughes did not attempt to surrender to the officers, the Court viewed all other facts, including his allegation that Officer Rodriguez punched him after he was handcuffed and subdued, in the light most favorable to plaintiff Hughes as the nonmoving party, on summary judgment.

The Ninth Circuit next considered the excessive force claim under the qualified immunity analysis as to (1) whether there had been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct.[5] Because the Eighth Amendment applies equally to convicted prisoners inside or outside the walls of the penal institution, the Court analyzed Hughes's claim of excessive force under the Eighth Amendment. The Court held that while the initial use of a dog was clearly proportional to the threat[6] posed by Hughes before he was handcuffed, whether the alleged post-handcuff beating and dog-biting occurred, and whether it was proportional to the threat Officer Michael Rodriguez reasonably perceived by a handcuffed plaintiff, were questions for the trier of fact. The Court further held that Officer Rodriguez was not entitled to qualified immunity under Section 1983 as to the claimed post-handcuff beating and dog-biting because it was clearly established law that beating a handcuffed convict violates the Eighth Amendment.[7] The Court accordingly reversed the District Court's summary judgment in favor of Officer Rodriguez.

PUBLIC RECORDS

Arrest information was not subject to public disclosure because the disclosure mandate in the Government Code regarding arrests extended only to information pertaining to contemporaneous police activity.

Kinney v. Superior Court, 77 Cal. App. 5th 168 (5th Dist. 2022)

Facts: In February 2021, Alisha Kinney sent a request to the County of Kern (the "County"; real party in interest here), under the California Public Records Act (the "Act") (Government Code section 6250 et seq.)[8] seeking the names of all persons arrested by the Kern County Sheriff's Department for driving under the influence ("DUI") from March 1, 2020 to April 1, 2020. The County provided a copy of a report reflecting the three DUI arrests made by the Sheriff's

[4] *Id.* at 380.
[5] *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).
[6] Law enforcement officials were aware that Hughes was in a home familiar to him (but not the officers), did not know whether Hughes was armed, and knew that prior weapons possession convictions. See *Miller v. Clark County*, 340 F.3d 959, 965 (9th Cir. 2003).
[7] *Hudson v. McMillian*, 503 U.S. 1, 4 (1992). See also *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994).
[8] Section 6250 provides in part: "…[T]he Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

Department during Kinney's specified timeframe but redacted the names of the three arrestees. The County explained that the arrestees' names had been redacted because "that information is protected and exempt from disclosure pursuant to California Government Code 6254(k)[,]" and other statutes

Kinney filed a verified petition for writ of mandate in Kern County Superior Court, alleging she was entitled to the full names of the three arrestees under Section 6254(f)(1). In April 2021, the County filed a demurrer to Kinney's petition on the ground that it failed to "state facts sufficient to constitute a cause of action." The demurrer argued, relying on the holding in *County of Los Angeles v. Superior Court (Kusar)*,[9] that "the records to be disclosed under section 6254, subdivision (f)(1) and (2), are limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity."[10] As Kinney's February 2021 request sought information that was 11 to 12 months old, the County implicitly argued that the request was not a request for "contemporaneous" information and thus not subject to disclosure under Section 6254(f)(1). The trial court sustained the County's demurrer to Kinney's petition without leave to amend. Kinney filed a verified petition for writ of mandate in the Fifth District Court of Appeal seeking extraordinary writ relief to compel the superior court to vacate its order sustaining the County's demurrer and to enter a new order directing the County to provide the arrestees' names.[11]

Held: Government Code section 6254 provides a description of public records which are not required to be disclosed by Chapter 3.5 (relating to Inspection of Public Records) of the Government Code. Section 6254(f)(1) requires state and local law enforcement agencies to make public, among other things, the "full name…of every individual arrested by the agency" (unless such disclosure would endanger the safety of a person involved in an investigation or the successful completion of an investigation). (Section 6254(f)(1).) The Fifth District Court of Appeal noted that although Section 6254(f)(1)'s, mandate had been interpreted to be "limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity[,]"[12] the Legislature had not defined "contemporaneous" as that term is used in the *Kusar* decision. The Court declared, however, that it did not need to discern the precise definition of "contemporaneous" as that term applied to Section 6254(f)(1)'s, disclosure mandate. The Court explained that the *Kusar* court's holding and reasoning supported the conclusion that the arrest information at issue here—i.e., the three arrestees' names—which was 11 to 12 months old when Kinney made her request to the County, should not be considered "contemporaneous."

The *Kusar* court, after reviewing Section 6254(f)'s, legislative history, concluded that the Legislature "demonstrated a legislative intent only to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information to

[9] 18 Cal.App.4th 588 (2nd Dist. 1993).

[10] *Id.* at p. 601.

[11] "Pursuant to section 6259, subdivision (c), an order of the trial court under the Act, which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. …" (*City of San Jose v. Superior Court*, 74 Cal.App.4th 1008, 1016 (6th Dist. 1999).)

[12] *Kusar, supra*, 18 Cal.App.4th at p. 601.

the press."[13] *Kusar* held that, "[b]ased on the legislative purpose and intent which we glean from the legislative history, we conclude that the records to be disclosed under section 6254, subdivision (f)(1) and (2), are limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity." (*Kusar, supra*, at p. 601.)

Guided by the *Kusar* court's conclusion that the purpose of Section 6254(f)'s disclosure exceptions was *only* to prevent secret arrests and provide basic law enforcement information to the press, the Fifth District concluded that the arrest information Kinney sought here – which was 11 to 12 months old when Kinney requested it from the County – was not "contemporaneous" because after 11 to 12 months, releasing the arrestees' names would not serve the purpose of preventing clandestine police activity. The Fifth District Court of Appeal concluded that the trial court could have correctly sustained the demurrer without leave to amend based on *Kusar*'s holding that Section 6254(f)(1)'s disclosure mandates are limited only to information pertaining to "contemporaneous" police activity, as that holding remained valid authority. The Court accordingly denied Kinney's petition on this ground.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 6, available at www.jones-mayer.com.

MISCELLANEOUS

Yahoo and Facebook's search of child pornographer's data was not a Fourth Amendment violation as they had legitimate, independent reasons to do so.

United States v. Rosenow, 2022 U.S. App. LEXIS 11371 (9th Cir. Apr. 27, 2022)

Facts: Yahoo and Facebook are electronic communication service providers ("ESPs") that provide online private messaging services. The federal Protect Our Children Act of 2008 requires ESPs to report "any facts or circumstances from which there is an apparent violation of" specified criminal offenses involving child pornography. (18 U.S.C. section 2258A(a)(1)-(2).) ESPs report to the National Center for Missing and Exploited Children ("NCMEC"), a non-profit organization that is statutorily required to operate the "CyberTipline," which is an online tool that ESPs use to report internet-related child sexual exploitation. In September 2014, Yahoo learned of user accounts selling child pornography and began an internal investigation. Yahoo filed a CyberTip report and additionally contacted the FBI and Homeland Security due to the urgency of its concerns regarding children in immediate danger. The FBI opened its own investigation. As Yahoo's internal investigation proceeded, the ESP determined that Yahoo user Carsten Rosenow was a buyer of child-exploitation content regularly communicating with sellers about his sex tourism in the Philippines. Rosenow arranged these illegal activities through online messaging services provided by Yahoo and Facebook. Yahoo filed another CyberTip and the FBI requested Yahoo to preserve the communication of users like Rosenow who were associated with the FBI's investigation. Finding more such communications by Rosenow, Yahoo in December 2015 filed another CyberTip and met with the FBI and NCMEC in February 2016 to discuss Yahoo's investigations.

[13] *Id.* at pp. 598.

An investigating FBI agent learned of Rosenow's Facebook account and sent preservation requests to Facebook and filed administrative subpoenas in 2017 for certain user account information, indicating child safety concerns which – unbeknownst to the FBI agent - automatically triggered Facebook's review of Rosenow's account activity. Facebook discovered child-exploitation content that violated its terms of use, immediately disabled Rosenow's accounts, and filed two CyberTips with NCMEC. NCMEC then forwarded these CyberTips to the FBI agent. In July 2017, the agent sought search warrants for evidence of child pornography offenses and child sex tourism, relying almost exclusively on evidence in Yahoo's and Facebook's CyberTips. Two days later, the FBI arrested Rosenow when he returned from a trip to the Philippines. The FBI's searches of Rosenow's electronic devices revealed significant child pornography, including numerous videos of Rosenow himself.

A District Court denied Rosenow's motion to suppress all the evidence obtained from Yahoo and Facebook's searches of his online communications. After a jury trial, Rosenow was convicted of attempted sexual exploitation of a child and of possession of sexually explicit images of children. Rosenow appealed.

Held: The Ninth Circuit Court of Appeals explained that the Fourth Amendment's guarantee of the right to be free from "unreasonable searches and seizures"[14] by the government does not protect against intrusive conduct by private individuals acting in a private capacity.[15] However, a private search or seizure may implicate the Fourth Amendment where the private party acts "as an agent of the Government or with the participation or knowledge of any governmental official."[16]

On appeal, Rosenow argued that the evidence discovered by Yahoo and Facebook should be suppressed because they were acting as government agents when they searched his online accounts. First, he argued that two federal statutes—the Stored Communications Act[17] and the Protect Our Children Act—transformed the ESPs' searches into governmental action. Second, Rosenow argued that the government was sufficiently involved in the ESPs' searches of the defendant's accounts to trigger Fourth Amendment protection. He argued that he had a right to privacy in his digital data and that the government's preservation requests and subpoenas, submitted without a warrant, violated the Fourth Amendment.

The Court held the government's requests that Yahoo preserve records related to the Rosenow's private communications did not amount to an unreasonable seizure, explaining that the Stored Communications Act does not authorize ESPs to do anything more than access information already contained on *their* servers as dictated by their terms of service,[18] and that an ESP can search through all of the stored files on its server and disclose them to the government without violating the Fourth Amendment. Moreover, the Protect Our Children Act provides that the statute "shall [not] be construed to require" an ESP to "monitor" users or their content or "affirmatively search,

[14] U.S. Const. amend. IV.
[15] *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).
[16] *Id.* (internal quotation marks and citation omitted).
[17] Under the Stored Communications Act, an ESP, upon receiving a preservation request, "shall take all necessary steps to preserve records and other evidence in its possession" for up to 180 days "pending the issuance of a court order or other process." 18 U.S.C. section 2703(f).
[18] See 18 U.S.C. section 2701(c).

screen, or scan for" evidence of criminal activity.[19] The Court noted that mandated reporting is different than mandated searching. The Court thus concluded that the statutes did not have the "clear indices of the Government's encouragement, endorsement, and participation" sufficient to implicate the Fourth Amendment.[20]

The Ninth Circuit stated that a private search still may implicate the Fourth Amendment if there is a "sufficiently close nexus" between the government and the private entity's challenged conduct.[21] The Court noted that in assessing whether a sufficient nexus exists, "the relevant inquiry is: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends."[22] Here, the record established that Yahoo and Facebook investigated Rosenow's accounts to further their own legitimate, independent motivations. Both companies had legitimate business reasons for purging child pornography and exploitation from their platforms, and they acted in furtherance of those reasons when they investigated Rosenow. These reasons included protection and safety of users, brand protection, and financial interest in keeping child pornography off its platforms to avoid losing advertising opportunities or be blocked from app stores.

The Court of Appeals also found Rosenow did not have a legitimate expectation of privacy in the limited digital data sought in the government's subpoenas, where the subpoenas did not request any communication content from the defendant's accounts and the government did not receive any such content in response to the subpoenas. Accordingly, the Ninth Circuit affirmed.

[19] 18 U.S.C. section 2258A(f).
[20] *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 615-16 (1989).
[21] See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).
[22] See *United States v. Cleaveland*, 38 F.3d 1092, 1094 (9th Cir. 1994) (internal quotation marks and citation omitted).