

June 2016

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Recommended Citation

Nicholas Pisegna, *Probable Cause to Protect Children: The Connection Between Child Molestation and Child Pornography*, 36 B.C.J.L. & Soc. Just. 287 (2016),
<http://lawdigitalcommons.bc.edu/jlsj/vol36/iss2/4>

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PROBABLE CAUSE TO PROTECT CHILDREN: THE CONNECTION BETWEEN CHILD MOLESTATION AND CHILD PORNOGRAPHY

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Abstract: The federal Circuit Courts of Appeal are divided regarding whether probable cause to search for evidence of child molestation provides probable cause to search for child pornography. This Note examines the relationship among the decisions of the Circuit Courts of Appeal, delves into the empirical evidence regarding the relationship between child pornography and child molestation, and analyzes how the “flexible, non-technical” probable cause standard properly interacts with this relationship. In *United States v. Colbert*, the U.S. Court of Appeals for the Eighth Circuit concluded that, because of the “intuitive relationship” between child molestation and child pornography, a warrant to search for evidence of child pornography based solely on evidence of child molestation is supported by probable cause. This Note argues that the Eighth Circuit appropriately balances the elastic probable cause standard, the policy concerns related to crimes against children, and the nexus between child molestation and child pornography in concluding that probable cause to search for evidence of child molestation provides probable cause to search for child pornography.

INTRODUCTION

“It was the worst moment of my life,” seventeen-year-old Nicole said, referring to the moment she discovered that her father had distributed photographs and videos of his repeated sexual abuse of her, occurring when she was between nine and thirteen years old.¹ Nicole’s father had started showing her child pornography when she was close to nine years old as a way to seduce her to engage in sexual acts with him.² His abuse quickly escalated, as soon there-

* Executive Articles Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2015–2016.

¹ Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html> [<http://perma.cc/2DK4-CVE5>].

² *Id.* In *Osborne v. Ohio*, the U.S. Supreme Court cited evidence presented by the Attorney General’s Commission on Pornography that indicates that pedophiles often use pornography to seduce their underage victims. See 495 U.S. 103, 111 n.7 (1990) (citing U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (July 1986)) (noting that “a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing other children ‘having fun’ participating in such activity”).

after, Nicole's father forced her to perform oral sex on him and raped her, sometimes binding her with ropes, all while recording the encounters and sharing them with thousands of individuals on the Internet.³ At age sixteen, Nicole revealed the abuse to her mother, and Nicole's father was arrested for child rape; however, law enforcement officials did not discover the pornographic photographs and videos of Nicole and her father until months after his initial arrest.⁴ At that point, Nicole's father was out on bail and he fled the country as soon as it became apparent that law enforcement knew he was involved in the production and distribution of child pornography.⁵

Unfortunately, Nicole's story is far from unique, as child pornography victimizes, conservatively, thousands of children each year.⁶ Although estimates vary regarding the extent of the child pornography industry because the crime is so difficult to track, the proliferation of child pornography as well as the prosecution of child pornography related crimes is considerable.⁷ In 1994, during the early days of the Internet, only sixty-one defendants were convicted in federal court for child pornography related offenses; in 2011, that number increased to 1880.⁸ Further, conservative estimates of the size of the child pornography market are daunting.⁹ In 2007, the National Center for Missing and Exploited Children reported that eight million images of child pornography are on the Internet, and a congressional investigation in 2008 estimated that number to be closer to three million images.¹⁰

As Nicole's case illustrates, child pornography and child sexual abuse are intricately related, but courts have struggled with how to handle the relationship between the two.¹¹ A recent report by the U.S. Department of Justice,

³ Bazon, *supra* note 1. A commenter on one of the videos noted, "The fact remains that she is the most searched for, sought after and downloaded ever . . . There are hours of video out there." *Id.*

⁴ *Id.*

⁵ *Id.* Law enforcement officials captured and arrested Nicole's father months later in Hong Kong. *Id.* Further, as of the date of publication of the *New York Times* article, Nicole has received more than \$550,000 in restitution from 204 different men. *Id.*

⁶ *See id.*

⁷ *See* IAN O'DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY: CRIME, COMPUTERS & SOCIETY 79 (2007) ("Attempts to tally the number of child pornography enthusiasts are as pointless as the guesstimates of the numbers of victims and images in circulation. The illegal nature of every aspect of this trade leaves few individuals willing to admit their involvement."); Bazon, *supra* note 1.

⁸ Bazon, *supra* note 1. Quoting a 2010 Department of Justice report about the troubling breadth of child pornography, the article notes that "'the market—in terms of numbers of offenders, images, and victims'—was growing to a degree described as 'overwhelming' and 'exponential.'" *Id.*

⁹ *See* 154 CONG. REC. H10250 (daily ed. Sept. 27, 2008) (statement of Rep. Barton); Julian Sher & Benedict Carey, *Federal Study Stirs Debate on Child Pornography's Link to Molesting*, N.Y. TIMES, July 19, 2007, at A20.

¹⁰ *See* 154 CONG. REC. H10250 (daily ed. Sept. 27, 2008) (statement of Rep. Barton); Sher & Carey, *supra* note 9. The discrepancy is likely not the result of a decrease in the number of images on the Internet, but rather because of the difficulty of tracking child pornography. Bazon, *supra* note 1.

¹¹ *See, e.g.,* U.S. v. Hodson, 543 F.3d 286, 292 (6th Cir. 2008) (finding a search warrant invalid and implying an insufficient connection between child molestation and child pornography because,

Criminal Division, Child Exploitation and Obscenity Section noted that child pornography requires child sexual abuse, concluding, “[I]t is simply not possible to disconnect the collection, trade, viewing, and possession of these images [of child pornography] from their production.”¹² Despite the Department of Justice’s opinion that child molestation and child pornography are unquestionably related, however, courts have come to differing conclusions regarding how the relationship between child pornography and child sexual abuse impacts offenders and the prosecution of offenders.¹³

This Note analyzes how courts address the connection between child pornography and child sexual abuse in the context of probable cause, examining, in particular, whether probable cause to search for evidence of child sexual abuse automatically creates probable cause to search for evidence of child pornography. Part I details the probable cause standard, the history of the criminalization of child pornography in the United States, and the current split among the U.S. Circuit Courts of Appeal regarding whether evidence of child molestation is sufficient to provide probable cause to search for evidence of child pornography. Part II examines the bases for the differing circuit court decisions, including the lack of consensus among empirical studies on the subject and the policy considerations that inform the probable cause inquiry. Finally, Part III argues that the U.S. Court of Appeals for the Eighth Circuit properly concludes that evidence of child molestation does provide probable cause to search for evidence of child pornography because of the common sense, non-technical nature of the probable cause standard, the sufficient empirical support for the connection, and the policy concerns related to child molestation and child pornography. Should courts decline to adopt this standard, Part III explains, the good faith exception should undoubtedly apply to evi-

although the warrant established probable cause to search for evidence of child molestation, it failed to establish probable cause to search for child pornography). *But see, e.g.*, *U.S. v. Colbert*, 605 F.3d 573, 578–79 (8th Cir. 2010) (holding that a search warrant for child pornography was valid based largely on evidence of child molestation because “there is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography”).

¹² ALEXANDRA GELBER, DEP’T OF JUSTICE, CRIMINAL DIVISION, RESPONSE TO “A RELUCTANT REBELLION” 4 (2009), <http://www.justice.gov/criminal/ceos/downloads/ReluctantRebellionResponse.pdf> [<http://perma.cc/D5HK-266W>]. The report cites a study that found a strong correlation between individuals who possess or traffic child pornography and individuals who have committed contact offenses against children. *See id.* at 6 (citing Michael L. Bourke & Andres E. Hernandez, *The “Butner Study” Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 183–91 (2009)).

¹³ *Compare Hodson*, 543 F.3d at 292 (finding a search warrant invalid and implying an insufficient connection between child molestation and child pornography because, although the warrant established probable cause to search for evidence of child molestation, it failed to establish probable cause to search for child pornography), *with Colbert*, 605 F.3d at 578–79 (finding a search warrant for child pornography valid based largely on evidence of child molestation because “there is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography”).

dence seized pursuant to search warrants to search for child pornography that are solely based on evidence of child molestation.

I. THE CRIMINALIZATION OF CHILD PORNOGRAPHY AND THE STANDARDS OF PROOF REQUIRED TO SEARCH FOR IT

The differing interpretations of probable cause in federal circuit court cases involving both child molestation and child pornography is a product of the U.S. Supreme Court's fluid "totality-of-the-circumstances" probable cause standard.¹⁴ Courts treat "probable cause" as the measure of justification under the U.S. Constitution and the Fourth Amendment for a search, seizure, or arrest.¹⁵ Although the Supreme Court has noted that probable cause is "incapable of precise definition or quantification," the Court has held that probable cause exists when, given the totality of the circumstances facing the officers or made apparent in an affidavit for a search or arrest warrant, "there is a fair probability that contraband or evidence of a crime will be found in a particular place."¹⁶

The discord among the Circuit Courts of Appeal regarding the relationship between child molestation and child pornography is also a result of the relatively recent criminalization of child pornography—first criminalized in 1977—and the resulting policy concerns.¹⁷ Because the probable cause inquiry is a "fluid concept . . . [that is] not readily, or even usefully, reduced to a neat set of legal rules," and because of the equally uncertain causal relationship between child molestation and child pornography, federal Circuit Courts of Appeal have come to different conclusions regarding whether probable cause to search for evidence of child sexual abuse automatically creates probable cause to search for evidence of child pornography.¹⁸

A. *The Case-by-Case Nature of Probable Cause*

The Fourth Amendment to the U.S. Constitution provides for the protection of citizens from unreasonable searches and seizures, guaranteeing:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

¹⁴ See *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983).

¹⁵ See *id.* at 236–38.

¹⁶ *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Gates*, 462 U.S. at 238.

¹⁷ See Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252A (2012); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *New York v. Ferber*, 458 U.S. 747, 757 (1982).

¹⁸ *Gates*, 462 U.S. at 232; see *Dougherty v. City of Covina*, 654 F.3d 892, 898 (9th Cir. 2011); *United States v. Doyle*, 650 F.3d 460, 463 (4th Cir. 2011); *Colbert*, 605 F.3d at 579; *United States v. Falso*, 544 F.3d 110, 113 (2d Cir. 2008); *Hodson*, 543 F.3d at 292.

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹

Accordingly, in order for a search warrant to be valid under the Fourth Amendment, it must (1) be issued by a neutral and detached magistrate,²⁰ (2) present to the magistrate an adequate showing of probable cause,²¹ and (3) describe with particularity the place to be searched and the items or persons to be seized.²² Although some dispute exists with regard to the relationship between the two opening clauses in the Fourth Amendment and whether a search without a warrant is presumptively unreasonable under the Fourth Amendment,²³ the Supreme Court has held that, in cases involving a search warrant, searches and seizures “are ‘reasonable’ only if supported by probable cause.”²⁴

In *Illinois v. Gates*, the Supreme Court held that magistrates should consider the “totality of the circumstances” when assessing whether there is probable cause to justify granting a search warrant.²⁵ The inquiry into the totality of

¹⁹ U.S. CONST. amend. IV.

²⁰ See *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (“[The Fourth Amendment’s] protection consists of requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

²¹ *Gates*, 462 U.S. at 230.

²² *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (noting that the Fourth Amendment addresses the problem of excessive searches “by requiring a ‘particular description’ of the things to be seized”) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)).

²³ See U.S. CONST. amend. IV. The two clauses in dispute are the “Reasonableness Clause,” which guarantees that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated” and the “Warrants Clause,” which requires that “no Warrants shall issue but upon probable cause.” *Id.* One understanding of the relationship between the two clauses is that the Warrants Clause “gives content to the word ‘unreasonable’ in the [Reasonableness Clause].” *New Jersey v. T.L.O.*, 469 U.S. 325, 359 (1985) (Brennan, J., dissenting) (quoting *Dunaway v. New York*, 442 U.S. 200, 214 (1979)). Under this interpretation, searches conducted without the prior approval of a judge or magistrate—that is, searches without a warrant—are presumptively unreasonable, subject to a few exceptions. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). The other possible interpretation of the relationship between the two clauses of the Fourth Amendment is that the two clauses should be read separately, and therefore the reasonableness of a search does not depend on whether law enforcement officials obtained a warrant. See *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring); *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950). Under this school of thought, a court, in determining whether the search violated Fourth Amendment interests, should examine the contextual circumstances that justified the search rather than strictly consider whether law enforcement officials obtained a search warrant prior to the search. See *Rabinowitz*, 339 U.S. at 65–66.

²⁴ *T.L.O.*, 469 U.S. at 359 (Brennan, J., dissenting) (quoting *Dunaway*, 442 U.S. at 214).

²⁵ *Gates*, 462 U.S. at 214. The Court in *Gates* modified the “rigid” two-pronged test that courts had been applying to assess probable cause. See *id.*; *Spinelli v. United States*, 393 U.S. 410, 418–19 (1969), *abrogated by Gates*, 462 U.S. at 214; *Aguilar v. Tex.*, 378 U.S. 108, 114 (1964), *abrogated by Gates*, 462 U.S. at 214. Prior to *Gates*, the Court applied the rigid two-pronged *Aguillar-Spinelli* test to situations in which the affidavit that supported a search warrant was based on hearsay information. See *Gates*, 462 U.S. at 214. Discussing the *Aguillar-Spinelli* test, the majority in *Gates* reasoned that, although an inquiry into the basis of knowledge and veracity of the source of information that informs

the circumstances requires judges and magistrates to make “a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.”²⁶ In order to make the “common-sense” determination regarding probable cause, courts should weigh the evidence presented “not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”²⁷ Under this standard, the judge or magistrate may draw reasonable inferences from the materials given in support of a warrant.²⁸ The probable cause standard under *Gates* is thus a “fluid concept,” and as a result has led to conflicting decisions in lower courts applying the standard.²⁹

B. The Criminalization of Child Pornography

The criminalization of child pornography is a relatively recent development in the nation’s legal system as Congress first criminalized child pornography in the late 1970s.³⁰ In response to growing societal outrage over the proliferation of child pornography and the lack of federal regulation of the crime, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977 (“PCASE”).³¹ Borrowing from Supreme Court precedent approving the criminalization of “obscene materials,” PCASE prohibited the creation or distribution of obscene material involving individuals younger than sixteen years old.³²

probable cause is critical, “these elements should [not] be understood as entirely separate and independent requirements to be rigidly exacted in every case.” *Id.* at 230. Instead, the *Gates* majority held that courts should consider the totality of the circumstances. *Id.* at 214.

²⁶ *Gates*, 462 U.S. at 238 (internal quotation marks omitted).

²⁷ *Id.* at 231–32 (quoting *United States v. Cortez*, 449 U.S. 441, 418 (1981)).

²⁸ *Id.* at 240.

²⁹ *Id.* at 232. Compare *United States v. Doyle*, 650 F.3d 460, 463 (4th Cir. 2011) (holding that probable cause to search for evidence of child molestation *does not* provide probable cause to search for child pornography), and *Virgin Islands v. John*, 654 F.3d 412, 422 (3d Cir. 2011) (coming to the same conclusion as the court in *Doyle*), and *United States v. Falso*, 544 F.3d 110, 113 (2d Cir. 2008) (coming to the same conclusion as the court in *Doyle*), and *United States v. Hodson*, 543 F.3d 286, 286 (6th Cir. 2008) (coming to the same conclusion as the court in *Doyle*), with *U.S. v. Colbert*, 605 F.3d 573, 578–79 (8th Cir. 2010) (holding that probable cause to search for evidence of child molestation *does* provide probable cause to search for child pornography).

³⁰ Emily Weissler, *Head Versus Heart: Applying Empirical Evidence About the Connection Between Child Pornography and Child Molestation to Probable Cause Analyses*, 82 *FORDHAM L. REV.* 1487, 1492 (2013). Weissler details the United States’ early history of apathy toward child pornography and notes that, until the late 1970s, magazines and pictures containing child pornography were openly distributed. *See id.*

³¹ Pub. L. No. 95-225, 92 Stat. 7 (1978).

³² *Id.*; see *Miller v. California*, 413 U.S. 15, 23–24 (1973) (noting the “inherent dangers of undertaking to regulate any form of expression,” but upholding the regulation of items that “appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”).

In *New York v. Ferber*, the Supreme Court addressed the issue of child pornography for the first time and concluded that child pornography is not entitled to First Amendment protection.³³ The Court reasoned that the government interest in preventing the sexual exploitation and abuse of children, an interest of “surpassing importance,” outweighed First Amendment considerations.³⁴ The Court considered child pornography so “abhorrent” that it did not fall under the reach of the First Amendment because child pornography “is intrinsically related to the sexual abuse of children.”³⁵

Following the enactment of PCASE and the decision in *Ferber*, Congress passed a series of legislation that provided for increased protection of children against the harms of child pornography.³⁶ The Child Protection Act of 1984 expanded PCASE, changing the definition of child pornography from its prior focus on “obscene materials” involving children to any materials that depicted minors engaged in sexually explicit conduct, and also increasing the age of maturity from sixteen to eighteen.³⁷ In 1988, Congress passed the Child Protection and Obscenity Enforcement Act (CPOEA), which criminalized the distribution of child pornography using a computer in response to technological advances that enabled the proliferation of illegal child pornography.³⁸ Finally, in 2003, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT”) further expanded the criminalization of child pornography, making it illegal to solicit child pornography.³⁹ Under PROTECT, any solicitation of child pornography is prohibited regardless of whether there is actual child pornography involved, so long as a party to the exchange believes that child pornography is involved.⁴⁰ As a result of the rapid expansion of the criminalization of child pornography, borne from a concern for the protection of children from sexual abuse and the difficulty in stopping the spread of child pornography due to technology, sentences for offenders have increased in severity.⁴¹

³³ 458 U.S. 747, 774 (1982).

³⁴ *Id.* at 757.

³⁵ *Id.* at 757 n.8.

³⁶ See Weissler, *supra* note 30, at 1494–95.

³⁷ Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. § 2252 (2012)).

³⁸ Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. § 2251 (2012)); see Weissler, *supra* note 30, at 1494.

³⁹ Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁴⁰ See Weissler, *supra* note 30, at 1495.

⁴¹ See Wilber A. Barillas, “*The Marvels of Modern Technology*”: *Constitutional Rights, Technology, and Statutory Interpretation Collide* in *United States v. Chiaradio*, 33 B.C.J.L. & SOC. JUST. 1, 7 n.49 (2013) (citing the title of a recent amendment to a law against child pornography, titled “Zero Tolerance for Possession of Child Pornography,” as an indication of Congress’s relatively recent intention of harshly punishing offenders); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U.L. REV. 853, 857 (2011) (detailing the drastic increase in sentencing for defendants convicted of dealing in child pornography); U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES: EXECUTIVE SUMMARY II (2012), <http://www.uscc.gov/sites/>

C. The Circuit Split Over the Automatic Right to Search for Evidence of Child Pornography Based on Child Molestation

Following the introduction of the fluid and imprecise totality of the circumstances standard for probable cause in *Gates* and the rapid criminalization of child pornography, the U.S. Circuit Courts of Appeal have struggled to come to a consensus regarding whether probable cause to search for evidence of child molestation automatically provides probable cause to search for child pornography.⁴² The U.S. Courts of Appeal for the Second, Third, Fourth, and Sixth Circuits have held that probable cause to search for evidence of child molestation does not provide probable cause to search for child pornography.⁴³ The U.S. Court of Appeals for the Ninth Circuit has held that, although probable cause to search for evidence of child molestation does not provide probable cause to search for child pornography, an objectively reasonable officer could believe that such a relationship provides probable cause; therefore the good faith exception should apply to evidence seized pursuant to warrants to search for child pornography based on evidence of child molestation.⁴⁴ Finally, the U.S. Court of Appeals for the Eighth Circuit has held that probable cause to search for evidence of child molestation does provide probable cause to search for evidence of child pornography.⁴⁵

1. The Second, Third, Fourth, and Sixth Circuits: No Relationship

The Second, Third, Fourth, and Sixth Circuits have each held that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography, and further, that the good faith exception does not apply to evidence seized pursuant to a search warrant when it is based solely on such a relationship.⁴⁶

default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Executive_Summary.pdf[<http://perma.cc/Q69J-QMFY>] (detailing increases in child pornography sentences and the considerable rise of the minimum sentencing guidelines for child pornography crimes).

⁴² See, e.g., *Dougherty v. City of Covina*, 654 F.3d 892, 899 (9th Cir. 2011); *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010); *United States v. Hodson*, 543 F.3d 286, 286 (6th Cir. 2008).

⁴³ See *Virgin Islands v. John*, 654 F.3d 412, 422 (3d Cir. 2011); *United States v. Doyle*, 650 F.3d 460, 463 (4th Cir. 2011); *United States v. Falso*, 544 F.3d 110, 113 (2d Cir. 2008); *Hodson*, 543 F.3d at 286.

⁴⁴ See *United States v. Needham*, 718 F.3d 1190, 1195 (9th Cir. 2013); *Dougherty*, 654 F.3d at 899–900; *United States v. Leon*, 468 U.S. 897, 922–23 (1984) (explaining the good faith exception: if an objectively reasonable officer would conclude that a search warrant, later found by the court to be insufficient, was valid, then evidence obtained as a result of the lacking warrant should not be suppressed).

⁴⁵ See *Colbert*, 605 F.3d at 578–79.

⁴⁶ See *John*, 654 F.3d at 422; *Doyle*, 650 F.3d at 463; *Falso*, 544 F.3d at 112–13; *Hodson*, 543 F.3d at 286.

a. *The Sixth Circuit: United States v. Hodson*

In *United States v. Hodson*, the Sixth Circuit became the first among these four federal Circuit Courts of Appeal to consider this issue.⁴⁷ In *Hodson*, law enforcement officials caught the defendant—a forty-one-year-old married man with two sons—attempting to arrange sexual acts with what he believed to be a twelve-year-old boy online.⁴⁸ As a result of their investigations into the defendant's attempts to commit child molestation, law enforcement officers prepared a search warrant for the defendant's residence to search solely for evidence of or related to child pornography, and not for evidence of or related to child molestation.⁴⁹ A magistrate judge issued the warrant and detectives recovered numerous pieces of evidence of child pornography in the defendant's home.⁵⁰

The Sixth Circuit held that the evidence recovered in the defendant's home should have been suppressed because the warrant failed to establish a nexus between child molestation and child pornography that would establish probable cause to support a search warrant for child pornography.⁵¹ The unanimous panel decision stressed that, although the law enforcement officials established probable cause for the crime of child molestation, they requested a search warrant for evidence related to an "entirely different crime (child pornography)."⁵² In support of its decision, the Sixth Circuit reasoned that the nexus between the crime of child molestation and child pornography is "limited," "indirect," and "weak," and that such a link would depend on empirical evidence that the law enforcement officials did not provide in their search warrant.⁵³ Further, the court added that even a "reasonably well trained officer," let

⁴⁷ 543 F.3d at 286; see *John*, 654 F.3d at 422; *Doyle*, 650 F.3d at 463; *Falso*, 544 F.3d at 112–13.

⁴⁸ 543 F.3d at 287. The detective pretended to be a twelve-year-old boy on the Internet while interacting with the defendant. *Id.*

⁴⁹ *Id.* at 287–89.

⁵⁰ *Id.* at 289.

⁵¹ *Id.* at 286, 292. The Sixth Circuit affirmed the lower court's ruling that the search warrant was not supported by probable cause and reversed the lower court's ruling that the search warrant was still valid as a result of the good faith exception to the search warrant requirement. See *id.* at 292–93. When the defendant moved to suppress the evidence recovered in his home because the search warrant contained various deficiencies related to the probable cause supporting the search warrant, the magistrate judge had found that, although the search warrant was not supported by probable cause, the search was nonetheless valid under the good faith exception because the omission of a connection between child pornography and child molestation in the warrant was an innocent oversight not made in bad faith or calculated to mislead the magistrate. See *id.* at 289–91; *Leon*, 468 U.S. at 922–23. The U.S. District Court for the Eastern District of Kentucky had affirmed the ruling of the magistrate judge, holding that, although the search warrant was not supported by probable cause, the good faith exception applied and, as a result, the defendant's motion to suppress was denied. See *Hodson*, 543 F.3d at 291–92.

⁵² *Hodson*, 543 F.3d at 292.

⁵³ *Id.* at 290–91.

alone a neutral and detached magistrate, would have realized that the search described did not match the probable cause described.⁵⁴

b. The Second Circuit: United States v. Falso

Soon after *Hodson* was decided, the Second Circuit echoed the Sixth Circuit in *United States v. Falso*, similarly concluding that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography.⁵⁵ In *Falso*, the defendant was under investigation for appearing to gain access to a child pornography website.⁵⁶ Law enforcement officials supported the search warrant with evidence of their investigation into the defendant's online habits, using information gathered by a member of the Federal Bureau of Investigation's Behavioral Analysis Unit that supported a connection between child molestation and child pornography.⁵⁷ The officials also cited evidence that the defendant was convicted of sexually abusing a seven-year-old girl approximately eighteen years prior to the application for the search warrant.⁵⁸ A magistrate judge issued the warrant and the search of the defendant's residence revealed a collection of child pornography; the defendant subsequently admitted to possessing the child pornography, partaking in sexual activity with girls in other countries whom he believed to be under the age of eighteen, and to a prior conviction of sexually abusing a seven-year-old girl.⁵⁹ The district court denied the defendant's motion to suppress and found that the search warrant was supported by probable cause because of the "proclivity of [child molesters] to . . . maintain images of child pornography," as well as the Behavioral Analysis Unit's submitted evidence connecting the two crimes.⁶⁰

The Second Circuit majority reversed the district court's finding that the warrant to search for child pornography was supported by probable cause, in part because "[the defendant's] crime allegedly involv[ing] the sexual abuse of a minor . . . did not relate to child pornography."⁶¹ The majority reasoned that

⁵⁴ See *id.* at 292–93. The court employed this reasoning to support the reversal of the lower court's decision that the search warrant and execution of the search warrant fell under the good faith exception. *Id.*

⁵⁵ See *Falso*, 544 F.3d at 113; *Hodson*, 543 F.3d at 292–93.

⁵⁶ *Falso*, 544 F.3d at 112. The defendant was under investigation for appearing to gain access to a child pornography website as opposed to actually accessing the website because the investigators could not prove that he had, in fact, accessed the website. *Id.* at 113–14. Instead, the investigators relied heavily on the fact that they found the defendant's name on an email list that the website sent to subscribers. *Id.*

⁵⁷ *Id.* at 112–14.

⁵⁸ *Id.*

⁵⁹ *Id.* at 114.

⁶⁰ See *id.* at 113, 116.

⁶¹ See *id.* at 123, 124. The majority also cited other excessive inferential leaps in the search warrant that precluded a finding of probable cause, including that the search warrant provided insufficient

“[a]lthough offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, the correlation drawn by the district court” that evidence of child molestation provides probable cause to search for evidence of child pornography.⁶² Although commending the lower court’s admirable concern for public safety, the majority concluded that an individual’s Fourth Amendment rights “cannot be vitiated based on fallacious inferences drawn from facts not supported by the affidavit.”⁶³

c. The Fourth Circuit: United States v. Doyle

In 2011, the Fourth Circuit in *United States v. Doyle* joined the Second and Sixth Circuits in holding that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography.⁶⁴ In *United States v. Doyle*, law enforcement officials based a search warrant for child pornography on the accounts of three children who alleged that the defendant had molested them.⁶⁵ The execution of the search warrant led to the discovery of child pornography in the defendant’s home in Lee County, Virginia.⁶⁶ Citing *Hodson* and *Falso*, the Fourth Circuit found that the warrant to search for evidence of child pornography lacked probable cause because the support for the warrant related almost entirely to child molestation and not child pornography.⁶⁷ The majority noted that, because Virginia has distinct laws addressing each offense, the search warrant insufficiently linked the child molestation of which the defendant was accused to the evidence of child pornography for which law enforcement officials sought to search.⁶⁸ Similar to the Sixth Circuit, the Fourth Circuit declined to apply the good faith exception,

evidence that the defendant in fact accessed or attempted to access a pornographic website. *See id.* at 124.

⁶² *Id.* at 122. The majority added, “It is an inferential fallacy of ancient standing to conclude that, because members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely or even largely composed of, members of group A That the law criminalizes both child pornography and the sexual abuse (or endangerment) of children cannot be enough.” *Id.* at 122–23 (internal quotation marks omitted) (quoting *United States v. Martin*, 426 F.3d 68, 82 (2005) (Pooler, J., dissenting)).

⁶³ *Id.* at 122. The majority ultimately upheld the lower court’s denial of the defendant’s motion to suppress based on the good faith exception in relation to the email list. *Id.* at 129. The court noted, *inter alia*, that the search warrant contained evidence that directly tied the defendant to child pornography websites, including the fact that the defendant’s e-mail address appeared on the mailing list of a child pornography website. *See id.* at 114, 128–29.

⁶⁴ *See United States v. Doyle*, 650 F.3d 460, 463 (4th Cir. 2011); *Falso*, 544 F.3d at 113; *United States v. Hodson*, 543 F.3d 286, 286 (6th Cir. 2008).

⁶⁵ *See Doyle*, 650 F.3d at 463–66.

⁶⁶ *Id.* at 463.

⁶⁷ *Id.* at 472 (citing *Falso*, 544 F.3d at 124; *Hodson*, 543 F.3d at 292).

⁶⁸ *See id.* at 471. The majority also expressed doubt regarding the veracity and accuracy of the victims’ accounts that supported the search warrant. *See id.* at 471–72.

concluding that the lack of a nexus between child molestation and child pornography is so clear that even a “reasonable law enforcement officer” would have known that the search warrant in this case—a search warrant for child pornography based almost entirely on evidence of child molestation—was not supported by probable cause.⁶⁹

d. The Third Circuit: Virgin Islands v. John

The Third Circuit is the most recent Circuit Court of Appeals to review at length, for the first time, the relationship between probable cause to search for evidence of child molestation and probable cause to search for evidence of child pornography.⁷⁰ In *Virgin Islands v. John*, the Third Circuit concluded, as the Fourth and Sixth Circuits had, that not only is a warrant to search for child pornography based solely on evidence of child molestation not supported by probable cause, but also that the relationship between the two offenses is so distant that evidence seized pursuant to such a warrant should not be admitted based on the good faith exception.⁷¹ The Third Circuit held that the affidavit in question did not provide any support for the connection between child molestation and child pornography.⁷² The Third Circuit relied heavily on the reasoning of the Second and Sixth Circuits, which reached the same conclusion, quoting language from the two that finding probable cause based on the relationship would be “an inferential fallacy,”⁷³ and that, because finding such a relationship is “entirely unreasonable,” the good faith exception should not apply.⁷⁴

⁶⁹ *Id.* at 473–74; see *Hodson*, 543 F.3d at 292–93.

⁷⁰ See *John*, 654 F.3d 412 (3d Cir. 2011); *Doyle*, 650 F.3d at 463; *Falso*, 544 F.3d at 112–13; *Hodson*, 543 F.3d at 286.

⁷¹ See *John*, 654 F.3d at 422; see also *Doyle*, 650 F.3d at 463 (holding that a warrant to search for child pornography based solely on evidence of child molestation is not supported by probable cause, nor is evidence seized based on a faulty warrant eligible for the good faith exception); *Hodson*, 543 F.3d at 286 (coming to the same conclusion as in *Doyle*). In *John*, the warrant to search for child pornography was solely supported by allegations that the defendant sexually assaulted several children at the school where he taught and recorded sexually explicit material about a number of his students in notebooks that he brought with him to school every day. See *John*, 654 F.3d at 413–14.

⁷² *John*, 654 F.3d at 419. The majority read the affidavit very narrowly, construing language in the affidavit that said that “persons who commit sexual offense crimes involving children customarily hide evidence of such offenses, including notes, photographs, [and] computer files, in their homes and on their computer[s],” to mean that the affiant-officer alleged that a defendant who has been accused of sexually abusing children “‘customarily hide[s]’ evidence of *that* crime in his home and/or on his computer,” and not to allege that the defendant also “‘customarily hide[s]’ evidence of *other* crimes in his home or anywhere else.” *Id.*

⁷³ *Id.* (quoting *Falso*, 544 F.3d at 122).

⁷⁴ *Id.* at 418.

2. The Ninth Circuit: The Good Faith Exception

Although the Ninth Circuit has adopted a bright-line rule in accordance with the aforementioned Circuit Courts of Appeal that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography, the Ninth Circuit stands in contrast to those other Circuit Courts of Appeal because it applies the good faith exception in cases involving search warrants for child pornography that are based solely on evidence of child molestation.⁷⁵ In *United States v. Needham*, the Ninth Circuit held that the search warrant in question was not supported by probable cause, but because it was “executed in objectively reasonable reliance on the search warrant [that had been issued by a neutral magistrate],” the good faith exception applied and, therefore, the evidence seized from the defendant’s apartment should not be suppressed.⁷⁶ With regard to probable cause, the majority concluded, “It is clear in this circuit that [the inference that those who molest children are likely to possess pornography], alone, does not establish probable cause to search a suspected child molester’s home for child pornography.”⁷⁷ Nonetheless, the majority refused to suppress the evidence seized as a result of the faulty search warrant because it had recently ruled in *Dougherty v. City of Covina* that the good faith exception should apply in cases in which a search

⁷⁵ Compare *United States v. Needham*, 718 F.3d 1190, 1195–96 (9th Cir. 2013), with *Doyle*, 650 F.3d at 472 (holding that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography), and *Hodson*, 543 F.3d at 292. *Needham* appears to have strictly interpreted the Ninth Circuit’s holding in *Dougherty* and upheld a bright-line test in these type of cases. See *Needham*, 718 F.3d at 1195–96; *Dougherty*, 654 F.3d at 899–900. In *Dougherty*, the Ninth Circuit appeared to uphold a totality of the circumstances test instead of a bright-line rule in a case involving a search warrant for child pornography based solely on evidence of child molestation. See *Dougherty*, 654 F.3d at 899. Police officers applied for a search warrant for the defendant’s home, computer, and electronic media for child pornography based on: (1) a three-year-old allegation from a sixth grade student that the defendant had molested her; (2) subsequent allegations from other students alleging similar conduct; and (3) the investigating officer’s fourteen years of experience on the police force and extensive training involving juvenile and sex crimes. *Id.* at 896. The Ninth Circuit held that the search warrant in question was not supported by probable cause, but suggested that the totality of the circumstances test for probable cause to search for evidence of child molestation could provide probable cause to search for evidence of child pornography. *Id.* at 899. Although this suggestion has since been rebutted by *United States v. Needham*, the Ninth Circuit has continued to apply the good faith exception to cases in which a warrant to search a defendant’s house was supported solely by evidence of child molestation and was issued by a neutral magistrate. See *Needham*, 718 F.3d at 1195–96; *Dougherty*, 654 F.3d at 899.

⁷⁶ *Needham*, 718 F.3d at 1195. The search warrant in *Needham* to search, inter alia, the defendant’s home for evidence of child pornography was supported by the following evidence: (1) an allegation from the mother of a five-year-old that the defendant had molested the child in the restroom at a local mall; (2) the defendant had been arrested for sexual abuse of a child under the age of fourteen; and (3) the investigating officer claimed that “based on [the officer’s] training and experience,” the defendant’s history of child molestation strongly suggested that the defendant was involved with child pornography. See *id.* at 1191–93.

⁷⁷ *Id.* at 1195.

warrant relies on the connection between child molestation and child pornography.⁷⁸ The majority in *Needham* explained that, because the majority in *Dougherty* granted the officers in that case qualified immunity, and “because the standard for granting qualified immunity is the same as the standard of objective reasonableness under [*United States v. Leon*],” Ninth Circuit precedent demands that evidence seized pursuant to an issued search warrant in cases involving a warrant to search for evidence of child pornography based solely on evidence of child molestation falls under the good faith exception and, therefore, should not be excluded.⁷⁹

The majority in *Needham* relied on *United States v. Leon* in applying the good faith exception to warrants to search for child pornography that are based on evidence of child molestation.⁸⁰ In *United States v. Leon*, the U.S. Supreme Court held that the exclusionary rule barring illegally obtained evidence from the courtroom does not apply to evidence seized “in objectively reasonable reliance on” a warrant issued by a detached and neutral magistrate judge, even where the warrant is subsequently deemed invalid.⁸¹ The good faith exception applies as long as the issuing judge has not been knowingly misled or has not wholly abandoned his or her role as a neutral and detached magistrate, the application is not so lacking in indicia of probable cause as to render reliance upon it unreasonable, or the warrant is not so facially deficient that reliance upon it is unreasonable.⁸² In providing such a considerable exception to the exclusionary rule, the majority in *Leon* reasoned that “even assuming that the [exclusionary] rule effectively deters some police misconduct and provides

⁷⁸ See *id.* at 1195–96; *Dougherty*, 654 F.3d at 900.

⁷⁹ *Needham*, 718 F.3d at 1195; see *United States v. Leon*, 468 U.S. 897, 926 (1984). The Supreme Court has explained that the doctrine of qualified immunity “protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Therefore, the determination regarding whether an official is entitled to qualified immunity generally depends on the “objective legal reasonableness” of the action. *Id.* at 1245. The Court also noted that the standard for the good faith exception is the same as this standard for granting qualified immunity. See *id.* at 1245 n.1; *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986) (citation omitted) (“Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost.”).

⁸⁰ See *Needham*, 718 F.3d at 1194–95; *Leon*, 468 U.S. at 926.

⁸¹ 468 U.S. at 922.

⁸² See *id.* at 922–23; see also *Groh v. Ramirez*, 540 U.S. 551, 551 (2004) (holding the good faith exception not applicable where a search warrant did not describe the things to be seized, and therefore was so facially invalid that reliance on it could not be found to be reasonable); *Lo-Ji Sales v. New York*, 442 U.S. 319, 320 (1979) (holding that the good faith exception was not applicable where a magistrate participated in execution of the search warrant and filled out sections of the warrant as he helped to conduct the search); *United States v. Doyle*, 650 F.3d 460, 476 (4th Cir. 2011) (holding that the good faith exception was not applicable where the search warrant was so lacking in indicia of probable cause that no objectively reasonable officer would rely on the warrant); *United States v. Hodson*, 543 F.3d 286, 293–94 (6th Cir. 2008) (coming to the same conclusion as in *Doyle*).

incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.”⁸³

3. The Eighth Circuit: An “Intuitive Relationship”

In *United States v. Colbert*, the Eighth Circuit became the first circuit court to hold that a search warrant for child pornography that was solely based on evidence that the defendant sought to commit or had committed child molestation was supported by probable cause.⁸⁴ The majority reasoned that, because of the “intuitive relationship” between child molestation and child pornography, probable cause to search for evidence of child molestation provides probable cause to search for child pornography.⁸⁵

The Eighth Circuit affirmed the lower court’s denial of suppression of evidence based on the malleable standard for probable cause as well as the clear connection between child molestation and child pornography.⁸⁶ The court rooted its reasoning in the Supreme Court’s standard that probable cause is a “fluid concept” that requires judges and magistrates to conduct a “commonsense analysis of the facts available” to determine whether probable cause exists.⁸⁷ According to the majority, this inquiry should weigh evidence “not in terms of

⁸³ *Leon*, 468 U.S. at 918–19. In *Herring v. United States*, the Supreme Court elaborated on the purpose of the exclusionary rule and when it is and is not applicable, noting that “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” 555 U.S. 135, 141, 144 (2009) (quoting *Leon*, 468 U.S. at 909) (adding that the Supreme Court has “repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation,” and that the exclusionary rule “is not an individual right and applies only where it ‘result[s] in appreciable deterrence’”); see *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (explaining that suppression of evidence pursuant to the exclusionary rule “has always been our last resort, not our first impulse”). Therefore, when a reasonable officer would not know that his or her conduct was unconstitutional, he or she likely would not be discouraged by the knowledge that the evidence seized as a result of his or her actions would be suppressed, and therefore the exclusionary rule should not apply. See *Herring*, 555 U.S. 144.

⁸⁴ *United States v. Colbert*, 605 F.3d 573, 578–79 (8th Cir. 2010). The police sought a warrant to search the defendant’s home for child pornography after being informed of the defendant’s attempts to lure a five-year-old girl at a public playground to his apartment; they subsequently found materials that could be used to entice or force young children to go to the defendant’s apartment. *Id.* at 575–76. The search warrant included the fact that the defendant made comments to the five-year-old girl regarding videos that they should watch together, but the defendant never mentioned that those videos were pornographic. *Id.* The police officers involved in the investigation testified at the suppression hearing about their experience with, and knowledge regarding, the link between child molestation and child pornography, but did not include that information in the search warrant. *Id.* at 579.

⁸⁵ *Id.* at 578; see also *United States v. Houston*, 754 F. Supp. 2d 1059, 1063–64 (D.S.D. 2010) (citing *Colbert*, 605 F.2d at 578) (upholding a search warrant for child pornography based on the defendant admitting to unlawful sexual conduct with a minor because “there is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography”).

⁸⁶ See *Colbert*, 605 F.3d at 576–78.

⁸⁷ *Id.* at 576 (citing *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

library analysis by scholars, but as understood by those versed in the field of law enforcement.”⁸⁸ Here, the court found that the search warrant set forth ample facts regarding the defendant’s desire to lure a five-year-old girl to his apartment.⁸⁹ Despite acknowledging the holdings of other circuits—that such facts only provide probable cause to search for child *molestation*—the majority held that the search warrant in the case, to search for child *pornography*, was supported by probable cause because of the “intuitive relationship” between child molestation and child pornography.⁹⁰

The Eighth Circuit based its holding on common sense and precedent from the federal circuit and Supreme Court that posits a connection between child molestation and child pornography.⁹¹ Although the warrant provided no evidence of a connection between child molestation and child pornography, the majority held that the relationship between the two crimes is so intuitive that, based on a common-sense, non-technical approach to analyzing probable cause, the probable cause in the warrant to search for evidence of child molestation also provided probable cause to search for evidence of child pornography.⁹² In support of this connection, the Eighth Circuit cited its own precedent, as well as authority from the Fifth Circuit and the Supreme Court, that has suggested such an intuitive relationship.⁹³

II. THE CONNECTION BETWEEN CHILD MOLESTATION AND CHILD PORNOGRAPHY

The inconsistency regarding whether probable cause to search for evidence of child molestation provides probable cause to search for child pornography is a result of each court’s struggle to balance the uncertainty and policy

⁸⁸ *Id.* at 578 (quoting *Gates*, 462 U.S. at 232).

⁸⁹ *Id.* at 575–77.

⁹⁰ *See id.* at 577–78 (distinguishing *Hodson*, 543 F.3d at 292; *Falso*, 544 F.3d at 123). Chiding the other circuits’ strict interpretation of the probable cause standard, the majority concluded that those circuits’ “categorical distinction between possession of child pornography and other types of sexual exploitation . . . seems to be in tension both with common experience and a fluid, non-technical conception of probable cause.” *Id.* at 578.

⁹¹ *See id.* at 576, 578–79; *see also* *Osborne v. Ohio*, 495 U.S. 102, 111 (1990) (“[E]vidence suggests that pedophiles use child pornography to seduce other children into sexual activity.”); *United States v. Paton*, 535 F.3d 829, 836 (8th Cir. 2008) (endorsing an officer’s statement that “computers and the Internet have become a common tool for individuals who get sexual gratification from viewing images of children or interacting with minors,” and that officers expect to find materials related to child pornography in the homes of such individuals); *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994) (“[C]ommon sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography.”).

⁹² *Colbert*, 605 F.3d at 578–79.

⁹³ *See id.* at 578 (reasoning that individuals seeking to entice and molest children may use child pornography to tempt children into engaging in sexual acts with them, and also may use child pornography as a “simpler and less detectable way of satisfying pedophilic desires”) (citing *Osborne*, 495 U.S. at 111; *Byrd*, 31 F.3d at 1339).

concerns surrounding the connection between child molestation and child pornography.⁹⁴ The scientific community, for instance, is divided on the issue, with some studies finding a discernable connection between the two crimes and others denying any useful connection.⁹⁵ Further complicating the issue, considerable policy concerns surround both the treatment of child molestation and child pornography at the judicial and legislative levels.⁹⁶

A. Scientific Studies Analyzing the Connection Between Child Molestation and Child Pornography

Although a large number of academic and government-sponsored social science studies have examined the purported connection between child molestation and child pornography, the studies provide no consensus regarding a connection between the two crimes, and therefore provide minimal assistance to courts confronted with cases involving warrants dependent on such a relationship.⁹⁷ In addition to the lack of consensus, scientific studies also signifi-

⁹⁴ Compare *Colbert*, 605 F.3d at 578 (holding that probable cause to search for evidence of child molestation provides probable cause to search for evidence of child pornography), with *Doyle*, 650 F.3d at 472 (holding that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography).

⁹⁵ Compare Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 FAM. VIOLENCE 183, 183 (2009) [hereinafter *Butner Study Redux*] (finding that a considerable majority of convicted possessors of child pornography consulted for the study—self reporting inmates in prison for possessing child pornography—had also committed child molestation), and JANIS WOLAK ET AL., CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 16 (2005), <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf> [<http://perma.cc/3PR3-BHMS>] [hereinafter WOLAK I] (finding that the majority of individuals examined in the survey of arrests for Internet-related sex crimes committed against minors had either committed child molestation or had attempted to solicit undercover investigators posing online as minors), with Angela W. Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, 35 LAW HUM. BEHAV. 466, 476 (2011) (arguing that not all child pornography offenders have a high risk of committing offenses involving the sexual molestation of minors).

⁹⁶ See Weissler, *supra* note 30, at 1498–1501 (highlighting the recent “extremely aggressive” efforts made in the United States to combat child pornography and punish offenders); Hessick, *supra* note 41, at 857 (highlighting the sentencing increases in the United States for child pornography offenders).

⁹⁷ See, e.g., Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22 (2011) [hereinafter *Wolak II*]; Michael Seto et al., *Contact Sex Offending by Men with Online Sexual Offenses*, 23 SEXUAL ABUSE 124 (2011); see also *United States v. Houston*, 754 F. Supp. 2d 1059, 1064 (D.S.D. 2010) (appealing for additional research in ruling that such an “intuitive connection” exists between child molestation and child pornography to support a search warrant for child pornography based on evidence of attempted child molestation). See generally U.S. SENTENCING COMM’N, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 170–74 (2012) [hereinafter 2012 SENTENCING REPORT] (summarizing existing research that examines the connection between child molestation and child pornography).

cantly vary with regard to their methodologies,⁹⁸ sample sizes,⁹⁹ and definitions of key terms.¹⁰⁰ The differing results of the studies support a wide range of conclusions regarding the connection between child molestation and child pornography.¹⁰¹

1. A Strong Connection: *The Butner Study Redux*

A 2009 study conducted by researchers Michael Bourke and Andres Hernandez, *The Butner Study Redux*, has been widely and controversially cited as the strongest evidence of a connection between child molestation and child pornography.¹⁰² Bourke and Hernandez conducted the study of 155 convicted child pornography offenders in the residential sexual offender treatment program at the Butner Federal Prison in North Carolina and found that, based on participants' self-reporting, a vast majority of the convicted child pornography offenders had committed at least one hands-on molestation offense.¹⁰³ The study depended on the voluntary participation and self-reporting of the sub-

⁹⁸ Compare Eke et al., *supra* note 95, at 467 (consulting data regarding convicted child pornography offenders from official databases such as the Ontario Sex Offender Registry), with *Butner Study Redux*, *supra* note 95, at 185 (consulting official data regarding prior convictions, information in presentencing reports, as well as self-admissions made by the subjects of the study).

⁹⁹ Compare *Butner Study Redux*, *supra* note 95, at 185 (sample of 155 federal child pornography offenders), with *Wolak II*, *supra* note 97, at 25 (sample of survey of over 2500 law enforcement agencies).

¹⁰⁰ Compare *Wolak II*, *supra* note 97, at 27 (defining "prior sexual misconduct against minors" to include offenses against minor victims as well as against undercover officers posing as minors), with Seto et al., *supra* note 97, at 132 (defining "prior sexual misconduct against minors" to include minor and adult victims, although noting that most of the victims were minors).

¹⁰¹ See *Butner Study Redux*, *supra* note 95, at 188 (asserting a strong connection between child molestation and child pornography—eighty-five percent of study participants convicted of possessing child pornography had committed prior "hands-on" offenses); Jerome Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY 1, 4 (2009) (purporting a minimal connection between the two offenses—4.8 percent of study participants had committed both).

¹⁰² See, e.g., *United States v. Crisman*, 39 F. Supp. 3d 1189, 1190 (D.N.M. 2014); *United States v. Houston*, 754 F. Supp. 2d 1059, 1063 n.1 (D.S.D. 2010), *aff'd*, 665 F.3d 991 (8th Cir. 2012); 2012 SENTENCING REPORT, *supra* note 97, at 172 n.13. Courts have repeatedly cited *The Butner Study Redux* in coming to differing conclusions regarding the viability of the U.S. Sentencing Commission's increasingly strict sentencing guidelines for child pornography offenses. See *United States v. Johnson*, 588 F. Supp. 2d 997, 1007 (S.D. Iowa 2008) (using the limitations of the study to highlight the lack of empirical data supporting sentencing guideline recommendations); *United States v. Cunningham*, 680 F. Supp. 2d 844, 859–60 (N.D. Ohio 2010), *aff'd*, 669 F.3d 723 (6th Cir. 2012) (considering the *Butner Study Redux* finding of a correlation between viewing child pornography and committing hands-on offenses, as well as its finding that online child pornography "communities" stimulate hands-on offenses and desensitize offenders, in sentencing a defendant convicted of child pornography). Further, while noting the study's limitations and the need for more conclusive empirical research regarding the connection between child molestation and child pornography, the Eighth Circuit has cited the *Butner Study Redux* to uphold a search warrant for child pornography solely supported by evidence of child molestation. *Houston*, 754 F. Supp. 2d at 1063–64.

¹⁰³ See *Butner Study Redux*, *supra* note 95, at 187–88.

jects, and built off of a smaller, unpublished study conducted by Hernandez in 2000.¹⁰⁴ The researchers collected their data from the participants' official criminal records, the presentencing reports prepared by the participants' probation offices, and the participants' self-reports following treatment.¹⁰⁵ Of the 155 participants, 115 had no prior documented contact offenses; after consulting the participants' self-reports, however, the researchers found that only twenty-four of the participants *denied* having committed a hands-on offense.¹⁰⁶ By the end of the study, eighty-five percent of the 155 participants admitted to having committed a hands-on offense.¹⁰⁷ Overall, the study reported that the vast majority of the participants admitted that they had committed child molestation before getting involved with child pornography.¹⁰⁸

The Butner Study Redux has been met with considerable criticism regarding its methodology and its overgeneralization of its results.¹⁰⁹ Problems with the study include its small sample size, the fact that the study did not use a control group, claims that the sample size was not representative of child pornography and child molestation offenders, and the study's lack of verification

¹⁰⁴ See *id.* at 185; Andres E. Hernandez, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders (Nov. 2000) (unpublished manuscript), <http://www.ovsom.texas.gov/docs/Self-Reported-Contact-Sexual-Offenses-Hernandez-et-al-2000.pdf> [<http://perma.cc/Q8VQ-Y6R8>] [hereinafter *First Butner Study*]. The *First Butner Study* assessed ninety voluntarily participating, self-reporting individuals convicted of child pornography possession and in treatment at the residential sexual offender treatment program at the Butner Federal Prison. *First Butner Study, supra*, at 2–3. Hernandez compared two categories for each participant: the “number of contact sexual crimes the subject was known to have committed prior to entering treatment” versus the “number of self-reported contact sexual crimes divulged over the course of evaluation and treatment.” *Id.* at 2. Of the ninety participants, sixty-two had been convicted of either possessing child pornography or of attempting to lure a child and traveling across state lines to sexually abuse a child. *Id.* at 3. The individuals in this group reported an additional 1379 contact sex crimes that had never been addressed by or reported to the criminal justice system. *Id.* at 4. Further, eighty percent of the individuals who were convicted of child pornography possession (a group totaling fifty-five participants) reported having committed a previously unknown contact sexual offense, meaning that close to eighty percent of the individuals imprisoned for child pornography possession at the prison had committed, and gotten away with, a child molestation offense. See *id.* at 4.

¹⁰⁵ *Butner Study Redux, supra* note 95, at 186.

¹⁰⁶ *Id.* at 187. In order to confirm that the participants were neither over- nor under-reporting, the researchers subjected fifty-two percent of the participants to polygraph tests. *Id.* at 186. Of the twenty-four participants in the study who denied that they had committed a hands-on test and submitted to polygraph tests, “only two passed [the polygraph test].” *Id.* at 188.

¹⁰⁷ *Id.* at 187. Twenty-six percent of the total study participants had known convictions for child molestation-related offenses, while fifty-nine percent of the participants reported that they had committed at least one previously unknown hands-on offense. See *id.*

¹⁰⁸ *Id.* at 189.

¹⁰⁹ See Weissler, *supra* note 30, at 1508–09; Melissa Hamilton, *The Child Pornography Crusade and its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1707–09 (2012); Sher & Carey, *supra* note 9.

of the self-reported incidents.¹¹⁰ In *United States v. Johnson*, the U.S. District Court for the Southern District of Iowa went even further, noting that “[*The Butner Study Redux*’s] ‘whole approach’ is rejected by the treatment and scientific community.”¹¹¹ In response, the study’s author, Andres Hernandez, stood by the results of the study, but cautioned against overgeneralization; he urged those considering the study to be aware of its small sample size.¹¹² Nonetheless, *The Butner Study Redux* remains the empirical study offering the most overwhelming evidence of the connection between child molestation and child pornography, and a study that courts frequently cite in their discussions of the subject.¹¹³

2. Additional Studies Examining the Connection Between Child Molestation and Child Pornography

A number of other social science studies have examined the connection between child molestation and child pornography and, compared to *The Butner Study Redux*, found a weaker, but still significant, connection between the two offenses.¹¹⁴ Seeking to understand the characteristics of child pornography offenders from the perspective of law enforcement, the 2005 National Juvenile Online Victimization Study (“N-JOV”) surveyed 429 investigators at every level of law enforcement about cases involving Internet child pornography of-

¹¹⁰ See Hamilton, *supra* note 109, at 1705–06. In a letter to the U.S. Sentencing Commission, the author of the study, Michael Bourke, defended the methodology, noting: “Offenders in the Butner program volunteered for treatment, which makes the study group a *convenience* sample. Such samples are less ideal than *randomized* sampling (the ‘gold standard’ in a perfect world), but by no means is this a flaw. In fact, convenience sampling is the most common form of sampling in the social sciences.” Letter from Michael L. Bourke to the Honorable Patti B. Saris, Chair, United States Sentencing Commission 16 (May 17, 2012), www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Bourke.pdf [<https://perma.cc/A8NK-9KW8>].

¹¹¹ *Johnson*, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008).

¹¹² See Andres E. Hernandez, Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment 9 (Apr. 2009) (unpublished position paper) (on file with author).

¹¹³ See *supra* note 102 (collecting cases that discuss the *Butner Study Redux*).

¹¹⁴ See, e.g., WOLAK I, *supra* note 95, at viii; 2012 SENTENCING REPORT, *supra* note 97, at 170–206. In 2012, the U.S. Sentencing Commission published a report that provided a thorough analysis of the empirical data regarding the connection between child molestation and child pornography. 2012 SENTENCING REPORT, *supra* note 97, at 170–206. Although noting that *The Butner Study Redux* offered the strongest published evidence of said connection, the Sentencing Report detailed other studies conducted in the United States and abroad. See *id.* at 172 n.13 (citing, e.g., Richard Wollert et al., *Federal Internet Child Pornography Offenders—Limited Offense Histories and Low Recidivism Rates*, in 7 THE SEX OFFENDER: CURRENT TRENDS IN POLICY & TREATMENT PRACTICE (Barbara K. Schwartz ed., 2012) (based on a study of seventy-two federal child pornography offenders in the United States who were treated by the authors during the past decade; the authors found that twenty offenders, or twenty-eight percent, had prior convictions for a contact or non-contact sexual offense, including a prior child pornography offense); Endrass, *supra* note 101, at 3, 4 (study of 231 Swiss child pornography offenders finding that only 1% had prior convictions for “hands-on” sex offenses and an additional 3.5% had prior convictions for possession of child pornography).

fenses.¹¹⁵ The study found that fifty-five percent of the cases in which child pornography was either investigated or eventually discovered involved a “dual offender,” defined in the study as those child pornography offenders who possessed child pornography *and* sexually victimized or attempted to sexually victimize children.¹¹⁶ In forty percent of the cases, evidence of child molestation and child pornography possession were both discovered during the course of the investigation; the other fifteen percent of the cases involved dual offenders who had attempted to sexually victimize children by soliciting undercover investigators who posed online as minors.¹¹⁷ Further, fifty-five percent of the cases in which investigators uncovered a dual offender began as allegations of child sexual victimization.¹¹⁸

Another study conducted a meta-analysis of twenty-four different studies from around the world that had examined the connection between individuals convicted of child pornography possession and those that had been convicted of child molestation.¹¹⁹ Eighteen of these studies solely looked at official data—for example, convictions or arrest records—and, in the aggregate, found that only 12.2% of subjects who had been convicted of child pornography possession had also been convicted of or arrested for a child molestation-related offense.¹²⁰ The other six studies derived data from self-reporting convicted child molesters and in the aggregate found that 55% of individuals convicted of child pornography possession had also committed child molestation.¹²¹ Accordingly, the meta-analysis concluded that neither number likely encompasses the true nature of the connection between child pornography and child molestation, but noted with certainty that a large number of sex offenses are never discovered.¹²² Still, the authors of the study advised courts and law enforcement officials to take into consideration the risk of the connection between child pornography and child molestation.¹²³

B. Judicial and Congressional Treatment of Child Molestation and Child Pornography

Further informing courts’ decisions regarding whether evidence of child molestation is sufficient to provide probable cause to search for evidence of

¹¹⁵ See WOLAK I, *supra* note 95, at xi.

¹¹⁶ See *id.* at viii, 16.

¹¹⁷ See *id.* at 16.

¹¹⁸ See *id.* at 16–17.

¹¹⁹ See Seto, *supra* note 97, at 128–30, tbl.1 (summarizing the studies that the meta-analysis examined).

¹²⁰ See *id.* at 128–30, 132.

¹²¹ See *id.* at 128–30, 133.

¹²² See *id.* at 139–40.

¹²³ See *id.* at 140.

child pornography are the policy concerns reflected by the judicial and legislative treatment of sexual offenses against children, as numerous judicial and legislative sources recognize a connection between child molestation and child pornography.¹²⁴ In cases unrelated to the probable cause inquiry, various courts have supported a connection between child molestation and child pornography.¹²⁵ Some state statutes criminalizing the possession of child pornography have conflated child pornography and sexual abuse.¹²⁶ Further, the federal legislature has shown a disdain for child pornography-related offenses, especially through the imposition of severe prison sentences.¹²⁷

The persistent increase in federal and state sentencing guidelines related to child pornography puts pressure on the courts to endorse search warrants to search for child pornography based solely on evidence of child molestation because of the persuasive effect of federal sentencing guidelines as well as the inferred public support that the U.S. Sentencing Commission (“Sentencing

¹²⁴ See Hessick, *supra* note 41, at 871 n.67; M. Jackson Jones, *A Confusing Interaction Between the Warrants Clause, Child Pornography, and Child Molestation: Determining Whether Evidence of Child Molestation Creates Probable Cause to Search for Child Pornography*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 118–21 (2014).

¹²⁵ See, e.g., *New York v. Ferber*, 458 U.S. 747, 759 (1982) (“The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children”); *United States v. Brand*, 467 F.3d 179, 198 (2d Cir. 2006) (quoting Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996)) (concluding that “possession of child pornography . . . shares a connection . . . with pedophilia” and citing a congressional finding that “child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children”); *United States v. Lebovitz*, 401 F.3d 1263, 1271 (11th Cir. 2005) (quoting S. REP. NO. 104-358, 104th Cong., 2d Sess., at 12–13 (1996)) (“Law enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica.”); *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994) (“[C]ommon sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography.”).

¹²⁶ See Hessick, *supra* note 41, at 866. Hessick compiles an array of examples of state laws that conflate the two offenses. *Id.* at 866 n.43 (citing, for example, HAW. REV. STAT. § 707-752 (2007) (categorizing possession on child pornography as “promoting child abuse in the third degree”); MONT. CODE ANN. § 45-5-625(1)(e) (2009) (classifying the possession of child pornography as “sexual abuse of children”); OR. REV. STAT. §§ 163.686, 163.687 (2003) (classifying possession of child pornography as “encouraging child abuse”); 18 PA. CONS. STAT. § 6312(d) (2010) (classifying the possession of child pornography under “sexual abuse of children”).

¹²⁷ See Hessick, *supra* note 41, at 863–64; 2012 SENTENCING REPORT, *supra* note 97, at 10–15. An example of the federal legislature’s palpable opposition to sexual offenses against children can be easily inferred from the passing of a 1991 amendment to the existing child pornography sentencing guidelines, the Helms-Thurmond Amendment, that purported to “attempt to assure severe punishment for dealing in child pornography.” 137 Cong. Rec. S10323 (July 18, 1991). The amendment passed the Senate by a vote of 99–0. See WILLIAM K. SESSIONS ET AL., U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 20 (2009), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf [<http://perma.cc/Q8VQ-Y6R8>] [hereinafter GUIDELINES HISTORY].

Commission”), as a product of legislative action, enjoys.¹²⁸ With the Sentencing Reform Act of 1984, Congress tasked the Sentencing Commission with creating sentencing guidelines that fit the basic sentencing objectives established by Congress in order to provide more determinate and uniform prison sentences.¹²⁹ The Supreme Court has repeatedly cited the federal sentencing guidelines as persuasive authority that, as “the product of a careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” should inform most sentencing decisions.¹³⁰ The guidelines are also directed by the substantive and procedural requirements of

¹²⁸ See, e.g., 18 U.S.C. § 2252A(a)(7) (2012) (providing a statutory maximum of fifteen years for knowingly producing, intending to distribute, or knowingly distributing “child pornography that is an adapted or modified depiction of an identifiable minor”); *Crisman*, 39 F. Supp. 3d 1189, 1206–18 (detailing historical and significant recent increases in sentencing for crimes related to child pornography). Courts are not bound by the sentencing guidelines and many judges have pushed back against them. See *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010); *United States v. Stern*, 590 F. Supp. 2d 945, 960 (N.D. Ohio 2008); see also *United States v. Nghiem*, 432 Fed. Appx. 753, 757 (10th Cir. 2011) (deferring to the sentencing guidelines despite expressing concern regarding their increasingly strict nature). But see *United States v. Cunningham*, 680 F. Supp. 2d 844, 862–63 (N.D. Ohio 2010), *aff’d*, 669 F.3d 723 (6th Cir. 2012) (praising the Sentencing Commission for using empirical data and its own expertise to craft appropriate guidelines). The U.S. District Court for the Northern District of Ohio advocated against the guidelines related to child pornography because they “do not reflect the kind of empirical data, national experience, and independent expertise that are characteristic of the Commission’s institutional role.” *Stern*, 590 F. Supp. 2d at 960 (quoting *United States v. Ontiveros*, No. 07-CR-333, 2008 WL 2937539, at *8 (E.D. Wis. July 24, 2008)). In *United States v. Dorvee*, the Second Circuit further excoriated the federal sentencing guidelines related to child pornography, arguing that the Sentencing Commission abandoned its usual calculated approach for establishing sentencing guidelines that involves careful study of empirical data. 616 F.3d at 184. The *Dorvee* court added that the sentencing guidelines for child pornography are “fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences,” and encouraged district judges “to take seriously the broad discretion they possess in fashioning sentences . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.” *Id.* at 184, 188.

¹²⁹ See Sentencing Reform Act of 1984, Pub. L. No. 98–473, Chapter II, § 212(a), 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.); 28 U.S.C. § 991(b) (highlighting the purposes of the Sentencing Commission, including to “provide certainty and fairness” in sentencing, to “avoi[d] unwarranted sentencing disparities,” “maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices,” and to “reflect, to the extent practicable, [sentencing-relevant] advancement in [the] knowledge of human behavior”); *Rita v. United States*, 551 U.S. 338, 349–50 (2007) (citing 18 U.S.C. § 3553(a)) (noting that Congress required the U.S. Sentencing Commission to consider the following sentencing objectives in promulgating the sentencing guidelines: “(1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, (a) just punishment (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the sentencing guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution”).

¹³⁰ *Gail*, 552 U.S. at 46; see *Rita*, 551 U.S. at 349–50.

congressional sentencing legislation.¹³¹ The U.S. Sentencing Commission adds that the sentencing guidelines are the product of a wide array of other factors in addition to those mandated by Congress, including “the public concern generated by the offense.”¹³² The Sentencing Commission promulgated the first sentencing guidelines regarding child pornography-related crimes in 1987.¹³³

In her examination of the modern legislative response to the increase of child pornography, Carissa Byrne Hessick outlines the spike since 1990 in the level of punishment recommended by the sentencing guidelines for possession of child pornography.¹³⁴ Since 1990, the federal maximum penalty for possession of child pornography rose from ten years of imprisonment to twenty years, while a mandatory minimum five-year sentence was also added in 2003.¹³⁵ The penalties for possession of child pornography have also drastically climbed at the state level, as thirty states have increased the penalties possible for possession of child pornography since each state initially criminalized child pornography possession.¹³⁶

III. THE COMMON SENSE AND “INTUITIVE” RELATIONSHIP: PROBABLE CAUSE TO SEARCH FOR EVIDENCE OF CHILD MOLESTATION PROVIDES PROBABLE CAUSE TO SEARCH FOR EVIDENCE OF CHILD PORNOGRAPHY

Given the common-sense, non-technical, and elastic nature of the probable cause standard, the sufficient empirical support for a connection between child molestation and child pornography, and the policy concerns related to child molestation and child pornography, probable cause to search for evidence of child molestation should provide probable cause to search for evidence of

¹³¹ See GUIDELINES HISTORY, *supra* note 127, at 1 (citing, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, Chapter II, § 212(a), 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.)).

¹³² See *id.* Other factors include, “[t]he public concern generated by the offense . . . and the current incidence of the offense in the community and in the Nation as a whole.” *Id.* (citing 28 U.S.C. § 994(c) (2012)).

¹³³ U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.1, 2G2.2 (1987); see GUIDELINES HISTORY, *supra* note 127, at 10.

¹³⁴ See Hessick, *supra* note 41, at 855–64. *But see* GELBER, *supra* note 12, at 15 (defending recent increases in sentences for child pornography-related offenses). Professor Hessick calls the legislative response to the modern increase in child pornography “uniformly draconian.” Hessick, *supra* note 41, at 855–64.

¹³⁵ See Hessick, *supra* note 41, at 857.

¹³⁶ See *id.* at 857–59. Hessick details the various increases of each state at length and notes the most extreme increases: Georgia reclassified possession of child pornography from a misdemeanor to a felony, increasing the prison sentence from a maximum of twelve months to a minimum of five years with a maximum of twenty years in prison; Montana increased the maximum from six months to ten years imprisonment, and Nevada increased the maximum penalty for repeat offenses of child pornography possession from ten years to life imprisonment. See *id.* at 860.

child pornography.¹³⁷ The Supreme Court should grant certiorari to a case involving the question and find that probable cause for child molestation is sufficient to establish probable cause for child pornography.¹³⁸ In the absence of a Supreme Court finding, courts should rule in accordance with the Eighth Circuit and find that probable cause to search for evidence of child molestation provides probable cause to search for evidence of child pornography.¹³⁹ Alternatively, courts that choose an unnecessarily strict interpretation of the probable cause standard that precludes such a probable cause finding should nonetheless admit evidence seized pursuant to a search warrant that is based solely on the nexus between child molestation and child pornography because such evidence would be seized “in objectively reasonable reliance on” a warrant and, therefore, the good faith exception to the exclusionary rule applies.¹⁴⁰

A. Granting Certiorari to Establish that Probable Cause to Support a Search Warrant for Child Molestation is Sufficient to Support a Search Warrant for Child Pornography

The Supreme Court should grant certiorari to a case involving the question of whether probable cause to search for evidence of child molestation provides probable cause to search for evidence of child pornography.¹⁴¹ The controversy is not only “compelling,”¹⁴² but also falls squarely within two of the reasons for which the Court generally grants certiorari: (1) “[A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;”¹⁴³ and (2) “[A] United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme Court].”¹⁴⁴

¹³⁷ See *Illinois v. Gates*, 462 U.S. 213, 231 (1983); *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010).

¹³⁸ See SUP. CT. R. 10; *Colbert*, 605 F.3d at 578–79.

¹³⁹ See *Colbert*, 605 F.3d at 579.

¹⁴⁰ See *United States v. Leon*, 468 U.S. 897, 922 (1984); *United States v. Needham*, 718 F.3d 1190, 1195–96 (9th Cir. 2013); *Colbert*, 605 F.3d at 579.

¹⁴¹ See SUP. CT. R. 10.

¹⁴² See *id.* (noting that the Supreme Court only grants a petition for certiorari for “compelling reasons”).

¹⁴³ SUP. CT. R. 10(a); compare *United States v. Doyle*, 650 F.3d 460, 463 (4th Cir. 2011) (holding that probable cause to search for evidence of child molestation *does not* provide probable cause to search for child pornography), and *Virgin Islands v. John*, 654 F.3d 412, 422 (3d Cir. 2011) (coming to the same conclusion as *Doyle*), and *United States v. Falso*, 544 F.3d 110, 112–13 (2d Cir. 2008) (coming to the same conclusion as *Doyle*), and *U.S. v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008) (coming to the same conclusion as *Doyle*), with *Colbert*, 605 F.3d at 578–79 (holding that probable cause to search for evidence of child molestation *does* provide probable cause to search for child pornography).

¹⁴⁴ SUP. CT. R. 10(c); see *Colbert v. United States*, 131 S. Ct. 1469 (2011) (denying certiorari for *Colbert*, 605 F.3d 573); *Falso v. United States*, 558 U.S. 933 (2009) (denying certiorari for *Falso*, 544 F.3d 110); *John*, 654 F.3d at 419–22 (inferring that the Supreme Court has not examined the issue of

By failing to grant certiorari in the two cases that involved this specific question, the Supreme Court has left open the controversy, thus allowing continued conflict among the Circuit Courts of Appeal and fostering conflicting interpretations of the probable cause standard.¹⁴⁵ For example, in denying certiorari in *United States v. Falso*, the Supreme Court passed on the opportunity to provide guidance to lower courts regarding whether an individual's criminal record that includes a conviction for child molestation is "highly relevant" to a probable cause determination for a search warrant to search that individual's home for evidence of child pornography.¹⁴⁶ Similarly, in denying certiorari in *United States v. Colbert*, the Supreme Court declined to consider whether an issuing court may properly grant a search warrant to search for evidence of child pornography based solely on the inference that individuals who are sexually interested in children probably possess child pornography.¹⁴⁷ Granting certiorari to resolve these issues would not only lead to unanimity among the Circuit Courts of Appeal on an important issue, but also resolve an unclear area of interpretation of the probable cause standard.¹⁴⁸

B. A Proper Application of the Fluid, Non-Technical Probable Cause Standard

If the Supreme Court grants certiorari or a lower court is forced to address this issue, the court should find that probable cause that can support a search warrant for child molestation should be sufficient to support a search warrant for child pornography.¹⁴⁹ In *Gates*, the Supreme Court offered a concise summary of the flexibility and perspective of the probable cause standard:

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library

whether probable cause to search for evidence of child molestation provides probable cause to search for evidence of child pornography by examining only other Circuit Courts of Appeal decisions that have analyzed the issue).

¹⁴⁵ See *Colbert*, 605 F.3d at 578, *cert. denied*, 131 S. Ct. 1469 (2011); *Falso*, 544 F.3d at 112–13, *cert. denied*, 558 U.S. 933 (2009); *Doyle*, 650 F.3d at 472.

¹⁴⁶ See *Falso*, 558 U.S. 933; Brief for Appellee at 25, *Falso*, 544 F.3d 110 (No. 06-2721-cr), 2006 WL 6272568.

¹⁴⁷ See *Colbert*, 131 S. Ct. 1469; Brief for Appellee at 22–24, *Colbert*, 605 F.3d 573 (No. 08-3243), 2009 WL 129651.

¹⁴⁸ See *Doyle*, 650 F.3d at 463; *Colbert*, 605 F.3d at 578.

¹⁴⁹ See *Gates*, 462 U.S. at 231; *Colbert*, 605 F.3d at 578.

analysis by scholars, but as understood by those versed in the field of law enforcement.¹⁵⁰

The solution to the question that has divided a number of the Circuit Courts of Appeal is readily available based on the elastic and multi-faceted probable cause standard that the Supreme Court has created: both issuing magistrate courts and appellate courts should conclude that a warrant to search for child pornography based solely on evidence of child molestation is supported by probable cause because such a finding would fall well within the carefully crafted boundaries of the probable cause standard.¹⁵¹

The Supreme Court should follow the reasoning of the Eighth Circuit, as was established in *Colbert*, which noted that a sufficient nexus exists between child molestation and child pornography possession to support a finding of probable cause to search for evidence of child pornography based solely on evidence of child molestation.¹⁵² The Eighth Circuit noted that finding otherwise “seems to be in tension both with common experience and a fluid, non-technical conception of probable cause.”¹⁵³ The Supreme Court has repeatedly held that the probable cause standard is one that is “not readily, or even usefully, reduced to a neat set of legal rules.”¹⁵⁴ Rather, the “practical, nontechnical conception” of the standard requires reason and common sense.¹⁵⁵ A finding of probable cause does not even need to be more likely true than false, nor correct; as long as the affidavit submitted in support of the search warrant sets forth facts sufficient to give rise to a reasonable inference of criminal activity, the search warrant is supported by probable cause.¹⁵⁶

When conducting a probable cause inquiry in these cases, precedent in the Supreme Court and Circuit Courts of Appeal mandates that justices consider not only their own experience and common sense, but also the experiences and opinions of the law enforcement officials who provide sworn support to search warrant applications.¹⁵⁷ Although the opinion and experience evidence that law

¹⁵⁰ 462 U.S. at 231–32 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

¹⁵¹ See *Gates*, 462 U.S. at 231–32; *Colbert*, 605 F.3d at 578.

¹⁵² See *Colbert*, 605 F.3d at 578–79.

¹⁵³ *Id.* at 578; see also Hessick, *supra* note 41, at 871 n.67 (providing examples of government actors who have expressed a concern that child pornography possessors present a higher risk of sexually abusing a child).

¹⁵⁴ *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) (quoting *Gates*, 462 U.S. at 232); see *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

¹⁵⁵ *Gates*, 462 U.S. at 231–32 (quoting *Brinegar*, 338 U.S. at 176).

¹⁵⁶ See *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990) (stating that the factual determinations on which the probable cause inquiry is based need not be correct, just reasonable); *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Brinegar*, 338 U.S. at 176).

¹⁵⁷ See, e.g., *Gates*, 462 U.S. at 214, 231; *United States v. Biglow*, 562 F.3d 1272, 1279–80 (10th Cir. 2009) (in weighing evidence supporting a request for a search warrant, a magistrate may rely on the opinions of law enforcement officers); *United States v. Whitner*, 219 F.3d 289, 296 (3d Cir. 2000)

enforcement officials submit forms only part of the evidence that a court can rely on to find that a search warrant is supported by probable cause, and although courts should weigh that the “officer [is] engaged in the often competitive enterprise of ferreting out crime” before crediting any of the officer’s sworn opinions,¹⁵⁸ cases illustrating the nexus between child molestation and child pornography feature repeated and consistent evidence from law enforcement officials supporting this nexus.¹⁵⁹ Officers regularly swear in the affidavits submitted in support of search warrants that—based on police experience and training—they believe individuals who have committed crimes related to child molestation also regularly possess child pornography.¹⁶⁰

Further, given the particular societal disdain for crimes against children that is apparent in the language of judicial decisions, legislation, and the congressional record, judges should heavily weigh the “valid public interest” in policing the issue of child pornography when determining whether probable cause exists.¹⁶¹ In *New York v. Ferber*, the Supreme Court concluded that states are entitled to greater leeway under the U.S. Constitution to criminalize child pornography in part because “safeguarding the physical and psychological well-being of a minor” outweighed the detriment of impinging on the constitu-

(in weighing evidence supporting a request for a search warrant, a magistrate may “give considerable weight to the conclusions of experienced law enforcement officers” (citation omitted)).

¹⁵⁸ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹⁵⁹ *See, e.g., Dougherty v. City of Covina*, 654 F.3d 892, 898 (9th Cir. 2011) (noting that an affidavit in support of a search warrant included an officer’s opinion evidence that, based on the officer’s experience and training, a nexus exists between child pornography and child molestation); *Falso*, 544 F.3d at 113 (noting that an affidavit in support of a search warrant included the opinion of the FBI’s Behavioral Analysis Unit that “[t]he majority of individuals who collect child pornography are persons who have a sexual attraction to children”).

¹⁶⁰ *See, e.g., Dougherty*, 654 F.3d at 896 (an affidavit included an officer swearing that “based upon [his] training and experience . . . [he] know[s] subjects involved in this type of criminal behavior have in their possession child pornography”); *Falso*, 544 F.3d at 113 (an affidavit included information gathered by a member of the FBI’s Behavioral Analysis Unit that included the observation that “[t]he majority of individuals who collect child pornography are persons who have a sexual attraction to children,” and that those who collect images of child pornography generally store their collections at home”); *United States v. Brand*, 467 F.3d 179, 198, 198 n.17 (2d Cir. 2006) (citing FBI congressional testimony that “noted ‘a strong correlation between child pornography offenders and molesters of children,’ and that ‘the correlation between collection of child pornography and actual child abuse is too real and too grave to ignore,’” in holding that, because a direct connection exists between child pornography and pedophilia, evidence regarding child pornography was admissible).

¹⁶¹ *Camara v. Mun. Ct. of the City & Cnty. of S.F.*, 387 U.S. 523, 539 (1967) (concluding that, in traditional criminal law, probable cause is not necessary to validate an administrative search, the court strongly considered whether “a valid public interest justifies the intrusion contemplated” by the warrant); *see Osborne v. Ohio*, 495 U.S. 103, 109, 110 (1990); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982); Protection of Children From Computer Pornography Act of 1995: Hearing on S. 892 Before the S. Comm. on the Judiciary, 104th Cong. 41 (June 4, 1996) (statement of Dee Jepsen, President, “Enough is Enough!”).

tionally protected right of free speech.¹⁶² The Court bluntly concluded that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”¹⁶³ Lower courts and legislative bodies share this contempt for crimes against children, as evidenced by both language in case law and legislative intent.¹⁶⁴ In addition, the consistent increase since 1987 in punishment for crimes related to child pornography under the state and federal sentencing guidelines reinforces, at the legislative level, the strong, persistent public sentiment against child pornography.¹⁶⁵ Because the Supreme Court has noted that “a valid public interest” can inform a court’s decision to endorse a search warrant, the particular public interest in curbing child pornography-related crimes should inform a court’s decision to endorse search warrants to search for child pornography based solely on evidence of child molestation.¹⁶⁶

The flexibility of the probable cause standard and the factors that contribute to the probable cause inquiry permit courts to conclude that a sufficient nexus exists between child molestation and child pornography to conclude that probable cause to search for evidence of child molestation provides probable cause to search for child pornography.¹⁶⁷ Such a nexus has been supported by judges applying an elastic and practical probable cause standard in a wide array of jurisdictions, by experienced law enforcement officials, and by scholars.¹⁶⁸ Rather than being “objectively unreasonable,”¹⁶⁹ the conclusion that

¹⁶² 458 U.S. at 756–57 (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982)). *But see* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239, 256 (2002) (holding that virtual child pornography is protected by the First Amendment).

¹⁶³ *Ferber*, 458 U.S. at 757.

¹⁶⁴ *See, e.g.*, GA. CODE ANN. § 16-6-4(a) (2014) (suggesting repulsion at such crimes by including the word “immoral” to describe the crime of child molestation); *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (noting that “a serious crime against a child is an offense . . . to society”); 154 CONG. REC. H10250 (daily ed. Sept. 27, 2008) (statement of Rep. Barton) (describing congressional investigation of child pornography as “shocking,” and noting that children who are harmed as a result of child pornography “suffer unspeakable pain and suffering”).

¹⁶⁵ *See* Hessick, *supra* note 41, at 866 (detailing the spike in severity of child pornography punishments under the sentencing guidelines at the state and federal level since 1987); 2012 SENTENCING REPORT, *supra* note 97, at 10–15 (detailing the evolution of the child pornography sentencing guidelines at the federal level).

¹⁶⁶ *Camara*, 387 U.S. at 539.

¹⁶⁷ *See* *Illinois v. Gates*, 462 U.S. 213, 231 (1983); *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010).

¹⁶⁸ *See, e.g.*, *Osborne*, 495 U.S. at 111 (commenting that “evidence suggests that pedophiles use child pornography to seduce other children into sexual activity”); *Colbert*, 605 F.3d at 578–79 (finding a sufficient nexus between child molestation and child pornography to uphold a warrant to search for child pornography based solely on evidence of child molestation); *Falso*, 544 F.3d at 131 (Livingston, J., concurring) (quoting *Brand*, 467 F.3d at 198) (noting that “possession of child pornography . . . shares a connection . . . with pedophilia,” and endorsing Congress’s finding that “child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children”); *United States v. Adkins*, 169 Fed. Appx. 961, 967 (6th Cir. 2006) (crediting an affidavit from an FBI agent that details the FBI’s “institutional

probable cause to search for evidence of child molestation provides probable cause to search for child pornography is arguably common sense, and at least fits within the “fluid, non-technical” probable cause standard.¹⁷⁰

C. Alternative Solutions: The Good Faith Exception and Law Enforcement Responsibility

Notwithstanding a holding by an appellate court that a search warrant to search for child pornography that is based solely on evidence of child molestation is invalid, the evidence seized as a result of such a warrant should still be admissible in court proceedings against the defendant because the process by which law enforcement seized the evidence easily falls within the good faith exception.¹⁷¹ The good faith exception to the Fourth Amendment mandates that evidence seized pursuant to a warrant that is later found to be invalid should nonetheless not be subject to the exclusionary rule as long as a law enforcement official’s reliance on the warrant is “objectively reasonable.”¹⁷² An of-

knowledge” that individuals who have committed child molestation “devote time, money, and energy to the pursuit of child pornography . . . and that they have well-developed techniques for gaining access to child pornography”); *United States v. Lebovitz*, 401 F.3d 1263, 1271 (11th Cir. 2005) (citation omitted) (noting that “law enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica”); *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994) (reasoning that “common sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography”); *Butner Study Redux*, *supra* note 95, at 187–88 (finding that a vast majority of convicted possessors of child pornography consulted for the study—self reporting inmates who were in prison for possessing child pornography—had also committed child molestation); Megan Westenberg, Comment & Case Note, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography as the Sole Basis for Probable Cause*, 81 U. CIN. L. REV. 337, 338 (2012) (arguing that evidence of child molestation provides probable cause for a warrant to search for child pornography).

¹⁶⁹ *Doyle*, 650 F.3d at 470, 476.

¹⁷⁰ *Colbert*, 605 F.3d at 578; *see Gates*, 462 U.S. at 231. In her law review article, Kathryn A. Rigler examines analogous situations of a broad, elastic view of the probable cause standard. *Child Pornography and Child Molestation: One and the Same or Separate Crimes?*, 9 SETON HALL CIRCUIT REV. 193, 210–12 (2013). For example, Rigler points out that the First, Fifth, Sixth, and Ninth Circuits have found that a judge may infer that suspected criminals are likely to retain evidence related to their crimes in their homes. *See id.* (citing *United States v. Williams*, 544 F.3d 683 (6th Cir. 2008); *United States v. Feliz*, 182 F.3d 82 (1st Cir. 1999); *United States v. Pace*, 955 F.2d 270 (5th Cir. 1992); *States v. Nance*, 962 F.2d 860 (9th Cir. 1992)).

¹⁷¹ *See United States v. Leon*, 468 U.S. 897, 922–23 (1984); *Colbert*, 605 F.3d at 577–78 (noting that the decisions of Circuit Courts of Appeal that conclude that search warrants to search for evidence of child pornography based solely on evidence of child molestation are not supported by probable cause are “in tension . . . with . . . a fluid, non-technical conception of probable cause”) (citing *Falso*, 544 F.3d at 114; *Hodson*, 543 F.3d at 287).

¹⁷² *Leon*, 468 U.S. at 922. In addition to situations in which the search warrant application is so lacking in indicia of probable cause as to render reliance upon it unreasonable, the U.S. Supreme Court has noted three other circumstances in which the good-faith exception does not apply: (1) where the issuing judge has been knowingly misled; (2) where the issuing judge wholly abandoned his or her judicial role; and (3) where the warrant is so facially deficient that reliance upon it is unreasonable. *See id.* at 923.

ficer may reasonably rely on a warrant when the evidence supporting probable cause in the search warrant application is sufficient to “create disagreement among thoughtful and competent judges as to the existence of probable cause.”¹⁷³ Given that, in cases dependent on whether probable cause to search for evidence of child molestation provides probable cause to search for child pornography, “thoughtful and competent” judges have come to opposite conclusions, the good faith exception should apply.¹⁷⁴

Another potential solution to the disagreement among the Circuit Courts of Appeal regarding the appropriate probable cause standard is to require law enforcement officials who investigate individuals suspected of committing criminal acts involving children to more carefully and thoroughly draft their search warrants.¹⁷⁵ In *Virgin Islands v. John*, the Third Circuit overturned a warrant to search for child pornography based solely on evidence of child molestation in part because the language of the warrant did not explicitly connect the defendant’s child molestation offenses to potential evidence of child pornography.¹⁷⁶ Similarly, the Second Circuit in *United States v. Falso* admonished the law enforcement officials who submitted the warrant to search for child pornography for not further investigating the link between the defendant’s criminal history of child molestation and suspected evidence of child pornography in the defendant’s home.¹⁷⁷ Further, the Sixth Circuit suggested that including in search warrant applications expert analysis about whether individuals who engage in child molestation are also likely to possess child pornography would help to persuade the courts that such a nexus exists, and therefore the search warrant would be supported by probable cause.¹⁷⁸ If law enforcement officials submit more thorough search warrant applications, a Circuit Court of Appeals may be more amenable to finding a sufficient link between child pornography and child molestation to support concluding that the

¹⁷³ *Id.* at 926.

¹⁷⁴ *Id.* Compare *Colbert*, 605 F.3d at 578–79 (holding that probable cause to search for evidence of child molestation provides probable cause to search for evidence of child pornography), and *United States v. Houston*, 754 F. Supp. 2d 1059, 1063–64 (D.S.D. 2010), and *Connecticut v. Bizewski*, No. UWYCR110144340, 2013 WL 1849282, at *5 (Conn. Super. Ct. Apr. 10, 2013), with *Doyle*, 650 F.3d at 472 (holding that probable cause to search for evidence of child molestation does not provide probable cause to search for evidence of child pornography), and *Falso*, 544 F.3d at 121–23, and *Hodson*, 543 F.3d at 292.

¹⁷⁵ See *Falso*, 544 F.3d at 124 n.20; *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2011).

¹⁷⁶ 654 F.3d at 419.

¹⁷⁷ 544 F.3d at 124 n.20.

¹⁷⁸ See *Hodson*, 543 F.3d at 289; see also *Westenberg*, *supra* note 168, at 357–58 (suggesting that the use of experts could help corroborate the nexus between child pornography and child molestation). Although urging law enforcement officials to provide in their affidavits in support of search warrants expert support for the nexus between child molestation and child pornography, the court in *Hodson* does not comment on the inconclusive empirical evidence available on the subject. See *Hodson*, 543 F.3d at 289.

search warrant is supported by probable cause, or at least finding that the evidence fits under the good faith exception.¹⁷⁹

CONCLUSION

Child pornography is, unfortunately, an ever-increasing scourge to society that causes irrevocable harm to thousands of children around the world. The Supreme Court should, in order to provide guidance for the rest of the country, grant certiorari to a case that includes the question of whether probable cause to search for evidence of child pornography exists based solely on evidence of child molestation. Without Supreme Court guidance, the Circuit Courts of Appeal and lower courts have reached differing conclusions with regard to the applicable probable cause standard, and law enforcement officials face uncertainty regarding whether their actions fully comply with the law. Courts are in a position to contain the incidence and spread of child pornography by providing law enforcement officers with a better opportunity to investigate offenders. Ample support exists in the scientific, law enforcement, and legal communities for courts to act and justly defend the most vulnerable members of our society. Courts can and should find that probable cause to search for evidence of child molestation provides probable cause to search for evidence of child pornography. Given the flexible, non-technical, and common sense nature of the probable cause standard, courts would not even have to step beyond the carefully crafted boundaries of their power to crack down on incidences of child pornography. In the absence of finding probable cause to support such search warrants, courts should nonetheless admit evidence recovered subject to these search warrants via the good faith exception.

¹⁷⁹ See *Leon*, 468 U.S. at 926; *John*, 654 F.3d at 419; *Colbert*, 605 F.3d at 579; *Falso*, 544 F.3d at 124.