No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

SPENCER SALCEDO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Speech that is sexually explicit, but not "obscene," enjoys First Amendment protection. To qualify as obscene, a particular material must, *inter alia*, depict or describe "hard core sexual conduct" in a way that an average adult, applying contemporary community standards, would deem "patently offensive."

Every day, tens of thousands of Americans use their cell phones and personal computers to create, store, and exchange digital images prominently depicting their genitalia. The practice of sending these images is ubiquitous in modern dating and popular culture. But, like any form of expression, it is not without controversy. The practice has generated an enormous amount of counterspeech, stimulating a robust, ongoing public debate over such topics as what to do about nonconsensual transfers, and how to regulate transfers between teenagers. In this case, the Fifth Circuit held that a picture falling within the core of this class of images was properly classified as legally obscene under the standard described above.

The question presented is:

Whether a still image of an erect penis portrays the kind of "patently offensive," "hard core sexual conduct" that qualifies as constitutionally unprotected obscenity.

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Petitioner Spencer Salcedo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The published opinion of the court of appeals (Pet. App. 1a-11a) is reported at 924 F.3d 172 (5th Cir. 2019).

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2019. This petition is filed within 90 days of that date and is therefore timely. *See* Sup. Ct. R. 13.1. The Court has jurisdiction under 28 U.S.C. § 1254(1).

DIRECTLY RELATED PROCEEDINGS

There are no other state or federal proceedings "directly related" to petitioner's case in this Court. *See* Sup. Ct. R. 14.1(b)(iii).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1470 of Title 18, United States Code, provides:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.

STATEMENT

A. Legal background

"Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). In *Miller v. California*, 413 U.S. 15 (1973), this Court attempted to solve what had been called the "intractable obscenity problem," *id.* at 16 (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting)), by outlining a three-prong standard for distinguishing protected, sexually-explicit speech from unprotected obscenity. Under *Miller*, material is obscene if it: (1) as a whole, predominantly appeals to a "prurient interest" in sex; (2) depicts or describes "hard core sexual conduct" in a "patently offensive way"; and (3) as a whole, lacks "serious literary, artistic, political, or scientific value." *Id.* at 24, 27. The first two prongs are viewed from the perspective of an average *adult* applying contemporary community standards. *See Pinkus v. United States*, 436 U.S. 293, 297 (1978); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 576 n.7 (2002). Appellate courts must conduct an "independent review" of a jury's determination of the constitutional fact of obscenity. *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974) (quoting *Miller*, 413 U.S. at 25); *accord Jacobellis v. State of Ohio*, 378 U.S. 184, 187-88, 190, 191 n.6 (1964).

Section 1470 of Title 18, United States Code, makes it a crime to knowingly use the mail or any other facility of interstate commerce to transfer "obscene matter" to someone believed to be under the age of 16. *See supra*, at 2. As with most federal criminal obscenity

statutes, *see, e.g.*, 18 U.S.C. §§ 1460-68, Section 1470 leaves the term "obscene" undefined. This Court has long construed the materials regulated by these statutes as "limited to the sort of 'patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller*." *Hamling v. United States*, 418 U.S. 87, 114 (1974) (§1461); *see also United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) (same, §1462). Those "hard core" examples consist of "ultimate sexual acts, normal or perverted, actual or simulated," "masturbation," "excretory functions," and "lewd exhibition of the genitals." *Miller*, 413 U.S. at 25.

B. Proceedings below

In November 2017, petitioner Spencer Salcedo was indicted on two counts of attempting to persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, *see* 18 U.S.C. § 2422(b), and two counts of attempting to transfer obscene matter to a minor under age 16, *see* 18 U.S.C. § 1470. The case proceeded to trial.

At trial, the evidence showed that, in July of 2017, Corpus Christi Police Detective Alicia Escobar participated in an undercover investigation targeting adults soliciting minors online. Escobar's role in the operation was to pose online as the mother of two fictional daughters, ages 11 and 14. In her role as the fictional mother, Escobar posted a cryptic advertisement on Craigslist that, in language that has an understood, implicit meaning in the child-exploitation realm, essentially conveyed that she was a woman looking for a male sexual tutor for the daughters.

Petitioner responded to the ad. After briefly exchanging emails, petitioner and Escobar moved to text messages, via cell phone. Over the course of the text conversation, petitioner expressed a desire to perform sexual acts on both fictional girls, whom he recognized to be minors. Near the beginning of the conversation, petitioner also sent the fictional mother, in the form of a multimedia text message, a picture he downloaded from the internet of a seated man (not petitioner) with an erect penis. Eventually, petitioner made plans to meet the fictional mother and the girls at a specific "Days Inn" motel for the purpose of engaging in the discussed sexual activity. He was arrested without incident after arriving in the motel parking lot. The content of the conversation and the trip to the motel formed the basis of the enticement charges. The penis picture formed the basis of the transferring obscenity charges.

As to the obscenity charges, the government's trial evidence consisted primarily of the image itself and Detective Escobar's testimony about the image. The image depicts a seated adult man who is nude from the waist down and whose fully erect penis is the focal point. Only the area between the man's chin and thighs is visible. The man's left hand is closed and resting on his left hip, behind the penis; the right hand is not visible. The image is, in essence, a "selfie" of an adult erection.[1]

[1] The image was admitted into evidence as Government Exhibit 6 and filed under seal in the record on appeal. Given the image's sexually-explicit content, petitioner has not included a copy in the petition appendix. Should the Court wish to review the image in connection with its review of this petition, petitioner will provide the image to the Court on its request.

On cross-examination, Detective Escobar agreed that the image showed "a penis full of blood in the state of excitement, that is it." She further conceded that the image did not depict the penis "penetrating anything" or "performing a sexual act," and she acknowledged that the man was not "simulating any type of masturbatory functions." Escobar also agreed that similar genital depictions "can be obtained from a pornographic website" or found in "a medical dictionary" or "college textbook on sex."

Petitioner moved for judgment of acquittal at the close of the government's case, contending, *inter alia*, that the evidence failed to demonstrate the image was legally obscene. After the motion was denied, petitioner elected not to present a defense, and the district court submitted to the case to the jury. The jury returned a verdict of guilty as to all four counts.

At sentencing, the district court exercised its discretion to vary below the recommended Sentencing Guidelines range (235–293 months), sentencing petitioner to 168 months' imprisonment and five years' supervised release as to the enticement counts, and 60 months' custody and three years of supervision as to the obscenity counts, all to run concurrently. The court also imposed a $100 special assessment as to each count, for a total of $400.

Petitioner appealed, challenging only the transferring obscenity convictions. Pertinent here, petitioner argued that the convictions should be reversed because the penis image he sent Detective Escobar did not depict "hard core sexual conduct" in a "patently offensive way," and thus failed to satisfy *Miller*. Noting that the only category of "hard core" sexual

conduct arguably portrayed in the image was "lewd exhibition of the genitals," petitioner contended that, even if lewd, this particular genital exhibition could not reasonably be deemed patently offensive to an average adult under *contemporary* standards of sexual expression. Petitioner further stressed that a contrary conclusion would have troubling implications. Documenting the prevalence with which Americans use the channels of interstate commerce to exchange materially indistinguishable images daily, petitioner warned that a precedential holding that a still image of an untouched erection is legally obscene would expose all of these transactions to potential criminal sanction under the various federal obscenity statutes.

In a published decision, the court of appeals affirmed the jury's obscenity finding. Pet. App. 1a-11a. Following a Third Circuit decision, the court construed *Miller*'s phrase "lewd exhibition of the genitals" as encompassing "'showing, evincing, or showing off,' in a manner 'sexually unchaste or liscentious,' 'suggestive of or tending to moral looseness,' or '[inciting] to sensual desire or imagination.'" Pet. App. 8a (quoting *United States v. Various Articles of Merchandise, Sched. No. 287*, 230 F.3d 649, 657 (3d Cir. 2000)). The court then concluded, "Looking to the photograph itself, and exercising our independent constitutional judgment, we are convinced that the photograph [petitioner] sent Escobar was a patently offensive, lewd exhibition of the genitals." Pet. App. 9a. The court offered no substantive explanation for this conclusion.

REASONS FOR GRANTING THE PETITION

The court of appeals ruled that a still image of an untouched erection depicts the kind of patently offensive, hard core sexual conduct that may be "isolate[d] . . . from expression protected by the First Amendment." *Miller*, 413 U.S. at 29. That holding is incorrect, and it transforms a class of expressive digital images that Americans routinely create, store, and exchange in interstate commerce into constitutionally unprotected contraband subject to federal criminal prosecution. Because marshalling the boundaries of the protections afforded by the First Amendment is an exceptionally important task, and the court of appeals' opinion purports to place a broad category of currently existing speech on the unprotected side of the line, this Court's review is warranted.

A. The Fifth Circuit's decision is incorrect.

The current guidelines for separating the obscene from the indecent were drawn in the early 1970s. The world is different now. The ensuing years have witnessed the "proliferation of digital communication technologies," and the pervasive reach of these technologies "has invariably resulted in [their] transformation into an instrumentality of human sexual expression." Kelly Muldavin, *Cruel to Be Kind: The Societal Response to Technology and Youth Sexual Expression*, 23 Lewis & Clark L. Rev. 425, 427 (2019). This case places front and center an important question: is this Court's obscenity jurisprudence responsive to new technologies and evolving expressive norms?

Miller made clear that, under its holding, "no one will be subject to prosecution for the sale or exposure of obscene materials unless th[o]se materials depict or describe patently offensive 'hard core' sexual conduct . . . ." 413 U.S. at 27. One year later, in *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974), the Court confirmed that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion" in determining whether particular material meets this patent-offensiveness threshold. Upon independent review, the Court reversed the Georgia jury's obscenity finding, holding that the presence of nudity and sexual innuendo in the popular film *Carnal Knowledge* "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way[.]" *Id.* at 161. In doing so, this Court implicitly recognized that by incorporating the concept of *contemporary* community standards, and stressing the importance of independent review, *Miller* gave appellate courts the tools to be responsive to society's evolving tolerance of sexual expression. No one would doubt that in the early days of the Republic, the average adult American would have viewed the scenes of nudity and sexual innuendo depicted in *Carnal Knowledge* as "hard core" and "patently offensive." *Jenkins* recognized, however, that society's tolerance of these kinds of depictions had evolved by the 1970s to the point that no reasonable contemporary adult would find the sexual conduct displayed in the film patently offensive.

Once again, society's standard for what constitutes hard core, patently offensive sexual conduct has evolved. Every day, tens of thousands of Americans text, email, Snap-

chat, upload, and download digital images prominently displaying—indeed, often only displaying—their genitalia. These images are part of the larger practice of "sexting," a practice that is "cemented into common culture" and has been "embraced in everyday vernacular by its addition to *Meriam-Webster's Collegiate Dictionary* in 2012." Muldavin, 23 Lewis & Clark L. Rev. at 429.[2] The use of various internet and social-media platforms to transfer pictures of male genitalia, in particular, is so prevalent that the pictures carry a universally recognized class moniker: everyone knows (many, to their dismay) what a "dick pic" is.[3]

The image at issue in this case is a paradigmatic member of this class. Yet under the court of appeals' published decision, binding federal circuit law now holds that a still image of an untouched erection, nothing more, depicts the kind of patently offensive, hard core sexual conduct that may be removed entirely from the marketplace of ideas. That ruling is plainly inconsistent with the broad societal consensus that these kinds of images constitute sexually-explicit speech, not patently offensive portrayals of hard core sex.

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[2] "*Webster's* defines sexting as 'the sending of sexually explicit messages or images by cell phone.'" *Id.* at 430 (quoting *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/sexting).

[3] *See Constitutional Law—First Amendment—Washington Supreme Court Affirms Child Pornography Conviction of Teenager*, 131 Harv. L. Rev. 1505, 1505 n.9 (2018) (noting that "[t]his type of sext is so common it has its own (crude) name" and citing definition of term in Oxford Online Dictionary). Articles frankly discussing the phenomenon and detailing its prevalence are published regularly. *See, e.g.*, Lizette Borreli, *Why Guys Like Sexting Dick Pics: Anthony Weiner and the Rise of Unsolicited Crotch Shots*, MEDICAL DAILY (Sep. 14, 2016), https://www.medicaldaily.com/why-guys-sexting-dick-pics-anthony-weiner-and-rise-unsolicited-crotch-shots-397908; Alex Abad-Santos, *Anthony Weiner and the Rise of Dick Pics, Explained*, VOX (Aug. 30, 2016), https://www.vox.com/2016/8/30/12699194/anthony-weiner-sexts-dick-pics-scandal; Jen Vaidis, *In Defense of Draymond Green's Dick Pic*, ROLLING STONE (Aug. 3, 2016), http://www.rollingstone.com/sports/draymond-greens-snapchat-dick-pic-w432448; Hayley Gleeson, *Why Do Men Send Unsolicited Dick Pics?*, ABC NEWS (July 8, 2016), http:// www.abc.net.au/news/2016-07-09/why-men-send-unsolicited-dick-pics/7540904.

To be sure, the practice of sexting, and sending genital images in particular, is controversial. But the responses these images have generated only reinforces their character as protected expression. Many recipients of unsolicited genital images employ "shaming"—they will post the image publicly on social media, naming the sender, or else send the picture to a family member, or the sender's spouse. *See* Gleeson, *supra*, at note 3 (citing multiple examples). Others have used the pictures to create their own expression. *See* Alison Stevenson, *This Woman Turned Her Collection of Unsolicited Dick Pics Into an Art Show*, VICE NEWS (Apr. 15, 2016) (discussing woman who made an art exhibit out of the numerous unsolicited images she had received).[4] Still others have taken to lobbying local legislatures for laws making the behavior classifiable as harassment. *See* Nicole Cobler, *Bumble Backs Texas Bill Aimed at Fighting Digital Sexual Harassment*, STATESMAN (Mar. 4, 2019).[5] This is pure "counterspeech," *cf. United States v. Alvarez*, 567 U.S. 709, 726-27 (2012) (emphasizing efficacy of "counterspeech" in combating repugnant, but protected, false claims of military heroism), and nothing could more typify the fundamental First Amendment principle that the answer to speech we don't like—no matter how uninformed, hateful, or offensive—is "more speech." *Whitney v. California*, 274 U.S. 357, 377 (1969) (Brandeis, J., concurring).

[4] https://www.vice.com/en_us/article/ppxjem/this-woman-turned-her-collection-of-unsolicited-dick-pics -into-an-art-show.

[5] https://www.statesman.com/news/20190304/bumble-backs-texas-bill-aimed-at-fighting-digital-sexual-harassment.

No less than any other category of protected expression readily employed in offensive form, when it comes to digital images of genitalia, we already "depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984). It is, therefore, not simply the prevalence of these images, but also the nature and character of the discourse surrounding the opposition to the ideas they sometimes express, that locates them within the zone of protected speech. Can it really be said that an average adult applying *contemporary* standards would view the transmission of a single still image of an erection as so patently offensive that it may properly be classified as "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality[?]" *Bose Corp.*, 466 U.S. at 504 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Of course not. The court of appeals erred by concluding otherwise.

B. The question presented is important and warrants review.

The court of appeals' answer to the question presented is not just incorrect; it has deeply troubling implications. Material that is obscene for purposes of Section 1470 is also obscene for purposes of each of the other federal statutes that incorporate *Miller*'s definition of obscenity but do not require a minor recipient. *See supra*, at 3-4. The upshot is that the decision below places speech that takes place every day across the country squarely within the crosshairs of federal prosecution.

The government did not dispute below that this would be a natural consequence of a decision in its favor. Nor could it. The example of Madeline Holden, a contributor to the national online media outlet Huffington Post, drives the point home. In a 2018 article, Ms. Holden explained that she personally receives between 50 and 100 pictures of adult male genitals by email in a given week, which she then rates on a customary letter-grade scale before publishing the most noteworthy submissions on a website hosted on the popular internet forum "Tumblr." *See* Madeleine Holden, *Confessions of a Semi-Professional Dick Pic Critic*, HUFFINGTON POST (July 13, 2018).[6] Some senders even pay a $25 fee to Holden to guarantee that their rated submission is featured on her site. *See id.*

Under the Fifth Circuit's decision, each one of these potentially "obscene" images would expose Ms. Holden to federal charges. She could be prosecuted for receiving obscenity on a computer, *see* 18 U.S.C. § 1462, for transporting obscenity for sale, *see id.* § 1465, or even for engaging in the business of selling or transferring obscenity, *see id.* § 1466. Indeed, the government has successfully prosecuted individuals under all three of these statutes in connection with truly obscene materials received by email and displayed on web pages. *See, e.g.*, *United States v. Kilbride*, 584 F.3d 1240, 1244-45 (9th Cir. 2009) (sending emails, §§ 1462 and 1465); *United States v. Whorley*, 550 F.3d 326, 330 (4th Cir. 2008) (sending and receiving emails, § 1462); *United States v. Stagliano*, 729 F. Supp. 2d

[6] https://www.huffpost.com/entry/confessions-of-a-semi-professional-dick-pic-critic_n_5b4510a2e4b048036ea36974.

215, 216-17 (D.D.C. 2010) (operating website, §§ 1462, 1465, and 1466). It would certainly be news to Ms. Holden that the United States has the discretion to indict her for sending and receiving obscenity in interstate commerce.

It is no answer to say that, if pursued, cases like Ms. Holden's would present a compelling case for acquittal. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life."). Nor is it cause for comfort that, to date, prosecutions involving these types of images appear to have been limited to Section 1470. As noted, in the court of appeals, the government did not dispute that a ruling in its favor would confirm its discretion to bring charges against consenting adults for texting pictures like the one petitioner sent under other federal obscenity statutes. But even if it had promised to limit its exercise of that discretion, this Court has previously warned of "the danger of putting faith in government representations of prosecutorial restraint." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Just as this Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly," *id.*, it should be weary of leaving in place binding federal circuit precedent cementing the government's discretion to make a federal case out of every written description or visual depiction of the male erection exchanged over interstate commerce.

The decision below renders expression engaged in daily by tens of thousands of Americans suppressible as criminal obscenity. Whether the First Amendment permits that result is an important question that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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