No.

IN THE SUPREME COURT OF THE UNITED STATES

ERIC ALLEN HAENSGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether amendments to the child pornography law set forth in 18 U.S.C. § 2252A(a)(2)(A) have rendered the current version of the statute unconstitutional under the First Amendment.

STATEMENT OF RELATED CASES

- *United States v. Eric Allen Haensgen*, No. 17CR00204-PA, U.S. District Court for the Central District of California. Judgment entered November 6, 2017.

- *United States v. Eric Allen Haensgen*, No. 17-50392, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 29, 2019.

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The Ninth Circuit's decision can be found at *United States v. Haensgen*, No. 17-50392, 2019 WL 2292722 (9th Cir. May 29, 2019).

JURISDICTION

The court of appeals entered its decision on May 29, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I:

> 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.

18 U.S.C. § 2252A provides in relevant part:

> (a) Any person who –
> * * *
> (2) knowingly receives or distributes –
> (A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer . . . .
> * * *
> shall be punished as provided in subsection (b).
>
> (b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . . .

18 U.S.C. § 2256 provides in relevant part:

> For the purposes of this chapter, the term –
>
> (1) "minor" means any person under the age of eighteen years;
>
> (2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated –
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) bestiality;
> (iii) masturbation;
> (iv) sadistic or masochistic abuse; or
> (v) lascivious exhibition of the genitals or pubic area of any person;
> (B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means –
> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
> (ii) graphic or lascivious simulated;
> (I) bestiality;
> (II) masturbation; or
> (III) sadistic or masochistic abuse; or
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person . . . .
> * * *
> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from,

> that of a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.
> * * *
> (10) "graphic," when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and
>
> (11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

STATEMENT OF THE CASE

The federal statutes proscribing the possession, receipt, and distribution of child pornography are found at 18 U.S.C. §§ 2252 and 2252A. Congress originally enacted § 2252 in the late 1970's, and that statute governs depictions "involv[ing] the use of a minor engaging in sexually explicit conduct . . . ." 18 U.S.C. § 2252(a). In 1996, Congress added § 2252A, which applies to an expanded definition of "child pornography." 18 U.S.C. § 2256(8). This Court struck down part of the expansive definition of "child pornography" in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and Congress responded with a new definition in 2003. *See United States v. Williams*, 553 U.S. 285, 289 (2008).

When first enacted, the federal child pornography laws only applied to depictions of individuals under the age of 16. *See* 18 U.S.C. § 2253 (1977). In 1984, Congress amended the definition of a minor for purposes of the federal child pornography laws by increasing the age to 18, *see* 18 U.S.C. § 2255 (1984), and this definition remains today. *See* 18 U.S.C. § 2256(1). When originally enacted, the federal child pornography laws carried no mandatory minimum penalty for a first offense and a maximum of 10 years. *See* 18 U.S.C. § 2252 (1978). Now, a first violation of § 2252A(a)(2)(A) results in a minimum sentence of five years and a maximum of 20 years, *see* 18 U.S.C. § 2252A(b)(1), and the current statutory scheme authorizes *lifetime* supervised release. *See* 18 U.S.C. § 3583(k).

In 2017, a federal grand jury in the Central District of California returned a three-count indictment charging petitioner with child pornography offenses. He pled guilty to Count 2, which charged him with distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). The factual basis for petitioner's guilty plea stated that the specific electronic file underlying Count 2 "depict[ed] *what appears to be*" a nude girl. Although petitioner had no prior record, the district court sentenced him to 180 months in custody and lifetime supervised release.

On appeal, petitioner challenged the constitutionality of § 2252A(a)(2)(A)

under the First Amendment. The Ninth Circuit rejected his challenge. The Ninth Circuit held that the amendment to the statute increasing the age cut-off of a "minor" from 16 to 18 was not overbroad and that "Congress did not increase the age cut-off to 18 solely to make it easier to prosecute pornography cases involving 15-year-olds." App. 3. The Ninth Circuit also held that the definition of child pornography in 18 U.S.C. § 2256(8)(B) "is not implicated by this case," and therefore "[a]ny constitutional infirmity in § 2256(8)(B) would not require striking down § 2256(8)(A)." App. 3-4. Finally, although recognizing that the current penalties for federal child pornography offenses have been criticized as harsh, the Ninth Circuit held that they are not so severe as to "impermissibly chill protected speech." App. 4.

ARGUMENT

The First Amendment requires a delicate consideration of constitutional interests. Rather than using surgical precision, however, Congress has responded to the problem of child pornography with a freewheeling hammer. Through a series of amendments over the course of four decades, Congress has created a statutory scheme that imposes the harshest penalties on an overly broad category of material. At least three features of the current version of 18 U.S.C. § 2252A(a)(2)(A), particularly when considered in *combination*, *see Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring), render the

statute unconstitutional under the First Amendment: (1) the amendment defining a minor as someone under 18; (2) the expansive current definition of "child pornography;" and (3) the staggering penalties that defendants now face. Although there is not a lower-court conflict, the Court should grant review because the Ninth Circuit decided the important Constitutional question presented in this petition in a way that conflicts with relevant decisions of this Court, particularly *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In recent years, the government has greatly increased the number of federal child pornography prosecutions, making the First Amendment issues at stake all the more important. The Court should now hold that § 2252A(a)(2)(A) violates the First Amendment.

A. The increase in age to 18 violates the First Amendment

In 1984, Congress amended the definition of a "minor" for purposes of the federal child pornography laws by increasing the age cut-off from 16 to 18. The reason offered by Congress for this increase – an increase with virtually no historical support – conflicts with this Court's most recent First Amendment jurisprudence. Accordingly, § 2252A(a)(2)(A) is substantially overbroad and violates the First Amendment.

This "Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage based on an ad hoc balancing of relative social costs

and benefits." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citation omitted). "Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few '*historic and traditional* categories of expression long familiar to the bar." *Id.* (emphasis added) (citation omitted). Without question, *child* pornography is among the historical and traditional categories of expression exempted from First Amendment coverage, *id.*, but just as history and tradition establish the exempted categories, history and tradition must also be considered in defining what constitutes *child* pornography.

The English common law set the relevant age of consent at 10-12, and this age range "was part of the common law brought to the United States." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 494 n.9 (1981) (Brennan, J., dissenting). This common law view persisted in the United States until at least the 1880's, when states began to increase the age, *see, e.g.*, *id.* at 494 n.9, but even then, defining a minor as an individual under 18 for purposes of proscribed sexual activity is a relatively recent and rare phenomenon.

Indeed, the federal age of consent for sexual relations is still 16. *See* 18 U.S.C. § 2243(a); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570-71 (2017). Thus, the perplexing reality of federal law is that two consenting 17-year olds can legally engage in sexual relations. But if they take a video of their consensual sexual relationship and text it to each other, they can be prosecuted for

production and distribution of child pornography. This arbitrary statutory framework does not survive the exacting scrutiny required for First Amendment analysis. *See Alvarez*, 567 U.S. at 724.

Consistent with federal law, the age of consent is 16 or younger in 39 states and the District of Columbia. *See Ashcroft*, 535 U.S. at 247; *see also Esquivel-Quintana*, 137 S. Ct. at 1571. Even the few states that set the age of consent at 18 typically have exceptions allowing 16 and 17-year olds to engage in sexual relations with individuals of similar ages. *See, e.g.*, Arizona Revised Statutes § 13-1407(F). Most countries throughout the world, including the United Kingdom (from where much of our law is derived), similarly set the age of consent at 16 or younger, as does the Model Penal Code. *See* Mode Penal Code § 212.4. The views of the States (and the rest of the world) are important when conducting a First Amendment analysis because although there is obviously "a broad societal consensus" against child pornography, there is very little consensus that a child includes 16 and 17-year olds for these purposes. *See United States v. Stevens*, 559 U.S. 460, 475-77 (2010) (striking down law prohibiting depictions of animal cruelty under First Amendment "because although there may be 'a broad societal consensus' against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel") (citation omitted).

When the federal child pornography laws were first enacted in 1977, they

only applied to pornography depicting individuals under the age of 16. *See* 18 U.S.C. § 2253 (1977). Similarly, in the landmark child pornography case of *New York v. Ferber*, 458 U.S. 747, 749 (1982), the applicable law defined a child as someone under the age of 16. Two years after *Ferber*, Congress increased the age to 18, but its rationale was not to protect 16 and 17-year olds. Indeed, as mentioned, the federal age of consent is still 16. Instead, Congress explained:

> The Committee concluded that the age of children encompassed by the act should be increased from 16 to 18 years. The prosecution for distribution are most often based solely on the pornography which is the subject of the offense; the children cannot be located. Based on the pictures alone, the prosecution must show that the child is under the age of 16. This is extremely difficult once the child shows any sign of puberty. Raising the age to 18 would facilitate the prosecution of child pornography cases and raise the effective age of protection of children from these practices, probably not to 18 years of age, but perhaps to 16.

H.R. Rep. No. 98-536, 1983 WL 25391 (Nov. 10, 1983). Despite this specific explanation, the Ninth Circuit asserted that making it easier to prosecute cases involving 15-year olds was not the only reason for the amendment, but it relied on very general language in the legislative history taken out of context and never addressed Congress's explicit justification for the amendment and the fact that the federal age of consent is still 16. App. 3.

The explicit rationale for the age-increase stated by Congress is precisely the type of overbreadth violation that this Court's most recent precedent forbids. In *Free Speech Coalition*, this Court struck down part of a prior version of §

2252A that applied to virtual child pornography and rejected the government's argument "that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children." *Free Speech Coalition*, 535 U.S. at 254. This Court explained: "The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down." *Id.* at 255. Thus, Congress "may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Id.* at 255. This Court reiterated: "The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* at 255. In short, Congress's rationale for increasing the age to 18 is inconsistent with this Court's 2002 decision in *Free Speech Coalition*, as Congress elected to proscribe pornography involving 17-year olds so that it could more easily prosecute pornography involving 15-year olds.

In *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), *rev'd*, 513 U.S. 64 (1994), the defendant made a similar challenge to the one made

here in the context of § 2252, and the Ninth Circuit observed that it had some "force." *Id.* at 1287-88. Nevertheless, without addressing the legislative history of the amendment increasing the age limit to 18, the Ninth Circuit rejected the contention, essentially reasoning that the defendant had not shown *substantial* overbreadth. *Id.* at 1288. This Court ultimately reversed in *X-Citement Video, Inc.* on other grounds, but, after noting that review was not granted on the age issue, this Court summarily adopted the Ninth Circuit's rationale in that regard. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994). The earlier and summary dicta in *X-Citement Video, Inc.* does not survive this Court's subsequent reasoned analysis in cases like *Free Speech Coalition*. Furthermore, the summary analysis in *X-Citement Video, Inc.* in the context of § 2252 did not address the combination of factors that makes § 2252A(a)(2)(A) overbroad.

Finally, to be facially unconstitutional under the overbreadth doctrine, the statute must be *substantially* overbroad. *See, e.g.*, *Stevens*, 559 U.S. at 473. The overbreadth here is *substantial*. The statute's "alarming breadth[,]" *id.* at 474, includes depictions of 16 and 17-year olds, even those with literary value. *See Free Speech Coalition*, 535 U.S. at 247-48. The government cannot attempt to save the statute by contending that it only prosecutes when depictions involve individuals under the age of 16. *See Stevens*, 559 U.S. at 480 ("But the First Amendment protects against the Government; it does not leave us at the mercy of

noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Nor does it matter under the overbreadth doctrine that the depictions alleged in this case involve individuals under the age of 16. For this reason alone, the statute is overbroad on its face and therefore must be struck down. *Id.* at 482.

B. The amended definition of "child pornography" is overbroad

Even if, despite *Free Speech Coalition*, 535 U.S. at 254-55, it were constitutionally permissible to raise the age to 18 so as to make it easier to prosecute pornography cases involving minors under 16, the specialized definition of "child pornography" under § 2252A(a)(2) is overbroad. Other child pornography laws, *see, e.g.*, 18 U.S.C. § 2252(a), require a visual depiction of a minor engaging in "sexually explicit conduct" as defined in 18 U.S.C. § 2256(2). The offense set forth in § 2252A(a)(2)(A), however, is different.

As it has been amended over the years, § 2252A contains a broader definition of "child pornography," which includes a visual depiction "that is, *or is indistinguishable from*, that of a minor engaging in sexually explicit conduct . . . ." 18 U.S.C. § 2256(8)(B) (emphasis added). "[T]he term 'indistinguishable' used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This

definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults." 18 U.S.C. § 2256(11).

Under the terms of the statutory scheme, § 2252A(a)(2)(A) applies to a movie where young adults are used to convincingly portray 17-year olds engaged in sexually explicit conduct. This is exactly the type of material that this Court held was protected in *Free Speech Coalition*. *See Free Speech Coalition*, 535 U.S. at 246-58. "The statute proscribes the visual depiction of an idea – that of teenagers engaging in sexual activity – that is a fact of modern society and has been a theme in art and literature throughout the ages." *Id.* at 246. "Contemporary movies pursue similar themes." *Id.* at 247. *Free Speech Coalition* makes clear that the First Amendment protects the depictions of such themes if they do not involve the use of an actual minor engaging in such activity. In reaching this conclusion, this Court specifically rejected the government's argument that depictions "virtually indistinguishable" to child pornography can be proscribed. *Id.* at 249. Adding yet another layer of overbreadth, the definition of child pornography includes a "computer-generated image[,]" 18 U.S.C. § 2256(8)(B), which is what *Free Speech Coalition* struck down as unconstitutional. *See Williams*, 553 U.S. at 313-14 (Souter, J., dissenting).

The Ninth Circuit reasoned that the definition of "child pornography" in § 2256(8)(B) was not implicated by this case. App. 3-4. But the factual basis for

petitioner's guilty plea stated that the electronic file distributed by him "depict[ed] *what appears to be*" a nude girl. Thus, the definition in § 2256(8)(B) was implicated. Furthermore, the Ninth Circuit's reliance on a 1985 opinion in the civil context, App. 4 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-06 (1985)), conflicts with this Court's more recent discussions of the overbreadth doctrine in the criminal context, which permit a facial First Amendment challenge as long as the statute's overbreadth is substantial in relation to its legitimate sweep. *See Stevens*, 559 U.S. at 473, 482; *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Given the breadth of the § 2256(8)(B) definition, there can be little question that § 2252A(a)(2) is substantially overbroad in relation to its legitimate sweep. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). In sum, *Free Speech Coalition* demonstrates that the definition of "child pornography" is unconstitutionally overbroad, and therefore § 2252A(a)(2) violates the First Amendment.

C. The amended penalties violate the First Amendment

It is one thing to sweep broadly (and overly so), as § 2252A(a)(2)(A) has done. It is another to punish such broad conduct with the harshest of penalties. This is yet another reason why the statute, as it now stands, violates the First Amendment.

When originally enacted in the late 1970's, when the relevant age for

minority was 16, the federal child pornography statute carried no mandatory minimum for a first offense and a maximum of 10 years. *See* 18 U.S.C. § 2252 (1978). The current penalties are far more "severe." *Free Speech Coalition*, 535 U.S. at 244. A first violation of § 2252A(a)(2)(A) results in a minimum sentence of five years and a maximum of 20 years, *see* 18 U.S.C. § 2252A(b)(1), even more harsh than the then-existing penalties described as "severe" in *Free Speech Coalition*. Furthermore, the current statutory scheme authorizes *lifetime* supervised release. *See* 18 U.S.C. § 3583(k).

"While even minor punishments can chill protected speech, this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law." *Free Speech Coalition*, 535 U.S. at 244 (citations omitted).

In other words, the statute is not "narrowly tailored[,]" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), as it imposes the harshest of penalties, including a significant mandatory minimum sentence, to an extraordinarily broad range of material, including material that may be of literary value and inoffensive to most viewers. The significant penalties, including a severe mandatory minimum, Sentencing Guidelines that have been well-documented as

unreasonable, *see United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011); *see also United States v. Hardrick*, 766 F.3d 1051, 1057-58 (9th Cir. 2014) (Reinhardt, J., concurring), and lifetime supervised release, essentially mean that whether conduct involving less offensive material results in extraordinary sentences is impermissibly left to the "unguided discretion" of law enforcement. *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987). Such a framework is unconstitutional, as it is "[f]ar from providing the 'breathing space' that 'First Amendment freedoms need to survive . . . ." *Id.* at 467 (citation omitted).

While petitioner maintains that the appropriate remedy is to strike the statute down as unconstitutional under the First Amendment and to vacate his conviction, *see Stevens*, 559 U.S. at 482, this Court should at least employ a quasi-severability analysis by which it restores the statutory framework to its original form, in which the age of minority was set at 16, the amended and expanded definition of "child pornography" is eliminated, and the original penalties of 0-10 years are restored. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 246-48 (2005). Under this alternative remedy, this Court should vacate petitioner's sentence and remand for resentencing with a range of 0-10 years in custody and supervised release of not more than three years for a Class C felony. *See* 18 U.S.C. §§ 3559(a), 3583(b).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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