NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. ROUSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the child pornography exception to the First Amendment, which is grounded in the long-standing exemption for speech integral to criminal conduct, applies to the private exchange of images depicting lawful, sexual conduct between individuals who had reached the age of consent under state law and had mutually agreed to record the images.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Matthew J. Rouse, appellant below. Respondent is the United States of America, appellee below. Petitioner is not a corporation.

STATEMENT ON RELATED CASES

There are no cases directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Matthew J. Rouse respectfully petitions the Court for a writ of certiorari to review the opinion entered by the United States Court of Appeals for the Eight Circuit on September 3, 2019.

OPINIONS BELOW

The decision of the United States Court of Appeals affirming the denial of Rouse's Motion to Dismiss can be found at *United States v. Rouse*, 936 F.3d 849 (8th Cir. 2019). A copy of the opinion is appended to this Petition. (App. A) The district court's Memorandum and Order is unpublished but is also attached to this Petition.(App. B) The United States Magistrate Judge's Findings and Recommendation in this case are also unpublished. They are appended at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 3, 2019. Rouse sought an extension of time in which to file a Petition for a Writ of Certiorari, and this Court granted an extension until January 2, 2020. This Petition has been timely filed before that date. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINE PROVISIONS INVOLVED

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

§ 2252A Certain activities relating to material constituting or containing child pornography

(a) Any person who–

* * * * *

(2) knowingly receives or distributes–

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been 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. . . .

STATEMENT OF THE CASE

Matthew Rouse is serving what one appellate judge called an "unseemly and quite possibly unfair" eight-year sentence for sharing with his sixteen-year-old girlfriend videos and images of their legal sexual activities. *United States v. Rouse*, 936 F.3d 849, 853 (8th Cir. 2019) (Beam, J., concurring). Rouse's girlfriend had reached the age to consent to a sexual relationship under Nebraska law[1] and had, in fact, consented to both the sexual conduct and the recording of it. Nonetheless, Rouse was convicted of distributing child pornography. The question presented in this Petition is whether this prosecution for the private exchange of images depicting lawful sexual conduct is permissible under the First Amendment to the United States Constitution.

A. Rouse and B.A.'s consensual sexual relationship

In 2016, Rouse was a Sergeant in the Army National Guard in Lincoln. He was organizing a CrossFit competition in August of that year and needed a female to complete his team. Rouse placed an ad for the position and B.A., who was 16 at the time, responded. B.A. competed with the team, and both she and her father became friendly with Rouse. The friendship continued after the competition was over, with Rouse and B.A. exchanging messages on Snapchat.

In September, Rouse and B.A. began meeting in person. The relationship soon

[1]Neb. Rev. Stat. § 28-319(1)(c).

became sexual. They met every couple of weeks between September, 2016, and January, 2017, to have consensual sexual intercourse, often at a hotel in Omaha.

In approximately December of 2016, Rouse brought up the possibility of recording their sexual contacts. B.A. agreed to the idea, and the recordings began. The two made approximately five video recordings of themselves engaged in sexual acts, sometimes using her phone and sometimes using his. B.A. also sent several nude pictures of herself to Rouse's phone.

B.A.'s mother eventually learned of the relationship and found the videos on B.A.'s phone. Another soldier who had been on Rouse's CrossFit team also knew of the relationship and reported it to co-workers. They in turn told their superior, who contacted the Nebraska State Patrol.

Sergeant Townsend and Sergeant Connelly handled the investigation for the Nebraska State Patrol. They interviewed both Rouse and B.A. Both gave the same account of their relationship and their mutual decision to record their sex acts for their private use. Neither had distributed the images to anyone but the other, and neither expressed an intent to do so.

The officers confiscated both phones for searching. They recovered two videos from B.A.'s phone that appeared to be of Rouse and B.A., but B.A.'s face is not visible on either video. Based on these recordings and the nude photos B.A. sent to Rouse, Rouse was charged with one count of enticing B.A. to engage in sexually

explicit conduct for the purposes of creating a visual depiction and one count of distributing child pornography.

B. Rouse's Motion to Dismiss

On June 30, 2017, Rouse filed a Motion to Dismiss the Indictment. In the Motion, Rouse argued that prosecuting him for documenting his lawful relationship with B.A. violated his First Amendment right to freedom of speech. Rouse argued that prohibitions against actual child pornography are justified by the government's interest in protecting children from sexual exploitation and abuse. When the speech is intrinsically related to that unlawful abuse, it is not protected by the First Amendment. When speech is the product of completely legal activity, however, the First Amendment is a bulwark against state censorship. There was no underlying abuse in Rouse's case. B.A. had reached the age of consent and had in fact consented to the sexual conduct depicted in the images. Rouse therefore argued his speech retained First Amendment protection.

C. Decisions in the District Court

Magistrate Judge Michael Nelson issued his Findings and Recommendation on July 26, 2017. The Magistrate Judge disagreed that the linchpin of the child pornography exception was the speech's connection to underlying abuse. Instead, the Magistrate Judge saw age as the only question relevant to the categorical ban. "Because B.A. was undisputedly a minor at the time of the recordings," the

Magistrate Judge stated, "the recordings involve the type of harm which can constitutionally be prosecuted." (App. C p. 15A)

Rouse objected to the the Magistrate Judge's recommendation, but the district court endorsed the Magistrate Judge's analysis and rejected Rouse's First Amendment claim. (App. B)

D. Rouse's Plea and Sentencing

Rouse had no criminal history points under the United States Sentencing Guidelines. Nonetheless, the Sentencing Guidelines for his offenses exposed him to a penalty range of 188 to 235 months imprisonment. Under 18 U.S.C. § 2252A(b)(1), the statutory minimum sentence was five years imprisonment. To limit his exposure, Rouse negotiated a conditional plea agreement with the government under Federal Rule of Criminal Procedure 11(c)(1)(C). The agreement called for Rouse to plead guilty to distribution of child pornography in exchange for the government's dismissal of the enticement charge. The lowest sentence to which the government would agree was 96 months imprisonment.

Rouse appeared before the district court for sentencing on June 25, 2018. The court recognized that Rouse did not pose a danger to children and agreed with defense counsel that it was not within "the purview of the court to decide what relationships are appropriate." (Sent. Tr. 14) Nevertheless, it considered the legality of the relationship "distinct" from the question of whether videos or photographs of

that relationship could be taken. (Sent. Tr. 11) The court therefore approved the parties' plea agreement and sentenced Rouse to the agreed-upon eight years in prison.

E. The Court of Appeals' Decision

Rouse appealed the denial of his Motion to Dismiss to the United States Court of Appeals for the Eighth Circuit, renewing the argument that his prosecution violated the First Amendment. Rouse pointed out that in *United States v. Stevens*, 559 U.S. 460 (2010), the Court placed child pornography within the category of unprotected speech that covers "'speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" *Stevens*, 559 U.S. at 471 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Because having consensual sexual intercourse with a woman who had reached the age of consent was not in violation of a criminal statute, Rouse argued his recordings were not integral to criminal conduct. Accordingly, the First Amendment still applied to his images.

The Eighth Circuit disagreed with how the "speech integral to criminal conduct" exception applied in his case. According to the Court of Appeals, "[w]hen the Court spoke of speech used as an integral part of conduct in violation of a 'valid criminal statute,' it was referring to statutes forbidding the production of child pornography." *United States v. Rouse*, 936 F.3d at 851-52. The court continued:

> As the Court explained in *Free Speech Coalition*, "[i]n the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse. . . . The "underlying abuse" to which the market for child

> pornography was "intrinsically related," therefore, was the unlawful production of the images themselves . . . .
>
> Rouse recorded an identifiable minor engaging in sexually explicit activity and then distributed the video over the internet. His speech in distributing the child pornography was intrinsically related to the unlawful production of the material, and thus categorically unprotected under the First Amendment. . . .

Rouse, 936 F.3d at 852 (internal citation omitted).

Senior Judge Arlen C. Beam agreed with the Court's constitutional analysis but wrote a separate concurrence "because the result–the conviction and especially the sentence of 96 months–under the particular facts of this case is unseemly and quite possibly unfair." *Id.* at 852 (Beam., J., concurring). The court noted that "there was in reality no victim of this crime," and argued that "the two-year gap between the age of majority for consensual sex and the age at which depictions of consensual and legal sex are *illegal* as child pornography should likely be addressed by a legislative body." *Id.* "In this usual and likely aberrant case," Judge Beam concluded, "a prison sentence of eight years is, to say the least, unfortunate." *Id.*

REASONS FOR GRANTING THE PETITION

I. The decision below misinterprets the child pornography exception to the First Amendment which, after *United States v. Stevens*, is limited to materials that are an integral part of an underlying crime of abuse or exploitation and thereby excludes materials depicting legal and consensual sexual activity.

In *United States v. Stevens*, this Court clarified its basis for excluding child

pornography from First Amendment protection. It held that child pornography is not exempt from First Amendment protection because of a cost-benefit analysis but because it falls naturally into the long-recognized exception for speech "'used an integral part of conduct in violation of a valid criminal statute.'" *Stevens*, 559 U.S. at 471 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

The Eighth Circuit acknowledged *Stevens*' clarification in the decision below. It held, however, that the "unlawful production of the images themselves" could serve as the "violation of a valid criminal statute" to which the speech in question must be integrally related. *Rouse*, 936 F.3d at 852. This interpretation conflicts with the Court's child pornography jurisprudence, which has consistently linked the child pornography exception to an underlying crime of sexual abuse or exploitation. *See New York v. Ferber*, 458 U.S. 747 (1982); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Before Rouse and others lose years of their lives for speech that bears little resemblance to prevailing concepts of child pornography, this Court should resolve this conflict.

A. Under this Court's caselaw, depictions of minors engaged in sexually explicit activity have only be categorically excluded from First Amendment protection when they were integrally related to an underlying crime of abuse or exploitation.

The "speech integral to criminal conduct" exception to the First Amendment has its origins in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). In *Giboney*,

members of the Ice and Coal Drivers and Handlers Union sought to convince Empire Storage & Ice Company, a wholesale ice distributor, to agree to stop selling ice to nonunion retail ice peddlers. *Id.* at 492. Such agreements were considered illegal restraints of trade under Missouri law. Nonetheless, the union began an extensive picketing and publicity campaign against the company to force one. When Empire sought an injunction against the picketing, the union argued that an injunction would violate the union's rights under the First Amendment. *Id.* at 493.

This Court disagreed, holding that the speech could not be "treated in isolation" from its objective and should instead be considered part of an "integrated course of conduct, which was in violation of Missouri's valid law." *Id.* at 498. The Court continued:

> It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.

Id.

Decades later, in *New York v. Ferber*, 458 U.S. 747 (1982), the Court invoked *Giboney* in a child pornography distribution case. *Ferber* examined the constitutionality of a New York criminal statute which prohibited the distribution of materials depicting sexual performances by children under the age of 16. *Id.* at 749. The Court in *Ferber* listed a number of reasons why distribution of child pornography falls

"outside the protection of the First Amendment" even if it does not meet the definition of obscenity. *Id.* at 763. Among those reasons is its intrinsic relationship to the sexual abuse and exploitation of minors depicted in the material. *Id.* at 757. Citing legislative findings, the Court noted that "[t]he act of selling these materials is guaranteeing that there will be additional abuse of children." *Id.* at n. 13 (citing Texas House Select Committee on Child Pornography: Its Related Causes and Control 32 (1978)). As in *Giboney*, then, the speech in *Ferber* was "'an integral part of conduct in violation of a valid criminal statute.'" *Id.* at 761-62 (quoting *Giboney*, 336 U.S. at 498).

Because *Ferber* included strong language about safeguarding the "physical and psychological well-being" of minors, *id.* at 756-57, courts after *Ferber* began to use this broad justification to uphold child pornography restrictions. *See*, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (citing child protection rationale in upholding Ohio law prohibiting private possession of child pornography). Congress also embraced this rationale in the Child Pornography Prevention Act of 1996, when it extended he federal prohibition against child pornography to "virtual child pornography," or "sexually explicit images that appear to depict minors but were produced without using any real children." *Free Speech Coalition*, 535 U.S. at 239. The Supreme Court struck down the prohibition, however, because distribution of virtual child pornography did not bear a sufficient relationship to an underlying crime. According to the Court, the prohibition in *Ferber* was based on the speech's "proximate link to

the crime from which it came," not on indirect harms that the images pose to children. *Free Speech Coalition*, 535 U.S. at 250-51. Because virtual child pornography "records no crime and creates no victims by its production," it cannot be categorically excluded from First Amendment protection. *Id.* at 250.

If *Free Speech Coalition* left any doubt as to the underpinnings of the child pornography exception to the First Amendment, *United States v. Stevens* laid them to rest. In *Stevens*, the Court examined the constitutionality of a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty. 559 U.S. at 464. The government argued that such depictions should be categorically excluded because the societal cost of the images outweighed the value of the speech. *Id.* at 470. It cited *Ferber* and pointed to child pornography as an example of speech that is prohibited for that reason. *Id.* at 470.

This Court labeled the government's "free-floating test" for First Amendment protection "startling and dangerous." *Id.* at 470. More importantly, it flatly rejected the notion that *Ferber* rested on any kind of balancing test. *Id.* According to the Court, *Ferber* was grounded in a "previously recognized, long-established category" of unprotected speech: speech that is "'an integral part of conduct in violation of a valid criminal statute.'" *Stevens*, 559 U.S. at 471 (internal citation omitted).

After *Stevens*, the initial question in any prosecution for child pornography offense must be whether there is specific illegal conduct to which the speech in

question is integral. *Giboney*, 336 U.S. at 498. And according to Ferber and *Free Speech Coalition*, actual harm to a child must be a key component of that illegal conduct. *See* Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437, 1451 (2014). *Ferber* identifies the "prevention of sexual exploitation and abuse of children" as the principal objective of child pornography regulation. *Ferber*, 458 U.S. at 757. Any limits on speech depicting minors must be consistent with "the nature of the harm to be combated." *Id.* at 764. Meanwhile, *Free Speech Coalition* draws a clear distinction between speech that is the "record of child abuse" and speech which "records no crime and creates no victims by its production." *Id.* at 250-51. The former is categorically unprotected speech while the latter is not.

Together, *Stevens*, *Free Speech Coalition*, and *Ferber* lead to the inescapable conclusion is that materials depicting sexual acts by minors do not lose First Amendment protection unless an underlying act of sexual abuse or exploitation is present. When the conduct depicted in the images is legal, the First Amendment applies.

B. The Eighth Circuit's decision conflicts with this precedent and with the original rationale for the "speech integral to criminal conduct" exception to the First Amendment.

The Court of Appeals offered a different view on the primary illegality in a child pornography case. According to the Eighth Circuit, "[w]hen the Court [in *Stevens*] spoke of speech used as an integral part of conduct in violation of a 'valid

criminal statute,' it was referring to statutes forbidding the production of child pornography." *Rouse*, 936 F.3d at 851-52. It defined "production of child pornography" in pre-*Stevens* terms as "record[ing] an identifiable minor engaged in sexually explicit activity." *Id.* Under the Eighth Circuit's reasoning, Rouse's "speech in *distributing* the child pornography was intrinsically related to the unlawful *production* of the material," leaving it "categorically unprotected under the First Amendment." *Id.* at 852 (emphasis added).

The problem with this analysis is that it merely begs the question at the heart of this case, which is whether "record[ing] an identifiable minor engaged in sexual explicit activity," is truly unlawful if the explicit sexual activity is, itself, legal. By assuming the illegality of the production and using that assumed illegality to ground a conviction for distribution, the Eighth Circuit manages to insulate both production and distribution of images depicting legal conduct from any real First Amendment scrutiny.

Such an approach cannot be reconciled with the *Giboney* doctrine on which the child pornography exception is based. The union's picketing in *Giboney* lost its protection because the union was "doing more than exercising a right of free speech or press." *Giboney*, 336 U.S. at 503. Its speech activities were facilitating unlawful non-speech conduct: the conspiracy to violate Missouri's anti-trade-restraint law. *United States v. Osinger*, 753 F.3d 939, 950-51 (9th Cir. 2014) (Watford, J., concurring).

The Eighth Circuit is arguing that Rouse's speech is "'integral to illegal conduct' simply because the speech is illegal under the law that is being challenged." Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 987 (2016). Its analysis is not an application of the *Giboney* exception but a perversion of it.

Circular logic notwithstanding, the Eighth Circuit has already convinced one other court to adopt its analysis. On nearly identical facts, the New Hampshire Supreme Court held in *State v. Barr*, No. 2018-0464, 2019 WL 6255853 (N.H. Nov. 22, 2019), that a defendant who had recorded a sexual act with his 16-year-old girlfriend and then privately shared the recording with her could constitutionally be prosecuted for manufacturing and possessing child pornography. *State v. Barr*, No. 2018-0464, 2019 WL 6255853 (N.H. Nov. 22, 2019). Like Rouse, the defendant in *Barr* argued that *Stevens* demanded a connection to an *unlawful* act of abuse or exploitation. The court disagreed, relying on the Eighth Circuit's decision in *Rouse*. *Barr*, 2019 WL 6255853 at * 6. It stated:

> We agree with the Eighth Circuit that *Stevens* did not disturb the Supreme Court's previous holdings that producing and possessing images of an actual child engaged in sexual activity are unprotected by the First Amendment, regardless of whether the underlying sexual activity was legal. . . . The criminal conduct underlying child pornography is not statutory rape, but recording a child engaged in sexual conduct.

Id.

Only this Court can decide whether *Stevens* "disturb[s]" the Supreme Court's holdings or simply illuminates an outstanding question in those decisions that has yet to receive the Court's full attention. What is clear is that the Eighth Circuit's analysis led to an "unseemly," "unfair," and "unfortunate" eight-year sentence in a case in which there was "no victim." *Rouse*, 936 F.3d at 853. It the Court leaves the limits of child pornography unclear, these results will only multiply. To avoid this outcome and provide much-needed guidance on the child pornography exception, this Court should grant certiorari.

II. The question presented is a recurring issue of national importance.

While the concurring judge was correct about the absurdity of the results, he was wrong to call this an "unusual and likely aberrant case." *Id.* Cases like Rouse's can be found in both state and federal courts.[2] Sadly, Rouse's case is not even the

[2] *See*, *e.g.*, *United States v. Ortiz-Graulau*, 526 F.3d 16 (1st Cir. 2008) (180-month sentence imposed on defendant who photographed consensual sexual activity with woman who had reached jurisdiction's age of consent and with whom he was cohabiting); *United States v. Laursen*, 847 F.3d 1026, 1031–32 (9th Cir.), *cert. denied*, 138 S. Ct. 218 (2017) (defendant received mandatory minimum penalties of 15 years for production of child pornography and 10 years for possession for taking "consensual nude 'selfies'" with woman with whom he was in a legal sexual relationship); *People v. Hollins*, 971 N.E.2d 504 (Ill. 2012) (defendant received eight-year sentence for filming consensual intercourse with his girlfriend, who had reached the age to consent to sexual activity but was considered a "child" under Illinois child pornography statutes); *State v. Senters*, 699 N.W.2d 810 (Neb. 2005) (defendant sentenced to two years imprisonment for videotaping, for private purposes, sex with woman who had reached the age of majority for sexual activity but was still covered by Nebraska child pornography laws); *United States v. Gore*, No. 1:17-cr-455, 2018 WL 454367 (N.D. Ga.

worst example of an "unseemly" and "unfair" sentence for recording legal sexual acts with a minor who had reached the age of consent. *See Laursen*, 847 F.3d at 1031 (15-year sentence for production of child pornography and 10 years for possession); *United States v. Ortiz-Graulau*, 756 F.3d at 14 (15-year sentence for production of child pornography); *Rinehart*, 2007 WL 647498 at *4 (same). Nor is Rouse's case the only one in which a court expressed dismay at being required to impose such a sentence. In *United States v. Rinehart*, the district court lamented having to sentence the defendant to the mandatory minimum 15-year penalty for photographing two women of consenting age with whom the defendant was in consensual sexual relationships. The Court acknowledged how "destructive and exploitive child pornography can be," but said Rinehart's conduct was not the kind typically prosecuted under child pornography statutes. *Rinehart*, 2007 WL 647498 at *4. "This case, involving sexual activity with victims who were 16 and 17 years old and who could and did legally consent to the sexual activity, is very different," the court wrote. *Id.* "But because of

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Jan 17, 2018) (one-year sentence for receipt of child pornography for defendant who received photos from a girlfriend who had reached age of consent in Georgia); *United States v. Hurley*, No 1:18CR408, 2019 WL 1382262 (N.D. Ohio Mar. 27, 2019) (motion to dismiss indictment denied in child enticement case in which photos of defendant's 16-year-old girlfriend, of consenting age in Ohio, were found on his phone); *United States v. Rinehart*, No. IP 06-129-CR-1 HF, 2007 WL 647498 (S.D. Ind. Feb. 2, 2007) (defendant sentenced to mandatory minimum 15-year penalty for recording sexual acts with two women of consenting age with whom he was in consensual sexual relationships).

the mandatory minimum 15 year sentence required by 18 U.S.C. § 2251(e), this court could not impose a just sentence in this case." *Id.*; *see also Laursen*, 847 F.3d at 1031 (judge noted, in imposing 15-year sentence, that it was "bound by the law, whether I agree with it or not"); *Ortiz-Graulau*, 526 F.3d at 22 (noting that prosecutions for photographing otherwise-legal sexual conduct can lead to "disquieting" results, and wondering whether these statutes are the "proper way" to deal with the relationships at issue).

Injustices like this are possible in every state in which there is a gap between the age of consent for sexual activities and the age at which a minor is no longer a "child" under child pornography statutes. This gap exists in most states. "Under federal and most state law, the child pornography age is under eighteen even though thirty-nine states have an age of consent of seventeen years or younger." Dr. JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 San Diego L. Rev. 951, 954-55 (2011); *see also* Office of the Asst. Secretary for Planning and Evaluation, U.S. Department of Health & Human Services, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, avail. at https://aspe.hhs.gov/system/files/pdf/75531/report.pdf, pp. 5-6 & Table 1 (2004) (detailing age-of-consent laws by state). In fact, as the Court noted in *Free Speech Coalition*, the age of a "child" under federal child pornography is higher than the legal age for marriage in many states. 535 U.S. at 247.

Within these states, there are undoubtedly hundreds of cases which could be federally prosecuted. According to a 2013 survey, approximately 33 percent of 16-year-olds and 48 percent of 17-year-olds have had sexual intercourse. Finer, Lawrence B. and Philbin, Jesse M., *Sexual Initiation*, *Contraceptive Use, and Pregnancy Among Young Adolescents*, Pediatrics Vol. 131 No. 5 (May 2013) avail. at https://www.ncbi.nlm.nih.gov/pubmed/23545373. Meanwhile, approximately 28 percent of sophomores and juniors have admitted to producing and sharing nude photos of themselves. Rosin, Hanna, *Why Kids Sext*, The Atlantic (Nov. 2014), avail. at https://www.theatlantic.com/magazine/toc/2014/11/. The decision of whether to prosecute and what sentence to pursue often rests on whether a parent or prosecutor has a particularly strong moral objection to the underlying relationship. Even the district court in this case recognized that neither courts nor prosecutors should be the arbiters of a relationship's "appropriateness."

The severity of the consequences, frequency with which this issue could arise, and potential for disparities in prosecution all justify a writ of certiorari in Rouse's case. But this matter also touches on two of the most fundamental rights embedded in our constitution–the right to free speech and the right to sexual privacy. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). Restrictions on such rights are always worthy of this Court's consideration. This

Court should therefore grant the Petition.

III. This case presents an ideal vehicle for resolving the question presented.

Rouse's case is an appropriate vehicle for examining the issue it presents. There are no disputes regarding the facts. Rouse and B.A. gave the same account of their consensual relationship and their mutual decision to record their sexual intercourse. The two participants shared the material only with each other.

Rouse properly preserved the issue in the district court and received a decision squarely on the merits in both the district court and the Court of Appeals. The Eighth Circuit provided no alternate ground for its judgment. This Court's answer to the question presented will be outcome determinative in this case and its impact will be widespread. This Court should therefore accept this opportunity to decide an important First Amendment issue.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

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