No. 19-7865

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD LAVERNE MECHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2256(8)(C), which defines "child pornography," for purposes of prohibiting its production, distribution, and possession, to include any "visual depiction" that "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," is permissible under the First Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Mecham, No. 18-cr-1339 (Apr. 10, 2019)

United States Court of Appeals (5th Cir.):

United States v. Mecham, 19-40319 (Feb. 13, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 950 F.3d 257. The order of the district court (Pet. App. 9a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2020. The petition for a writ of certiorari was filed on March 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing child pornography involving a prepubescent minor, in violation of 18 U.S.C. 2252A(a)(5)(B). Judgment 1; Pet. App. 2a. He was sentenced to 97 months of imprisonment, to be followed by a lifetime term of supervised release. Judgment 2-3. The court of appeals affirmed the conviction but remanded for resentencing. Pet. App. 1a-8a.

1. A computer technician servicing petitioner's computer found "thousands of images showing nude bodies of adults with faces of children superimposed." Pet. App. 1a. The technician informed the police, who executed a search warrant at petitioner's home and seized several electronic devices. Id. at 1a-2a. After waiving his Miranda rights, petitioner "admitted he had added the faces of his four granddaughters to photos and videos of adults engaged in sexual conduct." Id. at 2a. He later explained that he did so "to get back at his family for cutting him off" from interacting with his grandchildren. Ibid.

A subsequent forensic analysis of petitioner's electronic devices resulted in the discovery of more than 30,000 pornographic files. Pet. App. 2a. "All these photos and videos were morphed child pornography using the faces of [petitioner's] grandchildren," who were "four, five, ten, and sixteen in the photos [petitioner] used." Ibid. Petitioner emailed some of the

videos to his oldest granddaughter. Ibid. One such video showed "that granddaughter's face on an adult female having sex. [Petitioner] superimposed his face on the male in the video." Ibid. "The video uses computer animation to show the male ejaculating, with the semen shooting to the granddaughter's mouth." Ibid.

2. Under 18 U.S.C. 2252A(a)(5)(B), it is a felony to "knowingly possess[] * * * any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography." As relevant here, "child pornography" includes a "visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(C).

A federal grand jury returned a one-count indictment charging petitioner with possession of child pornography involving a minor under the age of 12, in violation of 18 U.S.C. 2252A(a)(5)(B). See Indictment 1-3; see also Pet. App. 2a. The video at issue in the charged count "lasts 8 minutes and 43 seconds. It adds the face of [petitioner's] five-year-old granddaughter to a montage of photos of an adult female engaging in oral, vaginal, and anal sex. In parts of the video, [petitioner's] face is morphed onto the face of the men engaging in the acts." Pet. App. 2a.

Before trial, petitioner moved to dismiss the indictment, arguing that "morphed" child pornography -- i.e., pornography where "faces of actual children" are "superimposed * * * on

pornographic photos of adults to make it appear that the minors were engaged in sexual activity" -- is protected under the First Amendment. Pet. App. 1a-2a. The district court disagreed and denied the motion. Id. at 2a; see id. at 9a-28a.

3. The court of appeals affirmed. Pet. App. 1a-8a.

The court of appeals observed that under this Court's decisions, child pornography with complete images of actual minors "is not protected speech under the First Amendment," although "virtual child pornography" with "'adults who look like minors'" or completely computer-generated imagery "is protected speech." Pet. App. 1a (citing New York v. Ferber, 458 U.S. 747 (1982) (child pornography with full images of children); Osborne v. Ohio, 495 U.S. 103 (1990) (same); and quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 239-240 (2002) (virtual child pornography)). The court of appeals determined from those decisions that morphed child pornography, which involves a pornographic "image of a real child," even if the child did not herself "actually engage[] in sexually explicit conduct," "does not enjoy First Amendment protection." Ibid. The court emphasized that "morphed child pornography raises th[e] threat to a child's psychological well-being," and explained that "because morphed child pornography depicts an identifiable child, it falls outside the First Amendment." Id. at 5a-6a. The court observed that decisions of this Court directly involving child pornography -- including New York v. Ferber, Osborne v. Ohio, and Ashcroft v. Free Speech Coalition, supra -- have "consistently

cited the interest in preventing reputational and emotional harm to children as a justification for the categorical exclusion of child pornography from the First Amendment." Pet. App. 3a-5a. And the court of appeals recognized that this Court's decision in United States v. Stevens, 559 U.S. 460 (2010), which "held that images depicting cruelty to animals are not categorically excluded from the First Amendment," did not override this Court's child-pornography precedent or extend First Amendment protection to morphed child pornography. Pet. App. 4a; see id. at 4a-5a.

Because it rejected petitioner's challenge to the federal definition of child pornography -- which did not include any argument that possession and distribution of morphed child pornography should be treated differently for constitutional purposes -- the court of appeals did not address whether petitioner's conviction was alternatively constitutional under a case-specific application of strict scrutiny. See Pet. App. 7a n.5. The court of appeals concluded, however, that the district court had erred at sentencing by applying a four-level enhancement for a child pornography offense that "involve[s] material that portrays * * * sadistic or masochistic conduct or other depictions of violence." Sentencing Guidelines § 2G2.2(b)(4)(A); see Pet. App. 6a-7a. The court of appeals accordingly vacated petitioner's sentence and remanded for resentencing. Pet. App. 7a.

ARGUMENT

Petitioner argues (Pet. 11-19) that the inclusion of morphed child pornography in the federal definition of child pornography violates the First Amendment. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court, and any tension in the lower courts does not warrant this Court's review. That is particularly so because petitioner's conviction would be valid even under the strict scrutiny standard that he advocates. This Court has repeatedly denied petitions for writs of certiorari raising similar First Amendment challenges to restrictions on morphed child pornography,[1] and it should follow the same course here.

1. As a threshold matter, this Court's review is not warranted because this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). While the court of appeals affirmed petitioner's conviction, it remanded his case for

[1] See Anderson v. United States, 135 S. Ct. 2309 (2015) (No. 14-7176); Boland v. Doe, 570 U.S. 904 (2013) (No. 12-987); Hotaling v. United States, 563 U.S. 1092 (2011) (No. 10-10813); McFadden v. Alabama, 563 U.S. 1092 (2011) (No. 10-1267); Allen v. Virginia, 558 U.S. 1111 (2010) (No. 09-306).

resentencing. See Pet. App. 7a. Petitioner will have the opportunity to raise his current claim, together with any other claims that may arise from further proceedings in the lower courts, in a single petition for a writ of certiorari following those proceedings. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. The petition would not warrant certiorari in any event.

a. Child pornography is "fully outside the protection of the First Amendment." United States v. Stevens, 559 U.S. 460, 471 (2010). In New York v. Ferber, 458 U.S. 747 (1982), this Court rejected a First Amendment challenge to a state law that prohibited the production and dissemination of sexually explicit material made using children under the age of 16. Id. at 750-751. The Court recognized "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," and that those harms are "exacerbated by th[e] circulation" of the materials, which "are a permanent record of the children's participation." Id. at 758-759; see id. at 759 n.10. The Court held that, in order "to dry up the market for this material" and thus prevent the attendant harms to children, States were justified in imposing "severe criminal penalties on persons selling, advertising, or otherwise

promoting the product," whether or not the materials were obscene. Id. at 760-761.

In Osborne v. Ohio, 495 U.S. 103, 110 (1990), the Court concluded that a similar rationale supports state laws that criminalize the possession of child pornography. The Court reiterated that the "continued existence" of the materials "causes the child victims continuing harm by haunting [them] in years to come." Id. at 111. It concluded that "ban[s] on possession and viewing" of child pornography combat such recurring harm by "encourag[ing] the possessors of these materials to destroy them." Ibid.

In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the Court held that a federal statute prohibiting the possession of "virtual child pornography," such as entirely computer-generated images, violated the First Amendment. See id. at 241, 258. The Court held that, because the production of such images does not implicate the interests of actual children, the governmental interests that supported the state law at issue in Ferber could not justify the federal ban on virtual child pornography. See id. at 249-251.

In so concluding, the Court distinguished the federal ban on possession of virtual child pornography from the prohibition at issue here, which covers "a more common and lower tech means of creating virtual images, known as computer morphing." Free Speech Coal., 535 U.S. at 242 (citing 18 U.S.C. 2256(8)(C) (2000)).

Because no party had challenged the ban on morphed child pornography, the Court did not decide its validity. See ibid. The Court observed, however, that because morphed child pornography involves "alter[ing] innocent pictures of real children so that the children appear to be engaged in sexual activity," such images "implicate the interests of real children and are in that sense closer to the images in Ferber." Ibid.

b. Consistent with the foregoing principles, the court of appeals correctly determined that possessing morphed child pornography, as defined in 18 U.S.C. 2256(8)(C), is not protected activity under the First Amendment. See Pet. App. 1a-8a. Among other things, petitioner "concede[d] it does not matter whether he was charged with possession or distribution, just as that distinction does not matter for real child pornography." Id. at 7a n.5. And both distribution and possession crimes that involve images of real children -- as opposed to adults who look like children or wholly fictional computer graphics -- impose harm of the sort identified in this Court's precedents denying First Amendment protection for child pornography.

Petitioner contends (Pet. 16-17) that the court of appeals' decision conflicts with language in Stevens that the First Amendment protects all speech other than certain "historic and traditional categories long familiar to the bar" -- such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct -- and that whether the First Amendment applies

does not turn on "a simple cost-benefit analysis" of the speech in question. 559 U.S. at 468, 471. But Stevens itself recognized that child pornography is "fully outside the protection of the First Amendment." Id. at 471. And as the court of appeals correctly observed, "Stevens makes no mention of the interest in preventing reputational or emotional harm to children," which was integral to this Court's holdings in Ferber, Osborne, and Free Speech Coalition, let alone hold that prevention of such harms is an inadequate rationale for the federal ban on morphed child pornography. Pet. App. 5a. See United States v. Price, 775 F.3d 828, 838 (7th Cir. 2014) (observing that Stevens discussed child pornography "only to reject an analogy between it and depictions of animal cruelty"); id. at 839 (observing that "Stevens did not suddenly confer First Amendment protection on some child pornography, i.e., pornographic images that stop short of depicting illegal child abuse."). "That would have been a significant doctrinal development, and not likely to be hidden in a case about [animal cruelty] videos." Ibid.

Petitioner similarly errs in contending (Pet. 17) that the court of appeals' decision conflicts with this Court's decision in Free Speech Coalition because the court of appeals did not conclude that the video at issue was the product of sexual abuse or address whether it was obscene. This Court has consistently recognized that child pornography involving visual depictions of actual children harms those children by threatening ongoing emotional,

psychological, and reputational injuries to the children depicted. See Free Speech Coal., 535 U.S. at 249; Osborne, 495 U.S. at 111; Ferber, 458 U.S. at 759. Morphed child pornography involves a similar harm and therefore also falls outside the protection of the First Amendment. See Pet. App. 3a-5a; see also, e.g., Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012), cert. denied, 570 U.S. 904 (2013); United States v. Hotaling, 634 F.3d 725, 729-730 (2d Cir.), cert. denied, 565 U.S. 1092 (2011). The potential for inflicting significant harm on real children distinguishes morphed child pornography from the "virtual child pornography" -- i.e., images that do not involve or even visually depict actual children -- at issue in Free Speech Coalition.

The decision in Free Speech Coalition does not support petitioner's view that distribution or possession of pornography with an identifiable child's face is protected First Amendment activity. There, the Court explained that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in Ferber." 535 U.S. at 242. Although the Court did not resolve the constitutionality of Section 2256(8)(C) in Free Speech Coalition (because the respondents in that case did not challenge that provision), this language supports the court of appeals' holding that morphed child pornography, like the child pornography at issue in Ferber, is categorically outside the scope of the First Amendment. See Shoemaker v. Taylor, 730 F.3d 778,

787 (9th Cir. 2013) ("[B]y stating that morphed images are 'closer to the images in Ferber,' th[is] Court noted that morphed images were more likely to be considered unprotected speech like the actual child pornography at issue in Ferber, rather than protected speech.").

3. Petitioner contends (Pet. 11-16) that the courts of appeals are divided on the question presented. That contention is incorrect. All three circuits that have squarely resolved the issue -- the Second, Sixth, and now Fifth -- have recognized that morphed child pornography is categorically outside the scope of the First Amendment. See Pet. App. 4a (citing Boland and Hotaling). The First and Ninth Circuits have likewise suggested that they would reach that same result, though neither court has done so definitively. See Shoemaker 730 F.3d at 786-788 (holding, in the habeas context, that this Court "has not clearly established that morphed images are protected by the First Amendment"); United States v. Hoey, 508 F.3d 687, 693 (1st Cir. 2007) (upholding application of sentencing enhancement for sadistic or masochistic child pornography and agreeing in dicta that the First Amendment does not encompass morphed child pornography as defined by Section 2256(8)(C)).

In the decision below, the court of appeals suggested that the Eighth Circuit had reached a contrary conclusion in United States v. Anderson, 759 F.3d 891, 894-895 (2014), cert. denied, 135 S. Ct. 2309 (2015). See Pet. App. 4a; see also Pet. 13-14.

But although the Eighth Circuit there expressed some doubt about whether morphed child pornography is categorically excluded from First Amendment protections, see Anderson, 759 F.3d at 895, it is not clear that it definitively resolved that issue. Instead, it ultimately found application of the prohibition in that case was permissible under strict scrutiny. See ibid. The Eighth Circuit accordingly "decline[d] to affirm the district court's order based on [a] categorical rationale" and instead affirmed on the "alternative[]" ground that "the government's interest in protecting minors * * * '[from] being falsely portrayed as engaging in sexual activity'" is "compelling" and could only be served in that case by prohibiting distribution of the morphed images at issue. Id. at 895-896. As a result, a future Eighth Circuit panel may be free to consider and accept the position on morphed child pornography that every other court of appeals to have addressed the issues has now adopted or endorsed.[2]

Petitioner also contends (Pet. 14) that the decision below conflicts with the divided decision of the Supreme Court of New Hampshire in State v. Zidel, 940 A.2d 255 (2008). But that decision concerned a state criminal statute worded differently from the federal prohibition at issue here. See Boland, 698 F.3d

[2] In its briefing below, the United States noted that Anderson "declined to hold that morphed images * * * [are] categorically unprotected by the First Amendment." Gov't C.A. Br. 27. To the extent that other sections of the United States' brief can be fairly read to suggest that Anderson affirmatively rejected such a rule, see, e.g., id. at 28, 32, it is unclear that is correct, for the reasons explained in the text.

at 884. And Zidel is an outlier among state-court decisions, which have otherwise upheld prohibitions of morphed child pornography. See, e.g., McFadden v. State, 67 So. 3d 169, 183-185 (Ala. Crim. App. 2010), cert. denied, 562 U.S. 1092 (2011); State v. Coburn, 176 P.3d 203, 222-223 (Kan. Ct. App. 2008); State v. Tooley, 872 N.E. 2d 894, 903 (Ohio 2007), cert. denied, 552 U.S. 1115 (2008).

Furthermore, even if the court of appeals here had applied Zidel's view that strict scrutiny is the appropriate framework for assessing prohibitions on morphed child pornography, it is doubtful that it would have reached a different result in this case. While Zidel relied on a supposed lack of "demonstrable harm * * * to the child whose face is depicted in the image" in holding the conviction there unconstitutional, 940 A.2d at 263, other courts have recognized that distribution or possession of morphed child pornography can harm the child whose image is misused. See pp. 12-14, supra; Pet. App. 23a-24a ("To the extent that defendant argues that 'no demonstratable harm' results to a child whose face, but not his or her naked body, is depicted in a pornographic image, this Court strongly disagrees."); see also generally Paroline v. United States, 572 U.S. 434, 439-440 (2014). The compelling need to protect children from the harm caused by such images is especially evident here, where petitioner had previously shared with one of his granddaughters a pornographic video in which the granddaughter's face was superimposed on the adult woman depicted

and his own face was superimposed on the body of the adult man. Pet. App. 2a.

In addition, the video here "would present a strong obscenity case." Pet. App. 7a n.2; see Free Speech Coalition, 535 U.S. at 240 ("Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not."); see generally Miller v. California, 413 U.S. 15, 24 (1973) (material is obscene, and therefore outside the scope of the First Amendment, if it "appeal[s] to the prurient interest in sex," "portray[s] sexual conduct in a patently offensive way," and lacks "serious literary, artistic, political, or scientific value"). For that reason as well, petitioner's conduct would not be constitutionally protected even if he prevailed on the question presented. The petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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