No. 19-7865

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD LAVERNE MECHAM, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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The federal courts of appeals are divided on the question expressly left open by *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002): Does the First Amendment protect morphed child pornography created without any child's involvement in sexually explicit conduct? *See* Pet. 11-15. In petitioner's case, the Fifth Circuit joined the Second and Sixth Circuits in holding that these types of images are categorically unprotected, and specifically rejected the Eighth Circuit's contrary opinion on the matter. Pet. App. 4a-6a.

As petitioner has argued (Pet. 16-18), the Fifth Circuit's decision on this important federal question is inconsistent with *New York v. Ferber*, 458 U.S. 747 (1982), as clarified by *United States v. Stevens*, 559 U.S. 460, 471-72 (2010), and *Free Speech Coal.*, 535 U.S. at 250-51. The Court should, therefore, grant certiorari in petitioner's case. It is an ideal vehicle for resolving the question presented. Pet. 19.

1. In its brief in opposition (BIO 6-7), the government first argues that the petition should be denied as premature because, although the court of appeals affirmed the conviction, it remanded for resentencing and thus left the case in an "interlocutory posture." That argument is unpersuasive. The resentencing will not in any way alter or refine the issue presented, which concerns the constitutionality of the conviction (not the sentence). Moreover, "[i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment." 17 Wright, Miller, Cooper, & Amar, FED. PRAC. & PROC. JURIS. § 4036 (3d ed. Apr. 2020) (collecting cases). Petitioner's

case should be no different.

2. The government next argues (BIO 10-11) that, in any event, this Court's review is not warranted because "[t]his 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. . . . Morphed child pornography involves a similar harm and therefore also falls outside the protection of the First Amendment." But that argument fails because it overlooks this Court's clarification, in *Free Speech Coalition*, that "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated," and "reaffirmed that where the speech is *neither obscene nor the product of sexual abuse*, it does not fall outside the protection of the First Amendment." 535 U.S. at 250-51 (emphasis added).

In petitioner's case, the court of appeals did not hold that the morphed images that he possessed, which were produced without any child's actual involvement in sexually explicit conduct, are the "product of sexual abuse." Nor did it hold that the images are "obscene"; although it posited that "[t]he video Mecham was convicted of possessing would present a strong obscenity case," it would "only consider the child pornography law as that is the one the grand jury charged." Pet. App. 7a (n.2). In light of *Free Speech Coalition*'s clarification of *Ferber*, the court of appeals had no sound legal basis for holding that the images fall outside the protection of the First Amendment.

3. The government's argument fails for an additional reason: it overlooks *Stevens*'s

clarification that *Ferber* "grounded its analysis in a previously recognized, long-established category of unprotected speech," *i.e.*, speech "used as an integral part of conduct in violation of a valid criminal statute," and that this Court's "subsequent decisions have shared this understanding." 559 U.S. at 471 (citing *Free Speech Coal.*, 535 U.S. at 249-50, and *Osborne v. Ohio*, 495 U.S. 103, 110 (1990)). The government fails to explain how morphed child pornography might fall within that same category of unprotected speech.

This Court has made clear that the "decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *Stevens*, 559 U.S. at 472, no matter whether the government's attempts to suppress those categories of speech are made in the name of protecting children from potential emotional or reputational harm. As this Court has said, "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011) (cleaned up) (citing *Stevens*, 559 U.S. at 470); *see also United States v. Alvarez*, 567 U.S. 709, 722 (2012) (same).

4. The government doubts (BIO 12-13) the circuits are divided on the question presented, arguing it is "not clear" whether *United States v. Anderson*, 759 F.3d 891 (8th Cir. 2014), "definitively resolved" the issue. But the Eighth Circuit's recent opinion in *United States v. Rouse*, 936 F.3d 849 (8th Cir. 2019), puts to rest any doubts the government may

have. In *Rouse*, the Eighth Circuit stated: "Applying *Stevens*, we have defined the category of unprotected activity as 'speech integral to criminal conduct, namely the sexual abuse of minors inherent in the production of child pornography.'" 936 F.3d at 851 (quoting *Anderson*, 759 F.3d at 894).[1] It is therefore clear that, in the Eighth Circuit, an image does not fall within this category of unprotected activity if "[n]o minor was sexually abused in the production of [the] image." *Anderson*, 759 F.3d at 894-95.

5. The government also suggests (BIO 6, 14) that petitioner's conviction "would be valid even under the strict scrutiny standard that he advocates" because "distribution or possession of morphed child pornography *can* harm the child whose image is misused." But, whether the federal ban on possessing these types of images, as applied to petitioner, can survive strict scrutiny under the First Amendment would be a question for the court of appeals to decide in the first instance, on remand from this Court. The court of appeals has yet to address that question. *See* Pet. App. 7a (n.5) ("We need not address this question because we take the majority view that morphed child pornography is categorically excluded from the First Amendment.").

In any event, the government is wrong. As petitioner has argued, the government cannot show that restricting his mere *possession* of morphed images like these is "actually necessary" to safeguard the physical or psychological well-being of a child. *See* Brief for Appellant at 23-25; Reply Brief for Appellant at 6-12. The existing federal prohibitions on

[1] Rouse's speech in distributing child pornography over the internet was "intrinsically related" to the unlawful production of the material, *i.e.*, the recording of "an identifiable minor engaging in sexually explicit activity," which was the "underlying abuse." *Rouse*, 936 F.3d at 852. Thus, his speech in distributing the child pornography was categorically unprotected. *Id.*

distribution and *production with intent to distribute* provide less restrictive means for the government to protect a child from emotional or psychological harm (especially where, as here, there was no evidence that the child whose face was used in the video in question ever actually learned of the video and what it depicted). *See* Brief for Appellant at 24-25; Reply Brief for Appellant at 8-12.[2]

6. Finally, the government speculates (BIO 15) that petitioner's conduct "would not be constitutionally protected even if he prevailed on the question presented," because the video he possessed is "obscene." Its speculation is of no moment here, however, because as the court below recognized, "the child pornography law . . . is the one the grand jury charged." Pet. App. 7a (n.2). "The CPPA . . . is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute." *Free Speech Coal.*, 535 U.S. at 240.

In any case, the government is wrong again. The First Amendment "prohibit[s] making mere private possession of obscene material a crime." *Stanley v. Georgia*, 394 U.S. 557, 568 (1969). So even assuming, *arguendo*, that the video is obscene, it does not follow that petitioner's possession of it would be constitutionally unprotected even if he prevailed on the question presented. *See* Pet. App. 8a (n.5) (noting the possibility that "a *Stanley*-like privacy claim may provide a defense to a defendant charged with only the private possession of morphed child pornography").

[2] "[O]n the categorical question, [petitioner has] 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." Pet. App. 7a (n.5) (emphasis added). But, on the strict-scrutiny question, he has always maintained that the distinction matters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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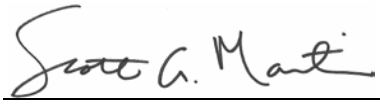

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