No. _____

IN THE

Supreme Court of the United States

MARSHALL M. COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the child pornography context, "sexually explicit conduct" is defined, in part, as a depiction which displays the "lascivious exhibition of the … genitals … of any person." 18 U.S.C. § 2256(2)(A)(v). For decades, federal courts have struggled to define how much evidence, if any, of the depiction's creator's intent or the context of the depiction's creation may be considered by the factfinder in its determination of lasciviousness. A three-way circuit split has developed over this issue.

Mr. Cohen sent photographs of his erect penis to women in exchange for photographs of their breasts. In its decision below, the Fourth Circuit concluded that his photographs were lascivious because they were created and "exchanged in the context of a sexual conversation with no conceivable other purpose." App. 6A. That approach was wrong. The evidence used to determine lasciviousness should be limited to the four corners of the depiction itself.

The question presented is:

Whether lasciviousness under 18 U.S.C. § 2256(2)(A)(v) may be found by examining the context in which the image was produced or the creator's intent, or whether it must be determined by looking only to the four corners of the image?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Cohen*, No. 2:20-CR-433-BHH, U.S. District Court for the District of South Carolina. Judgment entered Oct. 27, 2021.

(2) *United States v. Cohen*, No. 21-4612, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Mar. 20, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marshall M. Cohen, respectfully prays that a writ of certiorari issues to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 21-4612, entered on March 20, 2023.

OPINION BELOW

The Fourth Circuit's opinion (App. 1A-12A) is reported at 63 F.4th 250. Mr. Cohen did not file a petition for rehearing or rehearing en banc. The district court's judgment (App. 14A-18A) is unreported.

JURISDICTION

The Fourth Circuit issued its opinion and entered its judgment on March 20, 2023. App. 13A. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed within 90 days of March 20, 2023.

STATUTORY PROVISION INVOLVED

Section 2256(2)(A) of Title 18 of the United States Code provides:

> For the purposes of this chapter, the term—
>
> (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 anus, genitals, or pubic area of any person.

INTRODUCTION

Under 18 U.S.C. § 2256(2)(A)(v), a depiction contains "sexually explicit conduct" if it displays the "lascivious exhibition of the … genitals." This Court has never interpreted that statutory language to determine whether external evidence of the creator's intent or the context in which the depiction was made can be used to determine lasciviousness. In the absence of this Court's guidance, a three-way circuit split developed. Some circuits, like the Seventh, Eighth, and Ninth, place almost no restriction on the consideration of this evidence. Other circuits, like the Sixth Circuit, apply a "limited context" test which permits consideration of some evidence of context. Finally, some circuits, like the D.C. and Third Circuits, correctly exclude external evidence and instead determine lasciviousness solely from the four corners of the depiction. The four-corners approach is the only approach which actually applies the language of § 2256(2)(A).

While on supervised release, a condition of which prohibited him from possessing material depicting "sexually explicit conduct," Mr. Cohen sent photographs of his erect penis to women in exchange for photographs of their breasts. In its opinion below, the Fourth Circuit joined the "limited context" side of the split when it determined that Mr. Cohen's photographs were lascivious because they were "exchanged in the context of a sexual conversation." App. 6A. That decision was wrong, and errors like the one made by the Fourth Circuit will only continue until this Court grants certiorari and settles the three-way split. *See Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022) ("This Court granted certiorari to resolve" "the disagreement among the Circuits as to whether a district

court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact." (footnote omitted)).

STATEMENT OF THE CASE

Mr. Cohen was subject to conditions of supervised release which required him to "participate" in a sex offender treatment program and which prevented him from possessing any audio or visual depictions, including depictions of adults, containing "sexually explicit conduct" as defined by 18 U.S.C. § 2256(2)(A). While subject to those conditions, Mr. Cohen exchanged photographs of his erect penis for photographs of women's breasts on social media. Mr. Cohen's treatment provider informed his probation officer that this exchange was considered a violation of the program's pornography rules and that it would be discussed with Mr. Cohen at group therapy. *See* App. 2A.

A violation warrant was prepared because the United States Probation Office considered the possession and exchange of the photographs to be "sexually explicit conduct" and because his violation of his treatment programs rules meant that he was not participating in his treatment program. At his supervised release revocation hearing, Mr. Cohen argued he had not violated either condition of supervised release. The district court disagreed on both counts, concluding that the photographs contained "sexually explicit conduct" and that Mr. Cohen was not participating in treatment by violating the program's rules. The district court revoked Mr. Cohen's supervised release, extended his term of supervised release to life, and imposed several new conditions of supervised release. *See* App. 2A-3A.

On appeal to the Fourth Circuit, Mr. Cohen renewed his arguments that he did not violate the terms of his supervised release. As to the violation regarding his failure to "participate" in sex offender treatment, the Fourth Circuit agreed. The Fourth Circuit found "there is a difference between participating in something and perfect compliance with the rules of that thing." App. 4A.

As to the violation regarding "sexually explicit conduct," however, the Fourth Circuit concluded Mr. Cohen's photographs of his erect penis were lascivious because they "were designed to titillate their recipients" inasmuch as they were "exchanged in the context of a sexual conversation with no conceivable other purpose." App. 6A. The Fourth Circuit further found it would be erroneous to "conclud[e] the pictures at issue were lascivious based solely on the fact that they contain an erect penis." App. 6A.

Since Mr. Cohen's "sexually explicit conduct" violation remained valid, the Fourth Circuit found the "participate" error harmless. App. 6A-7A. The Fourth Circuit also rejected many of Mr. Cohen's other arguments but struck a provision in one of Mr. Cohen's new conditions of supervised release. *See* App. 7A-12A. The Fourth Circuit remanded for the purpose of entering an amended judgment. *See* App. 12A.

REASONS FOR GRANTING THE PETITION

I. The text of 18 U.S.C. § 2256(2)(A) requires a factfinder to determine whether an image depicts a "lascivious exhibition" from the four corners of the image itself.

The text of § 2256(2)(A)(v) requires the factfinder to apply an objective test that looks only to the four corners of the image. Section 2256(2)(A)(v) states that "lascivious exhibition of the … genitals" qualifies as "sexually explicit conduct." Words in a statute should be given their "ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (quotation marks and citations omitted). "Lascivious" is defined as conduct "tending to excite lust"; it is also defined as "lewd," "indecent," and "obscene." *Lascivious*, Black's Law Dictionary (11th ed. 2019). "Lascivious" modifies the word "exhibition," which in this context means "displaying." *See Exhibition*, OED, https://www.oed.com/view/Entry/66183?redirectedFrom=exhibition#eid ("The action of exhibiting or displaying, and related uses."). Taken together, then, the phrase "lascivious exhibition" means a display tending to excite lust. *See*, *e.g.*, *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019) (defining "lascivious exhibition" to "mean a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area … in order to excite lustfulness or sexual stimulation in the viewer" (quotation marks and citation omitted)). To violate the statute, therefore, the display "of the genitals" must tend to excite lust.

The phrase "lascivious exhibition," therefore, focuses on the depiction itself, and not how or why it was created. This comports with the prefatory language used

by § 2256(2)(A), which limits "sexually explicit conduct" to an "actual or simulated" "lascivious exhibition of the … genitals." Determining whether a depiction contains an "actual or simulated" "lascivious exhibition" can only be answered by looking to the four corners of the depiction itself. Other considerations such as intent or context are simply irrelevant. Whether a depiction actually depicts an exhibition does not turn on whether the creator of the depiction intended to do so, or the reasons why the creator created the depiction.

The remaining text of § 2256(2)(A), which provides a list of other depictions that qualify as "sexually explicit conduct," further confirms that "lascivious exhibition" is to be determined objectively. "A word is known by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). The company "lascivious" keeps in § 2256(2)(A) must be determined objectively:

> (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 anus, genitals, or pubic area of any person.

18 U.S.C. § 2256(2)(A). Subjective intent—of either the viewer or the creator of the visual depiction—is irrelevant to whether "sexual intercourse," "bestiality," "masturbation," or "sadistic or masochistic abuse" occurred in the depiction. Furthermore, evidence regarding the production of the image is irrelevant to whether the image displays actual or simulated sexual intercourse. Similarly, whether an image contains an "exhibition of the anus, genitals, or pubic area of any person" is solely an objective inquiry. No evidence of context or purpose is needed—an image either shows the anus, genitals, or pubic area, or it does not.

It would be anomalous, therefore, for Congress to have buried an inquiry that requires analysis of the creator's intent or the circumstances surrounding the production of the image when none of the other definitions of "sexually explicit conduct" require any such inquiry. The correct reading of the statute avoids that anomaly: § 2256(2)(A)(v) requires an objective, four-corners-of-the-image test just like §§ 2256(2)(A)(i)-(iv).

Finally, § 2256(2)(A)(v) unambiguously focuses only on the depiction itself and does not say anything about the intent of the depiction's creator or the context in which the depiction was created. *See United States v. Brown*, 579 F.3d 672, 682 (6th Cir. 2009) ("[T]he word 'intended' is" not found in § 2256(2)(A)). This Court should not read those words into the statute when the text of § 2256(2)(A)(v) is unambiguous. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 454 (2002) ("Despite the unambiguous language of the statute with respect to those entities to whom successor liability attaches, the Commissioner essentially asks that we read

into the statute mandatory liability for preenactment successors in interest to signatory operators. This we will not do."). This Court should instead conclude that § 2256(2)(A)(v) "says what it means and means what it says": "sexually explicit conduct" must be determined from the depiction itself. *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016).

II. Without guidance from this Court, circuit courts have adopted disparate approaches.

Despite the clear text of § 2256(2)(A)(v), circuit courts have struggled to apply it evenly, with courts adopting different tests to evaluate lasciviousness. Three primary approaches have developed: (1) all evidence is relevant, including evidence of the image's creator's subjective intent; (2) some evidence of the creator's subjective intent is relevant; and (3) evidence of the creator's subjective intent is irrelevant.

These approaches evolved in the wake of the Southern District of California's decision in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). In *Dost*, the district court identified six factors the factfinder should review to determine lasciviousness:

> 1) [W]hether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in appropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;

> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832. Over the course of the following decades, circuit courts adopted these factors wholesale, accepted them in part, or rejected them altogether. *See United States v. Hillie*, 39 F.4th 674, 689 (D.C. Cir. 2022) (collecting cases). These factors "fostered myriad disputes that have led courts far afield from the statutory language." *United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006). These disputes included the number of factors that must be present for an image "to qualify as 'lascivious'" and "what the specific factors mean." *Id.* (collecting cases). These splits have fostered because this Court has not addressed the issue.

The sixth factor, in particular, presented the greatest source of conflict. On one side of the three-way circuit split, the Ninth Circuit permits the introduction of evidence of context and the creator's intent to establish lasciviousness. *See United States v. Overton*, 573 F.3d 679, 689 (9th Cir. 2009) ("Here, the circumstances surrounding the creation of the homemade images only strengthen our conviction that the exhibition … is 'lascivious.'"). The Seventh and Eighth Circuits have adopted similar, anything-goes approaches. *See United States v. Miller*, 829 F.3d 519, 525 (7th Cir. 2016) ("Fact finders are not constrained, however, to the four corners of these videos to find that they were lascivious. Instead, the finder of fact may look to the creator's intent in making these videos."); *United States v. Ward*, 686 F.3d 879, 884 (8th Cir. 2012) (approving a jury's review of "extrinsic evidence,

such as Ward's extensive child pornography collection, to determine whether the images were intended to elicit a sexual response in the viewer" (quotation marks and citation omitted)).

The second side of the split has adopted what the Sixth Circuit has termed a "limited context test," which permits the factfinder to consider "(1) where, when, and under what circumstances the photographs were taken, (2) the presence of other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images." *Brown*, 579 F.3d at 683-684 (footnote omitted). The Second Circuit largely agrees with this approach. *See United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018) (concluding that "the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography" but "overreliance on the intent of the photographer … raises constitutional concerns").

The third side of the split rejects consideration of context and intent and analyzes only whether the four corners of the depiction show lasciviousness. Most explicitly, the D.C. Circuit has disavowed any reliance on the *Dost* factors. *Hillie*, 39 F.4th at 689 ("[W]e decline to adopt the *Dost* factors."). The D.C. Circuit construed § 2256(2)(A)(v) to require the depiction display "hard core" "sexually explicit conduct." *Id.* at 686. The D.C. Circuit limited its review to only the conduct depicted in the video in question. *Id.* ("JAA's conduct depicted in the videos must consist of her displaying her anus, genitalia or pubic area in a lustful manner that connotes the commission of a sexual act. … [N]one of the conduct in which JAA engages in the

two videos at issue comes close."). The Third Circuit has adopted a similar approach. *See United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) (noting that evidence was presented of Villard's subjective sexual response to the photograph, but that "[w]e must … look at the photograph, rather than the viewer"). The First Circuit has not expressly adopted a four-corners rule, *see Frabizio*, 459 F.3d at 89, but it has rejected the government's invitation to "look not only to the composition, but also to the context surrounding the creation and acquisition of the photograph" when determining lasciviousness. *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

The third approach is correct. An objective, four-corners review of the depiction comports with, and is compelled by, the statutory text. *See Hillie*, 39 F.4th at 685 (applying the *noscitur a sociis* canon to § 2256(2)(A)(v)). Moreover, "Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused." *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring). Looking to the context in which a depiction was created and to the creator's subjective intent "could invoke the constitutional concerns associated with criminalizing protected expressive activity" and "could pose due process concerns and could be used to convict defendants for acts other than those for which he or she is prosecuted." *Brown*, 579 F.3d at 683. Finally, the four-corners approach provides much needed definitive guidance regarding what evidence a factfinder may consider.

III. The Fourth Circuit's decision in this case was wrong.

In *Courtade*, the Fourth Circuit appeared to adopt the four-corners approach. *See Courtade*, 929 F.3d at 192 ("Here, the video's objective characteristics—the images and audio contained within its four corners, irrespective of Courtade's private subjective intentions—reveal the video's purpose of exciting lust or arousing sexual desire within the plain meaning of 'lascivious exhibition.'"). The Fourth Circuit's decision in this case, however, broke with that approach and applied a test akin to the limited-context test used by the Sixth Circuit. *See* App. 6A (concluding that the photographs of Mr. Cohen's penis were lascivious because they were "exchanged in the context of a sexual conversation with no conceivable other purpose"). That decision was wrong.

The resolution of this case is straightforward. The four corners of the photographs Mr. Cohen took display an erect penis. There is nothing lascivious about those photographs, as the Fourth Circuit acknowledged. *See* App. 6A ("Cohen insists the district court erred in concluding the pictures at issue were lascivious based solely on the fact that they contain an erect penis. We agree it would be legal error to rely on such reasoning."). Instead, the Fourth Circuit concluded the photographs were lascivious by looking to the circumstances surrounding their production and transmission. Consideration of evidence outside the four corners of the photographs was improper. This Court should grant certiorari and reverse.

IV. This case presents a good vehicle to address the proper application of § 2256(2)(A)(v).

This case presents a good vehicle to address the question presented. The facts are undisputed: the visual depiction at issue is an erect penis. Mr. Cohen sent that visual depiction in the context of a sexual conversation. The context of the conversation and his intent in creating the photographs are either relevant or they are not.

Moreover, the issue was squarely presented to both the district court and the Fourth Circuit. The issue is also dispositive, as Mr. Cohen successfully challenged the district court's other basis for revoking his supervised release.

Finally, this issue cries out for this Court's attention. As demonstrated above, the courts of appeals are divided on the proper interpretation of § 2256(2)(A)(v). The Fourth Circuit cannot even maintain internal consistency on the issue. *Compare Courtade*, 929 F.3d at 192-193 (looking only to the four corners of the video for its "objective characteristics") *with* App. 6A (concluding that the context in which an image is made is an "objective characteristic" of that image). This Court grants certiorari to resolve circuit splits over important federal questions and when a circuit decides an important federal question that this Court has yet to settle. *See* Sup. Ct. R. 10(a); 10(c). Both considerations are present here. This Court should grant the certiorari petition.

CONCLUSION

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

Respectfully submitted,

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