23-6481

ORIGINAL

No. 23-

IN THE

Supreme Court of the United States

ASHLEY NICHOLE KOLHOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REDACTED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 2251, 18 U.S.C. § 2252, and 18 U.S.C. § 2256 criminalize the production, distribution, receipt, or possession of any image of a minor depicting "the lascivious exhibition of the … genitals." Critically, it is well settled that images depicting "mere nudity" or "mere pictures of genitals" are *not* "lascivious" within the context of the federal child pornography statutes. *See e.g. United States v. Courtade*, 929 F.3d 186, 191 (4th Cir. 2019).

It is undisputed that the images forming the basis of Petitioner Ashley Kolhoff's convictions are, in fact, depictions of "mere nudity" and "mere pictures of genitals", and in no way contain any overt sexually explicit activity of any kind.[1] Nevertheless, the courts below sustained Ms. Kolhoff's convictions because they determined she "intended" to create child pornography, regardless of the actual result. This is decidedly not the law.

The question presented, then, is this:

Did this impermissible expansion of the scope of the federal child pornography statutes, in direct contravention of both the holdings of this Court and the plain language of the controlling statutes, deny Ms. Kolhoff her Due Process rights to a fair trial and the constitutional protections requiring criminal laws to explicitly and definitely identify what conduct is punishable?

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[1] Cert Appendix 2a

The answer to this question is, of course, is "yes". This Court has made it clear, at every opportunity, that the "lasciviousness" determination in the context of the federal child pornography statutes must be an objective inquiry into the nature and substance of the image itself, separate and apart from individual predilections and subjective "intent". It seems obvious that images that are licit in one context are not somehow transformed into child pornography in another, the only variable being the potential impression felt by some theoretical person who might view them. Indeed, as will be set for the below, this objective determination of "lasciviousness" is all that saves these statutes from being void for vagueness.

To illustrate the point, imagine, just for a moment, that Ms. Kolhoff had emailed these identical images to her pediatrician as part of an online medical consult to aid in the diagnosis of diaper rash, yeast infection or urinary tract infection. And further imagine the pediatrician then forwarded those images onto a colleague for a second opinion. In those circumstances, would Ms. Kolhoff be guilty of production of child pornography, the forwarding pediatrician guilty of distribution of child pornography, and the receiving pediatrician guilty of receipt? To ask is to answer, yet this is the logical result of the reasoning embraced by the courts below: identical, unchanging images yielding impossibly irreconcilable results.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings appear in the caption on the cover page.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

United States v. Kolhoff, No. No. 22-4601, United States Court of Appeals for the Fourth Circuit, judgment entered October 3, 2020;[2]

United States v. Kolhoff, No. 1:21-cr-00158-LMB-1, United States District Court for the Eastern District of Virginia, Alexandria Division, judgment entered July 12, 2022.[3]

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[2] Cert Appendix 1a-5a

[3] JA 371

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PETITION FOR WRIT OF CERTIORARI

Petitioner Ashley Kolhoff respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit appears at Cert Appendix 1a.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

The Court of Appeals for the Fourth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. The Panel issued its opinion and judgment on October 3, 2023.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or
> otherwise infamous crime . . . nor be deprived of life,
> liberty, or property, without due process of law.

This case involves the application of the following federal criminal statutes: 18 U.S.C. § 2251; 18 U.S.C. § 2252; and 18 U.S.C. § 2256

STATEMENT OF THE CASE

A. Factual background

Ashley Kolhoff was born in Arizona to a drug addicted mother and a father with a documented history of child sex abuse. Soon after she was born, Ashley's father was sent to prison for repeatedly sexually abusing her 2-year-old sister and her mother abandoned both of her children to the state. Ashley was ultimately adopted, separated from her sister and moved to Sandusky, Ohio. Her biological mother died soon thereafter.

Despite the best efforts of her adoptive parents, Ashley's childhood in Sandusky was a nightmare. In 4th grade, when she was only 10, Ashley was repeatedly sexually molested by the older son of one of her babysitters; the abuse only stopping after her parents discovered what was happening. The molester, who was 17 at the time, committed suicide a few years later.

At 16, Ashley was raped by force by a former boyfriend. Ashley reported the rape incident to the police, who opened a formal investigation. As the assailant was a juvenile, it is unclear what, if anything, came from the investigation.

At 17, Ashley was contacted by two men who had seen her photos on Instagram. She naively agreed to meet the men, who then took her to a hotel, had sex with her to "try her out", and began trafficking her on Backpage.com,

fuckbook.com and pimpchat.com under the name "Angel". Ashley estimates she was sexually trafficked approximately 10 times over a two-month period.

One of the "customers" to whom Ashley was trafficked ultimately tried to kidnap her and transport her to Georgia. After receiving a call from the police, the man dumped Ashley on the side of the road outside a small town about 2 hours from her home in Sandusky, Ohio before fleeing. No arrests were made.

Again at 17, Ashley was contacted by a man who found Ashley's photo on Backpage.com and recruited her to participate in a pornographic movie with another underage girl. Ashley was ultimately taken to a hotel in Sandusky, Ohio where she and another minor were filmed engaging in sex. After the man was arrested, Ashley fully cooperated with the federal government, and with Special Agent Amy Glore in particular, in support of the government's prosecution. Ashley identified the man from a lineup and testified against him before a federal grand jury. Ashley believes this man ultimately pleaded guilty to Production of Child Pornography in federal court in Toledo, Ohio.

At 19, Ashley was again raped, this time in her car while visiting friends in Cleveland, Ohio. No arrests were made.

All of this has been corroborated, either by her adoptive parents or by the police themselves.

So there is no speculation and guessing here: Ashley's formative years were defined by a series of repeated, violent and degrading instances of rape and sexual trauma.

Given Ashley's history of sexually degrading and violent abuse, it should come as no surprise that she has a lengthy history of mental illness.

When Ashley was 18, Ashley had a near complete mental breakdown:

- she began to engage in self-harm;
- began hearing voices in her head; and
- tried to get herself admitted to hospital because she felt she was going crazy.

On her own, Ashley did manage to see a professional mental health expert who (mis)diagnosed her as suffering from Bi-Polar II disorder, despite the seriousness of her mental collapse and her history of mental dissociation from the world around her.

Ashley did not receive any counseling or therapy and her only two appointments with her counselor provider were to manage her prescription for Risperidone, a drug designed to mitigate her psychotic events. Ashley never received any follow up care or treatment because she had no insurance and was unable to afford care.

However, as the evidence made clear at trial and will be set forth briefly below, Ashley suffers from a variety of mental illnesses, all of which are far more serious and debilitating than simple Bi-Polar disorder. Specifically, Ashley was diagnosed by both her expert and the government's expert as suffering from:

- Borderline Personality Disorder;
- Post-Traumatic Stress Disorder;
- Complex Post-Traumatic Stress Disorder; and
- Major Depressive Disorder, Recurrent

Shortly after her daughter was born, Ashley suffered from postpartum depression, her mental health worsened, and the events in which she felt disconnected and disassociated from reality occurred with more frequency.

In the midst of her postpartum depression, Ashley created a Facebook group called "Save Our Children", a Facebook group dedicated to combatting the sexual abuse and online exploitation of minors, a reality with which she was all too personally familiar.

Given the sensitive nature of "Save Our Children", and the reality it might draw the very predators she was (and is) determined to eliminate, Ashley set up the site so that was private. That is, she set up the Facebook group so that no one could join until she personally vetted and approved their membership.

Ashley was administering "Save Our Children" while simultaneously working full time and caring for her newborn daughter- and this was a bigger and more involved job than she was capable of handling. As a result, Ashley soon started admitting people in the "Save Our Children" Facebook group *en masse*, with the idea that she would go back after, vetting them one at a time.

While vetting one of the people to whom she had already granted access, Ashley saw a link to a website she didn't recognize. When she clicked on it, Ashley was linked to the rape.su. website where she was assaulted with a litany of sexually explicit chats discussing the virtues of child rape, and videos and other images depicting child pornography.

It was at that moment that Ashley realized to her horror that she has done the one thing she vowed never to do: put other children at risk by allowing child sex predators into Save Our Children. This is what is known as a triggering event: when a person who has suffered from past severe trauma encounters the same stimuli in another context and it brings on- or triggers- a reminder of their past trauma. This is exactly the kind of experience one would expect to trigger Ashley into relieving her past trauma of her own sexual abuse; and it is common in those who suffer from PTSD- like Ashley- to lose track of their surroundings and to experience dissociative episodes. As the government's expert testified at trial, Ashley suffered from

precisely the kind of early and frequent trauma one would expect to see in those who experience periods of dissociation.

In an effort to undo- or limit- the damage and harm she believed she caused, Ashley made the confused decision to join the rape.su website in order to expose and trap those operating it. So, Ashley registered as a user and created a profile designed to make herself appear as vulnerable as possible to the site's other users.

To complete the project, Ashley also took several still pictures of [redacted] and posted them to the site. These pictures form the basis of her convictions and her appeals.

As this Court will see, and as the evidence showed at trial, none of these pictures depict any sexual activity of any kind or description, simulated or otherwise; there is a complete absence of any vaginal or anal penetration of the type and kind normally associated with these sorts of images; and the only digital manipulation is that which is required to observe the body parts. Indeed, they are essentially clinical anatomical images, are not remotely sexual in nature, and are images one might see in a medical textbook.

B. Procedural background

1. Trial

On March 2nd and 3rd of 2022, Ashley was tried by the Court on the charges of production and distribution of child pornography. The evidence was largely

undisputed and at the conclusion of the trial, Undersigned Counsel filed a written Rule 29 motion for a judgment of acquittal on the grounds that, even if the trial court found she did act with the requisite *mens rea*, these images- which are completely and entirely devoid of any actual or simulated sexual activity – are not violative of the federal child pornography statutes because they do not satisfy this Court's directives on how "sexually explicit" and "lascivious" must be interpreted and understood within the specific context of those child pornography statutes.

The trial court denied the Rule 29 motion and ultimately found Ashley guilty of both charges.[5]

2. Appeal

In an unpublished opinion affirming her convictions, the Fourth Circuit began its analysis by acknowledging that the "[M]ere picture of genitals is insufficient on its own to be 'lascivious'" within the context of the federal child pornography statutes.[6] As set forth above, it undisputed that the images in dispute in this case are, in every sense, "mere pictures of genitals" and do not contain any overt sexually explicit activity.

Nevertheless, the Fourth Circuit affirmed the convictions because it found that these "mere images of genitals" were intended to "excite lustfulness or sexual

[5] Cert Appendix 9a
[6] Cert Appendix 4a

stimulation in the viewer"[7] and were therefore violative of the statutes. In other words, it was Ashley's intent in creating the images- rather than the images themselves- that secured her convictions.

As will be set forth below, this is not the law, and the Fourth Circuit explicitly and impermissibly expanded the scope and reach of these federal statutes in direct violation of nearly 50 years of binding Supreme Court precedent. *See United States v. 12 200-Foot Reels of Super 8mm,* 413 U.S. 123 (1973), *New York v. Ferber,* 458 U.S. 747 (1982), *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) and *United States v. Williams*, 553 U.S. 285 (2008).

REASONS FOR GRANTING THE PETITION

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 the above statutory language in such a way as to make it permissible for triers of fact to consider external evidence of the creator's intent or the context in which the depiction was made or published when determining whether an image is or is not "lascivious". In the absence of this Court's guidance, a three-way circuit split developed.

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[7] Id.

Some circuits, like the Seventh, Eighth, and Ninth, place almost no restriction on the consideration of external "intent" or "context" evidence and it is essentially a free for all. *See United States v. Miller*, 829 F.3d 519, 525 (7th Cir. 2016); *United States v. Ward*, 686 F.3d 879, 884 (8th Cir. 2012); *See United States v. Overton*, 573 F.3d 679, 689 (9th Cir. 2009). *See United States v. Brown*, 579 F.3d 672, 683-84 (6th Cir. 2009).

The Second and Sixth Circuits have adopted something akin to a "limited context" or "limited intent" test. *See United States v. Brown*, 579 F.3d 672, 683-84 (6th Cir. 2009); *United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018).

Finally, the D.C. and Third Circuits correctly exclude external "intent" and "context" evidence and instead properly determine "lasciviousness" solely from the four corners of the depiction, precisely as the statutes and this Court requires. *See United States v Hillie,* 39 F.4th 674 (2022); *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989). This "four-corners" approach is the only approach which correctly applies the language of § 2256(2)(A) and is the only approach sanctioned by this Court as necessary to save the statutes from otherwise being void for vagueness. *See 12 200-Foot Reels of Super 8mm supra.*

Given that the Panel's decision in this matter involves questions of exceptional importance bearing on Ashley's fundamental Due Process right to a fair trial and the constitutional protection requiring criminal laws to explicitly and

definitely identify what conduct is punishable, this Court should grant *certiorari* or summarily reverse. Given the split within the Circuits on these fundamental questions, this Court must grant *certiorari* or summarily reverse.

ARGUMENT

A. By The Very Terms Of The Statutes, The Images In Dispute Are Not "Lascivious" Within The Meaning Of The Federal Child Pornography Statutes

1. Elements of the Offenses

For each of the indicted charges, the government was required to prove, among other things, that the images in dispute involved the use of a minor engaged in "sexually explicit conduct".

18 U.S.C. § 2256(2)(A) reads that "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.

As the evidence showed, none the images at issue depict actual or simulated sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse.

Accordingly, part (v) of the relevant definition- "lascivious exhibition of the anus, genitals, or pubic area"- is the only definition which could possibly apply to the facts of this case.[8]

2. The Plain Language Of 18 U.S.C. § 2256(2)(A) is Clear and Unambiguous

"[W]hen interpreting a statute, we begin with the plain language." *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013); *see also United States v. Venable*, 2019 U.S. App. LEXIS (4th Cir. Nov. 20, 2019) ("our conclusion flows directly from the plain language of the relevant statutes"). In doing so, Courts must give terms "their ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) (citation omitted). "If the plain language is unambiguous, we need look no further." *See United States v. Turkette*, 452 U.S. 576, 580 (1981) (court must accord words of statute their common and ordinary meaning unless ambiguous); *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (citation omitted).

As an initial matter, this Court must recognize what the statutes do *not* proscribe. The statutes do not proscribe images a theoretical viewer *could find to be* lascivious. *See United States v. Williams,* 553 U.S. 285, 301 (2008*) (Scalia, J.,*

[8] Cert Appendix 3a

writing for the Court); see also United States v. Steen, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring) ("Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused."). Similarly, the statutes do not proscribe images the producer *intends to be* lascivious. *See e.g. United States v. Brown*, 579 F.3d 672, 682 (6th Cir. 2009) ("[T]he word 'intended' is" not found in § 2256(2)(A)).

By the plain language of the statutes, then, the proscriptions are specifically against the production, distribution, receipt and possession of images that *are* lascivious. Accordingly, whether an image is or is not "lascivious" must be determined objectively- separate and apart- from any consideration of the subjective perspectives or intents of the producer, distributor, possessor, or viewer. *See Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says.").

3. The Statutory Term "Lascivious Exhibition" Refers To The Content Of The Visual Depiction, Not How That Visual Depiction Is Viewed Or Intended To Be Perceived

This objective approach to understanding the statute is completely consistent with how this Court has instructed lower courts to interpret the relevant statutes. Indeed, Justice Scalia made this precise point when writing for this Court in *United States v. Williams,* 553 U.S. 285, 301 (2008), a case in which this Court considered

a constitutional overbreadth challenge to the statute criminalizing the promotion of child pornography[9]:

> ". . . the Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is "lascivious." (Clause (v) of the definition of "sexually explicit conduct" is "lascivious exhibition of the genitals or pubic area of any person." § 2256 (2)(A) (2000 ed., Supp. V)) That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a "lascivious exhibition of the genitals," the statute has no application."

Thus, contrary to the Panel's reasoning and conclusions, the statutes have no application to an image because the viewer subjectively believes the image constitutes a "lascivious exhibition of the genitals." *Id.* Moreover, the statutes have no application to an image because the producer believes and intends the image to be "lascivious". *Id.* The image, which must be judged on its own terms, either "is" or "is not" lascivious; therefore, despite the Panel's insistence to the contrary, the validity of the convictions cannot rely upon – or even consider – where or whether

[9] 18 U.S.C. § 2252A(a)(3)(B) uses the same definition of "sexually explicit conduct" as the offenses herein.

the images were posted online, what was said about them, Ms. Kolhoff's intent in creating them, or potential viewer reactions to them. As Justice Scalia made abundantly clear in *Williams supra*, those subjective considerations are simply outside the proper scope of an inquiry into the objective nature and substance of the images.

4. To Be "Lascivious" Within The Child Pornography Statutes, The Video Or Image Must Depict The Minor Engaging In *Some* Sort Of Sexual Conduct

How, then, to objectively determine whether an image is, or is not, "lascivious" within the meaning of the federal child pornography statutes? Drawing on nearly 50 years of Supreme Court jurisprudence- from *Miller v. California*, 413 U.S. 15 (1973) through *12 200-Foot Reels of Super 8mm supra*, *New York v. Ferber,* 458 U.S. 747 (1982), *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) and *Williams supra*, the DC Circuit Court of Appeals in *United States v Hillie supra* arrived at the inescapable conclusion that to be "lascivious" within the meaning 18 U.S.C. § 2256(2)(A), the "exhibition of the anus, genitals, or pubic area" must be performed in a manner that connotes the commission of *some* sexual act, either actual or simulated. *See Hillie* at 685. Mere nudity, as we have in this case, is simply not enough.

This is hardly a revolutionary conclusion. Again, writing for the Court in *Williams*, Justice Scalia reached this precise conclusion about the proper

understanding of the statutory prohibitions when he opined that the phrase "sexually explicit conduct", *by its very nature*, connotes the actual or simulated depiction of some sex act:

> "Sexually *explicit* conduct" connotes the actual depiction of the sex act rather than merely the suggestion that it is occurring. And "simulated" sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera."
>
> *Williams* at 297.

Moreover, the litany of previous Supreme Court opinions in this area makes it unambiguously clear that equating "lascivious" with an actual or simulated sex act is all that protects that portion of the statute from being void for vagueness. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (opinion of White, J.)) ("[i]f and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material" in federal statutes, "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific '*hard core* ' *sexual conduct* given as examples in *Miller v. California*).

Accordingly, it is abundantly clear that, to be "lascivious" within the context of the federal child pornography statutes, the image must depict *some sort* of sexual conduct, either actual or simulated. Any other reading of "lascivious" would necessarily lead to widely divergent applications between and among individuals, rendering the statute unconstitutionally vague both because it would fail to enable ordinary people to understand what conduct it prohibits while also authorizing and even encouraging arbitrary and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). *See also Williams* at 306 ("Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."

B. This Court's Jurisprudence Makes Clear That The Panel Decision Finding The Images Are "Lascivious" Is Manifestly Incorrect And Must be Corrected

As set forth above, the Fourth Circuit Panel affirmed the convictions after finding that these "mere images of genitals" were intended to "excite lustfulness or sexual stimulation in the viewer"[10] and were therefore violative of the statutes. In *United States v. Hillie*, the United States Court of Appeals for the District of Columbia authored an exhaustive opinion on the meaning of "lascivious" in federal

[10] Cert Appendix 4a

prosecutions involving child pornography and makes clear that the Panel's decision in this matter is fatally flawed as it is at odds with both the plain language of the statutes and this Court's directives.

In *Hillie*, the defendant was charged with, among other things, Production of Child Pornography in violation of 18 U.S.C. § 2251(a) after it was discovered that he had installed hidden cameras in the bedroom and bathroom of two minors with whom he shared a house. Using these cameras, he recorded six videos, two of which are of particular interest here.

In the first video, which is 29 minutes and 49 seconds long, one of the minor girls is seen bending over and exposing her genitals to the camera for approximately nine seconds; cleaning her genital area with a towel, with her breasts and pubic hair visible; walking around naked with her breasts and pubic hair visible; and rubbing lotion on her naked body with her breasts and pubic hair visible. *Hillie*, 39 F.4th at 677-78.

The second video, which is 12 minutes and 25 seconds long, shows a minor sitting on the toilet and subsequently cleaning her genital area with a towel, exposing her genital area for approximately 16 seconds. *Id.* at 678.

The only question on appeal was whether these videos were "lascivious" *within the context of the federal child pornography statutes*, the same question at issue in the instant proceeding.

Before beginning its exhaustive review of the meaning of "lascivious", the DC Circuit correctly pointed out that this Court has provided guidance as to how to construe the same or similar phrasing in a line of cases going back nearly fifty years, beginning with *Miller v. California*, 413 U.S. 15 (1973), which held that the prohibition on the "lewd" or "lascivious" exhibition of the genitals within the federal child pornography statutes applied only to patently offensive "hard core sexual conduct." *Id.* at 681.[11]

From *Miller,* the DC Circuit then drew a straight line through *12 200-Foot Reels of Super 8mm, New York v. Ferber*, *X-Citement Video* and *Williams*, 553 U.S. 285 to conclude that, to be "lascivious" within the federal child pornography statutes, the video or image must depict the minor engaging in overt sexual activity. Nudity, in other words, is not enough.

In *12 200-Foot Reels of Super 8mm. Film*, decided the same day as *Miller,* Justice White opined that "[i]f and when such a 'serious doubt' is raised as to the

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[11] The Courts of Appeal have uniformly treated the terms "lewd" and "lascivious" as materially equivalent. *See, e.g., United States v. Adams, 343 F.3d 1024, 1035* (9th Cir. 2003) ("We hold that the statute at issue in *Ferber* is legally indistinguishable from 18 U.S.C. § 2256(2)(A). . . . [T]his court has equated 'lascivious' with 'lewd.'"; *United States v. Reedy,* 845 F.2d 239, 241 (10th Cir. 1988). The Supreme Court has itself endorsed this position. *See United States v. X-Citement Video, Inc. (X-Citement Video II)*, 513 U.S. 64, 78-79, 115 S.Ct. 464 (1994) (approving of *United States v. X-Citement Video, Inc.,* 982 F.2d 1285, 1288 (9th Cir. 1992), *rev'd on other grounds, X-Citement Video II,* 513 U.S. 64, 115 S.Ct. 46).

vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material" in federal statutes, "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific '*hard core*' *sexual conduct* given as examples in *Miller v. California.*" 413 U.S. at 130 n.7. (emphasis added). As set forth above, *Miller* held that the prohibition on the "lewd" or "lascivious" exhibition of the genitals within the federal child pornography statutes applied only to patently offensive "hard core sexual conduct." *Miller* at 27.

In *New York v. Ferber,* 458 U.S. 747, 765 (1982), this Court found that "[t]he term 'lewd exhibition of the genitals,'" in particular, "is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation." Again, the Court reiterated that "the reach of ["lewd or lascivious"] is directed at the *hard core* of child pornography," (*emphasis added*), the characterization that was approved in *Miller*. *Hillie* at 682 (citing *Ferber* at 773).

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), decided some twelve years later, this Court again rejected vagueness and overbreadth challenges to the statutory term "lascivious exhibition of the . . . genitals," as used in 18 U.S.C. § 2256(2)(A)(v), but only because the constitutionality of this phrase as used in the statute was specifically upheld in *Miller v. California* and in *Ferber* as being limited to "hard core sexual conduct." *Hillie* at 682 (citing *X-Citement Video*, 513 U.S. at

78–79). Thus, this Court in *X-Citement Video* "expressly engrafted the 'hard core' characterization of the prohibited 'lascivious exhibition of the genitals' from *Miller* onto the construction of the federal child pornography statute." *Hillie* at 682-83.

The *Hillie* Court also specifically noted that Justice Scalia, even in dissent in *X-Citement Video*, agreed that 'lascivious exhibition of the genitals' survived vagueness and overbreadth challenges only because its reach was limited to instances of *hardcore sexual conduct. Id. (*citing *X-Citement Video* at 84.):

> [S]exually explicit conduct,' as defined in the statute, does not include mere nudity, but only conduct that consists of 'sexual intercourse ... between persons of the same or opposite sex,' 'bestiality,' 'masturbation,' 'sadistic or masochistic abuse,' and 'lascivious exhibition of the genitals or pubic area.' What is involved, in other words, is not the clinical, the artistic, nor even the risqué, but hard-core pornography." (emphasis added).

Finally, in *Williams*, this Court considered a constitutional overbreadth challenge to the promotion of child pornography statute, 18 U.S.C. § 2252A(a)(3)(B), which uses the same definition of "sexually explicit conduct" as the offenses herein. Just as in *X-Citement Video*, the Court in *Williams* made clear that the federal child pornography statutes remained constitutional only if they were construed consistently with *Ferber, Miller, et al.* In short, the reach of the federal

child pornography statutes is directed only at the *hard core* of child pornography. *Hillie* at 683.

And the *Williams* Court went one step further. In addition to relying on previous Supreme Court holdings universally finding that the reach of the statute is directed at the *hard core* of child pornography, *Williams* also relied upon the *noscitur a sociis*[12] canon to interpret the child pornography statute at issue:

> Because "lascivious exhibition of the anus, genitals, or pubic area" appears in a list with "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse," its "meaning[] [is] narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated.
>
> *Id.* at 294

Given all of this - the fifty years of Supreme Court jurisprudence on the precise issue in dispute and the controlling principles of statutory interpretation - the DC Circuit necessarily concluded that to be "lascivious" within the meaning 18 U.S.C. § 2256(2)(A), the "exhibition of the anus, genitals, or pubic area" must be performed in a manner that connotes the commission of *some* sexual act, either actual or simulated. *Hillie* at 685. This understanding of "lascivious" is faithful to,

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[12] *Noscitur a sociis* counsels that a word is given more precise content by the neighboring words with which it is associated.

and consistent with, every single decision from this Court on the only constitutionally approved way in which to understand "lascivious" within the meaning the federal child pornography statutes. *Id.*

As neither of the two videos at issue *Hillie* contained the commission of *some* sexual act, the DC Circuit reversed Hallie's convictions, finding that no rational trier of fact could find the conduct depicted in the videos to be a "lascivious exhibition of the anus, genitals, or pubic area of any person," as defined by § 2256(2)(A).

The same can be said about the images in the instant case, compelling the same conclusion: all parties agree- and there is no dispute- that the images depict mere nudity and in no way depict the minor's anus, genitalia, or pubic area in a lustful manner that connotes the commission of any sexual conduct, simulated or otherwise. Indeed, the images contain not even a hint of such conduct.

Therefore, as set forth above, they are not violative of the federal child pornography statutes and Ms. Kolhoff is not- and cannot be- guilty of any the charged crimes in her indictment.

THE COURT SHOULD GRANT CERTIORARI OR SUMMARILY REVERSE

This Court's intervention is urgently warranted and at a minimum should grant *certiorari.*

A. The Panel's Decision Is Manifestly Incorrect

As set forth above, the Fourth Circuit clearly erred by considering the context of the images in dispute when determining whether they violated the federal child pornography statutes. As the plain language of the statutes makes clear, the statutes do not proscribe images *the producer intends to be* lascivious exhibitions of the anus, genitals, or pubic area; similarly, the statutes do not proscribe images a theoretical viewer *could find to be* lascivious exhibitions of the anus, genitals, or pubic area. By the plain language of the statute, the proscription is specifically against the production, distribution, receipt and possession of images that *are* lascivious exhibitions of the anus, genitals, or pubic area. By the very terms of the statute, therefore, the critical inquiry is limited to the nature and substance of the images themselves.

Moreover, as this Court (and specifically Justice Scalia) has made abundantly clear, whether an image is deemed "lascivious" within the meaning of the federal child pornography statutes is not- and cannot be- a subjective inquiry into what may or may not have been in someone's mind when they viewed it, created it, posted it, or described it. Whether an image is or is not "lascivious" cannot be a function of to

whom the images were distributed. In short, an image is "lascivious" within the context of the federal child pornography statutes only when it connotes the commission of *some* sexual act, either actual or simulated.

B. There Is Wide And Significant Split Amongst The Circuits

Despite the clear text of the statutes themselves and this Court's specific directives, only the DC Circuit and the Third Circuit have the right of it. The other Circuits, including the Fourth, continue to misapply the law by adopting their own, different tests for evaluating "lasciviousness", none of which are consistent with each other or faithful to the statutes and this Court's holdings:

- The DC and Third Circuits correctly limit their review to the conduct depicted in the images in question. *See Hillie supra*; *see also Villard supra at* 125 (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 Ninth Circuit permits the introduction of evidence of context and the creator's intent to establish lasciviousness. *See Overton supra* at 689 ("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 an anything-goes approach. *See Miller supra at* 525 ("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."); *Ward supra at* 884 (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 and Sixth Circuits have adopted something akin to a "limited context" or "limited intent" test. *See Brown* and *Spoor supra*; and
- The First Circuit has not expressly adopted a four-corners rule, *see United States v. Frabizio,* 459 F.3d 80, 88-89 (1st Cir. 2006) but 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. *See also United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

C. This Case Presents A Good Vehicle To Address The Proper Application Of § 2256(2)(A)(V)

This case cleanly presents the question at issue: the facts are undisputed and resolving this question does not rely on any factual details specific to this case.

Further, the four-corners approach provides much needed definitive guidance regarding what evidence a factfinder may consider when determining whether an image is or is not "lascivious", and a clean resolution will have universal application to every defendant charged with the same or similar offenses. Finally, this Court instructs that it 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).

Conclusion

The decision below is manifestly incorrect and is at odds with the plain language of the statues, the decisions of this Court, and with sister Circuit Courts of Appeals. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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