

IN THE SUPREME COURT OF GEORGIA

ROBERT BRUCE CRAFT,

Petitioner

v.

STATE OF GEORGIA,

Cross-Petitioner

PETITION FOR CERTIORARI
FROM THE COURT OF APPEALS OF GEORGIA
Nos. A01A0880, A01A0881

BRIEF OF AMICUS CURIAE DKT LIBERTY PROJECT
IN SUPPORT OF PETITION FOR CERTIORARI

Julie Carpenter
Brian Hauck
JENNER & BLOCK, LLC
601 Thirteenth Street, N. W.
Suite 1200
Washington, D.C. 20005
(202) 639-6000

Counsel for Amicus Curiae

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AND FILED
JAN 18 2002

Julie Carpenter

JULIE CARPENTER
COUNSEL FOR AMICUS CURIAE

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INTEREST OF AMICUS CURIAE AND INTRODUCTION

Thomas Jefferson warned, “the natural progress of things is for liberty to yield and government to gain ground.” Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that the state will unduly restrict those liberties. Because of the DKT Liberty Project’s strong interest in protecting citizens from any government overreaching and in defending those citizen’s constitutional rights, it is well-situated to provide this Court with additional insight into the issues presented in this case.

This case requires this Court to set a marker between constitutionally protected expression and unprotected child pornography. Clearly defined child pornography laws that prevent sexual exploitation and the abuse of the children involved protect an important government interest. New York v. Ferber, 458 U.S. 747, 757 (1982). Amicus strongly supports the sensible application of valid child pornography laws criminalizing the creation and distribution of materials depicting actual children engaging in sexually explicit conduct. But, as the Ferber Court warned, “laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.” Id. at 756. This Court should grant certiorari in this case to adequately define Georgia’s child pornography law.

STATEMENT OF THE CASE

Federal Bureau of Investigation and Georgia Bureau of Investigation agents seized or reviewed a total of approximately 70,000 photographs from the home of Dr. Robert Bruce Craft. T-589. Except for a few that had been enlarged, the photographs were stored in their original envelopes and in boxes, and they were in no way grouped or stored together. T-95. There was no evidence of any sexual paraphernalia related to the molestation of children. T-99, 421. Of the 70,000 photographs, law enforcement officials indicted on 119. Dr. Craft was convicted of 117 of those charges.

The convictions involved two statutes. The majority of the charges arose under Georgia's sexual exploitation of a minor statute which reads, in relevant part, as follows:

(b)(5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor engaged in any sexually explicit conduct; . . . (b)(7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct; (b)(8) It is unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct.

Ga. Code Ann. § 16-12-100. In turn, the statute defines "sexually explicit conduct," in relevant part, as actual or simulated "(C) masturbation; (D) lewd exhibition of the genitals or pubic area of any person; . . . (H) defecation or urination for the purpose of sexual stimulation of the viewer." Ga. Code Ann. § 16-12-100(a)(4).

Dr. Craft was also convicted of child molestation charges, some of which arose under the theory that some of his photographs went so far as to constitute child molestation.

Under Ga. Code Ann. § 16-6-4, “A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.”

Without mentioning the First Amendment, the Court of Appeals affirmed the convictions on 46 of the counts and reversed the convictions on 71 counts. The Court expressly declined to define or explain the term “lewd,” though it reversed numerous convictions based on that term.

SUMMARY OF ARGUMENT

Because child pornography involves images, and most images are protected by the First Amendment, it is unlike many other crimes. For murder or bank robbery, for example, there is rarely a question as to whether a crime occurred. There is a stabbed corpse or money missing from the safe, and those facts point to only one conclusion. Thus, the only issue at trial is whether the person charged actually committed that crime. And the law does not concern itself with whether others may be discouraged from desirable future conduct as a result of the trial, even if the person charged is determined to be innocent.

But where the evidence of a “crime” is simply an image of an unclothed child, distinctly different conclusions are possible. An adoring parent may have snapped the picture to record a child’s delight in his body. An artist may have taken the picture to depict innocence in one of its most universal forms. Or a pedophile may have exploited children sexually for profit. Because photographs are protected expression, the First Amendment requires that only those images of children that are, at a minimum, “sexually explicit” can fall into the unprotected category. Ferber, 458 U.S. at 764-65 (recognizing exception to First Amendment for class of

materials because of identifiable harm to actual minors). And because at least some pictures of nude children are constitutionally protected, the law does concern itself with the effect of a prosecution on the speech of others. If prosecutors and jurors are free to assume, as did the prosecutor and the trial court here, that where a child is concerned, any exhibition of any genital area, clothed or unclothed, is lewd, or that taking a photograph of any nude child is child molestation, then the statute allowing that assumption is overbroad and must be limited to remain within constitutional boundaries.

The unchecked discretion created by Georgia's sexual exploitation of a child statute threatens protected expression. The law's lack of guidance on the meaning of "lewd," for example, which should distinguish the protected innocent nude pictures that many parents take of their children from the unprotected sexually explicit pictures, leaves the definition largely in the hands of photo-developing technicians and local prosecutors. Without authoritative guidance from this Court, viewers may draw the wrong line: like the prosecutor and trial court in Dr. Craft's case, they may reason that simple nudity is lewd and then start the process that subjects parents and others involved in the child-raising process to long, expensive, humiliating, and undeserved child pornography prosecutions. A statute so vague and capable of misapplication in the First Amendment context injures the innocent, chills protected speech, and wastes state resources. Granting certiorari would allow this Court the opportunity to give better guidance to those who must obey, enforce, and interpret this statute.

This Court should also grant certiorari to make clear that in this "sensitive area," Ferber, 458 U.S. at 764, the test of whether some expression is constitutionally protected or

criminal must be an objective one, based on the contents of the photograph and the average viewer's perspective, and not the subjective test employed by the Court of Appeals.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSTRUE AUTHORITATIVELY THE CHILD EXPLOITATION AND CHILD MOLESTATION STATUTES.

A. Lack Of Standards Leads To Devastating Overreaching.

Although many jurisdictions have adopted the standards for “lewd” articulated in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), this Court has not yet considered this issue.¹ It should do so now. At both the trial level and at the Court of Appeals, Dr. Craft urged adoption of the Dost test or some equivalent. But the Court of Appeals rejected any definition of the term “lewd,” instead leaving that term wholly to the discretion of a prosecutor in bringing charges and a jury in convicting. Where the expression being prosecuted may be not only non-criminal, but constitutionally protected, this standardless discretion cannot be allowed.

¹ Six federal Courts of Appeals have adopted the Dost standards, as have numerous lower federal courts. See United States v. Amirault, 173 F.3d 28, 31-32 (1st Cir. 1999); United States v. Carroll, 190 F.3d 290, 297 (5th Cir. 1999); United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999); United States v. Villard, 885 F.2d 117, 121-22 (3d Cir. 1989); United States v. Wolf, 890 F.2d 241 (10th Cir. 1989); United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987); United States v. Pullen, 41 M.J. 886, 889 (C.A.A.F. 1995); Rhoden v. Morgan, 863 F. Supp. 612, 619 (M.D. Tenn. 1994); United States v. Mr. A., 756 F. Supp. 326, 328 (E.D. Mich. 1991).

Additionally, ten state courts have endorsed the Dost factors. See State v. Morrison, 31 P.3d 547, 554 (Utah 2001); People v. Lamborn, 708 N.E.2d 350, 354 (Ill. 1999); State v. Saulsbury, 498 N.W.2d 338, 344 (Neb. 1993); State v. Roberts, 796 So.2d 779, 786 (La. Ct. App. 2001); People v. Bimonte, 726 N.Y.S.2d 830, 834 (N.Y. City Crim. Ct. 2001); People v. Gagnon, 997 P.2d 1278, 1282 (Colo. Ct. App. 1999); State v. Dixon, No. 01-9802-00085, 1998 WL 712344, at *2 (Tenn. Crim. App. Oct. 13, 1998); People v. Kongs, 30 Cal.App.4th 1741, 37 Cal.Rptr.2d 327 (Ct. App. Cal. 2d Dist. 1995); Alexander v. State, 906 S.W.2d 107, 110 (Tex. Crim. App. 1995); Foster v. Commonwealth, No. 0369-87-2, 1989 WL 641956, at *2 (Va. Ct. App. Nov. 21, 1989). Amicus has found no case – until this one – that has rejected the Dost test.

This lack of guidance in Georgia leads to confusion. As the Solicitor of Cobb County observed, “It’s a tough area of the law. It’s kind of vague.” See Doug Payne, Cobb Mulls Charging Stores with Selling Obscene Books; Protestors Say that Two Books Sold at Barnes & Noble Contain Child Pornography, Atlanta Journal & Constitution, Oct. 21, 1998, at 1B. And that vagueness leads to prosecuting any nudity to be sure no child pornographer gets away. Thus, in jurisdiction after jurisdiction, photographs of simple nudity are prosecuted as child pornography. Told only that they must prosecute for “lewd” photographs of genitals or the pubic area, and without further instructions regarding what qualifies as “lewd,” law enforcement officers employ their own standards. In many jurisdictions, including Georgia, the discretion is in the hands not only of law enforcement, but of the technicians who work at photo-development labs on whom the law imposes a duty to report any material that violates this lewdness standard. See Ga. Code Ann. § 16-12-100(c). With only minimal training and facing hefty penalties for failure to report such material, photo processors quite naturally err on the side of over-reporting: if a child is nude, they call the police. Law enforcement officers and prosecutors respond with understandably vigorous investigations, and, if the particular prosecutor is uncomfortable with nudity, with extremely serious criminal charges that carry extraordinarily harsh sanctions.

The consequences for free speech, as well as for parent-child relationships, can be grave. The lack of a standard to guide enforcement means that parents, other relatives, and serious artists face lengthy investigations, huge legal fees, temporary losses of custody, and enormous – and often irreversible – social stigma before ultimately winning acquittal or seeing all charges dropped. Such enforcement leaves both the defendant and the public substantially chilled from taking pictures, and more anxious with their children lest they be perceived as being

somehow perverted. Indeed, this fairly modern anxious concern over and reaction to childhood nudity has led some commentators to suggest that by focusing so exclusively on the sexual aspect of nudity, child pornography laws have “sexualized” children, and thereby unwittingly promoted the very dangers they seek to solve. See Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 256 (2001).

This concern is not theoretical. In New Jersey, award-winning photographer Marian Rubin was arrested for taking a picture of her 4- and 6-year-old granddaughters before a bath. Rubin was suspended from her job for a year, and authorities seized all of her artwork and computers. According to Rubin, authorities grilled one of the granddaughters with questions far more damaging than the photographs. “They asked her things like, ‘Did Grammy ask you to spread your legs? Did Grammy ask you to touch yourself?’” Rubin was released on a \$50,000 bond, a condition of which was that she not see or talk to her granddaughters – all before the charges were dismissed. *See* Andrew Jacobs, N.J. Law; Grandmother, Nude Photos and Charges, N.Y. Times, Feb. 13, 2000, at 14NJ; Juju Chang, “The Photo Police; Minimally-Trained Photo Inspectors Act as Unofficial Police Deputies in Spotting Child Pornography,” 20/20 Downtown (ABC television broadcast, Aug. 13, 2001), transcript available on LEXIS.

Similarly, Ohio mother Cynthia Stewart was arrested after police found photographs of her daughter taking a bath. The pictures constituted just a few of the approximately 40,000 that Stewart had taken to document her daughter’s life. Stewart was suspended from her job without pay and faced a humiliating trial, sixteen years in prison, and the possible loss of her child. She chose instead to avoid that risk and accept psychological counseling. Her story highlights the dangers of an undefined child pornography law: county

prosecutors had been given the case only after the city prosecutor had turned it down because he found no violation. In the city prosecutor's words, "I didn't feel or see that there was a violation of criminal law. But that doesn't mean that one doesn't exist. These are cases of opinion"

See John Caniglia, Prosecutors at Odds over Nude Photos Case, The Plain Dealer (Cleveland), Mar. 31, 2000, at 2B; Steve Marshall & Hilary Wasson, Pictures of Daughter in Bath Submerge Mom in Hot Water; Ohio Case of 'Sexually Oriented Material' Could be Settled Today, USA Today, Feb. 28, 2000, at 5A. In the wake of that prosecution, local commentators began warning parents that any picture of a naked child is ripe for investigation:

Let's say you take a picture of your young child in the bathtub and the bubbles don't quite cover all the private parts. You take the film to be developed and the lab turns it over to a prosecutor. Are you willing to bet perhaps years of your life in jail that the prosecutor will agree with your view that the picture is for a 'proper purpose'? . . . If you're not sure, you'd better not snap the shutter.

Armond Budish, Taking Pictures of a Nude Child Can Be Illegal, The Plain Dealer (Cleveland), Apr. 16, 2000, at 7L.

In New Jersey, 45-year-old businessman Ejlat Feuer was cleared of child endangerment charges when he agreed to enter a pretrial intervention program for photographs he had taken of his daughter. He passed a polygraph test and spoke with a therapist who concluded that he was at worst guilty of poor judgment for allowing nude photographs "in today's cultural climate." In the meantime, he spent time in jail, lived in a motel for ten months while banned from his home, and at court order avoided contact with his daughter. A doctor determined that the daughter was harmed less by the photographs than by the arrest of her father; police had interrogated her about the photographs, good and bad touches, and the existence of God. See Sid

Smith, A Developing Controversy; Child Pornography Laws Have Chilling Effect on Photographers, Chi. Trib., Feb. 20, 1995, at 1C; Doreen Carvajal, Family Photos or Pornography? A Father's Bitter Legal Odyssey, N.Y. Times, Jan. 30, 1995, at A1.

These are not isolated incidents. After two photographs of his daughters “mooning” the camera were found amidst other family pictures, Jeffrey Bimonte was convicted of attempting to possess child pornography. He lost custody of his children and was fired from his job – despite passing a lie detector test in which he stated that he had not asked the girls to pose. See Juju Chang, “The Photo Police; Minimally-Trained Photo Inspectors Act as Unofficial Police Deputies in Spotting Child Pornography,” 20/20 Downtown (ABC television broadcast, Aug. 13, 2001), transcript available on LEXIS. Toni Marie Angeli, a photography student at Harvard, spent thirty days in jail for a scuffle that ensued after a photo lab called police over nude pictures of her four-year-old son; she was never charged with child abuse or pornography. See Alan Gathright, Clerk Called Hero in DeAnza Case; But Sometimes Labs Have Gone Overboard, S.F. Chronicle, Feb. 4, 2001, at B1. Karen Lupton was acquitted of pandering obscenity involving a minor for pictures of her six-year-old daughter; while charges were pending, she was allowed to see her children just two hours a week. See Robert L. Smith, Life Changed in a Day for Mother Accused of Obscenity; Children Remain in County Custody, The Plain Dealer (Cleveland), Nov. 11, 2000, at 1B.

In each of these cases, the outcome was acquittal, dropped charges or plea agreements, or in a few cases, conviction for an unrelated offense. Any legal offense was doubtful, at best. Yet the personal and social costs were severe. A clearer standard would

minimize the risks of sweeping innocent parents and relatives into the net intended for pedophiles.

B. In These Circumstances, The First Amendment Requires Guidance In Construing “Lewd Exhibition Of The Genitals.”

Granting certiorari in this case would allow this Court to construe the phrase “lewd exhibition of the genitals” and, without harming efforts to prosecute actual child pornography, minimize the threat that faces those engaged in protected expression. Section 16-12-100, on its own, gives no guidance on what distinguishes a lewd exhibition of the genitals from ordinary childhood nudity, except that lewd exhibition is one form of “sexually explicit conduct.” The Court of Appeals in this case expressly declined to give any guidance to the term, and refused to adopt the six factors suggested in United States v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986), and adopted by many other courts.² See Craft v. State, Nos. A01A0880, A01A0881, 2001 WL 1388537, at *4 (Ga. Ct. App. Nov. 9, 2001). To the contrary, the Court of Appeals simply determined that the term “has not been defined in Georgia” and is best left to the jury’s discretion – with no direction as to what the word means. Id.

As the Supreme Court highlighted in Ferber, specific guidance from the legislature or a court construing an obscenity or child pornography statute is critical in preserving the boundaries of protected speech. See Ferber, 458 U.S. at 751. “As with all legislation in this

² The six Dost factors are (1) whether 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 inappropriate 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.

sensitive area,” wrote the Court, “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.” Id. at 764. Where the statute allows a prosecutor to bring charges and a trier-of-fact to convict on the notion that any exhibition of a child’s genitals, clothed or unclothed, is “lewd,” the courts must limit the statute’s application. See also Osborne v. Ohio, 495 U.S. 103, 112-14 (1990) (praising the Ohio Supreme Court for offering a limiting construction of the state’s child pornography statute that “avoided penalizing persons for viewing or possessing innocuous photographs of naked children”).

Specific guidance with regard to this statute is critical for two reasons. First, well-defined standards put individual citizens on notice as to which expressions are protected and which are not. Particularly where the crime involves speech, such notice is crucial to avoid chilling protected expression. See Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (“It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”).

Second, well-defined standards enable law enforcement officials to focus their investigations and prosecutions on conduct that more likely violates the law. See Kolender v. Lawson, 461 U.S. 352, 358 (1983) (“Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”) (internal quotation and citation omitted); Smith v. Goguen, 415 U.S. 566, 578 (1974) (striking statute on First Amendment grounds “because it subjected him to criminal liability under a standard so indefinite that police,

court, and jury were free to react to nothing more than their own preferences”); Kunz v. New York, 340 U.S. 290, 295 (1951) (“New York cannot vest restraining control over the right to speak on religious subjects in an administrative official when there are no appropriate standards to guide his action.”). Consequently, prosecutions brought under well-defined standards are less likely to chill protected speech.

C. This Court Should Grant Certiorari To Reject The Court Of Appeals’ Unwarranted And Unexplained Extension Of The Child Molestation Statute.

As traditionally interpreted, the offense of child molestation raises no issues of protected expression. Georgia’s child molestation statute defines the offense as doing “any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.” Ga. Code Ann. § 16-6-4. But by holding that taking a photograph of a child with the intent to satisfy the photographer’s sexual desires is an indecent or immoral act, the Court of Appeals has expanded the child molestation statute to encompass taking photographs of nude children, without any sexual conduct apparent on the face of the photograph. If the statute can be so interpreted, it allows prosecution of images that are not child pornography as defined by the Supreme Court, and it vitiates the First Amendment protection for photographs. This interpretation, which is one of first impression, raises both due process as well as First Amendment concerns

As a matter of due process, extending the child molestation statute to non-sexual photography undermines the very grounds on which this Court has upheld § 16-6-4’s validity. Indeed, § 16-6-4’s “immoral or indecent act” provision has survived due process challenges for vagueness precisely on the ground that the statute would not be applied in an unforeseeable

manner. In McCord v. State, 248 Ga. 765, 766 (1982), this Court emphasized that “[m]en of common intelligence would not differ as to the application of its provisions.” Similarly, the Court of Appeals has made clear that § 16-6-4 could be void for vagueness only if it were applied to conduct to which its application could not be foreseen. The statute must be “examined in the light of the conduct with which a defendant is charged.” Davidson v. State, 231 Ga. App. 605, 607 (1998). When applied to a defendant who touched children’s genital areas with his fingers and a vibrator, the court ruled, notice was sufficient. Id. But when applied to one who only took unposed photographs that are not sexual, notice is completely missing.

This lack of notice is particularly troubling in the context of free expression because of the chilling effect on protected speech. See Ferber, 458 U.S. at 756. And the severe sanctions that follow a child molestation conviction insure that the chill is powerful. In Georgia, turning a photographer into a child molester subjects the photographer to (1) civil actions for childhood sexual abuse, see Ga. Code Ann. § 9-3-33.1; (2) the collection and storage in a state data bank of one’s DNA profile, see Ga. Code Ann. § 24-4-60; and (3) the “sexual offender” label that prohibits the alleged offender from visiting any non-relative minor during his time in prison, see Ga. Code Ann. § 42-5-56, and forces him to register with the sheriff and school superintendent while he is on parole, see Ga. Code Ann. § 42-9-44.1. In these circumstances, the consequences for mistaking the line between constitutionally protected expression and criminal conduct virtually ensure that much protected expression will be suppressed.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE SQUARELY RAISES THE ISSUE OF WHETHER CHILD PORNOGRAPHY MUST BE MEASURED BY AN OBJECTIVE OR A SUBJECTIVE STANDARD.

Although the Court of Appeals reversed many of the convictions because the pictures did not contain a lewd exhibition of the genitals, it upheld other convictions based on its belief that Dr. Craft's alleged sexual desire could make an otherwise legal picture illegal. Thus, for example, the Court of Appeals evaluated how the photographs appeared to Dr. Craft, and asked whether photographs that depict "minor boys who are urinating from a back and side angle" (counts 44-46) support an inference "that Craft created these photographs for his own sexual gratification." Craft, 2001 WL 1388537, at *6. Relying on certain assumptions about Dr. Craft's "lustful disposition," id. at *7, the court concluded that Dr. Craft had the requisite inclination to make the photographs sexually explicit.

The Court of Appeals thus defined illegal content by reference to the effect of the image on one person. But this subjective standard conflicts with the First Amendment's requirement that content be determined by using objective, average viewer tests. As the Court stated in Miller v. California, 413 U.S. 15, 33 (1973), when defining obscenity, "it will be judged by its impact on an average person, rather than on a particularly susceptible or sensitive person – or indeed a totally insensitive one." An objective, reasonable viewer standard keeps the government's focus on the constitutionally unprotected expression rather than on the private thoughts of the one who receives that expression.³

³ Indeed, of the few states that include urination and defecation on their list of proscribed sexually explicit conduct, most do so with an objective standard. See Fla. Stat. Ann. § 847.001; Ill. Comp. Stat. 11-20.1; Mass. Gen. Laws. ch. 272, § 29C; Nev. Rev. Stat. 200.700; N.H. Rev. Stat. Ann. § 650:1; N.C. Gen. Stat. § 14-190.1; N.D. Cent. Code § 12.1-27.1-01; Ohio Rev. Code Ann. § 2907.01; Okla. Stat. Ann. tit. 21, § 1024; S.C. Code Ann. § 16-15-305; Tenn. Code Ann.

The Supreme Court expressly justified the unprotected status of child pornography because, by definition, it caused actual harm to the children involved. See Ferber, 458 U.S. at 758-59. Thus, “the audience’s appreciation of the depiction is simply irrelevant to [the government’s] asserted interest in protecting children from psychological, emotional, and mental harm.” Id. at 774-75 (O’Connor, J., concurring). Quite simply, the First Amendment does not permit the suppression of speech on the grounds that it might have undesirable effects on some potential hearer. Rather, it requires courts to evaluate the content of the speech itself from the perspective of an average viewer. See Brandenburg v. Ohio, 395 U.S. 444 (1969). Thus, § 16-12-100 may not be premised “on the desirability of controlling a person’s private thoughts.” Stanley v. Georgia, 394 U.S. 557, 566 (1969). Ruling a photograph illegal because the person taking it found it sexually gratifying is like “prohibit[ing] possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.” Id. at 567. See also United States v. Hilton, 167 F.3d 61, 75 (1st Cir. 1999) (rejecting district court’s subjective standard and asking how the portrayals would appear to “a reasonable unsuspecting viewer”); United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir. 1987) (reasoning that the crime cannot “consist in the cravings of the person posing the child or in the cravings of his audience,” because “[p]rivate fantasies are not within the statute’s ambit”).

More practically, the subjective standard used by the Court of Appeals creates an overbroad definition of child pornography, according to which anything that a pedophile could


§ 39-17-1002; Utah Code Ann. § 76-5a-2; W. Va. Code Ann. § 61-8C-1. The most common of the objective tests simply imports the jurisdiction’s obscenity standard: if the image would qualify as obscene, then it is illegal under the sexual exploitation of a child statute. See, e.g., N.H. Rev. Stat. Ann. § 650:1. Other states make such images illegal only if they depict urination or defecation in an otherwise “sexual context.” See, e.g., Ill. Comp. Stat. 11-20.1.

find sexually gratifying is illegal. The Supreme Court warned against this mistake as far back as Roth v. United States, 354 U.S. 476, 488-89 (1957), in which the Court noted that a test that judged obscenity by its effects on particular individuals could encompass protected materials. Accordingly, the Court reasoned, the subjective test “must be rejected as unconstitutionally restrictive of the freedoms of speech and press.” Id. The inevitable overbreadth of a subjective standard is a result of the lack of uniformity among individuals’ preferences. Research shows that individual pedophiles find “arousing images” in such mainstream sources as “newspapers and magazines, television programmes, and videos, not usually involving nudity.” Dennis Howitt, Pornography and the Pedophile: Is it Criminogenic?, 68 Brit. J. of Med. Psychol. 15, 23 (1995). “In fact, certain pedophiles may prefer ‘innocent’ pictures.” Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 259 (2001). It would be absurd to suggest that any image that might appeal to a pedophile therefore constitutes child pornography. See United States v. Amirault, 173 F.3d 28, 34 (1st Cir. 1999) (“If [the defendant’s] subjective reaction were relevant, a sexual deviant’s quirks could turn a Sears catalog into pornography.”); United States v. Villard, 700 F.Supp. 803, 812 (D.N.J. 1988) (“When a picture does not constitute child pornography . . . it does not become child pornography because it is placed in the hands of a pedophile.”).

Thus, the Court of Appeals’ reliance on the subjective test violates the First Amendment, and this Court should grant certiorari to clarify this important issue.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2002, I served by first-class mail, postage prepaid, a copy of the foregoing Brief of Amicus Curiae DKT Liberty Project in Support of Petition for Certiorari on Daniel J. Craig, District Attorney, Augusta Judicial Circuit, 551 Greene Street, Augusta, Georgia, 30901; and on Christopher J. McFadden, Suite 800, Commerce Plaza, 755 Commerce Drive, Decatur, Georgia 30030.



Brian Hauck