

AUG 12 2019

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No. 18-9285

IN THE  
SUPREME COURT OF THE UNITED STATES

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DEAN A. SCHWARTZMILLER - PETITIONER  
VS.  
STATE OF CALIFORNIA -- RESPONDENT

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SUPPLEMENTAL BRIEF TO PETITION FOR CERTIORARI

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Pursuant to Rule 15.8, Rules of the Supreme Court of the United States, Petitioner supplements his Petition for Writ of Certiorari placed on the Court's docket on May 16, 2019.

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1 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

2  
3 AMENDMENT XIV: !. All persons born or naturalized in the United  
4 States, and subject to the jurisdiction thereof, are citizens of  
5 the United States and of the State wherein they reside. No State  
6 shall make or enforce any law which shall abridge the privileges  
7 or immunities of citizens of the United States; nor shall any State  
8 deprive any person of life, liberty, or property, without due pro-  
9 cess of law; nor deny to any person within its judisdiction the  
10 equal protections of the laws.

11 STATUTORY PROVISION

12 CALIFORNIA PENAL CODE § 288: (a) Any person who willfully and  
13 lewdly commits any lewd or lascivious act...upon or with the body  
14 or any part or member thereof of a child who is under the age of  
15 14 years, with the intent of arousing, appealing to, or gratifying  
16 the lust, passions, or sexual desires of the person, or the child,  
17 is guilty of a felony....  
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1 SUPPLEMENTATION

2  
3 On June 24, 2019, this Honorable Court issued its Opinion in the  
4 case of United States v. Davis, 588 U.S. \_\_\_\_ (2019), that requires  
5 calling this Court's attention to it as a new caselaw not available  
6 at the time of filing this Petition for Writ of Certiorari on April  
7 29, 2019. The current petition assaults the constitutionality, vel  
8 non, of California Penal Code Section 288 as suffering from both  
9 vagueness and overbreadth as currently construed by the Courts of  
10 California.

11 The Davis opinion essentially tracks the arguments made in  
12 Petitioner's Certiorari application beginning with the opening para-  
13 graph:

14 In our constitutional order, a vague law is no law at all. Only the  
15 people's elected representatives in Congress have the power to write  
16 new...criminal laws. And when Congress [state legislature] exercises  
17 that power, it has to write statutes that give ordinary people fair  
18 warning about what the law demands of them. Vague laws transgress  
19 both of those constitutional requirements. They hand off the legis-  
20 lature's responsibility for defining criminal behavior to unelected  
21 prosecutors and judges, and they leave people with no sure way to know  
22 what consequences will attach to their conduct. When Congress [the  
23 State legislature] passes a vague law, the role of courts under our  
24 Constitution is not to fashion a new, clearer law to take its place,  
25 but to treat the law as a nullity and invite Congress [State Legis-  
26 lature] to try again. Davis, slip op. at 1.

27 At page 4, of the Davis Opinion, the Court continues:

28 Our doctrine prohibiting the enforcement of vague laws rests on the  
twin constitutional pillars of due process and separation of powers.  
See Dimaya, 584 U.S. at \_\_\_\_ - \_\_\_\_ (plurality opinion) slip op. at 4-5;  
GORSUCH, J., concurring in part and concurring in judgment (slip op.  
at 2-9)...Vague laws also undermine the Constitution's separation of  
powers and the democratic self-governance it aims to protect. Only  
the people's elected representatives in the legislature are authorized  
to make an act a crime." United States v. Hudson, 7 Cranch 32, 34  
(1812). Vague statutes threaten to hand responsibility for defining

1 crimes to relatively unaccountable police, prosecutors, and judges,  
2 eroding the people's ability to oversee the creation of the laws they  
3 are expected to abide. See Kolender v. Lawson, 461 U.S. 352, 357-358  
4 and, n.7 (1983); United States v. L. Cohen Grocery Co., 255 U.S. 81,  
5 89-91 (1921); United States v. Reese, 92 U.S. 214, 221 (1876). Davis  
6 588 U.S. \_\_\_\_ (2019)(slip op. at 4-5. See also, Petition for Certiorari  
7 at 9 & 27.

8 Like Davis, [slip op at 3, n.1], when his case was tried, a  
9 defendant convicted of two § 288(a) violations in a single prosecution  
10 faced a 30 year to life minimum for the second violation. Section  
11 924(c), Title 18 U.S.C., carried only a minimum of 25 years, no life.

12 The vague overbroad Penal Code § 288 uses more than 35 pages of  
13 the California Penal Code to list punishments imposed from 25 years to  
14 consecutive life imprisonments and if ever released from prison, civil  
15 complaints and trials for confinement for life for being an "any touch-  
16 ing" Sexually [non]-violent predator (SVP), WIC 6600 et.seq.; regis-  
17 tration as a sex offender on the internet for life, or GPS tracking  
18 devices for life, or what used to be called "shaming" for life in your  
19 own community while living on the streets for life. See, Penal Code  
20 § 290 et.seq. No other crime currently carries the stigma as does a  
21 sexual crime in today's society, the result of political exploitation  
22 of these non-violent crimes. Simply make an allegation of sexual con-  
23 tact and the defendant is presumed guilty before any trial is had.

24 As also directly concluded by the Davis majority, when reading  
25 a statute most naturally, a court would expect the words of the stat-  
26 ute to retain the same meaning. "After all, '[i]n all but the most  
27 unusual situations, a single use of a statutory phrase must have a  
28 fixed meaning.'" Cochise Consultancy, Inc. v. United States ex rel.,  
Hunt, 587 U.S. \_\_\_, \_\_\_ (2019)(slip op. at 5)." Davis at 10.

1 As relates to this Petition For Writ of Certiorari, the word  
2 lewd was changed to "any touching" in People v. Martinez, 11 Cal.4th  
3 434 (1995), by the California Court by activism. "Any touching"  
4 however has no fixed meaning thus allowing for the courts and pros-  
5 ecutors to select defendants by an ad hoc process in every case to  
6 come before the courts.

7 Moving forward, the Davis Court also opines that "we normally  
8 presume that the same language in related statutes carries a consis-  
9 tent meaning. See, e.g., Sullivan v. Stroop, 496 U.S. 478, 484  
10 (1990), Id. at slip op 12. See also, Petition for Certiorari at 8  
11 (emphasis supplied), citing to United States v. Evans, 504 U.S. 255,  
12 260 and n.3 (1990)("...as Justice Frankfurter advised, 'if a word is  
13 obviously transplanted from another legal source, whether the common  
14 law or other legislation, it brings the old soil with it.'). In  
15 Section 288 of the California Penal Code however, Martinez, Lopez  
16 [19 Cal.4th 281 (1998)], and Murphy [25 Cal.4th 136 (2001)], the  
17 California Court completely changed the sexual nature of the offense  
18 of lewd and lascivious conduct from sexual offenses to "any touching"  
19 of a child, and no lewd or lascivious acts are necessary to convict  
20 a defendant. Just any touching however slight. See, JA G.

21 Concerning the alteration of any criminal statute's nature,  
22 this Court states in Davis, "so in plain English, when we speak of  
23 the nature of an offense, we're talking about 'what an offense nor-  
24 mally -- or, as we have repeatedly said, ordinarily' -- entails,  
25 not what happened to occur on one occasion." Dimaya, 584 U.S. \_\_\_\_  
26 (slip op at 14). The term lewd or lascivious has never been defined  
27

1 in any legal context as being simply "any touching" of a child, not  
2 even when first written and construed by a court in People v. Stout-  
3 er, 142 Cal. 146 (1904). Davis (slip op at 11).

4 "Usually when statutory language "is obviously transplanted  
5 from... other legislation," we have reason to think 'it brings  
6 the old soil with it'". Sekhar v. United States, 570 U.S. 729, 733  
7 (2013).

8 Respect for due process and the separation of powers suggest a court  
9 may not, in order to save Congress the trouble of having to write a  
10 new law, construe a criminal statute to penalize conduct it does not  
clearly proscribe. Davis (slip op at 18-19).

11 But here, with Section 288 of the California Penal Code, the  
12 Court, not the Legislature, has taken it upon itself to rewrite a  
13 statute with already vague and overbroad language to make it more  
14 so, molding it into a catchall criminal code that is:

15 ...willing to consign "thousand" of defendants to prison for years--  
16 potentially decades [or life], not because it is certain or even  
17 likely that Congress ordained those penalties, but because it is  
18 merely "possible" Congress might have done so. Post at 30, 33-34.  
In our republic a speculative possibility that a man's conduct vio-  
lated the law should never be enough to justify taking his liberty.  
Davis (slip op at 23). (Emphasis supplied).

19 Here, it is unknown just exactly what Penal Code § 288 as con-  
20 strued by the California Court's always "subjectively", not the  
21 Legislature, addresses. And its now adopted "any touching" defin-  
22 ition of lewd and lascivious acts without requiring or describing  
23 any lewd or lascivious act or acts, the Court must purposely mean  
24 any conduct, sexual or not as any Court reviewing the charges may  
25 perceive fit to violate the statute, including non-sexual acts.

26 The Court in Davis determined that "after all, in all but the  
27




1 most unusual situations, a single use of a statutory phrase must  
2 have a fixed meaning." Davis (slip op at 10). Pet. Certiorari at  
3 8 & 20. Lewd and lascivious acts did at one time at least, sort of,  
4 had one:

5 The Court's first inquiry is whether the term "lewd" or "lascivious"  
6 have well defined, generally accepted meanings. If these terms have  
7 meanings of general import, this Court is unaware of what they are.  
8 Schwartzmiller v. Gardner, 567 F.Supp. 1371, 1376 (D.Id. 1983).

9 On May 28, 2019, Petitioner advised Respondent with the Clerk  
10 supplied waiver form to Mr. Xavier Becerra, Attorney General for  
11 California at his San Diego, California office, to which no reply  
12 was received. This supplemental Brief by Petitioner is also being  
13 sent to him via the prison mail system postage prepaid as required  
14 by Rule 29, Rules of this Supreme Court.

15 DATED this 12<sup>th</sup> day of August, 2019.

16 Respectfully submitted,

17   
18 Dean A. Schwartzmiller  
19 Petitioner pro se  
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## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Dean A. Schwartzmiller".

Dean A. Schwartzmiller  
Petitioner pro se

Date: August 12, 2019

No. 18-9285

IN THE  
SUPREME COURT OF THE UNITED STATES

DEAN A. SCHWARTZMILLER--PETITIONER


VS.

STATE OF CALIFORNIA--RESPONDENT

PROOF OF SERVICE

I Dean A. Schwartzmiller, do swear or declare that on this date August 12, 2019, as required by Supreme Court Rule 29, I have served the enclosed SUPPLEMENTAL BRIEF TO PETITION FOR CERTIORARI on the Attorney General for the State of California or his representative Respondent's counsel, by depositing an envelope containing the above documents in the United States mail, prison system by depositing the above document to him with first-class postage prepaid to:

Xavier Becerra  
Attorney General for California  
Cal. Department of Justice  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA. 94102

  
Dean A. Schwartzmiller  
August , 2019