No. 19-6100

In The Supreme Court of the United States

MELVYN PERRY SPROWSON,
Petitioner

v.

THE STATE OF NEVADA,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITIONER'S REPLY BRIEF

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1. The Nevada Supreme Court ignored binding U.S. Supreme Court precedent when denying Petitioner's facial challenge.

Citing U.S. Supreme Court Rule 10 ("Rule 10"), Respondent claims that "[c]ertiorari is only warranted where there is a substantial conflict between decisions of lower state and/or federal courts, or where an important question of federal law needs to be settled." Brief in Opposition ("Opp.") at 10. Yet, Respondent conveniently ignores Rule 10(c), which recognizes an additional "compelling reason" for granting a petition for certiorari: where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Since 2015, this Court has granted certiorari in three cases where state courts of last resort issued rulings on questions of federal constitutional law that conflicted with controlling U.S. Supreme Court decisions.

In *Grady v. North Carolina,* 575 U.S. 306 (2015), this Court granted certiorari and vacated a decision by the North Carolina Supreme Court that the petitioner could not challenge a sex-offender registration requirement of lifetime satellite monitoring because it was not Fourth Amendment "search". Yet, the state court ignored *United States v. Jones*, 565 U.S. __, 132 S.Ct. 945

(2012), which held that installation and monitoring of a GPS tracking system was a Fourth Amendment "search". This Court granted certiorari and reversed because the court's ruling was "inconsistent with this Court's precedents". 575 U.S. at 308-09.

In *Lynch v. Arizona*, 578 U.S. __, 136 S.Ct. 1818 (2016), this Court granted certiorari and reversed after the Arizona Supreme Court erroneously concluded that the petitioner (a capital defendant ineligible for parole) could not inform the jury of his parole ineligibility, in violation of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and its progeny. Where the Arizona Supreme Court ignored that binding precedent, this Court found a compelling reason to grant certiorari and reversed.

Finally, in *Bosse v. Oklahoma*, 580 U.S. __, 137 S.Ct. 1 (2016), this Court granted certiorari and reversed a petitioner's death sentence after the Oklahoma Court of Criminal Appeals found "no error" when three of his murder victims' relatives recommended death during the penalty phase of his capital murder trial, in violation of *Booth v. Maryland*, 482 U.S. 496 (1987). As this Court noted when granting certiorari, "[t]he Oklahoma Court of Criminal Appeals remains bound by *Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders the ban." *Bosse*, 580 U.S. at __, 137 S. Ct. at 2.

These cases demonstrate that when a state court ignores controlling Supreme Court precedent on issues of federal constitutional law, Rule 10(c) is satisfied, and a "compelling reason" exists to grant certiorari. Furthermore, in cases where the state court's error is clear, this Court can reverse and remand immediately, without further briefing. *See, e.g.*, *Grady,* 575 U.S. at 309; *Lynch*, 578 U.S. at __, 136 S.Ct. at 1820; *Bosse*, 580 U.S. at __, 137 S.Ct. at 3. Mr. Sprowson's Petition for Certiorari presents just such a case.

In *Shue v. State*, 133 Nev. 798, 807 n.10, 407 P.3d 332, 339 n.10 (2017),[1] the Nevada Supreme Court wrongly concluded – in a footnote no less – that Shue's facial challenge to Nevada's sexual portrayal statutes failed because the statutes allegedly did not "not implicate protected speech under the First Amendment." Yet, that conclusion directly violated this Court's precedent in both *New York v. Ferber*, 458 U.S. 747 (1982), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 232 (2002).

In *Ferber,* 458 U.S. at 764, this Court placed "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." In doing so, this Court established a "test for child pornography" which was similar to

[1] The Nevada Supreme Court relied on *Shue* to reject Mr. Sprowson's facial challenge to Nevada's sexual portrayal statutes. (Pet. App. 6-8,58-65).

but "separate from the obscenity standard" set forth in *Miller v. California*, 413 U.S. 15 (1973). *Id.*

Recall that "obscenity" is unprotected by the First Amendment only to the extent it satisfies *Miller's* three-part test:

> (a) [if] 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; **(b) [if] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;** and (c) [if] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24 (internal citations omitted) (emphasis added). Importantly, a work is not "obscene" under *Miller* unless it "depicts or describes" sexual conduct in a patently offensive way.

As with "obscenity", this Court's test for "child pornography" requires a depiction of "sexual conduct". As this Court explained in *Ferber*:

> [T]he conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. **Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.** The category of "sexual conduct" proscribed must also be suitably limited and described.

458 U.S. at 764 (emphasis added). Ultimately, to constitute "child pornography" under *Ferber*, there must be a visual

depiction of sexual conduct by children below a specified age. *See also, United States v. Williams*, 553 U.S. 285, 293 (2008) (identifying the "material held constitutionally proscribable in *Ferber* and *Miller*" as "obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct").

> Black's Law Dictionary defines "conduct" as follows:
>
> conduct n. (15c) **Personal behavior**, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds. . . .

CONDUCT, Black's Law Dictionary (11th ed. 2019) (emphasis added). Plainly, in order to constitute child pornography, the images in question must visually depict a child's sexual behavior.

Yet, Nevada's sexual portrayal statutes criminalize more than child pornography because they do not require a child to have engaged in any sexual behavior or sexual conduct whatsoever. The minor need not even be aware that he or she is being recorded. *See* Nev. Rev. Stat. § 200.710(2). To violate Nevada's sexual portrayal statutes, images need only portray a child in a manner that "appeals to a shameful or morbid interest in the sexuality of the minor" where the image "does not have serious literary, artistic, political, or scientific value, according to

the views of an average person applying contemporary community standards". *Shue*, 133 Nev. at 805, 407 P.3d at 338.

Where *this Court's* test for "child pornography" requires visual depictions of sexual conduct by children below a specified age, and where Nevada's sexual portrayal statutes criminalize images that fall outside of that narrow definition, the Nevada Supreme Court erred as a matter of law when it found that Nevada's sexual portrayal statutes "do not implicate protected speech under the First Amendment." *Compare Shue*, 133 Nev. at 807 n.10, 407 P.3d at 339 n.10, *with Ashcroft*, 535 U.S. at 251 (where "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment").

Because Nevada's sexual portrayal statutes require no sexual conduct whatsoever, they are not conduct-based limitations on speech, but content-based restrictions on speech. *Compare United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000) (law requiring cable television operators who offered "sexually-oriented programming" to "fully scramble or otherwise fully block" was a content-based restriction on speech), *with United States. v. O'Brien*, 391 U.S. 367 (1968) (statute prohibiting knowing destruction or mutilation of selective service certificate was a conduct-based restriction that did not facially abridge freedom of speech).

The appellant in *Shue* "argue[d] on appeal that Nevada's statutes barring the sexual portrayal of minors. . . violate the First Amendment as a content-based restriction that fails strict scrutiny". *Shue*, 133 Nev. at 807 n.10, 407 P.3d at 339 n.10. Yet, by finding that Nevada's sexual portrayal statutes did not even implicate First Amendment protections, Nevada's Supreme Court failed to apply strict scrutiny to the content-based restrictions and failed determine, in the first instance, whether the sexual portrayal statutes were the least-restrictive means necessary to achieve a compelling government interest. *Cf. Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) ("Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.").

In Mr. Sprowson's case, the Nevada Supreme Court rejected his identical facial challenge to Nevada's sexual portrayal statutes, finding itself constrained by its prior holding in *Shue*. (Pet. App. 6-8, 58-65). Because *Shue* was wrongly-decided in violation of controlling U.S. Supreme Court precedent, and because Nevada's Supreme Court relied on *Shue* to reject Mr. Sprowson's First Amendment facial invalidity claim, this Court's intervention is necessary. Like in *Grady*, 575

U.S. at 309, where North Carolina's courts erroneously determined that the Fourth Amendment did not apply to a state sex-offender monitoring statute, the Nevada Supreme Court erroneously concluded that the First Amendment did not apply to Nevada's sexual portrayal statutes.

In *Grady*, *Shue* and *Sprowson*, state courts failed to undertake the requisite legal analysis to determine whether their statutes passed constitutional muster. In North Carolina, the court "did not examine whether the State's monitoring program [was] reasonable – when properly viewed as a search". *Grady*, 575 U.S. at 309. In Nevada, the Supreme Court failed to apply strict scrutiny to an obvious content-based restriction on speech. Under Rule 10(c), this Court can follow a similar path to the one taken in *Grady* – it can immediately reverse and remand this matter to the Nevada Supreme Court and direct it to determine, in the first instance, whether Nevada's sexual portrayal statutes are the least restrictive means of achieving a compelling government interest. *See Grady*, 575 U.S. at 309 (granting certiorari and remanding so state court could determine in the first instance whether a search was "unreasonable").

2. Nevada's sexual portrayal statutes are overbroad.

In *Massachusetts v. Oakes*, 491 U.S. 576 (1989), this Court left open the question of whether a child pornography statute that did not comply with *Ferber* was necessarily overbroad.

Seeking to avoid this question, Respondent contends that the statute in *Oakes* was "far broader than the statute at issue in Petitioner's case." Opp. at 12. Not so.

The statute in *Oakes* required conduct on the part of the child: the child had to be posed in a state of nudity. *Oakes*, 491 U.S. at 580. By contrast, Nevada's sexual portrayal statutes require neither nudity nor conduct (sexual or otherwise). Nevada's statutes merely require that a minor be portrayed in a manner that appeals to a viewer's prurient interest. Nev. Rev. Stat. § 200.700(4); (Pet. App. 141). So, Nevada's statutes are far broader than the one at issue in *Oakes*, and clearly subject to an overbreadth challenge.

Respondent admits that the purpose of Nevada's sexual portrayal statutes was to criminalize more content than was permitted under *Ferber*. *See* Opp. at 21. Although Nevada's original child pornography statute satisfied *Ferber* by requiring sexual conduct, Nevada's legislators believed that statute did not go far enough:

> The concern of the Nevada State Legislature was that the statute as written contained a gap that left children unprotected. Id. Children were being sexually exploited when they were the subject of images that had a pornographic purpose, **but the children were not engaging in sexual conduct.**

Opp. at 21 (emphasis added). Where Respondent concedes that the purpose of Nevada's sexual portrayal statutes was to outlaw

content that did not satisfy *Ferber's* test for "child pornography", Nevada's statutes are necessarily overbroad.

Respondent concedes that Nevada's sexual portrayal statutes were added "in part . . . because of an incident where children were secretly filmed in a public place and then those videos were edited into other pornographic videos." Opp. at 22. Respondent then identifies a broader rationale for the sexual portrayal statutes: that Nevada has a "compelling interest of protecting children from sexual exploitation" and that "children can be sexually exploited in ways that do not fall within the definition of sexual conduct." *Id.* Finally, Respondent claims that Nevada's sexual portrayal statutes are the "least restrictive means" of achieving that purpose. *Id.* at 23.

Petitioner wholeheartedly agrees that Nevada's legislature can properly criminalize the sexual exploitation of children by adults. Yet, Nevada's sexual portrayal statutes prohibit far more than the sexual exploitation of children; the statutes criminalize content and are not the least restrictive means of preventing sexual exploitation of children. *See* Nev. Rev. Stat. §§ 200.710(2), 200.700(4).

Although Respondent takes issue with Petitioner's discussion of teenagers who sext, who send each other partially clothed "selfies" and who post seductive pictures of themselves on Instagram, these examples were intended to illustrate that

Nevada's sexual portrayal statutes prohibit far more than the "sexual exploitation" of children.

While *this case* involves a minor who sent intimate images of herself to an adult, Nevada's sexual portrayal statutes apply with equal force to communications *between minors themselves.* Nevada's sexual portrayal statutes criminalize teenagers' sexual communications with one-another and give Nevada prosecutors the sole discretion to brand those children as child pornographers for the rest of their lives.

Sexting among teenagers is common and "affects a substantial portion of the teenage population". *See* Joanna R. Lampe, A *Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. Mich. J.L. Reform 703, 704–05, n. 8 (2013). One study found that "20 percent of teenagers age thirteen to nineteen reported sending electronically or posting online nude or seminude images or video of themselves." *Id.* Though teenagers commonly disseminate electronic images of themselves to one another, that behavior does not generally involve sexual abuse or exploitation. *See* Sarah Wastler, *The Harm in "Sexting"?": Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession and Dissemination of Sexually Explicit Images By Teenagers*, 33 Harv. J.L. & Gender 687, 700 (2010). Where Nevada's sexual portrayal statutes criminalize non-exploitative communications

between minors themselves, the statues infringe upon First Amendment rights in a manner that is "substantial" when "judged in relation to the [law's] plainly legitimate sweep". *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Although Respondent scoffs at the notion that parents who "take an innocent, naked photograph of their child could be prosecuted and convicted" under Nevada's overbroad sexual portrayal statutes (Opp. at 26), such an outcome is, in fact, possible. Consider a parent with an open Facebook profile, who indiscriminately shares photographs of her children among strangers, some of whom find those photographs sexually stimulating. If a jury, applying contemporary community standards, finds that the photographs appeal to an accused pedophile's prurient interests, both the accused pedophile who possessed the photographs and the parent who uploaded them to the internet would be criminally liable. *See* Nev. Rev. Stat. §§ 200.710(2) and 200.700(4). Far from attempting to "distract the Court from his conduct" (Opp. at 26), Petitioner has instead provided this Court with concrete examples of the various ways in which Nevada's sexual portrayal statutes are unconstitutionally overbroad.

3. Petitioner's case is a strong vehicle to address these issues.

As a direct appeal from the Nevada Supreme Court's affirmance of Mr. Sprowson's four child pornography convictions, this case has a simple procedural history and none of the complexities of a federal habeas case. Furthermore, it involves a simple question of law: whether a state regulation of child pornography that fails to satisfy all four requirements set forth in *Ferber* and that criminalizes content that is neither "obscene nor the product of sexual abuse" is facially unconstitutional and/or overbroad.

Respondent suggests that this Court need not decide whether Nevada's sexual portrayal statutes are unconstitutional because "the photographs of J.T. for which Petitioner sustained convictions for, satisfy both the sexual conduct and sexual portrayal requirements in NRS 200.700." Opp. at 16 (emphasis added). Yet, Respondent's argument is belied by the record.

In his Petition for Certiorari, Mr. Sprowson challenged four different child pornography convictions. As to Counts 4 and 6, the State charged and convicted Mr. Sprowson under the sexual portrayal statutes alone. (Pet. App. 54-57). Therefore, if this Court finds Nevada's sexual portrayal statutes unconstitutional or if this Court finds that the Nevada Supreme Court erred by failing to apply the appropriate level of

constitutional scrutiny to those statutes, Mr. Sprowson's convictions on Counts 4 and 6 must be reversed and remanded.

As to Counts 3 and 5, the State charged Mr. Sprowson under both the "sexual conduct" and "sexual portrayal" portions of Nev. Rev. Stat. § 200.710. (Pet. App. 54-57). It is unclear which provision the jury relied upon to convict Mr. Sprowson of Counts 3 and 5. However, when the Nevada Supreme Court affirmed his convictions on those counts, it did so solely under the sexual portrayal statutes. (Pet. App. 7) ("Because the jury could reasonably find that the photographs depicted the minor victim as the subject of a 'sexual portrayal' the evidence is sufficient to support the child pornography convictions under NRS 200.710(2). Thus, we need not determine whether the evidence is sufficient to support those convictions on the alternative theory that the photographs showed 'sexual conduct' for purposes of NRS 200.710(1)").

Therefore, if this Court agrees that Nevada's sexual portrayal statutes are unconstitutional, or if this Court finds that the Nevada Supreme Court erred by failing to apply the appropriate level of constitutional scrutiny to those statutes, the case would *still* have to be remanded to the Nevada Supreme Court to determine whether Mr. Sprowson's convictions on Counts 3 and 5 could stand under an alternative theory.

Therefore, this case is an ideal vehicle for addressing the constitutionality of Nevada's sexual portrayal statutes.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, DEBORAH L. WESTBROOK, declare that I am over the age of 18 years, not a party to the within cause and a member of the bar of this Court; my business address is 309 South Third Street, #226, Las Vegas, Nevada 89155-2610. I served a true copy of the **PETITIONER'S REPLY BRIEF** on each of the following, by placing same in an envelope addressed as follows:

Aaron D. Ford, Attorney General
State of Nevada, Criminal Justice Division
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Carson City, Nevada 89701-4717

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Each said envelope was then, on the 13 day of December, 2019, sealed and

deposited in the United States mail at Las Vegas, Clark County, Nevada, the county in which I am employed, with the postage thereon fully prepaid. I certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 13 day of December, 2019, at Las Vegas, Nevada.

Counsel for Petitioner

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WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,997 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 13 day of December, 2019, at Las Vegas, Nevada.

Counsel for Petitioner