No._____

IN THE
SUPREME COURT OF THE UNITED STATES

T.B., Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for Writ of Certiorari to the
Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves teen "sexting" or, more specifically, the exchange of nude and partially nude "selfies" between consenting teenagers.[1] Petitioner T.B. was 15 or 16 years old when he asked for and received partially nude selfies from two girls he was dating, one girl was nearly two years older than T.B., and the other was a few months younger. For merely possessing these images, T.B. was found guilty of sexual exploitation of a child (possession of child pornography), was sentenced to two years of sex offender probation, and is required to register as a sex offender.

Colorado has broadly construed section 18-6-403, its sexual exploitation of a child statute, to cover a teenager's possession of partially nude "selfies" texted to him or her by other teenagers. This raises two related federal questions.

I. Does Colorado's interpretation of what constitutes child pornography violate a teenager's First Amendment right to protected speech and conflict with this Court's First Amendment jurisprudence?

II. Does petitioner's adjudication for possession of sexually exploitative material violate the Due Process Clause as no rational trier of fact could view the charged images and conclude these images are child pornography?

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[1] A "selfie" is "an image of oneself taken by oneself using a digital camera especially for posting on social networks." http://www.merriam-webster.com/dictionary/selfie. "Sexting" is defined as "the sending of sexually explicit messages or images by cell phone." http://www.merriam-webster.com/dictionary/sexting . As used in this petition, "sexting" will refer to the texting of semi-nude "selfie" photographs between teenagers younger than eighteen.

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The Colorado Supreme Court's decision in *People in the Interest of T.B.,* Case No. 17SC66, 455 P.3d 1049 (Colo. 2019) is attached as Appendix A. App. at 2a-15a. The Colorado Court of Appeals' opinion in Case No. 14CA1142, is published at 2016 COA 151M, 2016 WL 6123557, but is not yet published in an official reporter. App. 16a-32a. The trial court's pertinent findings in support of the adjudication Case No. 13JD15 are also attached. App. at 33a-35a.

JURISDICTION

The Colorado Supreme Court issued its decision on June 17, 2019. App. 2a. The state court denied T.B.'s petition for rehearing on August 19, 2019. App. 36a. This petition has been filed within the 90 days permitted by Supreme Court Rules 13.3 and 30.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend I

> Congress shall make no law … abridging the freedom of speech…..

U.S. Const. Amend XIV, § 1

> …. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 18-6-403(3)(b.5), Colo. Rev. Stat. [Possession of Sexually Exploitative Material or Child Pornography][2]

> (3) A person commits sexual exploitation of a child if, for any purpose he or she knowingly:
>
> . . . .
>
> (b.5) Possesses or controls any sexually exploitative material for any purpose….
>
> (5) (b) Sexual exploitation of a child by possession of sexually exploitative material pursuant to (b.5) subsection (3) of this section is a class 5 felony….

Section 18-6-403(2), Colo. Rev. Stat. [Pertinent Definition for "Sexually Exploitative Materials"]

> (2) As used in this section, unless the context otherwise requires:
>
> . . . .
>
> (d) "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.
>
> (e) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.
>
> . . . .
>
> (j) "Sexually exploitative material" means any photograph, motion picture, video, recording or broadcast of moving visual images, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

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[2] A complete copy of this statute is attached as Appendix G. App.42a-44a. The statute also proscribes the use of children to create "sexually exploitative materials," and the production and distribution of such materials. This petition will use the terms "sexually exploitative materials" and "child pornography" interchangeably unless otherwise noted.

STATEMENT OF THE CASE

I. T.B. was charged with and found guilty of sexual exploitation of a child based solely on his possession of four partially nude and nude "selfies" that were texted to him by girls he knew.

a. The charges

The state charged T.B. with two counts of sexual exploitation of a child as follows: "[T.B.] unlawfully, feloniously and knowingly possessed or controlled any sexually exploitative material for any purpose in violation of section 18-6-403(3)(b.5), C.R.S." CF at 40-41. Although the charging language is generic, the prosecution's proof at trial was aimed at showing that the charged images focused on the girls' breasts and were displays of "explicit sexual conduct" in the form of "erotic nudity." *See* §18-3-403(2)(d), (e).

b. The trial evidence

Petitioner T.B. met L.B. and E.H. at a Future Farmers of America conference in Hesperus, Colorado in September of 2012. R.Tr.(1.24.14), p.23,53. T.B. and L.B. were both 15, and E.H. was 17 at the time. *Id.* at 23,52. Over the next several months, T.B. became involved in consensual, long distance, dating relationships with each girl. *Id.* at 25,40-41. These relationships consisted primarily of phone and text contacts, as the teenagers lived in different towns. *Id.* T.B. dated E.H. in the Fall of 2012, and he dated L.B. in the Spring of 2013. *Id.* at 35,69,72. Each girl considered T.B. to be her boyfriend while they were dating. *Id.*

The teenagers frequently texted each other and exchanged many photographs by text, the vast majority of which were completely innocuous. *Id.* at 25,29-30,54-56. Both girls said T.B. had sent them a "selfie" that showed his erect penis. *Id.* at 35,47-48. He also asked each girl to send him a naked photograph of herself. *Id.* at 34, 56.

During the Fall of 2012, E.H. texted T.B. three nude selfies that she had taken on her cell phone. *Id.* at 55, 61; R.Exh.1-3, pp.54-57. These images showed E.H.'s breasts but obscured any other private parts. L.B., during the Spring of 2013, texted T.B. one semi-nude selfie, which showed her standing in front of a mirror with a towel wrapped around her with her breasts exposed.[3] *Id.* at 23, 35, 53; R.Exh.4,p.58.

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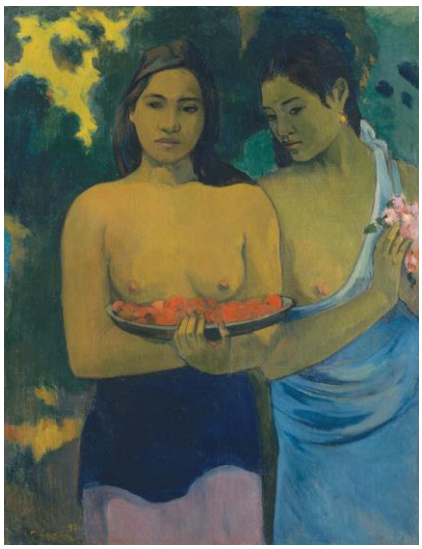
[3] The charged images of the teenage girls in this case, when objectively viewed, bear little resemblance to images that can be constitutionally proscribed as child pornography. For example, L.B.'s pose in Exhibit 4 is strikingly similar to the pose of the young woman on the left in the Gauguin painting replicated below. The exact same areas of L.B.'s body are covered, albeit with a towel.



c. The trial court's findings

Trial to the court[4] was held in January of 2014. The court, in finding T.B. guilty of both counts, rejected the defense argument that the images of E.H. and L.B. were simply nude images and, thus, could not qualify as sexually exploitative materials. (Tr.(1.24.14), pp.161,167-168); App. 34a-35a. *Compare New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982) ("Depictions of child nudity, without more, are constitutionally protected expression.").

The trial court rejected this argument in reliance on *Gagnon,* a CCA case which ruled that an image of a girl's cleavage or a part of her breast, not including the nipple, could qualify as a display of "explicit sexual conduct" in the form of "erotic nudity," depending on the surrounding circumstances.[5]

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[4] The court denied T.B.'s §19-2-107, Colo. Rev. Stat., request for a jury trial, a ruling the CCA affirmed on appeal. App. 22a-24a.

[5] In *People v. Gagnon*, 997 P.2d 1278, 1281-82 (Colo. App. 1999), the CCA determined explicit sexual conduct in the form of "erotic nudity," had two requirements: (1) the depiction of specified body parts, including a child's breast; and (2) the display must be for the purpose of real or simulated overt sexual gratification of one or more of the persons involved. The "person involved" in *Gagnon* was the adult photographer. As for the scienter or purpose requirement, the court noted "some courts have looked to a more concrete test, first articulated in *United States v. Dost*, 636 F.Supp. 828 (S. D. Cal. 1986)."

The *Gagnon* Court stated the *Dost* factors included: "1) whether the focal point of the visual depiction is on the child's **breasts,** genitals, or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, such as 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; and 6) whether the visual depiction appears to be intended or designed to elicit a sexual response in the viewer. *Id.* at 1282 (emphasized word "breasts" not found in the factors listed in *Dost*).

Notably, the federal court in *Dost* was construing a different definition of "sexually explicit

The trial court's entire findings vis-à-vis whether the four charged images, Exhibits 1-4, constitute "sexually exploitative material" are set forth here:

> Whether or not the photographs were erotic nudity, it's pretty clear that these photographs were sent in response to a request from [T.B.], and multiple requests as to [E.H.], for naked pictures after he had sent pictures of his erect penis to them. The photographs for that reason qualify as erotic nudity. He requested these pictures repeatedly. He even complimented [E.H.] after he received the photographs.

App. 34a-35a; (R.Tr.(1.24.14), pp.167-168).

These findings and the trial evidence establish nothing more than protected expression between the teenagers involved and, thus, are wholly insufficient to legitimately support T.B.'s adjudication for sexual exploitation of a child, i.e., possession of child pornography.

d. T.B. is sentenced to sex offender probation and is required to register as a sex offender.

On April 29, 2014, the court sentenced T.B. to two concurrent 2-year terms of sex offender probation and required him to register immediately as a sex offender. R.CF, p.504; Tr.(4.29.14), p.21. Terms of T.B.'s probation required, *inter alia*, that he stay away from children more than three years younger than himself (including his own 11-year-old

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conduct," one that requires the visual depiction of the minor be a "lascivious exhibition of the genital or pubic area." §18 U.S.C. §2255(2)(E). There can be no doubt that the charged images in this case do not qualify as child pornography or display "sexually explicit conduct" under the Federal Code. *See* CD-Exh. at 54, 56-58 (Exhibits 1-4); *see also United States v. Bennett,* 823 F.3d 1316, 1322 (10th Cir. 2016)(recognizing the Colorado child sexual exploitation statute may punish the possession of visual depictions that fall outside the federal definition of child pornography).

brother), attend a sex offender treatment program, submit to psychological testing at his own expense, follow restrictions on both his Internet use and visits to places like parks and pools, consent to all searches by his probation officer, and disclose to potential sexual partners "the nature and extent of [his] sexually offending behavior history prior to any sexual contact occurring." R.Supp., pp. 505-508 (listing twenty-three conditions of sex offender probation).

After T.B. served a significant portion of his sentence to probation, the court stayed the sentence for the pendency of his appeal, as allowed by Colorado Appellate Rule C.A.R. 8. The court denied T.B.'s request not to be required to register as a sex offender pending appeal, ruling it lacked any discretion to stay the registration requirement. Case No. 2013JD15, Order dated Aug. 18, 2016. Accordingly, T.B. has been required to register as a sex offender since he was adjudicated in April of 2014. *See* §16-22-108, Colo. Rev. Stat.

II. The Colorado Court of Appeals (CCA) affirmed T.B.'s adjudications in a divided decision.

On appeal, T.B. challenged the sufficiency of the evidence on two grounds:

> (1) Colorado's sexual exploitation statute, when correctly interpreted, does not apply to consensual teen sexting since such sexting involves no criminal conduct and creates no record of sexual abuse of a child; and,
>
> (2) if the statute can apply to teen sexting, there is still insufficient evidence that the four images found on T.B.'s phone qualify as "sexually exploitative materials" or displays of "explicit sexual conduct" and "erotic nudity," as those terms are statutorily defined and must be constitutionally construed.

See Case No. 14CA1142, Op.Brief at 5-6, filed Sept. 29, 2015.

T.B. argued to the CCA, as a matter of statutory construction, legislative intent and First Amendment requirements, that the sexual exploitation of a child statute could not apply to consensual teenage texting of nude selfies, because (1) the legislature intended to punish the possession of images that is a "permanent record of an act or acts of sexual abuse," and (2) such sexting was not integral to any criminal conduct. Accordingly, the girls' creation and sending of their images, as well as T.B.'s possession of the images, was protected speech.

T.B.'s position found support in the express language of the statute. Specifically, when the legislature initially banned possession of "sexually exploitative material" in 1988, it expressly found "that the mere possession or control of any sexually exploitative material results in continuing victimization of our children by the fact that such material is a permanent record of an act or acts of sexual abuse of a child." App. 42a [§18-6-403(1.5)]. Additionally, this Court's First Amendment jurisprudence holds that sexually explicit images of children cannot be proscribed simply because of their content. Such speech lacks First Amendment protection because it is "used as an integral part of conduct in violation of a valid criminal statute." *United States v. Stevens,* 559 U.S. 460, 471 (2010); *see also Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 250 (2002)(Court distinguishes child pornography, "speech that itself is the record of sexual abuse" from virtual child pornography, speech "that records no crime and creates no victims by its production").

The images in this case, like the virtual images held to be protected speech in *Free Speech Coalition,* create no record of sexual abuse. Since no criminal conduct was involved in creating the charged images, the images are protected speech, and there is insufficient evidence to support T.B.'s adjudication.

Alternatively, T.B. argued that, assuming *arguendo* that the sexual exploitation statute could apply to the teen sexting in this case, the evidence was still insufficient, pursuant to *Jackson v. Virginia,* 443 U.S. 307 (1979), since the charged images do not depict the required "explicit sexual *conduct*" in the form of "erotic nudity," as those terms are statutorily defined and as they must be limited by the First Amendment and this Court's precedent, which holds that (1) an image of mere nudity, even of a child, is constitutionally protected expression, (2) statutes proscribing speech must be narrowly construed, and (3) child pornography cannot be proscribed because of its content, but because it is a "record of sexual abuse of a child" and/or it is integral to criminal conduct. *Ferber, supra; Free Speech Coalition, supra; see also United States v. Williams,* 553 U.S. 285, 296 (2008); *Osborne v. Ohio,* 495 U.S. 103, 112-113 (1990).

Whether there was sufficient evidence depended in the first instance on the court's interpretation of the statute. Each member of the panel wrote a separate decision addressing whether the statute, when correctly interpreted, covered teen sexting.

a. The opinion authored by Judge Richman

Although the legislative declaration in §18-6-403(1.5) provides, consistent with this Court's precedent in *Ferber* and *Stevens*, that the possession of "sexually exploitative materials" or "child pornography" may be outlawed because "such material is a permanent record of an act or acts of sexual abuse of a child," Judge Richman found the legislative declaration to be irrelevant because he believed the statute clearly and unambiguously set forth the elements of the offense and these elements do not require that the charged images constitute a record of sexual abuse. App. 20a-21at ¶¶ 37-41.

Judge Richman refused to consider whether nude photographs created by teenagers of themselves were constitutionally protected speech, deeming this an unpreserved "as applied" challenge to the statute. App. 21a, ¶45. T.B.'s argument on appeal, however, was not a direct constitutional challenge to the statute as applied; his argument was that (1) the statute must be read in a constitutional manner, and (2) the statute would be constitutional if it were read as a whole, including its declaration that possession of child pornography creates a permanent record of sexual abuse of a child and the requirement that the offending displays show "explicit sexual *conduct*," not just nude images. *See* Op.Brief at 11-22.

Although Judge Richman discarded the legislative declaration because he deemed the language defining the offense to be unambiguous, he looked beyond the language of the statute to construe the meaning of "erotic nudity." In determining whether the

charged images qualified as sexually exploitative material, Judge Richman looked to the *Gagnon-Dost* factors to discern whether Exhibits 1-4 constituted the "erotic nudity" form of "explicit sexual conduct." *See* fn.5 at 5-6, *supra.* He found sufficient evidence they did because:

> [t]he focal points of the photographs … were the nude breasts of E.H. and L.B. and E.H.'s pubic area … the girls' poses were unnatural and suggestive: in one photograph, E.H. was standing in front of a mirror when she took a photograph of her nude body reflected in the mirror; in another photograph, L.B.'s shirt is pulled down below her breasts, exposing them. The photographs suggested a sexual coyness. And they appeared to be intended and designed to elicit a sexual response from the juvenile. Some of the text messages between the juvenile and L.B. further confirm the conclusion that the juvenile requested pictures of her for the purposes of sexual gratification and arousal.[6]

App. 20a at ¶33.

Again, and as with the trial court's factual findings, the evidence cited by Judge Richman, shows nothing more than protected speech on the part of T.B. and the girls.

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6 Several of these factual findings lack record support. First, although both the CCA and the CSC find the focal point of the images of E.H. is on her pubic area, this is not so. *See* App. 20a, ¶33; App. 10a, ¶47. In the three images showing E.H, her pubic area is either not shown at all or is hidden by the way she has positioned herself. *See* Exhibits 1-3. Notably, the trial prosecutor never alleged any display of E.H.'s pubic area; he claimed only that the charged images focused on the girls' breasts. R.Tr.(1.24.14) at 155 ("In these cases, the focal depiction of all four of the images are on these young women's breasts."). And, second, as the CSC recognized, there is no shirt in the photo of L.B. App. 11a at n.13; Exh. 4.

In addition, both the CCA and the CSC rely on text messages between T.B. and L.B. to confirm that T.B. requested pictures for the purpose of sexual gratification and arousal and found sufficient evidence on that basis. *See* App. 20a, ¶33; App.11a, ¶53. However, no text messages were introduced as evidence at trial and, thus, as should have been obvious to the state appellate courts (and as was pointed out in petitions for rehearing in the CCA and CSC), they were not considered by the trial court and cannot be relied on to find sufficient evidence.

b. Judge Bernard's partial concurrence

Judge Bernard joined Judge Richman's opinion as to whether the girls' nude and partially nude images qualified as sexually exploitative material or erotic nudity. App.26a, ¶78. However, he declined to decide whether Colorado's sexual exploitation statute applied to teen sexting because the issue was not preserved at trial, and he believed any error was not plain or obvious.[7] App. 26a-27a at ¶¶82-86.

c. Judge Fox's dissent

Lastly, Judge Fox, like Judge Richman, applied de novo review to T.B.'s sufficiency of the evidence claim, but she would have vacated T.B.'s adjudications.

Judge Fox wrote in dissent:

> [O]ur juvenile justice system and the statute at issue, targeting sexual exploitation of children, were never intended to reach imprudent or irresponsible behavior by and among juveniles. Here, a seventeen-year old and a fifteen-year old each voluntarily sent texts containing partially nude photographs (or sexts) to their then-boyfriend, T.B., who was then sixteen years old. The record does not show that T.B. forwarded or shared those photographs. And although both teen girls also received sexts from T.B. they were not prosecuted.
>
> ….
>
> …. Consensual teen sexting is worlds apart from a predator's sexual exploitation of a child. Criminalizing the conduct at issue here under the sexual exploitation statute—section 18-6-403(3)(b.5)—turns a law that was intended to shield minors into a sword to use against their imprudent conduct. The expansive

[7] After the CCA decided T.B.'s case, the Colorado Supreme Court resolved the disagreement amongst the CCA judges and held that de novo review applies to all sufficiency of the evidence claims, preserved or not. App. 6a at ¶25, citing *McCoy v. People,* 442 P.3d 379 (Colo. 2019). Accordingly, the CSC addressed the merits of both prongs of T.B.'s sufficiency of the evidence claim on its certiorari review.

> interpretation given by the trial court, and affirmed here, could just have easily have led to charges against the teen girls, the putative victims here. Surely, that is not how the legislature intended section 18-6-403(3)(b.5) to be applied.

App. 27a-29a at ¶¶87, 92. Judge Fox expressed particular concern over the onerous consequences of T.B.'s adjudications, which included, for example, mandatory sex offender registration, restrictions on dating and the use of any Internet service, and a ban on contact with children over the age of three without prior permission. *See id.* at ¶¶98-99 (listing eleven restrictions that are part of T.B.'s probationary sentence and eight potential adverse consequences arising from adjudications in delinquency for sex related offenses).

III. The Colorado Supreme Court [CSC] in a divided decision also affirmed.

The CSC granted certiorari to decide the following issue:

> Whether the court of appeals misconstrued section 18-6-403(3)(b.5), C.R.S. (2016)[8], in concluding that the evidence was sufficient to support the juvenile defendant's adjudication for sexual exploitation of a child.

Case No. 17SC66, Order dated Aug. 21, 2017.

a. The CSC majority holds that Colorado's sexual exploitation statute applies to teen sexting of partially nude images and that child pornography or "sexually exploitative material" need involve any criminal act or sexual abuse.

Like the CCA, the majority found that the language of the statute did not require the proscribed material to reflect a permanent record of sexual abuse of a child,

[8] The CSC cited to the then-current statutes because the relevant provisions had remained unchanged since 2012 (the statute in effect at the time of the alleged offenses) except where specifically noted in the opinion. This petition uses the same convention.

notwithstanding the legislative declaration. App. 7a-8a, ¶¶ 29-33. It also rejected T.B.'s contention that (1) "his reading of the statute is necessary to avoid constitutional infirmities" and (2) "the creation of teenage nude selfies is constitutionally protected speech to the extent that the images are neither obscene nor the product of abuse." App. 8a, ¶34.

The CSC did not actually analyze whether teen sexting and the images in this case were protected speech or whether its expansive authoritative construction of the statute would unconstitutionally impinge on substantial protected speech, although these issues were certainly before the court. Rather, the CSC, both rejected and side-stepped these issues when it concluded the statute was unambiguous, and, thus, the "canon of constitutional avoidance has no application." *Id.*

The court's failure to consider the constitutional ramifications of its statutory interpretation of §18-6-403(3)(b.5) was not justified as a matter of state law or First Amendment jurisprudence. *See, e.g., See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 66 (1994) (to avoid constitutional danger zone in statute proscribing the interstate transportation of visual depictions of minors engaged in sexually explicit conduct, Court applies scienter requirement to both interstate commerce element and to the use of minor, even though the "most natural grammatical reading of statute" would apply scienter only to transportation element); *see also Duprey v. Anderson,* 184 Colo. 70, 518 P.2d 807, 810-811 (1974) (court interprets "may" to mean "shall" to avoid constitutional infirmity arising if county clerk's duty to send notice to purged electors was

discretionary); *see also* § 2-4-201(1), C.R.S. ("In enacting a statute, it is presumed that: (a) Compliance with the constitutions of the state of Colorado and the United States is intended; (b) The entire statute is intended to be effective; and (c) A just and reasonable result is intended").

In a passing footnote, the CSC states that T.B. "does *not* claim that section 18-6-403 is unconstitutional as applied to him." App. 8a, fn. 9. While it is true that T.B. did not raise an independent "as applied" challenge to the statute on appeal, he consistently argued that the exploitation statute had to be interpreted consistently with the First Amendment and the legislative declaration, which both recognize that speech cannot be criminalized unless it is integral to criminal conduct and/or involves a record of sexual abuse of a child. Since the teen sexting underlying this case involved no criminal behavior, T.B.'s conduct could not, consistent with the First Amendment and the legislative declaration, be covered by the sexual exploitation statute.

T.B. argued in the CSC that if the statute were not narrowly construed, it would be unconstitutional as applied to him. Once the CSC interpreted the statute so broadly that it covered the nude images he possessed, he argued on rehearing:

> Let there be no doubt. T.B. does, in fact, contend that the sexual exploitation of a child statute *as interpreted by the majority and applied to him* violates his First Amendment right to Free Speech. Both his possession of a girlfriend's texted nude image and his request for a nude picture are Protected Speech, as was both girls' taking and texting of their own image(s). Neither a facial nor or an as applied challenge to the statute was fully ripe until this Court interpreted the statute as broadly as it did.

At the conclusion of its opinion the court characterized its First Amendment holding as follows:

> We hold that section 18-6-403(3) need not be read to limit sexually exploitative material to images that depict "an act or acts of sexual abuse of a child." Such a limitation is neither warranted by the plain language of the statute nor required to avoid First Amendment concerns.

App. 12a, ¶55. This holding is contrary to the legislative declaration in §18-6-403(1.5) and this Court's holdings in *Ferber* and *Stevens*.

b. The majority relies on expansive language from inapplicable federal case law to find sufficient evidence that the charged images are "sexually exploitative material," i.e., displays of "explicit sexual conduct" in the form of "erotic nudity."

The majority examined the charged images and concluded there was sufficient evidence to find the charged images constitute "erotic nudity" under §18-6-403(2)(d).

> Because the sexually explicit content of the photos and the circumstances surrounding their creation, including T.B.'s direct and repeated solicitation of them, demonstrate they were made for the purposes of T.B.'s "overt sexual gratification" we conclude the trial court properly considered them erotic nudity for purposes of the sexual exploitation statute.

App. at ¶ 22.[9]

[9] The CSC appeared to use the phrase "sexually explicit content" in a colloquial sense to indicate that the images are somewhat sexy or sexually suggestive. The statute defines "explicit sexual conduct" as "sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement." §18-6-403(2)(e). An objective view of the charged images would recognize that they are devoid of "sexually explicit" *conduct* as that phrase is typically defined in statutes banning child pornography. *See* fn.3, supra at p.4; Exhibits 1-4; *see also* 18 U.S.C. §2256(2)(A) (defining "sexually explicit conduct").

The CSC concluded that "the *Dost* factors provide a useful general framework for analyzing whether an image is the kind the General Assembly intended to encompass within its definition of 'erotic nudity' for the purpose of the sexual exploitation of a child statute." App. 10a, ¶46; *see* fn. 5, *supra* at 5-6. Relying on these factors, in lieu of the legislature's actual words, the court found the partially nude images here qualified as "erotic nudity" and that the evidence supported T.B.'s adjudications.

The court specifically held that the following factors should be considered in determining whether images qualify as sexually exploitative material (a display of "explicit sexual conduct" in the form of "erotic nudity"):

1) whether the focal point of the depiction is on the breasts, genitals, or pubic area of the child;

2) whether the setting, pose, or attire depicted is sexually suggestive, considering the age of the child; and

3) whether the depiction appears staged to suggest a willingness to engage in sexual activity.

App. 10a at ¶ 46. The court stated these "factors are not exclusive, and a court may determine that an image is 'for the purpose of real or simulated overt sexual gratification or stimulation' under section 18-6-403(2)(d) without satisfying all of the factors." *Id.*

The scope of images and speech captured by the above factors is staggering and veers far from the First Amendment requirement that most speech is constitutionally protected unless it is integral to criminal conduct. *See, e.g., Stevens, supra; Ferber, supra.*

c. The dissent would find insufficient evidence as it does not believe the statute includes T.B.'s conduct since he was not a "person involved" in the display and because of constitutional concerns.

The two-justice dissent would have reversed, because (1) the dissent did not believe the prosecution had proven that the juvenile committed sexual exploitation of a child, pursuant to a correct statutory interpretation of "erotic nudity," and (2) it was concerned that the majority's broad construction of the statute gave rise to a number of potential constitutional infirmities. *See* App. 12a-15a (Gabriel, J., dissenting). As it relates to the issue on which T.B. seeks certiorari, the dissent wrote:

> [C]onstruing section 18-6-403 so broadly as to encompass a teenager's request that another teenager send a nude selfie strikes me as potentially implicating a juvenile's right to free speech. This is particularly true here, where the conduct did not involve any sort of physical manipulation or compulsion but rather encompassed a group of teenagers doing what teenagers often—albeit perhaps foolishly—do, namely, text nude selfies to one other.

App.15a at ¶ 81.

d. The CSC's suggestion that Colorado's new possession of private images statute, section 18-7-109, will necessarily cure the harsh results in this case in future cases is belied by its holding that the images here are displays of "explicit sexual conduct."

The CSC suggests that Colorado's new possession of private images statute, §18-1-709, which makes juvenile possession and/or exchange of "sexually explicit images" a civil infraction, will in the future prevent the harsh result it has approved in T.B.'s case. *See* App. 3a-12a, ¶¶3, 19, 26, 39-40, 55. This is not correct; the court's holding that the

partially nude images in this case constitute "sexually exploitative material" and "erotic nudity" will allow future felony prosecutions for teen sexting at the discretion of state prosecutors.

The term "sexually explicit image" in the new statute, unlike the terms "explicit sexual conduct" and "erotic nudity" in §18-6-403, has no scienter requirement. It simply means any depiction of "the external genitalia or perineum or anus or buttocks or pubes of any person or the breast of a female person." App. 51a [§18-7-109(8)(b)]. The new law, House Bill 18-7-109, will still allow teens to be prosecuted for felony possession of sexually exploitative materials, if the state can prove the exchanged images are something more than mere images of the enumerated body parts listed in §18-7-109(8)(b). *See* App. 47a, 51a [§§18-7-109(2),(8)(b); 18-6-403 (3)(b.5), Colo. Rev. Stat. (2018)].

If the state can prove an image constitutes "sexually exploitative material," it can still prosecute the juvenile for the felony, because the juvenile's conduct would not be "limited to the elements of the petty offense of possession of a private image by a juvenile, as described in section 18-7-109(2)." App. 47a. Since the majority holds that the partially nude images in this case satisfy all the elements of felony sexual exploitation of a child, conduct like T.B.'s would not be "limited to the elements of the petty offense of possession of a private image by a juvenile," and teens who are identically situated to T.B., except that their conduct occurs after January 1, 2018, may still be prosecuted under the sexual exploitation of a child statute. *See* §18-6-403(3.5), C.R.S. (2018).

REASONS FOR GRANTING CERTIORARI

I. Given the role of cell phones in our society and human nature, teen sexting is a phenomenon that is not going away. In T.B.'s case, the sexting involved the exchange of nude and partially nude images between teenagers. In other cases, the images have been more explicit. *See, e.g., In re S.K.,* 215 A.3d 300 (Md. 2019) (girl adjudicated for distribution of child pornography for texting friends images of herself engaged in lawful sexual activity); *State v. Gray,* 189 Wash.2d 334, 401 P.3d 254, 258 (2017) (boy adjudicated for distribution for the unsolicited texting of an image of his erect penis to adult woman), aff'g, *State v. E.G.*, 377 P.3d 272, 278 (Wash. App. 2016) (court notes strong policy argument that sexting cases should not be brought under the state's dealing in depictions statute, but finds the case before it is not a "sexting case").

Whether some or all of this juvenile speech in the form of teen sexting is protected speech is an important question. Under this Court's First Amendment precedent, the teen sexting in T.B.'s case has all the hallmarks of protected speech. This can be seen in a brief review of applicable First Amendment precedent.

Visual images are part of free speech and expression and, thus, are protected by the guarantees of the First Amendment. *Kaplan v. California,* 413 U.S. 115, 119-120 (1973). Subject to limited exceptions, no law restricting freedom of speech may be enacted. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010).

This Court first considered laws banning child pornography in *New York v. Ferber,* 458 U.S. 747 (1982), and held that production of child pornography could be regulated, even if it did not qualify as obscenity. *Id.* at 765; *see also Osborne v. Ohio,* 495 U.S. 103 (1990) (upholding ban against possession of child pornography).

Courts originally interpreted *Ferber* as having defined a broad category of unprotected expressive content—visual depictions of sexual conduct involving children, with the caveat that the "sexual conduct" depicted must be suitably defined. *See Stevens*, 559 U.S. at 470 (acknowledging that language in *Ferber* may have created this erroneous impression); *see also People v. Hollins,* 971 N.E.2d 504, 517-519 (Ill. 2014) (J. Burke, dissenting). This broad reading of *Ferber* was called into question in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002), and it was rejected outright by the Court in *Stevens.* Now, it is understood that child pornography may be constitutionally proscribed, not because of the offensive nature of what it portrays, but because it is "an integral part of conduct in violation of a valid criminal statute." *Stevens, supra* at 471, quoting *Ferber, supra* at 759, 761.

In *Free Speech Coalition*, the Court struck down on First Amendment grounds a federal statute that criminalized sexually explicit images that appeared to include children but were not in fact made by using real children. Since the making of such "virtual child pornography" did not harm any child, the First Amendment was violated by restricting the related speech. The Court distinguished *virtual* child pornography from child pornography: "In the case of the material covered by *Ferber,* the creation of the speech is

itself the crime of child abuse," and with virtual child pornography "there is no underlying crime at all." *Id.* at 254. The Court observed that "[i]n contrast to the speech in *Ferber*, speech that is the record of sexual abuse, [virtual pornography] records no crime and creates no victims by its production." *Id.* at 250.

Free Speech Coalition seemed to view crime prevention as the core reason why the Court would deny constitutional protection to child pornography. It "clarified that child pornography was limited to those images that are the 'record of sexual abuse' and that sexually explicit images of minors that are 'neither obscene nor the product of sexual abuse' retain the protection of the First Amendment." 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, 697 (2010).

This Court in *Stevens* confirmed this reading of *Free Speech Coalition* when it struck a law that banned depictions of "animal cruelty" on First Amendment grounds. In doing so, the Court clarified *Ferber* as it resoundingly rejected the government's argument that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." *Stevens, supra* at 470.

In *Stevens,* the Court emphasized that exceptions to free speech are extremely limited. For material to be non-protected speech and banned as child pornography, it

must be "integral to criminal conduct." *Id.* at 468, 471. *See, e.g.,* Haynes, *The Age of Consent: When is Sexting No Longer "Speech Integral to Criminal Conduct"?*, 97 Cornell L. Rev. 369, 392-397 (2012) ("After *Stevens,* Sexting Prosecutions are 'Presumptively Invalid.'"); *The Supreme Court 2009 Term Leading Cases,* 124 Harv. L. Rev. 239, 247 (2010).

When, as in T.B.'s case, "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Free Speech Coalition, supra* at 251. Since the texted images created by L.B. and E.H. did not involve sexual abuse of a child or any criminal conduct, possession of the images cannot be banned without violating First Amendment guarantees. *See Stevens, supra.*

All of this applicable precedent was presented to the state appellate courts below and, yet, the courts interpreted Colorado's sexual exploitation of a child statute so broadly that it now covers possession of partially nude images and images that do not involve any criminal conduct whatsoever. This interpretation of a criminal statute unconstitutionally subjects individuals to punishment for protected speech.

II. One look at the images in this case should have resulted in an acquittal. With respect to the image of L.B., it is simply an image of a teenager displaying her breasts; with respect to E.H., the only private parts shown on any of the three images are her breasts. Although the images may have been meant to communicate sexual interest or sexiness, there is nothing beyond protected speech in these images. Pursuant to

Jackson v. Virginia, supra, T.B.'s adjudications violate the Due Process Clause as no rational finder of fact would find these materials constitute sexually exploitative material.

III. Sexual exploitation of children statutes are meant to protect children. To brand T.B., a child, as a sex offender and require him to register as one for the rest of his life is not only wrong, it is not allowed when the statute is fairly and constitutionally read, in light of the statute's actual language and declared legislative purpose and this Court's First Amendment precedent.

IV. Freedom of expression is an important constitutional right. Teenagers, too, have this right. None of the facts found by any of the state courts to support T.B.'s adjudications constitute anything other than constitutionally protected speech.

V. Colorado's expansive interpretation of its sexual exploitation of a child statute casts a wide net; it captures a substantial amount of protected speech. Not only is T.B. liable for possession of child pornography under §18-6-403, the girls who took and texted the semi-nude images of themselves to T.B. could be prosecuted for the even more serious felonies of production, dissemination, and possession with intent to distribute child pornography. App. 43a [§18-6-403(3), (5)(a)]. And even if the girls never texted their image(s) to anyone, they would still be guilty of possessing child pornography, i.e., possessing the photograph they had taken of themselves. Surely this scenario is not justified by §18-6-403, a statute meant to protect children from sexual

exploitation, not to irrationally and "irreparably brand" them as registered sex offenders. *See, e.g.*, App. 27a-32a; *T.B., supra* at ¶¶98-100 (Fox, J., dissenting).

Colorado's interpretation of sexually explicit materials is so expansive vis-à-vis nude images or what it deems to be "explicit sexual conduct" in the form of "erotic nudity" that the statute covers partially nude images, which are clearly protected speech. *See Ferber, supra.*

Over the years, the state court has altered and expanded the definition of "sexually explicit materials," beyond that which may be lawfully regulated as "child pornography." *See* App. 20a, *T.B.* at ¶¶ 32-33 (partially nude photograph of teenager may qualify as child pornography if, for example, the depiction suggests "sexual coyness") (citing *People v. Gagnon,* 997 P.2d 1278 (Colo. App. 1999), which held photographs that show a teenager's partially exposed breasts, not including a nipple, may qualify as sexually exploitative materials in the form of "erotic nudity"). *Gagnon's* broad interpretation of §18-6-403 is not supported in the language of the statute and is inconsistent with this Court's First Amendment precedent, which recognizes that (1) any definition of child pornography must be sufficiently precise to avoid infringing on protected expression, and (2) the reason child pornography lies outside the realm of protected expression is not because of its content, but because its creation is integral to criminal conduct. *See Stevens, supra;* Haynes, *The Age of Consent: When is Sexting No Longer "Speech Integral to Criminal Conduct"?*, 97 Cornell L. Rev. 369, 392-397 (2012).

CONCLUSION

Petitioner T.B. respectfully asks this Court to grant his petition and review the decision of the Colorado Supreme Court affirming his adjudication for sexual exploitation of a child based simply on his possession of nude and partially nude images consensually texted to him by other teenagers.

In the alternative, T.B. asks this Court to grant a writ of certiorari, vacate the Colorado Supreme Court's decision, and remand with instructions that the state court reconsider its decision in light of *United States v. Stevens*. Under the First Amendment standard enunciated in *Stevens* and earlier cases, the images in this case are protected speech as they involve no criminal conduct, and T.B. should not be branded a sex offender and required to register as a sex offender for the rest of his life, simply because he possessed partially nude images of peers on his phone.

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