No. _____

In The
Supreme Court of the United States
October Term, 2021

_____

Walter Crayton,
petitioner

v.

Commonwealth of Massachusetts,
respondent

_____

Petition for Writ of Certiorari
to the Appeals Court of the Commonwealth of Massachusetts

_____

Counsel of record for petitioner
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Submitted April 12, 2021

Question Presented

Did the Massachusetts Court violate the First and Fourteenth Amendments by convicting and imprisoning Mr. Crayton for possessing a photograph of five naked children standing "in order of height and development" with their arms around each other's backs while three of them held consecutively numbered placards at their sides, and in the absence of other aspects suggesting a prurient focus?

Should this Court grant *certioari* to resolve continuing conflicts among the state and federal courts over how to differentiate child pornography from mere depictions of nude children?

Parties to the Proceedings

The parties are listed in the case caption.

Petition for a Writ of Certiorari

Petitioner Walter Crayton respectfully prays for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

Citations to the Opinions Below

The opinion of the Massachusetts Appeals Court declaring a photograph to be child pornography and upholding Mr. Crayton's conviction, docket number 2019-P-1593, appears at Appendix *. It is unreported.

The order of the Massachusetts Supreme Judicial Court denying further appellate review docket number FAR-27918. Appears at Appendix *. It too is unreported.

Proceedings Directly Related to This Case

Mr. Crayton has filed a notice of appeal in the Massachusetts Appeals Court challenging the trial court's denial of his motion to vacate one of his conditions of probation. The case is *Commonwealth v. Walter Crayton,* docket number is 2021-P-0261. The order denying his motion was issued on February 17, 2021.

Statement of Jurisdiction

The Massachusetts Appeals Court entered its decision on its docket on November 6, 2020 (App. **). The Massachusetts Supreme Judicial Court denied Mr Crayton's Application for Further Appellate Review on January 15, 2021 (App. at 6). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Relevant Constitutional and Statutory Provisions

The First Amendment provides in pertinent part: "Congress shall make no law... abridging the freedom of speech...."

The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law...."

Mass. General Laws. ch. 272, § 29C states in pertinent part:

> Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:
>
> ***
>
> (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than $1,000 nor more than $10,000, or by both such fine and imprisonment for the first offense, not less than five years in a state prison or by a fine of not less than $5,000 nor more than $20,000, or by both such fine and imprisonment for the second offense, not less than 10 years in a state prison or by a fine of not less than $10,000 nor more than $30,000, or by both such fine and imprisonment for the third and subsequent offenses.

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Introduction

While "depictions of nudity, without more, constitute protected expression," *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990), this case presents a contested issue capable of resolution only by this court: what and how much "more" is required to remove images of nude children from First and Fourteenth Amendment protection?

Petitioner was convicted of possessing six allegedly pornographic photographs of underage naked girls, only one of which the Massachusetts Appeals Court found to be "child pornography within the meaning of the statute." App. at 1. This one photograph shows five girls standing in descending order of height and perhaps age, smiling unselfconciously, with their arms around each other's backs and their genital and breast areas visible. Suppl.App. (sealed).[1]

The Appeals Court described the children's nudity as "the entire focus of the image." App. at 3. It claimed that the children were arranged in order of height and development. It found that the placards held at the sides of three of the girls were "carefully placed so as not to obsecure any genitals or breasts," App. at 3–4, and contrasted the photograph with "image[s] where 'the children are not shown in any unnatural poses.'"[2]

Mr. Crayton was convicted under the portion of the Massachusetts child pornography statute criminalizing possession of images of children under age eighteen "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child...." Mass. G.L. c. 272, §29C(vii).

In *New York* v. *Ferber*, 458 U.S. 747 (1982), this Court upheld a statute criminalizing the production and distribution of "lewd exhibition of the genitals." This case concerns what may be considered lewd and thus constitutionally valid grounds for punishment under the First and

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[2] Quoting *Commonwealth* v. *Rex*, 469 Mass. 36, 47, 11 N.E. 3d 1060, 1071 (2014).

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Fourteenth Amendments.

Various federal appeals courts have described "lewd" and its synonym, "lascivious"[3] as "commonsensical term[s]," *See, e.g., United States* v. *Frabizio*, 459 F.3d 80, 85 (CA1 2006); *United States* v. *Price*, 775 F.3d 828, 840 (CA7 2014); *United States* v. *Ward*, 686 F.3d 879, 882 (CA8 2012); *Shoemaker* v. *Taylor*, 730 F.3d 778, 785 (CA9 2013). But a review of case law indicates that except in cases of blatantly sexual displays such as *Ferber*, *supra*, 458 U.S. at 752; and *Osborne*, *supra*, 495 U.S. at 107 n. 1, 116, the two terms are not susceptible of consistent interpretation absent further direction from this Court.

Concise Statement of the Case

1. *Trial*

Copies of six photographs depicting naked children fell out of Mr. Crayton's pocket while he struggled with officers after a shoplifting incident. T4/104-06,[4] 126-27. Crayton continued struggling and was placed in custody. T4/109, 130. An officer took custody of the photos. T4/112-114.

An expert witness testified that the one image ultimately found pornographic by the Massachusetts Appeals Court showed five naked girls "standing smallest to largest," with breasts and genitals unobscured, the smallest holding the number 1, the second "holding a 2," and the "tallest and largest" holding the number 5. T4/157. Two girls had their heads tilted to the side. *Id.*

The other photographs included headers or URLs mentioning or indicating search results for "nude girls," "nude girls 14," T4/163, 166, 168-69; or "nudism-naturism," T4/171. The URL for one photo included the term "pikabu," which the expert had seen in other child pornography cases. T4/175. Several photos were from Russian web sites. T4/166, 168, 173-176. The expert

[3] "'Lascivious' is no different in its meaning than 'lewd." *United States* v. *Wiegand*, 812 F.2d 1239, 1243 (CA9 1987)

[4] "T" stands for the trial transcript, followed by the volume and page numbers.

testified that child pornography often "originated in Eastern Europe and Russia where the laws are not as stringent as here." T4/167. There were no headers, URLs, or other writing on the photo found pornographic by the Appeals Court. T4/158.

Mr. Crayton moved for a required finding of not guilty at the conclusion of the Commonwealth's case due to insufficient evidence , T5/13–14, and again at the close of all the evidence. T5/31. Both motions were denied. *Id.* Mr. Crayton was convicted of all six counts of possessing child pornography, T5/87-89, and, in a subsequent hearing without a jury, of second or subsequent offense on all counts. T6/25.

The judge agreed that under state law, possession of the six photographs constituted only a single violation of the statute, T7/34, and sentenced him accordingly to six years to six years and a day in prison on the charge. T7/37. Mr. Crayton filed a timely notice of appeal. App. at 7.

2. Appeal

Mr. Crayton argued a single issue on appeal: that the photographs were not lewd and were thus non-pornographic under the First and Fourteenth Amendments. The Appeals Court found that it "need go no farther than reviewing Exhibit 10, which was the basis of the count on which the defendant was sentenced." App. at 4. The appeal was denied on the basis of the photograph marked as Exhibit 10.

State proceedings terminated with the Massachusetts Supreme Judicial Court's denial of Mr Crayton's Application for Further Appellate Review on January 15, 2021. App. at 6.

Reasons for Granting the Petition

This case is well-suited to unknotting the tangle of child pornography case law created since *Osborne, supra.* By granting the writ, this Court can resolve the disagreements among the circuits and states on the subject, *see infra,* without constraint by the limits of *habeas corpus* review.

1. Current case law provides state and federal courts with inadequate, contradictory guidance regarding the nature of lewd or lascivious exhibitions of children's genitalia, thus leaving courts and individuals unsure of what is or is not protected by the First Amendment.

In *Ferber*, *supra*, 458 U.S., at 756, this Court found "that the States are entitled to greater leeway in the regulation of pornographic depictions of children" than would be permitted in cases of obscenity involving adults, but cautioned that "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. *Id.,* at 764. *See also United States* v. *Williams*, 553 U.S. 285, 289 (2008) ("The broad authority to proscribe child pornography is not, however, unlimited"). *Ferber* found that "[t]he term 'lewd exhibition of a the genitals'" "sufficiently describe[d] a category of material the production and distribution of which is not entitled to First Amendment protection." 458 U.S., at 765. In *Osborne, supra,* 495 U.S., at 111, 113-14, this Court upheld a statute proscribing possession of such images.. But the lack of meaningful definitions of "lewd" and "lascivious" has led to inconsistency in the courts regarding what may or may not be constitutionally proscribed.

As the Eleventh Circuit has remarked, "what constitutes a forbidden lascivious exhibition 'is not concrete'...." *United States* v. *Holmes*, 814 F.3d 1246, 1251 (CA11 2016). The problem is of long standing. The First Circuit has said that "[w]hatever the exact parameters of 'lascivious exhibition,' we find it less readily discernable than the other, more concrete types of sexually explicit conduct" listed in the federal child pornography statute. *United States* v. *Villard*, 885 F.2d 117, 121 (CA1 1989). Those parameters are no more discernable today. In *State* v. *Bolles*, 541 S.W.3d 128 (Tex. Crim. App. 2017), the court was reduced to paraphrasing Justice Stewart's famous concurrence to *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring):

> [W]e shall not attempt further to define the kinds of material we understand to be child pornography; and perhaps we could never succeed in intelligibly doing so. But we know it when we see it.

Bolles at 143. This would be a useful standard only if one were to assume everyone saw "it" the same way.

In the oft-quoted case of *United States* v. *Dost*, 636 F. Supp. 828, 832 (SD Cal. 1986),[5] the judge listed six factors to be used to clarify what may or may not be proscribed. The Massachusetts Court purported to rely on these factors in the case at hand, App. at 2, as have several federal circuits and state supreme courts. *See, e.g, Doe* v. *Chamberlin*, 299 F.3d 192, 196 (CA3 2002); *United States* v. *Rivera*, 546 F.3d 245, 252-53 (CA2 2008); *Shoemaker* v. *Taylor, supra,* 730 F.3d at 785; *People ex rel. T.B.*, 445 P.3d 1049, 1059 (Colo. 2019); *People* v. *Lamborn*, 185 Ill. 2d 350, 708 N.E.2d 350, 354–55 (Ill. 1999).

At least one of the *Dost* factors – "whether the focal point of the visual depiction is on the child's genitalia or pubic area" – seems contrary to the language of *Osborne*: "[t]he crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks…." 495 U.S. 103 at n. 11; *quoted* in *Sullivan* v. *Marchilli,* 827 F.3d 197, 200 (CA1 2016). Perhaps more importantly, as the First Circuit cautioned in *United States* v. *Frabizio*, *supra*, 459 F.3d at 88:

> [T]he *Dost* factors have fostered myriad disputes that have led courts far afield from the statutory language. One dispute is, for example, how many of the factors must be present in an image for it to qualify as "lascivious." [Cites omitted.] Another dispute is about what the specific factors mean.... As one commentator observed, "the Dost test has produced a profoundly incoherent body of case law." A. Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 953 (2001).

Accord, United States v. *Courtade,* 929 F.3d 186, 192 (CA4 2019). But as Prof. Adler writes in

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[5] *Aff'd sub nom. United States v. Wiegand*, *supra*, 812 F.2d at 1244. The 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." *Id.*

The "Dost Test" in Child Pornography Law: *"Trial by Rorschach Test,"* (2016),[6] "[a]lthough courts routinely criticize the 'Dost test,' it is the reigning—and indeed the only—definition of 'lascivious exhibition' in child pornography law."

Frabizio showed understandable skepticism regarding the *Dost* factors, but asserted that "[t]here is every reason to avoid importing unnecessary interpretive conundrums into a statute, especially where the statute employs terms that lay people are perfectly capable of understanding," 459 F.3d, at 88.[7] It thus eliminated any objective basis for evaluating alleged pornography. The Eleventh Circuit further elasticized the standards by stating that "[w]hile the pictures needn't always be 'dirty' or even nude depictions to qualify, screening materials through the eyes of a neutral factfinder limits the potential universe of objectionable images." *United States* v. *Holmes*, supra, 814 F.3d, at 1251.

In *Ferber*, *supra,* 458 U.S. at 773, this Court found a New York pornography statute constitutional based in part on the understanding that "the reach of the statute is directed at the hard core of child pornography.... Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd [exhibitions] of the genitals.'" Several courts have relied on these words in upholding similar state statutes, s*ee, e.g., Staley* v. *Jones,* 239 F.3d 769, 788 (CA6 2001); and this Court echoed them in *Osborne* by pointing out that "the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." *Id.*, at 119. These cases contemplate a greater judicial role in determining the First Amendment sufficiency of child pornography prosecutions than *Frabizio* and similar cases would allow. As C.B. Hessick writes in *The Limits of Child Pornography*, 89 Ind. L.J. 1437, 1455-1456 (2014), "We cannot rely on legislative definitions because child pornography is a constitutional category, which makes it necessarily

[6] in Refining Child Pornography Law: Crime, Language, and Social Consequences (C.B. Hessick, *ed.,* U. Mich. 2016) at 87.

[7] *accord United States v. Price,* 775 F.3d 828, 840 (CA7 2014).

independent from legislative policy preferences."

Given the "less discernable" meaning of lewd or lascivious exhibitions, *Villard*, *supra*, it should not be surprising that appellate courts have construed the terms far more expansively than this Court contemplated in *Ferber* and *Osborne*, and in wildly different ways. In *Shoemaker*, *supra*, 730 F.3d, at 785, for example, the Ninth Circuit found six photographs pornographic due to the presence of several *Dost* factors: "nudity, expressions of sexual coyness, focus on genitals and pubic areas, and girls 'arrayed for the sexual stimulation of the viewers.'" But its description of those photographs provides no basis for finding these factors present other than the protected category of nudity. One of them, for instance, "portrays a nude girl, from the knees up, sitting on the edge of a sailboat. Her breasts and pubic hair are visible." *Id.*, at 781. But in *United States* v. *Perkins*, 850 F.3d 1109, 1122 (CA9 2017), the same court reviewed a photograph described in terms not meaningfully different from the *Shoemaker* photo discussed above and came to the opposite conclusion:

> Other than the fact that the subject is nude, the image lacks any traits that would make it sexually suggestive.... *See also Dost*, 636 F. Supp. at 832 ("[T]he visual depiction may not constitute a 'lascivious exhibition' of the genitals, despite the fact that the genitals are visible."). The subject is not posed in a sexual position with, for example, "her open legs in the foreground." *Dost*, 636 F. Supp. at 832. She is not pictured with any sexual items. She is sitting in an "ordinary way for her age." *Id*. Indeed, if the subject were clothed, this would be a completely unremarkable photo.

Similarly, in *United States* v. *Amirault*, 173 F.3d 28, 35 (CA1 1999), the First Circuit held that :

> [T]he only truly striking aspects of the photograph to be the girl's nakedness and her youth. These factors alone are not enough to render the photo "lascivious."

The Eighth Circuit, however, upheld a conviction upon finding that the the trial court's "emphasis on whether or not the videotapes themselves are actually lascivious [was] somewhat misplaced," and that "[a] reasonable jury could conclude that...videos of teenage minor females disrobing and weighing themselves in the nude cannot reasonably be compared to innocent family photos, clinical depictions, or works of art." *United States* v. *Johnson*, 639 F.3d 433, 439

(CA8 2011).[8]

Johnson, whatever its merits, raises another unresolved issue: it acknowledges that "mere nudity" cannot be grounds for conviction, but suggests that no one knows what "mere nudity" means, *Id.*

The lower courts' contradictory conclusions regarding the meaning of a child's gaze further demonstrate the arbitrariness of the terms "lewd" and "lascivious." In *Amirault*, 173 F.3d, at 33, for instance, the First Circuit found nothing "in the girl's expression that demonstrates a 'clear willingness to engage in sexual activity," pointing out that "her gaze is averted from the viewer." Yet in *United States* v. *Overton*, 573 F.3d 679, 687 (CA9 2009), the Court adopted the trial court's finding that the child was posed with her head down, and that "[t]he hair in the child's face and arms partially covering her breasts suggests sexual coyness or reluctance." In *Frabizio*, *supra*, 459 F.3d, at 86, it found lascivious significance in the fact that the girl in each of three photographs looked "directly at the camera," In *United States v. Larkin*, 629 F.3d 177, 185 (CA3 2010), the Third Circuit found similar significance in the girl "sheepishly looking into the camera," and in the inference that "[t]he positioning of her head as resting on her shrugged shoulders as she attempts a smile appears to be at the direction of the photographer rather than a natural pose for a child of her age," a description applicable to many family photographs.

These cases, read together, impress upon the reader that a photograph showing any gaze in any direction may be lascivious. As the First Circuit remarked in *Amirault*, 173 F.3d at 33,

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[8] In *Johnson*, unlike here, the defendant created the challenged images by surreptitiously filming the teenagers. *Id.,* at 436. The court nonetheless evaluated the videos themselves under the usual "lasciviousness" standard, explaining that "even images of children acting innocently can be considered lascivious if they are intended to be sexual," *id.*, at 440, a separate issue from the one presented here, where there is no direct evidence of the photographer's intent.

In Mr. Crayton's case, the Appeals Court found it "apparent that the picture is designed to elicit a sexual response in the viewer," App. at 4, thus raising the separate issue of whether a viewer or possessor of an image may be held responsible for the unknown creator's intent.

*"*any expression or posture that does not show an overt willingness to engage in sexual activity could be construed as coy...." Or, as stated in *United States* v. *Hill*, 322 F. Supp. 2d 1081, 1086 (SD Cal. 2004), *s.c.* 459 F.3d 966 (CA9 2006):

> The fifth *Dost* factor measures coyness or the minor's apparent willingness to engage in sexual activity. Almost any facial expression--or lack thereof--could fairly be described as one of these. A young girl looking straight at the camera, as in Image 1, could be perceived as willing to engage the viewer. But a naked child looking away from the camera, as in Image 2, or covering her face with her hands, could be coy. Not much help here.

The Connecticut Supreme Court further muddied the waters by finding a reasonable inference of "coyness" in the fact that a child in a photograph was covering her genital area with her hand. *State* v. *Sawyer*, 225 A.2d 668, 679 (Conn. 2020), suggesting that either the presence or absence of genitalia in a photograph may be grounds for conviction. Absent further direction from this Court, the cases merely create confusion.

In *Sullivan v. Marchilli, supra,* 827 F.3d, at 200, the First Circuit properly cited *Osborne* and *Ferber* on the distinction between nudity and lewdness, but then ignored them, finding that:

> Because there is nothing in the record at odds with our common experience that girls of her age and degree of physical maturity are virtually never seen naked at a beach, and because parents are not known to make records like this for the family album, one is at a loss to imagine why such a photograph would be taken except to exploit the adolescent sexuality, or why it would be kept by anyone not engaged in pediatrics or law enforcement except to stimulate and gratify a sexual attraction to minors.

Id. The Utah Supreme Court similarly found that "the very fact that a child is depicted nude in a location commonly associated with children's daily, public activities, is indicative of the photograph's design to sexually arouse pedophiles." *State* v. *Morrison*, 31 P.3d 547, 555 (Utah 2001). *Frabizio*, *supra*, 459 F.3d, at 86, went so far as to reverse the burden, holding that:

> The subjects of the photographs, who are of an age when girls normally are clothed even when in nature or in a stream, are completely unclothed (except for some jewelry), and the settings of the photographs provide no ready explanation that makes the nudity indisputably innocent."

These cases contradict not only *Osborne* and *Ferber*, but also *Amirault*, 173 F.3d, at 33,

where the First Circuit described a beach setting as "a natural landscape that, unlike a bedroom or boudoir, does not evoke associations of sexual activity." Yet the Second Circuit later tacitly adopted this portion of *Amirault* by noting that nudity "is to be expected to some degree" at a beach as opposed to "potentially sexually suggestive locations." *United States* v. *Spoor*, 904 F.3d 141, 149–50 (CA2 2018). But in *United States* v. *Hill*, *supra,* 459 F.3d at 968, 972, the court found "partially nude children" "provocatively and unnaturally dressed" because of the photograph's beach setting.

After assuming that state courts would not "widen the possibly invalid reach of the statute" by expansively construing the term "lewd," 458 U.S. at 773, *Ferber* declared that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.*, at 773–74. As shown by the cases cited above, it was overly optimistic. Mr. Crayton's case provides this Court the opportunity to establish more definitive, less malleable principles for guiding that face-by-face analysis.

2. <u>This Court can provide guidance to lower courts by holding that a photograph of five nude, happy girls with their arms around each other's backs in a natural setting cannot be found pornographic consistently with the First and Fourteenth Amendments.</u>

The case at hand exemplifies the arbitrariness of child pornography decisions. The Massachusetts Appeals Court described the offending photograph as follows:

> Exhibit 10 depicts five naked girls standing side by side, facing front, with their arms around each other. They are arranged in order of height and development. The girl on the viewer's right (the least developed girl) is holding a placard with a "1" on it. The placard is positioned so that it does not obscure either her own genitals or breasts or the genitals or the breasts of the girl next to her. The girl next to her is holding a placard with a "2" on it. Again, the placard is positioned so that it does not obscure either her own genitals or breasts or the genitals or breasts of the children next to her. The girl on the viewer's left (the most developed girl) is holding a placard with a "5" on it. The placard is held out away from the other girls, and positioned so that it does not obscure the fifth girl's genitals or breasts.

Decision at 3. "The unnatural ordering of the girls with the placards corresponding to their

development, carefully placed so as not to obscure any genitals or breasts, adds to the lewdness of the image," the Court concluded. *Id.*, at 3–4.

But while the Court acknowledged that "nudity alone is not enough to render a photograph lewd," *id.,* at 3, its focus on the placards' non-functionality makes it clear that the children's nudity alone is the basis for its finding of lewdness. If the placards had been used to heighten the viewer's attention to the girls' genitals, they might have suggested lewdness, as in *United States* v. *Hill*, *supra*, 459 F.3d, at 972-73, where "[t]he girls' clothing was opened so as to reveal their breasts and pubic areas," or *United States* v. *Wilder*, 526 F.3d 1, 12 (CA1 2008), where "[i]n each image, the child is largely unclothed, and the clothing she is wearing is limited to black thigh-high stockings, a white garter, and a white lacy hat. Her chest and genital area are unclothed."

Further, the girls are "unnaturally ordered" only if we assume that their ordering was meant to correspond to sexual development rather than height or age.[9] Two of the girls do not hold placards. Under the Appeals Court's reasoning, if none had held placards there would have been little basis for finding the photograph lewd, even though all of them would have been just as nude.

We cannot know what the placards signify. Any attempt to find sexual meaning in them is speculative and insufficient for a finding of proof beyond a reasonable doubt. *See Clark* v. *Reeder*, 158 U.S. 505, 529 (1895); *United States* v. *Pothier*, 919 F.3d 143, 147 (CA1 2019).

The Appeals Court claimed that "[t]he nudity of the children is the entire focus of the image." App. at 3. While it cited this "entire focus" as an element of lewdness, it did so in reliance on other Massachusetts cases where the focus was on specific "intimate" body parts.

[9] The girl between those holding placards "1" and "2" seems to have slighly more breast tissue than the two other girls to the immediate left, while the girl second from the left seems less developed than all but the smallest and last.

Id.[10] Focus on such parts often indicates lewdness, such as in *United States* v. *Horn,* 187 F.3d 781, 789-790 (CA8 1999), where "[s]hots of young girls were freeze-framed at moments when their pubic areas are most exposed...and these areas are at the center of the image and form the focus of the depiction." *See also United States* v. *Mecham*, 950 F.3d 257, 266 (CA5 2020).[11] But the alleged focus on the children's nudity in the case at hand means only that they are nude. As in *United States* v. *Various Articles of Merch*., 230 F.3d 649, 657 (CA3 2000), "[t]he fact that their genitals are visible is incidental to their being nude, but it is not the focal point of any of the photographs." *Accord, Commonwealth* v. *Rex*, 469 Mass. 36, 47, 11 N.E. 3d 1060, 1071 (2014); *Amirault, supra,* 173 F.3d, at 35.

Finally, the Court declared that "[g]iven the nudity, posing, and touching, it is apparent that the picture is designed to elicit a sexual response in the viewer." App. at 4. But it is hard to imagine anything more comradely and less erotic than this photograph of five happy, relaxed girls with their arms around each other's backs. A pedophile might concievably be aroused by this or any photo of nude children, but if that were relevant, "a sexual deviant's quirks could turn a Sears catalog into pornography." *Amirault,* 173 F.3d, at 34; *accord United States v. Steen,* 634 F.3d 822, 829 (5th Cir. 2011) (Higgenbotham, J. concurring) ("A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic").

Although it is an obscenity rather than pornography case, *Various Articles of Merch., supra,* 230 F.3d at 657–58 provides an analysis of lewdness that should govern this case. It begins by discussing the work of David Hamilton, a well-known photographer whose work, it

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[10] "*Commonwealth* v. *Rollins*, 470 Mass. 66, 77 [18 N.E.3d 670, 681] (2014) ('girl's buttocks the focal point of the image'); [*Commonwealth* v.] *Sullivan*, 82 Mass. App. Ct. [293], 300 [971 N.E.2d 476, 483, (2012)] ('The focal point of the photograph is [the adolescent girl's] developing breasts and, to a lesser extent, her pubic area')."

[11] "Similar prosecutions involving images that zoom in on a minor's genitals...have been brought in many federal circuits as well as in state courts. *State* v. *Bolles*, 541 S.W.3d 128, 136-37 (Tex. Crim. App. 2017) (citing cases from the Sixth, Eighth, Ninth, and Eleventh Circuits)."

says, is found in many bookstores:

> Several aspects of these photographs make them sexually provocative: the majority of the photographs are in soft focus and the girls are often staring into the camera, unsmiling, with a sultry look; many of the photographs reveal girls in the process of taking off lingerie or other articles of clothing; some photographs are of nude or partially nude girls lying on beds; in some of the photographs, the girls are looking at their bodies in mirrors; some girls are lying or standing with their arms over their heads and their backs arched; in some photographs, the girls are touching their own breasts or sexual organs; and a few of the photographs show two nude or partially nude girls kissing.

It then compares those photographs with the ones at issue in the case before it:

> By contrast, the tone and situation of the photographs...are entirely non-sexual, and the photographs contain none of the sexually provocative elements that are present in Hamilton's photographs. None of the subjects are on beds or undressing or touching their bodies in a sexual way. The magazines instead consist of brightly colored photographs of nude children, teenagers, or adults playing or smiling and posing for the camera. Accordingly, the photographs in the magazines can neither be said to be depictions of lewd exhibitions of the genitals.

Id., at 658.

Under the cases cited above, Mr. Hamilton's photographs might constitutionally be found pornographic. But the images in Mr. Crayton's possession are indistinguishable from those found not to depict "lewd exhibitions of the genitals" in *Various Articles*.

As this Court observed in *Ashcroft v. Free Speech Coalitio*n, 535 U.S. 234, 254 (2002), "[i]n the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse." The children in this case were manifestly not abused. As in *Various Articles of Merch, supra*, 230 F.3d, at 657:

> [E]ven a most conservative, straight-laced, and puritanical viewer of the photographs could not responsibly claim that the photographs are "lewd".... It is true that the subjects in some of the photographs are posed for the camera, but they are not posed in a way "suggestive of moral looseness." All of the photographs are of smiling, happy, and playful subjects, and none can be deemed lewd by any standard.

And as in *Ashcroft,* 535 U.S., at 254, "there is no underlying crime at all." The photograph thus cannot be held pornographic.

3. This Court should grant *certiorari* in order to impose a constitutional limit on definitions of lewdness and lasciviousness such as the one set in *Commonwealth v. Perkins, supra.*

No formula can completely eliminate arbitrariness in the application of child pornography statutes. But it can limit it. As noted above, the Eleventh Circuit held in *Holmes*, 814 F.3d, at 1251, that images of children can be pornographic even without nudity. In *Perkins, supra*, 850 F.3d, at 1122. the Sixth Circuit found an image non-pornogaphic in part because "if the subject were clothed, this would be a completely unremarkable photo." Together, these cases suggest a principled, easily-applied rule for determining whether an image of a naked child deserves First and Fourteenth Amendment protection: if the child's genitals are displayed in a sexual manner, it might constitutionally be found pornographic.[12] If, however, the photograph would be innocent if the child were clothed, the child's nakedness cannot transform it into pornography.

The photo in Mr. Crayton's case is unremarkable but for the children's nakedness. This Court should grant *certiorari* and find that it cannot be the basis for a child pornography conviction consistently with the First and Fourteenth Amendments.

Conclusion

This Court should grant Mr. Crayton's petition for *certiorari.*

Respectfully submitted,

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[12] Mr. Crayton will not discuss whether a child's clothed genitalia may be found lewd or lascivious, since the issue does not arise in his case.