No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY BRANDON FREDRICKSON, *PETITIONER*

vs.

UNITED STATES OF AMERICA, *RESPONDENT*

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner requests leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to proceed in forma pauperis in this case in the Seventh Circuit under the Criminal Justice Act. The circuit clerk's notice of the finding of indigency and appointment of undersigned counsel is attached hereto.

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From : jeanette_king@ca7.uscourts.gov
To : mwbell@kirkwoodlaw.com, bbrebner@kirkwoodlaw.com
Sent : 7/14/2020 10:12PM
Subject : CJA eVoucher - c07_prod Notifying Counsel of Appointment

To: Murray Bell,

Date: 7/14/2020 8:12:30 PM.

This is to inform you that the Seventh Circuit Court of Appeals has appointed you to represent Timothy B. Fredrickson in case USA v. Fredrickson 7:20-AP-02051 before this court.

Thank you for accepting this appointment under the Criminal Justice Act. Please review the attached letter as it contains important information regarding appointments in the Seventh Circuit. (Letter to Counsel)

You may access this appointment via the CJA eVoucher program at www.ca7.uscourts.gov under the Criminal Justice Act section eVoucher login.

Regards,
Seventh Circuit Court of Appeals

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether Section 18 USC 2251(a) is overbroad in that it provides punishment for constitutionally protected activity in the inducement of consensual production and consensual private transmission of images depicting sexually explicit conduct that is not illegal in itself and is not child pornography.

Petitioner (Petitioner and Appellant below):

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Respondent (Respondent and Appellee below):

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PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy B. Fredrickson respectfully prays the Court issue a Writ of Certiorari to address the errors below in a federal criminal prosecution.

CITATION FOR OPINIONS BELOW

The ruling denying the Motion to Dismiss was delivered in the district court by oral pronouncement from the bench after oral arguments on January 17, 2020. That ruling of the district court is in the attached Appendix at page 11. No written ruling was filed. Judgment of sentence was entered in *U.S.A. v. Timothy Brandon Fredrickson,* Central District of Illinois, No. 4:17-40032, on June 5, 2020.

Mr. Fredrickson's appeal proceeded through the Seventh Circuit under No. 20-2051. The decision from the appellate court is in the Appendix at page 12. The appellate panel's decision was filed May 12, 2021, and is reported at *U.S.A. v. Timothy Brandon Fredrickson,* 996 F. 3d 821 (7th Cir. 2021)

JURISDICTION STATEMENT

The action was prosecuted in the United States District Court for the Central District of Illinois. This Petition arises from the Seventh Circuit after Mr. Fredrickson's conviction was affirmed by a panel of three judges on appeal. With the Seventh Circuit's denial of the Petition for Rehearing En Banc on June 16, 2021, this Court's jurisdiction is conferred by Rule 10 of the Rules of the Supreme Court of the United States. (App. 19)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner was prosecuted on the allegation of a violation of 18 USC 2251(a). In pertinent part, the statute provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . .any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce . . .including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

Petitioner claims that the statute is facially overbroad, and that the prosecution and conviction violates his First Amendment rights under the United States Constitution. Amendment One provides:

> Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Statement of the Facts

The investigation leading to the instant charge began when police learned Mr. Fredrickson had received photos and video from a sixteen year-old young woman who lived in Moline, Illinois. The investigation began in February of 2017. Mr. Fredrickson was twenty-seven years old at that time, and he lived in Davenport, Iowa. The police discovered twenty-four videos in Petitioner's possession wherein the girl had engaged in sexually explicit conduct while alone. The girl had produced the videos for Mr. Frederickson and transmitted them to him via cell phone. The videos included images of the girl displaying her genitalia and the act of masturbation, both of which are within the definition of "sexually explicit conduct" under 18 USC 2256(2)(A). A city of Moline, Illinois police detective described for the jury how Mr. Fredrickson was able to make and keep recordings of the videos the young woman had sent to him. The videos were

transmitted in January and on February 1, 2017. Through the detective, the Government provided extensive testimony describing the video evidence that was recovered from Mr. Fredrickson's phone pursuant to a search warrant. The prosecutor also placed into evidence the actual videos and still photos taken from the videos. (Trial Transcript [hereafter "Tr."] pp. 170-178) (Gov't Trial Exhibits 11 to 17A) The defense did not challenge the authenticity of the videos and did not object to their admission into evidence. On cross-examination of the detective, the defense established there was no evidence Mr. Fredrickson and the complaining witness had ever met in person. The two had first made contact through an application called Whisper. The Whisper application is an anonymous platform where a participant can keep his or her identity unknown. The young woman created all of the videos on her own, using her cell phone camera. Mr. Frederickson did not provide a phone or any other type of equipment to her. There is no evidence Mr. Fredrickson ever shared any of the images with anyone else, or that the young woman ever transmitted the images to anyone else. There is no evidence Defendant conveyed any threats to coerce the young woman into producing or sending the videos. The evidence recovered also included texts and photos exchanged between

the two that were not of a sexual nature. On redirect, the Government pointed out that while Mr. Frederickson did not give any physical items to the young woman, he did provide remote direction in the production of the videos. (Tr. 237-244) In her testimony, the complaining witness confirmed that she had never met Tim Fredrickson in person. In addressing Mr. Frederickson's direction in production of the videos, the young woman told the jury she made the videos, "Because Tim asked me to." She claimed she was " very uncomfortable" because of his age, and he had "convinced" her to produce the videos. On cross-examination, the young woman admitted Mr. Frederickson disclosed his age to her when they first met online, and that she chatted with him hundreds of times in January of 2017. He never made any threats of any kind toward her. She admitted she could have stopped communicating with him at any time. (Tr. 254-257)

Proceedings and Ruling

The Indictment was filed in the instant action on March 21, 2017. In a single count, the Government charged Mr. Fredrickson with Sexual Exploitation of a Child, in violation of 18 USC 2251(a) and (e). (R. Doc. 13) Although Section

2251 is entitled Sexual Exploitation of Children, the prohibited conduct set out above refers to a "minor". Under 18 USC 2256(1), a minor is defined as "any person under the age of eighteen years ." As stated, the videos included images of the girl displaying her genitalia and the act of masturbation, both of which are within the definition of "sexually explicit conduct" under 18 USC 2256(2)(A). There was no dispute that the cell phone transmissions of the videos from Illinois to Iowa would qualify as "communication" defined as interstate commerce. The Honorable Michael M. Mihm would eventually instruct the jury on this definition using the stock instruction. (R. Doc. 156, p. 21) Judge Mihm also heard and ruled upon Mr. Fredrickson's Motion to Dismiss on Constitutional Grounds before trial. The Motion to Dismiss on Constitutional Grounds with a supporting memorandum of law was filed January 7, 2020. (App. p. 2) Judge Mihm heard oral arguments on the motion in a telephonic hearing on January 17. (App. pp. 4-11) In his motion, Defendant stated facts very similar to those set out in the Statement of the Facts set out above. Among other things, Mr. Fredrickson stated that the discovery documents provided by the Government had shown two undisputed facts:

1) "In 2017, Defendant had developed a relationship with a sixteen year-old

girl. He is accused of asking the girl to send him photographic and video images that included images of the girl engaging in sexually explicit conduct while alone;

2) "There is no evidence that either of the two people involved intended to share the images with anyone else."

The Motion to Dismiss also asserted the following basic facts and constitutional arguments, and those assertions were supported in the attached memorandum:

1) "The statute does not prohibit conduct with a "child", but rather conduct with a "minor". It prohibits the inducement to create images of sexually explicit conduct that the Defendant knows will be transmitted using means of interstate commerce."

2) "If Mr. Fredrickson and the girl had met in person in either state, it would not have been illegal for Defendant to watch the girl engage in the sexually explicit conduct recorded in the images, or to use his phone or a camera to record her activity."

3) "Section 2251(a) is overly broad in prohibiting expression and communication of legal sexually explicit conduct. The statute violates the First

Amendment rights of the girl and the Defendant to direct, produce and communicate sexual expressions in photo and video graphic forms. The images do not record sexual abuse, and are not exempted from constitutional protection as child pornography."

4) "Congress could have easily provided less restrictive alternatives in the legislation by prohibiting the transmission of images of conduct that in itself was a violation of a valid criminal statute." (App. pp. 2-3)

The gist of the Government's written response rested on two points. The first was that the videos in question were indeed child pornography, and child pornography is not protected by the First Amendment. Secondly, the prosecutor argued the production of the videos is prohibited by state law in both Illinois and Iowa. (R. Doc. 146) In the telephonic oral arguments, the defense summarized the Supreme Court cases analyzed in the Argument, below, emphasized that the videotaping of acts that are not illegal in themselves, or not uniformly illegal throughout the United States, is an expression in free speech that is protected by the First Amendment. (App. pp. 4-11) The prosecutor argued "that child pornography and child exploitation is prohibited and is not permissible under the

First Amendment". The Government simply stated that "child pornography and sexual exploitation of a child is a carveout" that is not given First Amendment protection". The prosecutor made no attempt to define child pornography or child sexual exploitation. (App. 9-10) Judge Mihm ruled from the bench and issued no written ruling. Quite simply, the judge ruled, "I believe it's clear there is a carveout for child pornography to protect children under the age of 18 . . . and, I -- the motion to dismiss is denied." (App. p. 11)

The case went to jury trial on January 21, 2020, and the jury returned a guilty verdict on January 22. At sentencing on June 5, Judge Mihm sentenced Mr. Fredrickson to 200 months imprisonment. Notice of Appeal was timely filed June 18, 2020. (R. Doc's. 183 and 188)

REASON FOR GRANTING CERTIORARI

This is a constitutional issue of first impression that addresses an infringement of the First Amendment right to freedom of speech and expression in personal communications.

The Indictment was filed in the instant action on March 21, 2017. In a single count, the Government charged Mr. Fredrickson with Sexual Exploitation of a Child, in violation of 18 USC 2251(a) and (e). (R. Doc. 13) In pertinent part, the statute states under subsection (a):

"Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . .any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce . . .including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

With the Child Pornography Prevention Act (CPPA) of 1996, Congress defined "child pornography" in 18 USC 2256(8) to include a photographic or

video image that uses a "minor engaged in sexually explicit conduct". Under 2256(1), a "minor" is defined as any person under the age of 18. The crux of the issue lies in the fact the Supreme Court had carved out a freedom of speech exception to allow punishment related to "child pornography" long before the inception of the CPPA. The exception was carved out in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348 (1982). The *Ferber* decision did not define a "child" as any person under 18, and in fact did not define the term "child" in any way. The decision did uphold a conviction upon a state statute that punished use of a person "who is less than sixteen years of age to engage in a sexual performance". 458 US at 750, 102 S.Ct. 3351. At the same time, the Court did not define its use of the word "child" by the terms of that state statute.

Two subsequent Supreme Court cases relied heavily upon *Ferber* to determine that federal statutes were overbroad in their punishment of conduct related to the production of visual images. In *Ashcroft v. Free Speech Coalition,* 535 US 234, 122 S Ct 1389 (2002), the Court held that *Ferber* did not authorize the punishment of speech involved in the production of virtual child pornography produced by using computer-generated, virtual children. Because no actual child

was used in the production, there was no government interest in allowing punishment for the exercise of the First Amendment right of expression. In *U.S. v. Stevens*, 559 US 460, 130 S.Ct. 1577 (2010), the Court determined Congress could *not* punish the production of "animal crush' videos that depicted the killing of small animals. Again, the Government did not have a sufficient interest that would justify infringement on the First Amendment right to produce the videos. The Court distinguished the federal legislation in *Stevens* from a critical aspect that had motivated the *Ferber* decision. In *Ferber,* the Court held that state laws universally condemn *child* pornography, and the societal interests and protections in its prohibition were readily clear. In *Stevens,* the Court found that was not the case in regard to cruelty to animals. There was a wide divergence among the states as to the definition and severity of conduct that was prohibited by animal cruelty laws, and some states had no statutes at all prohibiting cruelty to animals. *Stevens,* 559 US at 471, 474-477, 130 S.Ct. at 1586- 1590 (2010)

Throughout the nation, 16 and 17-year-olds are granted legal permission to engage in sexual intercourse and other sex acts with persons their own age or older. Under 18 USC 2243(a), a person 16 years of age or older may legally engage in

sex acts with an adult. In dicta, the *Free Speech Coalition* opinion noted the federal age of consent at 16 while assailing the inclusion of 16 and 17-year-olds in the pornography statute. "Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 USC 2256(1). This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations." *Free Speech Coalition.* 535 U.S. at 246-247, 122 S.Ct. at 1400

The district court and the Seventh Circuit have decided the video images involved in this case are "child pornography", but those courts refused to define the term "child". Interpretation of a statute to abridge free speech requires application of strict scrutiny analysis. The lower courts have refused to engage that process. This Court must take the opportunity to strike down this statute as overbroad in violation of the First Amendment.

ARGUMENT

The statute is overbroad, and unconstitutional on its face, in that it provides punishment for constitutionally protected activity in the inducement of consensual production and consensual private transmission of images depicting sexually explicit conduct that is not illegal in itself and is not child pornography.

Burden of Proof and Standard of Review

A statute that explicitly prohibits speech in the form of expression on the basis of content is presumptively invalid, and the Government bears the burden of overcoming the presumption. To succeed in a facial attack, the proponent must establish that no circumstances could exist under which the statute would be valid, or prove that the statute lacks a "plainly legitimate sweep". *U.S. v. Stevens*, 559 US 460, 468, 473, 130 S.Ct. 1577, 1584, 1587 (2010) A content-based prohibition of speech can only stand if it can withstand **strict scrutiny**. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. *Ibid.* If a less restrictive alternative would serve the

Government's purpose, the legislature must use that alternative. *U.S. v. Playboy Entertainment Group, Inc.* 529 US 803, 813, 120 S Ct 1878, 1886 (2000).

The Panel's Error

The panel simply took its cues from the Government's brief and totally failed to address Mr. Fredrickson's arguments. Failure to address arguments can be easily interpreted as a concession that the arguments are valid. Neither the Government, nor the panel, addressed the standard of strict scrutiny or the Government's burden to prove there are no less restrictive means that would serve the Government's purpose.

The definition of the term "begging the question" has evolved in the last century. In common, contemporary parlance, a speaker or writer will use the phrase to maintain that a certain fact "raises" a question that could or should be "raised" in regard to that fact. In Mr. Fredrickson's instant petition, he identifies the defect in the panel's decision as begging the question in the legal sense. The origin of the phrase is traced to translations of Aristotle's explanations in Latin. It is originally a tenet of formal, classic logic. Aristotle termed the defective logic as

"*petitio principii*". Simply stated, a legal argument begs the question when it "assumes the very thing it is trying to prove". The rule of *petitio principii* is the essence of the concept commonly known as circular reasoning.

The *Merriam-Webster Online Dictionary*:

https://www.merriam-webster.com/words-at-play/beg-the-question

The panel failed to see the core of Mr. Fredrickson's analysis. His premise is that the video recordings the 16-year-old made at his request and direction do not meet the definition of child pornography as determined in *Ferber.* For that reason, the expression of communication between the girl and Fredrickson is protected speech, and the Government has failed in its burden to show that there is any exception that would allow it to punish this exercise of free speech. While Petitioner claims the photographic video images do not constitute child pornography, the panel merely states the obvious, i.e., that child pornography is not protected by the First Amendment.

The May 12 circuit decision shows its defect in logic at its beginning and at its end.

> He contends that because he could have lawfully
> watched the minor where she recorded the videos (Illinois)

> and where he received them (Iowa), the First Amendment shields him from prosecution under 18 U.S.C. § 2251(a). But child pornography's exclusion from the First Amendment's protection does not hinge on state law, so we affirm Fredrickson's conviction. (Slip Opinion, pp. 1-2; App. 12-13)
>
> * * * *
>
> Neither *Stevens* nor *Free Speech Coalition* created an exception to the rule of *Ferber* that child pornography is not protected under the First Amendment. We decline to do so as well. (Slip Op. 6-7; App. 17-18)

The Petitioner has never made any assertion to suggest that First Amendment protection would "hinge on state law". The argument Mr. Frederickson brought to this Court was not that *Stevens* or *Free Speech Coalition* "created an exception to the rule of *Ferber*". The argument is that if the speech in question is not child pornography, and it is not subject to any other exception to the right to free speech, the Government has violated the First Amendment with a facially overbroad statute.

Protected Speech

The panel's conclusion that "the First Amendment's protection does not hinge on state law" came directly out of the Government's brief. (Slip Op. 1-2; App. 12-13) Mr. Fredrickson squarely confronted that misdirected assertion in his reply brief. He referred to state laws concerning the legal age for engaging in sexual acts and activities only for the purpose of demonstrating that the age of consent is a factor in defining the overbreadth of the criminal statute. The age of consent is fully blurred on a nationwide basis and a bright line cannot be found. That state-to-state incongruity as to the legality of sexual activity and acts, based upon the age of the actors, is a major reason in showing that Section 2251 is overbroad.

In *Stevens*, this Court directly addressed a question of defining the type of speech content that could be prohibited by a federal statute. "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Stevens,* 559 US at 460, 130 S. Ct at 1584. The *Stevens* decision made it clear that the exemption to the constitutional protection of free speech that had been

established in *Ferber* for the broad category of child pornography was rooted in the fact that child sexual abuse was conduct similarly defined as a crime in every state in the union. The Court pointed to the *Free Speech Coalition* decision that concluded there could not be an exemption from free speech protection where no actual crime was depicted in the virtual images. For that reason, visual depictions could only be punished if they were making a record of an actual criminal act of abuse. 559 US at 471, 130 S. Ct. at 1586. The statute analyzed in *Stevens* prohibited dissemination of videos that depicted animal cruelty. The problem is that "animal cruelty" could be characterized by a wide variance in definitions and punishments nationwide, and in some states there were no animal abuse crimes at all. 559 US at 474-477, 130 S. Ct. at 1587-1590.

The panel in the instant case paid no heed to this foregoing point Mr. Fredrickson advanced in his opening and reply briefs. Instead, the panel summarily reached the opinion that Defendant had misinterpreted *Stevens* and *Free Speech Coalition.* On that course, the decision continued to beg the question: "*Stevens* did not suddenly confer First Amendment protection on some child pornography—i.e., pornographic images that stop short of depicting illegal child

abuse." The panel borrowed that quote from *United States v. Price,* 775 F.3d 828, 838 (7th Cir. 2014). Here again, the panel is using language for the circular proposition that Mr. Frederick cannot be protected on *this* child pornography because *Ferber* held *all* child pornography is subject to punishment. The *Price* case does not provide a proper analogy, factually or legally, for deciding the instant question.

The instant question is not whether the instant images are a particular type of child pornography that should be protected. The question is whether the instant images are child pornography at all. In *Price,* the defendant had taken "sexually explicit" photos of his own daughter when she was between 10 and 12 years old. "He put some of them on the Internet, and they have been implicated in at least 160 child-pornography investigations across the country. Price also kept a large stash of child pornography depicting other children, which he stored on two computers." 775 F.3d at 830 The defendant in *Price* was guilty of conduct very different than that of Mr. Fredrickson and dealt with images clearly within the classification of child pornography. More importantly, *Price* did not involve a constitutional challenge to the statute. That defendant merely raised challenges to jury

instructions and whether they were wrongly applied to certain images in evidence at trial. The Court found no error in the instructions, but specifically added this caveat to its holding:

> Nothing in this brief discussion addresses the definition of child pornography or limits the category to visual depictions of criminal child abuse. Child pornography remains categorically unprotected and thus fully proscribable. *Stevens* did not suddenly confer First Amendment protection on *some* child pornography—i.e., pornographic images that stop short of depicting illegal child abuse.
> *Price,* 775 F. 3d at 838 -839

The *Price* decision does not address the issue Mr. Fredrickson raised in this Court or provide a useful analogy on the instant issue. The question is not whether child pornography is categorically unprotected speech. The question is whether Section 18 USC 2251(a) is overbroad in that it punishes production of images that "do not qualify as child pornography." Rather than address the argument, the Government changed Petitioner's argument.

The Merits

Mr. Fredrickson's argument was twisted in different ways by the Government in the Seventh Circuit. The following two descriptions the

Government put forth summarize the general misrepresentation that runs through its brief. First, the Government wrongly asserts that Fredrickson is attempting to establish a bright line at age sixteen for defining images in child pornography:

> Fredrickson argues that sixteen is the operative age that should distinguish child pornography from adult pornography. His reasoning appears to stem from the New York statute at issue in *Ferber* as well as the age of consent in the state of Iowa. Def. Br. 10-31. But neither *Ferber* nor any other case cited by Fredrickson hinge on the production of such materials by persons over sixteen. In fact, *Ferber* specifically acknowledged the disparity across states in defining "child." *Ferber*, 458 U.S. 747, 764 n. 17. (Gov't. Br. 14)

As will be explained below in more detail, the Petitioner's opening brief in the Seventh Circuit did not propose a bright line rule for age sixteen regarding persons who are subjects in photo or video images in defining child pornography. Without addressing the core of Petitioner's argument, the Government then summarily concluded at various parts of its argument that the images involved in the instant case are "child pornography". Of course, that summary conclusion is offered in order to repeatedly state the proposition that *is not in issue* in the instant case, i.e. child pornography is not protected speech. For example, the Government argues:

> Here, Fredrickson's speech served his end goal: to persuade S.B. into creating and disseminating child pornography at his direction. This

> conduct is analogous to the conduct considered by courts in examining the constitutionality of § 2422(b), which prohibits the coercion or enticement of a child to engage in illegal activity. (Gov't Br. 19)

Mr. Frederickson's overarching argument is that the private "sexting" or other visual communications between S.B. and him did not constitute child pornography or depict any other illegal act. The speech must therefore be protected speech. Petitioner's references to the age of consent in New York and Iowa do not purport to establish a bright line. In fact, the defense argument is that the age of consent is fully blurred on a nationwide basis and a bright line cannot be found. That state-to state incongruity as to the legality of sexual activity and acts, based upon the age of the actors, is the reason that Section 2251 is overbroad. Mr. Fredrickson securely linked that argument to the *Stevens* decision at pages 15-16 of his opening brief in the Seventh Circuit.

The essence of the *Stevens* decision is that the Government cannot create a federal crime for producing or receiving images of acts that are recognized as legal in some states, but illegal in others. *Stevens,* 559 US at 474-477, 130 S. Ct. at 1586-1590. That rule is fully applicable to images of a sixteen-year-old like S.B. who is legally engaged in a sex act, i.e. masturbation. Like the varying state

statutory definitions of "animal cruelty", there is also a great variance of the definition of the age of consent across the nation.

A 2004 publication from the United States Department of Health and Human Services reported that the majority of states statutorily define the age of consensual consent at sixteen years of age: "[T]he age of consent varies by state. In the majority of states (34), it is 16 years of age. In the remaining states, the age of consent is either 17 or 18 years old (6 and 11 states, respectively)." *Statutory Rape: A Guide to State Laws and Reporting Requirements, Sexual Intercourse with Minors,* U.S. Dept of Health and Human Services (2004)

https://aspe.hhs.gov/report/statutory-rape-guide-state-laws-and-reporting-requirements-summary-current-state-laws/sexual-intercourse-minors#

Additionally, Petitioner previously pointed out the Supreme Court's reference to the sixteen and seventeen-year-old class: "Throughout the nation, 16 and 17-year-olds are granted legal permission to engage in sexual intercourse and other sex acts with persons their own age or older. Under 18 USC 2243(a), a person 16 years of age or older may legally engage in sex acts with an adult." The *Free Speech Coalition* opinion noted that federal age of consent while assailing the inclusion of 16 and 17-year-olds in the child pornography statute. "Under the

CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations." 535 U.S. at 246-247, 122 S.t at 1400 (Def. Seventh Cir. Open Br. 23-24,)

Mr. Fredrickson cited the legal age of consent of sixteen years in Iowa to illustrate the overbreadth of a federal penalty for conduct that is legal in most of the nation. He is serving 200 months in federal prison for producing and receiving images of S.B. engaged in legal sex acts. These are images of sex acts he could have legally encouraged and engaged in person in his own home in Iowa with S.B. In fact, he could have actually and legally engaged in consensual sexual intercourse or any other sex act with S.B. in his own home.

Last, the Government insisted that proof of a facial overbreadth requires proof of the statute's *substantial* infringement of free speech rights: "Thus, for § 2251 to be facially overbroad, it must prohibit 'a substantial amount of protected speech.'" *Williams*, 553 U.S. at 292. The Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (Gov't Br. 16)

While specific numbers may not be available, it is undeniable that a huge portion of the nation's sixteen and seventeen-year-olds own or possess cell phones, and a huge portion of that same population is sexually active or at least sexually curious. How many thousands of sixteen and seventeen year-olds share sexually explicit photos by phone with their boyfriends and girlfriends every day? And then, the Court must also consider the chilling effect that curtails the free speech communications of persons in this age group. There is clearly a sweeping infringement of free speech imposed by Section 2251's prohibition of communications with "minors", as that statutory definition of minors includes all persons at sixteen and seventeen years of age.

The Government did not address Mr. Fredrickson's arguments that show the absence of governmental interests under analyses that included references to the Congressional Findings of 1996 for the CPPA. Those arguments included explanation of specific defects in any purported justification under "Market Deterrence" or "Cost-Benefit Analysis'. (Def. 7th Cir. Open Br. 25-30)

The Congress failed to narrowly tailor the language of the statute to protect free speech, and the Government has failed in its burden in the instant case to

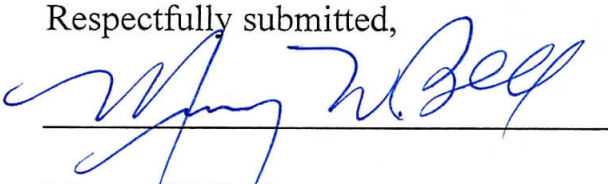
prove the statute was properly tailored to prevent an overly broad and sweeping violation of the right to free speech. The Government has not offered an explanation as to a compelling interest in restricting these communications for sixteen and seventeen-year-olds and the people with whom they would communicate. The presumption of the invalidity of the statute has not been overcome.

CONCLUSION

Throughout this nation, 16 and 17-year-olds are granted legal permission to engage in sexual intercourse and other sex acts with persons their own age or older. Under 18 USC 2243(a), a person 16 years of age or older may legally engage in sex acts with an adult of any age. Interpretation of a statute to abridge free speech in personal communications requires application of strict scrutiny analysis. The lower courts have refused to engage that process. This Court must take the opportunity to strike down this statute as overbroad in violation of the First Amendment.

TIMOTHY BRANDON FREDRICKSON

Respectfully submitted,



Murray W. Bell
Attorney for Petitioner

CERTIFICATE OF FILING

I, Murray W. Bell, hereby certify that on September 11, 2021, I filed the foregoing Petition by depositing the original and ten copies thereof in the United States mail to the Clerk of the United States Supreme Court, 1 First Street NE, Washington, DC 20543.

Murray W. Bell

CERTIFICATE OF SERVICE

I, Murray W. Bell, hereby certify that on September 11, 2021, I served the foregoing Petition by mailing one copy by email and US Mail to the following:

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Murray W. Bell

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY BRANDON FREDRICKSON, *PETITIONER*

vs.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI

APPENDIX

Contents

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Tuesday, 07 January, 2020 03:43:43 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY BRANDON FREDRICKSON, Defendant.	Criminal Case No. 17-cr-40032 DEFENDANT'S MOTION TO DISMISS ON CONSTITUTIONAL GROUNDS

In support of the Motion to Dismiss, Defendant states:

1. Mr. Frederickson is charged by Indictment with Sexual Exploitation of a Child under 18 USC 2251(a). The statute does not prohibit conduct with a "child", but rather conduct with a "minor". It prohibits the inducement to create images of sexually explicit conduct that the Defendant knows will be transmitted using means of interstate commerce. In 2017, Defendant had developed a relationship with a sixteen year-old girl. He is accused of asking the girl to send him photographic and video images that included images of the girl engaging in sexually explicit conduct while alone. The term "sexually explicit conduct" is defined by 18 USC 2256(1). The girl sent the images to Mr. Fredrickson via cell phone. The girl lived in Moline, Illinois, and Defendant lived in Davenport, Iowa at the time. If Mr. Fredrickson and the girl had met in person in either state, it would not have been illegal for Defendant to watch the girl engage in the sexually explicit conduct recorded in the images, or to use his phone or a camera to record

her activity. There is no evidence that either of the two people involved intended to share the images with anyone else.

2. Section 2251(a) is overly broad in prohibiting expression and communication of legal sexually explicit conduct. The statute violates the First Amendment rights of the girl and the Defendant to direct, produce and communicate sexual expressions in photo and videographic forms. The images do not record sexual abuse, and are not exempted from constitutional protection as child pornography. Congress could have easily provided less restrictive alternatives in the legislation by prohibiting the transmission of images of conduct that in itself was a violation of a valid criminal statute.

WHEREFORE, because the statute is overly broad in violation of the First Amendment, the Indictment must be dismissed.

__/s/ Murray W. Bell__

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Attorney for Defendant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal No. 4:17-40032
vs.	)	
	)	
TIMOTHY BRANDON FREDRICKSON,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL M. MIHM
TELEPHONIC MOTION HEARING
JANUARY 17, 2020; 9:03 A.M.
PEORIA, ILLINOIS

APPEARANCES:

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Jennifer E. Johnson, CSR, RMR, CRR
U.S. District Court Reporter
Central District of Illinois

Proceedings recorded by mechanical stenography; transcript produced by computer

a little louder, please?

MR. BELL: You bet I can.

Your Honor, the position is as stated, that this is an unconstitutional limitation of Mr. -- of the First Amendment rights to free speech. And for the history of these kind of cases and the Supreme Court's ruling on them, which started in 1982 with *New York vs. Ferber*, that was a case of child abuse, and in that case, the court was concerned about innocent children being abused for the purpose of making video or -- yeah, video or photographic images.

The interesting -- the interest the court addressed mostly was the market for children's -- child pornography is intrinsically related to the underlying abuse and was, therefore, an integral part of the production of such material, an activity illegal throughout the United States. It found that basically we were videotaping illegal behavior, and that was the basis -- a part of, a major part of the basis for the exclusion -- for upholding the law that forbid that.

You then move ten years down to *Ashcroft vs. Free Speech Coalition*, and this is a different kind of case because this deals with virtual children as

opposed to real children, but engaging in the same sort of behavior. Now, here the court ruled that they couldn't limit that activity because it wasn't a video recording of an illegal activity or abuse of a child. It was an artistic behavior, and it was an expression, and so they did -- the court did not find that the government could prohibit the underlying activity or the video-recording of it.

And then you move, of course, to *United States vs. Stevens* which was in 2010. This is an animal cruelty case. The issue in the case was the state really -- or the government was really shooting at the -- what they call crush videos. This is videos of, apparently, women crushing small animals, stomping them, killing them, making them squeal. And Justice Roberts wrote the opinion which -- in the case and focused on the fact that, among other things, the law as passed -- and it was Title 18 USC Section 48. The law that was passed illegalized virtually any behavior, including killing animals. And it -- even though the statute required that the activity be illegal, it didn't -- it was a problem because the state laws throughout the states are different on what constitutes illegality.

The court was concerned that it essentially allowed one state to transport or export its statutes into another state. And they pointed out that while not requiring cruelty, Section 48 did require that the depicted conduct be illegal.

Now, then the court pointed out there are many federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. And it points out hunting out of season for deer might constitute a crime and make a video of it illegal. The problem you have, of course, is all the hunting magazines and all the hunting shows on TV and all of that may or may not engage in illegal behavior. The court said specifically because the statute allows each jurisdiction to export its laws to the rest of the country, it extends to any magazine or video depicting lawful hunting so long as the depiction sold -- this was a Washington, D.C., case. So, if the magazine was sold in Washington, D.C., or the video show was shown in Washington, D.C., you have a problem.

Interestingly enough, I think inadvertently the government actually pointed out that there's a problem with its case. The government's brief

talks about the behavior being of a sexually explicit manner, which is actually the behavior of a 16-year-old masturbating, and the government claims that's a videotape that is illegal in both the state of Iowa and the state of Illinois. And I beg to differ. I've practiced in the state of Iowa for 30 years, and I've never seen a statute in Iowa that says masturbation is illegal. I will skip all the jokes you can say about that, but illegalizing masturbation is really problematic. The problem is, it's not illegal in Iowa, and it's not illegal to video it in Iowa.

If one reads the bottom of page four of the government's brief, you'll see that it is illegal because masturbation is specifically prohibited in Illinois -- or videoing masturbation of someone under 18. But when you read the Iowa statute, it says "who employ, use, persuade, induce, entice, coerce, solicit, knowingly permit, or otherwise cause or attempt to cause a minor to engage in a prohibited sexual act."

Well, masturbation is not prohibited in Iowa; therefore, the recording of this in Iowa would not be illegal.

So, our position is that it's an

unconstitutional limitation on freedom of speech, and, therefore, the case should be dismissed.

THE COURT: All right. Thank you.

Who's going to respond?

MS. MATHEW: Your Honor, this is Jennifer Mathew.

THE COURT: Okay.

MS. MATHEW: I'll be arguing the government's response in this matter.

THE COURT: Thank you.

MS. MATHEW: Your Honor, the courts are pretty clear throughout, ever since the *Ferber* decision, that child pornography and child exploitation is prohibited and is not permissible under the First Amendment.

Mr. Bell refers to the kind of -- the history of this case law from *Ferber* to *Ashcroft*, from *Ashcroft* to *Stevens*, but I believe his reliance on the *Stevens* case in order to make his point is misguided. The court, in the *Stevens* matter, Your Honor, used the *Miller* analysis and specifically referenced its prior decisions in both *Ferber* and *Ashcroft* in stating that, unlike in *Ferber* and *Ashcroft*, animal cruelty is a completely different topic. In *Ferber* and *Ashcroft*, the court found

that this category -- this category of speech, child pornography and sexual exploitation of children, is a carveout and is not subject to the same analysis that the court used subsequently in the *Stevens* decision.

In the *Ashcroft* case, Judge, the conversation is about virtual child pornography, and the court in that analysis was looking at virtual child pornography because there are no victims in virtual. It's virtual; there aren't real people. There aren't real people who now have to suffer the repercussions of these images and videos being memorialized.

Those aren't the facts of this case. In this case, we have a real victim. She is not virtual. The defendant solicited these specific depictions from her and then preserved those depictions. His behavior does not fall within the First Amendment. It is not protected behavior. There is a real victim who suffered real harm from his conduct, and because of that, we believe that the defendant's motion to dismiss based on the First Amendment should be denied.

THE COURT: All right. Thank you.

THE DEFENDANT: Your Honor, if I may?

THE COURT: Yes.

THE DEFENDANT: Counsel's argument is, I believe, to be very strong --

THE COURT: I'm sorry, hold on. Who's talking?

THE DEFENDANT: Like the statute --

THE COURT: I'm sorry?

MR. BELL: Tim, Tim, you're not arguing. Remain silent.

THE COURT: Yes. All right.

Well, with all due respect to Defense Counsel, I believe it's clear that there is a carveout for child pornography to protect children under the age of 18. We're not talking about a virtual situation here, and I -- the motion to dismiss is denied.

Now, the other motion is on the Speedy Trial grounds. Who's going to argue that for the defense?

MR. BELL: This is Murray Bell. I will argue that one also.

THE COURT: Yes. Let me ask you, Mr. Bell, I note in your pleading you reference the transcripts from the various hearings. I took the time to look at those, and I could be mistaken, but I believe in each and every one of those the Court made a

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-2051

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY B. FREDRICKSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 17-CR-40032 — **Michael M. Mihm**, *Judge.*

ARGUED FEBRUARY 18, 2021 — DECIDED MAY 12, 2021

Before BRENNAN, SCUDDER, and KIRSCH, *Circuit Judges.*

BRENNAN, *Circuit Judge.* The First Amendment does not protect child pornography. In challenging his conviction for inducing sexually explicit videos from a minor, Timothy Fredrickson asks us to reconsider this well-established principle. He contends that because he could have lawfully watched the minor where she recorded the videos (Illinois) and where he received them (Iowa), the First Amendment shields him from prosecution under 18 U.S.C. § 2251(a). But

child pornography's exclusion from the First Amendment's protection does not hinge on state law, so we affirm Fredrickson's conviction.

I

In December 2016, S.B.,[1] a sixteen-year-old girl from Illinois, began chatting on the internet with Fredrickson, a twenty-seven-year-old man from Iowa. Over the next two months, S.B. and Fredrickson communicated through social media, including Whisper, Snapchat, and Facebook. Eventually their conversations turned sexually explicit, with S.B., at Fredrickson's request, sending him images and videos of her. When Fredrickson sent flowers to S.B.'s high school in February 2017, her mother became suspicious and discovered the relationship, later contacting police. A search of Fredrickson's cell phone revealed he had been recording the videos and saving the images S.B. had sent him via Snapchat. Fredrickson possessed at least fifteen sexually explicit videos of S.B. on his phone.

A federal grand jury indicted Fredrickson for sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a), which provides in relevant part:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in … any sexually explicit conduct for the purpose of producing any visual depiction of such conduct … shall be punished … if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or

[1] We continue the district court's practice of identifying the minor by her initials.

> transported in or affecting interstate or foreign commerce by any means . . . .

18 U.S.C. § 2251(a); *see also* 18 U.S.C. § 2256(1) (defining a "minor" as "any person under the age of eighteen years"). Fredrickson moved to dismiss the indictment, citing Illinois and Iowa state laws. To him, the First Amendment's lack of protection for child pornography depended on the material depicting child sex abuse. S.B.'s videos, in contrast, showed conduct that he could have lawfully viewed in person within either state. So, Fredrickson argued, § 2251(a) criminalized protected expressive speech. After a brief hearing, the district court orally denied his motion and ruled there was no First Amendment defense to the prosecution. A jury found Fredrickson guilty, and the district court sentenced him to 200 months' imprisonment.

II

On appeal Fredrickson renews his argument from the district court: § 2251(a) is unconstitutionally overbroad. Under First Amendment overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). And "[t]he overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal quotation marks and alteration, omitted); *see United States v. Bonin*, 932 F.3d 523, 537 (7th Cir. 2019) (same), *cert. denied*, 140 S. Ct. 960 (2020). We review de novo this constitutional challenge to a statute. *United States v. Burrows*, 905 F.3d 1061, 1063 (7th Cir. 2018).

Supreme Court precedent presents a problem for Fredrickson's argument, however. The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." Yet in *New York v. Ferber*, the Court held that child pornography was categorically unprotected under the First Amendment. 458 U.S. 747, 763 (1982) ("Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not, [sic] incompatible with our earlier decisions."); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which ha[ve] never been thought to raise any Constitutional problem." (footnote omitted)). Since *Ferber*, the Court has upheld the constitutionality of statutes criminalizing child pornography's possession under Ohio law, *Osborne v. Ohio*, 495 U.S. 103, 108–22 (1990), and its solicitation under federal law, *Williams*, 553 U.S. at 288, 297–304. Only virtual child pornography has retained First Amendment protection because it "is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002) (quoting *Ferber*, 458 U.S. at 759). This precedent is prologue to any constitutional challenge, as here, to the criminalization of child pornography.

Despite all this, Fredrickson insists that his conviction under § 2251(a) contravenes the First Amendment. He reads the post-*Ferber* caselaw—specifically, *United States v. Stevens*, 559 U.S. 460, 471 (2010), and *Free Speech Coal.*, 535 U.S. 234 at 250—as conditioning the lack of constitutional protection for child pornography on the criminality of the substantive conduct depicted. True, *Stevens* noted that "*Ferber* presented a special case" under the First Amendment as "[t]he market for child

pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *Stevens*, 559 U.S. at 471 (quoting *Ferber*, 458 U.S. at 759, 761). And as discussed, virtual child pornography receives First Amendment protection, according to *Free Speech Coalition*: "In contrast to the speech in *Ferber*," virtual child pornography "records no crime and creates no victims by its production." *Free Speech Coal.*, 535 U.S. at 250. For Fredrickson, S.B.'s videos did not depict child abuse, so *Stevens* and *Free Speech Coalition* protect him from prosecution under § 2251(a).

But this position misunderstands both cases and their relation to *Ferber*. *Stevens* concerned a First Amendment challenge to a statute, 18 U.S.C. § 48, that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty." 559 U.S. at 464. So when "the Court mentioned child pornography" in *Stevens*, "it did so only in passing and then only to reject an analogy between it and depictions of animal cruelty and to decline the government's invitation to recognize the latter as a new category of unprotected speech." *United States v. Price*, 775 F.3d 828, 838 (7th Cir. 2014). In other words, "*Stevens* did not suddenly confer First Amendment protection on *some* child pornography—i.e., pornographic images that stop short of depicting illegal child abuse." *Id.* at 839. Because *Stevens* involved animal cruelty videos and not child pornography, Fredrickson's gloss on *Ferber* "was not likely to be hidden" within that decision. *Id.* We rejected Fredrickson's argument in *Price*, and we do the same here.

Fredrickson's reliance on *Free Speech Coalition* is similarly flawed. There, the Court confronted the constitutionality of

the Child Pornography Prevention Act, 18 U.S.C. § 2251 *et seq.*, which "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children." *Free Speech Coal.*, 525 U.S. at 239. In describing the relevant precedent, the Court stated that "under *Ferber*, pornography showing *minors* can be proscribed whether or not the images are obscene[.]" *Id.* at 240 (emphasis added). Taken on its own terms, *Ferber* did not limit its definition of child pornography to depictions of minors only under the age of sixteen. Instead it cited several state statutes setting the age of a minor at under seventeen or eighteen. 458 U.S. at 764 n.17. *Free Speech Coalition*'s description of *Ferber* was—and remains—accurate. *See Free Speech Coal.*, 535 U.S. at 240, 249–51.

To be sure, *Free Speech Coalition* treated virtual child pornography differently. 535 U.S. at 250. But it did so based on the lack of a sufficient causal connection between the virtual images and the actual harm to minors. *Id.* So *Free Speech Coalition* may have distinguished *Ferber* but did not undermine it. Unlike the virtual child pornography in *Free Speech Coalition*, the harm to S.B. from Fredrickson's inducement of sexually explicit videos "necessarily follow[ed] from the speech." 535 U.S. 234 at 250. As recognized in *Ferber*, these depictions "are a permanent record" of S.B.'s victimization, 458 U.S. at 759, a reality she reiterated during her victim impact statement at sentencing. Her consent, then, makes no difference. "Congress may legitimately conclude that even a willing or deceitful minor is entitled to governmental protection from 'self-destructive decisions' that would expose him or her to the harms of child pornography." *United States v. Fletcher*, 634 F.3d 395, 403 (7th Cir. 2011). Neither *Stevens* nor *Free Speech Coalition* created an exception to the rule of *Ferber* that child

pornography is not protected under the First Amendment. We decline to do so as well.

Section 2251(a) is constitutionally valid. From the moment Fredrickson persuaded S.B. to record and send him sexually explicit videos, he committed a federal crime—one "fully proscribable" under the Constitution. *Price*, 775 F.3d at 839. Under the First Amendment, § 2251(a) suffers from no overbreadth problem because child pornography enjoys no constitutional protection.

AFFIRMED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 16, 2021

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 20-2051

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TIMOTHY B. FREDRICKSON,
Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois.

No. 17-CR-40032

Michael M. Mihm,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Defendant-Appellant on May 26, 2021, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.