No. 22-7751

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

David Paul Bickford — PETITIONER
(Your Name)

vs.

State of Maryland — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Maryland Court of Special Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Paul Bickford 455298
(Your Name)
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(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. If the First Amendment case of New York v Ferber, 458 US 747 (1982), describes the essential elements required for "all legislation in [the] sensitive area" of producing images of minors, then how can a charging document allege a cognizable offense related to a parent's candid filming of their own child without alleging the essential elements required by New York v Ferber?

2. If the First Amendment case of United States v O'Brien, 391 US 367 (1968), requires that a law regulating conduct which incidentally infringes on expression must pass a four part test to be justified in limiting the expression, then what justification exists for a court to take jurisdiction over a parent's candid filming of their own child under a law that itself fails the O'Brien test?

3. If the case of Morton v Mancari, 417 US 535 (1974), held that "a specific statute...is not controlled or nullified by the general [law], and the State of Maryland enacted specific laws which set the extent of the State's right to protect children against filming which constitutes sexual exploitation and protects parents who film their own child in the nude, then how can a charging document describe a cognizable offense related to a parent's filming of their own child under a general law, which itself nullifies the specific ones?

4. If the case of Ashcroft v Free Speech Coalition, 535 US 234 (2002), held that a law cannot prohibit "materials beyond the categories recognized in Ferber and Miller," then how is Maryland's sexual abuse of a minor law, CL § 3-602, not overbroad as construed to prohibit depictions of minors that are neither obscene under Miller nor child pornography under Ferber?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- State v Bickford, No. 21-k-16-052397, Circuit Court For Washington County, Maryland. Judgment entered Jan. 4, 2017.
- Bickford v State, No. 95, Sept. Term, 2017, Court of Special Appeals of Maryland. Judgment entered May 15, 2018.
- Bickford v State, No. COA-PET-0188-2018, Court of Appeals of Maryland. Judgment entered Aug. 31, 2018.
- Bickford v State, No. 683, Sept. Term, 2020, Court of Special Appeals of Maryland. Judgment entered Feb. 8, 2021.
- Bickford v State, No. 483, Sept. Term, 2020, Court of Appeals of Maryland. Judgment entered Apr. 23, 2021; Reh Den Jun. 22, 2021.
- Bickford v Warden of Eastern Correctional Institution, Maryland DPSCS, No. C-07-CV-21-000157, Circuit Court for Cecil County, Maryland. Judgment entered June 9, 2021.
- Bickford v State, No. 277, Sept. Term, 2022, Court of Special Appeals of Maryland. Judgement entered Oct. 11, 2022; Reh. Den. Dec. 7, 2022.
- Bickford v State, No. COA-PET-0279-2022, Court of Appeals of Maryland. Judgment entered Jan. 24, 2023; Reh. Den. Mar. 27, 2022.
- Bickford v Warden of Eastern Correctional Institution, No. GLR-21-1561, U.S. District Court for the District of Maryland. Judgment pending.

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Circuit Court for Wahington County, Md court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Jan. 24, 2023. A copy of that decision appears at Appendix C.

[X] A timely petition for rehearing was thereafter denied on the following date: Mar. 27, 2023, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I.

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 to peacefully assemble, and to petition the Government for a redress of grievances.

MARYLAND RULES

Maryland Rule 4-252(d)

Other Motions. A motion asserting the failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time.

MARYLAND STATUTES

Child pornography

Maryland Code, Criminal Law Article, § 11-207..... APPENDIX E

Possession of child pornography

Maryland Code, Criminal Law Article, § 11-208(d) Nothing in this section may be construed to prohibit a parent from possessing visual representations of the parent's own child in the nude unless the visual representations show the child engaged: 1. as a subject of sadomasochistic abuse; or 2. in sexual conduct and in a state of sexual excitement.

Sexual abuse of a minor

Maryland Code, Criminal Law Article, § 3-602(a)(4)(i) "Sexual abuse" means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not. (ii) "Sexual abuse" includes: 1. incest; 2. rape; 3. sexual offense in any degree; 4. sodomy; and 5. unnatural or perverted sexual practices. § 3-602(b)(1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor.

Visual surveillance with prurient intent

Maryland Code, Criminal Law Article, § 3-902.....APPENDIX E

STATEMENT OF THE CASE

Allegations that Mr. Bickford filmed his child in the bathroom of his home prompted an investigation which yielded the following charges: one count of sexual abuse of a minor, CL §3-602; twenty three counts of visual surveillance with prurient intent, CL §3-902; one count sexual solicitation of a minor, CL §3-324; and one count possession of child pornography, CL §11-208.

Mr. Bickford stood trial on January 3 and 4, 2017, where the State told the Trial Court that the "Schmitt" case was prosecuted with the exception of child pornography which is Maryland Law (Trial Transcripts vol. 2, 20-21) (referring to Schmitt v State 210 Md App 488). Schmitt was properly charged with the underlying offense of visual surveillance with prurient intent, and, those elements were proven, in support of a conviction for CL §3-602. With respect to the videos alleged to be sexual abuse the state prosecutor said,

> "Nudity, in and of itself, a nude child is not pornography. So, for example, if any of you are parents or grandparents, if you have pictures of your child in the bathtub, that's not child pornography...In this case there's many videos of [the minor] using the bathroom. However, she's not engaged in a sexual act. Ah, she's not touching herself. No one is touching her, anything like that. She's nude and she's a minor" (Trial Transcripts vol 1, 122).

The Court agreed stating, "I mean a little girl in the bathroom is not porn" (Trial Transcripts vol. 1, 196).

After the State presented its case, Mr. Bickford's Motion For Aquittal was: Granted, with respect to the possession of child pornography, because CL §11-208(d) provides immunity to a parent who has nude images of their child. The Court said,

> "there is a specific statutory exemption...designed to allow innocent pictures of your children bathing...its not some-

> thing any of us want...our parents took pictures of us when we were doing that...there's certainly lots of pictures like that in existence..." (Trial Transcripts vol 2, 42).

Denied, with respect to the surveillance charges, after Bickford argued that there was no evidence presented that the filming took place in a "private place" as defined under CL §3-902(a)(5)(i) the Court said, "There's nothing...that limits...that term to a public building;" Denied with respect to the count of CL §3-602 because Bickford allegedly had showered with his child prior to moving to Maryland, searched for pornography on his phone, and placed a camera in his bathroom, creating "an inference of the desire of the defendant to exploit sexually the victim in this case" (Trial Transcripts vol 2, 39-46). The Jury then Found Mr. Bickford Not Guilty for sexual solicitation under CL §3-324; and Guilty of the remaining counts of CL §3-902, including count thirteen which was alleged to be a person other than Bickford's child (Trial Transcripts vol. 2, 39), and Guilty for sexual abuse of a minor.

On March 31, 2017, Mr. Bickford filed a timely appeal where he argued that:

> "The evidence adduced did not provide the specific necessary legal basis, vis a vis a 'private place,' in accordance with the applicable statute, on which to support the convictions...the evidence was insufficient as a matter of law on any and all counts that depend upon the video surveillance in the bathroom" (Appellant's Brief 17; 20).

The State argued that:

> "Although Maryland Courts have interpreted the term 'exploitation' to be limited to sexual exploitation, the courts have otherwise interpreted the term broadly to include 't[aking] advantage of or unjustly or improperly us[ing] the child for [the defendant's] own benefit' (citing Walker v State, 432 Md. 587, 615-16, 619-20). Indeed this Court has expressly held (and the Court of Appeals has expressed approval) that recording a child in a 'private and intimate place' without their consent can, with the requisite intent, constitute child sexual abuse"

(citing Schmitt v State, 210 Md App 488, 502 (2013)).

On May 15, 2018, the Appellate Court determined that the private place element was misconstrued at trial an vacated the convictions for the visual surveillance charges. However, the Court Held that the insufficiency of the evidence for the surveillance charges

> "has no impact on the sufficiency of the evidence to support Bickford's conviction for the sexual abuse of a minor" because the act establishing the offense need not be otherwise criminal" (Bickford v State, No. 95, 2017 (2018 WL 2215485)).

A timely Petition for Certiorari was filed on June 21, 2018, and subsequently denied.

On March 12, 2022, Mr. Bickford raised the federal question sought to be reviewed for the first time in a timely filed Motion To Dismiss Conviction under Maryland Rule 4-252(d), which provides for a dismissal of conviction upon a showing that a charging document failed to show jurisdiction in the court or to charge a cognizable offense. Mr. Bickford grounded his motion in the First Amendment and argued:

> "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable law...The category of "sexual conduct" proscribed must be suitably limited and described...As with all obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant (quoting New York v Ferber, 458 US 747, 764-65). The Maryland law, 3-602, neither adequately defines the conduct to be prohibited nor suitably limits and describes the category of "sexual conduct" to be proscribed. The Maryland law, 3-602, also fails to incorporate a scienter element; therefore, the Maryland law, 3-602, may not constitutionally regulate the purely expressive process of taking a picture or video...The expression...must be placed outside of the protection of the First Amendment by a statute that regulates expression or incorporates the necessary elements...Failure to do this would be an infringement upon free speech...The failure to include these elements is a fail ure to allege a cognizable offense. Failure to show a cognizable offense is a failure to show jurisdiction in the Court." See Ayre v State, 291 Md 155, 162-69 (1982) (State v Bickford, Case

No. 21-k-16-52397, (Motion To Dismiss Conviction, points 8-10). Here, Mr. Bickford plainly asserted that a cognizable offense cannot be stated, related to the filming of a minor, under the sexual abuse of a minor law because that law does not allege that this specific expression is unprotected consistent with Ferber.

The State attempted to recast Bickford's argument as a sufficiency of evidence for conviction, which had been determined on direct appeal. The State argued that Bickford had no First Amendment right to sexually abuse his child. On April 1, 2022, the Trial Court denied the motion without memorandum.

On April 13, 2022, Mr. Bickford Filed a timely appeal. The Ferber issue sought to be reviewed was put before the Appellate Court in the same manner as below. Mr. Bickford argued:

> "The prosecution of Mr. Bickford was unconstitutional with the exception of child pornography [because]...the omission of the elements...required to constitute sexual exploitation of a minor with respect to filming a minor, constituted a failure to demonstrate jurisdiction for the court to decide the merits of the case" (Informal Brief of Appellant, No. 277, 5-6 (2022).

Bickford re-asserted the Ferber holding as controlling the subject matter of filming a minor.

For the first time, Mr. Bickford supplied the federal case of United States v O'Brien, 391 US 367 (1968), as a fairly included First Amendment Case. Mr. Bickford supported his contention that the specificity of Ferber was related to all expression because O'Brien held that only a sufficiently justified law can regulate conduct that incidentally infringes on First Amendment Freedoms. Bickford specifically argued that:

> "the State failed...to identify a 'sufficiently important governmental interest' in regulating the privacy considerations between a parent and a that parent's child" (Informal Brief, 6).

Mr. Bickford introduced for the first time, as a fairly included case related to the issue, the Morton v Mancari decision. Mr. Bickford argued that the denial of his motion to dismiss nullified the meaning of the term sexual exploitation under the child pornography law, which:

> "comports precisely with the Ferber Court's required elements to constitute sexual exploitation of a minor. There is no indication that the term sexual exploitation means anything different, in the C.L. Art. 3-602 than it does in the C.L. Art. 11-207. Therefore it is not appropriate to nullify the meaning of sexual exploitation in the specific statute...by relying on a...meaning, which is judge made, under the very broad statute of C.L. Art. 3-602 (Informal Brief of Appellant, 8-9).

That this nullification is in conflict with the Morton v Mancari holding - a specific statute will not be nullified or controlled by a general one.

Finally, on appeal, Mr. Bickford challenged the sexual abuse of a minor law as both overbroad and underinclusive due to the lower Court's denial of his Motion to Dismiss. Mr. Bickford asserted that the refusal to dismiss conviction determines that Maryland CL §3-602 makes criminal the filming of a minor categorized as:

> "when the defendant takes advantage of or unjustly or improperly uses the child for his own benefit [or]...a privacy violation... Since neither of these categories are recognized in either Miller ...or New York v Ferber...the provision is invalid" citing Ashcroft v Free Speech Coalition (Informal Brief of Appellant, 11).

And, the law must be "underinclusive because it creates a more abridged version of protected speech based upon...being a parent" (Informal Brief of Appellant, 12).

The Maryland Appellate Court's decision was entered on Oct. 11, 2022. The Court shied away from a point by point analysis because they determined that the authorities cited, such as Ferber, did not apply to Bickford's Filming. The Court said that Bickford Claimed

> "that the count charging child sexual abuse did not confer subject matter jurisdiction on the circuit court because it did not allege that Bickford's videos depicted his daughter 'engaged as a subject in sexual conduct,' nor that he had 'knowledge of what runs the risk of being obscene.' That contention misconstrues the elements of the crime charged" (Bickford v State, No. 277(2022), pg 8-9; N. 7).

The Court also said that the State authority of Ayre did not apply because the expression in that case was different (N. 7). The Court relied on Williams v State, Which held "averments essential to characterizing a crime were completely omitted" (williams, 302 Md. 787, 794 (1985), and, "Bickford is wrong in asserting that is was necessary to aver 'the elements of child pornography' in the count charging him with child sexual abuse" (Bickford 277 at N. 7).

The Appellate Court addressed the claim that the sexual abuse of a minor law is overbroad and under-inclusive stating:

> "The...Contention neither implicates the subject matter jurisdiction of the circuit court, nor that of any other claim within the scope of a Rule 4-252(d) motion alleging the failure of a charging document to show jurisdiction or to charge an offense" (Bickford v State, 277 at 12).

On October 22, 2022, Mr. Bickford timely filed a Motion To Reconsider Judgment. In it, he argued that Ferber was relevant because it

> "set the limits as to what may be prohibited and, specifically, which elements are required to be included in a law that regulates the production of films of a minor."

The Motion was denied on December 7, 2022.

On November 9, 2022, Mr. Bickford Filed a timely Petition for Writ of Certiorari to the Maryland Court of Appeals (case No. 0277, Sept. Term, 2022). In his Petition, Mr. Bickford asked the Court to determine if the facts supporting the charging document were sufficient to confer subject matter jurisdiction where such a finding

would not "insure that protected expression is not erroneously suppressed; and,...a consistent and harmonious body of law" is not preserved (Petition, 3). Mr. Bickford contended that Ferber requires more from a charging document and the State requires more from a charging document under Ayre v State; and, the charging document is not sufficiently justified under state and federal law (Petition, 5; 8). Mr. Bickford filed an affidavit and a Motion to Consider in Support of Motion to Reconsider Petition for Certiorari; however, no amount of begging for acknowledgment of First Amendment constraints was to be heard. The Writ was denied on January 24, 2023; A timely Motion to Reconsider Petition for Certiorari was filed on January 30, 2023 and subsequently denied on March 27, 2023.

A Petition for a Writ of Certiorari was sent to the Supreme Court Of The United States on April 5, 2023; received on April 12, 2023; and, returned with instructions, on April 17, 2023, to correct and resubmit within "60 days of the date of this letter. This Timely Petition For Certiorari is now before the Court.

REASONS FOR GRANTING THE PETITION

America's most treasured value is freedom of speech and expression as evidenced by being the First Amendment to the U.S. Constitution. When a State Court creates an exception to well settled United States Supreme Court precedents, as in this case, a writ of certiorari should issue. "It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state-court decisions giving the Constitution to little shrift" (New York v Ferber, 458 US 747, 767).

I. The Maryland State Appellate Court created an exception to New York v Ferber, 458 US 747 (1982), when it held that a parent's filming of their own child may be a cognizable offense without alleging the esential elements of scienter, a defined category of prohibition, a limited category of prohibition, sexual conduct, or a definition of sexual conduct as required by Ferber.

II. The Maryland Appellate Court decided that, although the State's child pornography statute sets the extent of the State's right to protect minors who are filmed against sexual exploitation, a cognizable offense is charged under the State's insufficiently justified sexual abuse of a minor statute when the filming alleged does not rise to the level of child pornography; this conflicts with United States v O'Brien, 391 US 367 (1968).

III. In deciding that a charging document alleged a cognizable offense with respect to the filming of a minor, the Maryland Appellate Court contradicted Morton v Mancari, 417 US 535

(1974), when it held that the State's broad sexual abuse of a minor statute may nullify both the limits of the State's right to abridge free speech and the immunity afforded to parents under the specific child pornography statutes.

IV. The Maryland Appellate Court's decision that a cognizable offense is charged related to the filming of a minor that is not alleged obscene under Miller nor child pornography under Ferber is in conflict with Ashcroft v Free Speech Coalition, 525 U.S. 234 (2002); this determined scope of prohibition renders the State's sexual abuse of a minor law overbroad and underinclusive.

This Honorable Court should Grant a Writ of Certiorari in this case because the Maryland Appellate Court announced an exception to New York v Ferber. The exception permits the State to charge parents who film their own children with the crime of sexual abuse of a minor when the filming at issue does not constitute child pornography or obscenity under State law. The exception provides for two separate standards of protected speech, which is an affront to the words etched in stone above the entrance to the Supreme Court of the United States. Since this case was decided, the new exception has been used to prosecute school teachers who film students in Maryland classrooms. This exception is used to prohibit what is plainly and expressly legal under the specific child pornography laws. This Court should Grant Certiorari to ensure state-court decisions continue to defer to the United States Constitution and the related precedents set by this Honorable Court.

ARGUMENTS

I. The State Court's decision conflicts with New York v Ferber, 458 U.S. 747 (1982).

The Maryland Appellate Court contradicted New York v Ferber, 458 U.S. 747 (1982), when it held that a cognizable offense is charged related to the candid filming of a minor, under Maryland's sexual abuse of a minor law (CL §3-602), without any "additional specificity" (Bickford v State, 277 p 11 (2022).

The Constitution's First Amendment provides that "congress shall make no law...abridging the freedom of speech" (U.S. Constitution, Amend. I); however, "[t]here are certain well defined and narrowly limited classes of speech" such as obscenity, which are not protected (Chaplinsky v New Hampshire, 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942). Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973) sets the dividing line as to what is unprotected as obscene speech; however, the Ferber Court carved out an exception to what may be prohibited as obscene under Miller, related to the "distribution and sale of child pornography, as well as its production" (Ashcroft v Free Speech Coalition, 535 U.S. 234, 152 L Ed 2d 403, 1 S Ct 1389 (2002). The exception under New York v Ferber specifically requires

> "all legislation in this sensitive area...[to] be adequately defined by applicable state law...be limited to works that visually depict sexual conduct by children...The category of 'sexual conduct' proscribed must also be suitably limited and described...[and] criminal liability may not be imposed without some element of scienter on the part of the defendant" (Ferber at 764-65).

The Maryland Supreme Court Held that Maryland's child pornography law is the applicable state law which "balance[s] the right to freedom of expression against the right of the State to protect children against

sexual exploitation" (Outmezguine v State, 355 Md 20, 36 (1994)). This means that Maryland's CL 3-602 is not the applicable statute which regulates filming a minor.

Maryland's CL §3-602 fails to comply with Ferber because it is not the applicable state law as authoritatively construed; CL §3-602(a)(4)(i) does not adequately define its scope of prohibition (it broadly encompasses "an act that involves the sexual molestation or exploitation of a minor"); the Law is not limited to filming that depicts sexual conduct by children; the category of exploitation is neither limited nor described by CL 3-602; and, it has no element of scienter. Maryland's CL 3-602 does not satisfy any of the criteria which is required to allege a cognizable offense consistent with the First Amendment under Ferber. Therfore, the Charging document alleging that Bickford's filming was criminal under CL §3-602, fails to allege a crime consistent with the First Amendment.

This is of great public interest because the Maryland Supreme Court publicly announced, in Outmezguine v State, that the limits of its "right to protect children against sexual exploitation" lies within the confines of the child pornography law (CL 11-207). The Maryland Appellate Court's equivocation of the term 'sexual exploitation' in CL 3-602, pulls the rug out from under parents and guardians (such as school teachers) who film children consistent with the Maryland Supreme Court's announced "right to freedom of expression" under the child pornography law (Outmezguine, 36). In so doing, the Maryland Appellate Court creates an exception to Ferber, based upon who is filming a minor and not on what is being filmed. This should be of great importance to the Supreme Court of the United

States, as well as to the public.

Maryland's CL §3-602 brings a new concept to the limits of free speech, which needs to be addressed by this Court. The videos produced by Bickford were alleged to be an act of sexual exploitation only because he is the parent of the child filmed. A non-parent could not suffer the humiliation of a trial based upon the charging document in Bickford's case. The State's description of the videos to the jury were as follows:

> "Nudity, in and of itself, a nude child is not pornography. So, for example, if any of you are parents or grandparents, if you have pictures of your child in the bathtub, that's not child pornography...In this case there's many videos of [the minor] using the bathroom. However, she's not engaged in a sexual act. Ah, she's not touching herself. No one is touching her, anything like that. She's nude and she's a minor" (Trial Transcripts vol 1, 122).

A non-parent cannot be charged with having pictures described as candid nudity. The equivocation of sexual exploitation under CL §3-602 provides for the criminalizing of the filming of a child, without alleging any of the elements required by Ferber, when the defendant is a parent. Moreover, the law nullifies the enunciated rights of both the State and the individual, and re-draws the lines that were set in Outmezguine.

This concept creates a dual meaning for "sexual exploitation" and provides for unequal punishments under law. For instance, non-parents sexually exploit a child by filming in violation of Maryland's child pornography law (CL §3-602) or in violation of Maryland's visual surveillance with prurient intent law (3-902); the penalty for a first time child pornography producer or privacy violator is a maximum ten year prison term or eighteen month prison term, respectively. The other meaning is that a parent sexually

exploits a child by filming a child "improperly...for his or her own benefit," an affront to Ferber, and may be punished for up to twenty five years in prison (Bickford v State, No 95 Sept., *16 (2018))(quoting Schmitt v State, 210 Md 488, 499 (2013)). Considering that Mr. Bickford was given a twenty-five year sentence, fifteen of which is active incarceration, for filming his child in a manner which rises neither to the level of child pornography nor a privacy violation. This is a concept that warrants attention.

The State Argued, and the Appellate Court agreed, that Bickford had no First Amendment right to sexually exploit and abuse his own child. However, if any of the people who made or support that appealing rhetoric had produced the exact same videos, the alleged sexual exploitation and abuse would not have been cognizable. The producer would have been exercising free expression. The concept that filming a minor which amounts to sexual exploitation is dependent upon who holds the camera, and not what is filmed, is a new legal principle that conflicts with Ferber.

The Appellate Court's rejection of Ferber as being an authority in support of Bickford's contention that a cognizable offense was not alleged is baseless. In determining that "Bickford is wrong in asserting that it was necessary to aver the elements of child pornography in the count charging him with child sexual abuse" (Bickford v State, 277 p9 N 7 (2022)), the Appellate Court said "that contention misconstrues the elements of the crime charged" (Bickford v State, No. 277, Sept. Term, 8-9; N. 7 (2022)). The Court uses the deficiency of elements in CL §3-602 to justify not needing the elements required. This cannot be viewed as anything other than an

exception to the elements required to be included in "all legislation in this sensitive area" under New York v Ferber (Ferber, 458 at 764). Mr. Bickford asserts that it is of sufficient importance for this Court to decide whether Maryland's exception to the Ferber test can permit a prosecution for expression described as lawful in a charging document.

The Ferber Court has determined that the filming of a minor can be regulated only by an applicable statute, written in the prescribed form, which includes all the enunciated criteria required to determine that the filming of a minor may be prohibited as unprotected speech. The expression which so disquiets the Maryland Courts was not ever alleged unprotected under a law that applies to the filming of a minor in the count charging CL §3-602. Consequently, an allegation of criminal liability related to the filming of a minor, under a law that is not in compliance with Ferber, is insufficient to determine whether the filming can be punished. Such an allegation is not a cognizable offense because the State is barred by the First Amendment from making a law that abridges speech not within a category of proscribable speech. Maryland's CL §3-602 is insufficiently written to place expression into any category of unprotected speech; therefore, it is insufficient to allege a cognizable offense without irreconcilable conflict with Ferber.

II. The Maryland Appellate Court's decision conflicts with United States v O'Brien, 391 U.S. 367, 20 L Ed 2d 672, 88 S Ct 1673, reh den 393 U.S. 900, 21 L Ed 2d 188, 89 S Ct 63 (1968).

The Maryland Appellate Court's decision that the State charged a cognizable offense related to Bickford's filming of his minor child

under the State's sexual abuse of a minor law conflicts with United States v O'Brien in that CL §3-602 is not sufficiently justified to regulate the filming of a minor alleged to be an act of sexual exploitation. It is well established that

> "when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (O'Brien, 391 U.S. 376).

The O'Brien Court enunciated a four part test, which determines when a law is sufficiently justified: 1) it is within the constitutional power of the Government; 2) it furthers an important or substantial government interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest.

This means that a law which fails to meet any one of the four parts of the test enunciated in O'Brien is not sufficiently justified to regulate expression. Any allegation of unlawful expression under a law which is not sufficiently justified in regulate that expression, fails to sufficiently justify the State's interest in prohibiting the expression; and thus, fails to allege a cognizable offense - it is a failure to properly and adequately charge Mr. Bickford with a crime. Any ruling to the contrary constitutes an erroneous application of the constitutional precedent set in O'Brien which requires correction.

The State of Maryland alleged that Mr. Bickford sexually abused his child, under Maryland's CL §3-602, by producing candid videos alleged to constitute his child's sexual exploitation. However, under

O'Brien, the charging document fails to allege a cognizable offense because CL §3-602 fails the O'Brien test. The government does not have the constitutional power to prohibit speech that is not within a category of unprotected speech under the First Amendment mandate that "congress shall pass no law...abridging the freedom of speech" (U.S. Constitution Amend. I); the sexual abuse of a minor law may further Maryland's interest in preventing the sexual exploitation of minors because Maryland "is entitled to greater leeway in the regulation of pornographic depictions of children" (New York v Ferber, 458 U.S. 747 (1982); the sexual abuse of a minor law is related to the suppression of free expression when it is construed to determine if the filming of a minor constitutes or involves the exploitation of a minor; and, the restriction on the filming of a minor that constitutes sexual exploitation is far greater than is essential to the furtherance of that interest - the child pornography statute restricts the filming of minors in a manner no greater than is essential to the furtherance of that interest (Outmezguine v State, 355 Md. 20, 36 (1994)). At minimum, Maryland's CL §3-602 does not meet three of the four conjunctive conditions required by O'Brien.

Maryland's CL §3-602 is not constitutionally capable of incidentally limiting any expression because it fails the O'Brien test. It cannot be an exception to the Ferber law because it restricts expression more than the child pornography law. A charging document that alleges a crime which is not sufficiently justified is not sufficiently alleged. The failure to dismiss Bickford's conviction despite the well settled requirement of sufficient justification, conflicts with United States v O'Brien.

III. The Maryland Appellate Court's decision conflicts with Morton v Mancari, 417 U.S. 535, 41 L Ed 2d 290, 94 S Ct 2474 (1974).

The Maryland Appellate Court's decision that a parent's filming of their child can be prohibited under the State's sexual abuse of a minor law, nullifies the legal standards and protections enunciated in the specific laws that were enacted to prohibit the conduct at issue conflicts with the precedent that a general law will not be controlled or nullified by a specific one.

The Morton v Mancari decision held that "The two statutes...are capable of co-existence...as a specific statute applying to a specific situation, is not controlled or nullified by the general [one]" (Morton v Mancari, 417 U.S. 535 (1974)).

This means that the specific Maryland law prohibiting filming which constitutes the sexual exploitation of minors will not be controlled or nullified by Marylands general prohibition against sexual abuse under Md. Crim. Law §3-602. The sexual abuse of a minor statute can in no way modify the preferences accorded parents who film their children in the nude consistent with the specific law §11-207, child pornography, or the painstakingly specific possession of child pornography law, CL §11-208(d). Maryland's CL §11-208(d) provides that

> "nothing in this section may be construed to prohibit a parent from possessing visual representations of the parent's own child in the nude unless the visual representations show the child engaged as: 1. as subject of sado-masochistic abuse or; 2. in sexual conduct and in a state of sexual excitement."

Maryland's CL §11-208(d) enunciates the General Assembly's parental "preferences [that] had long been treated as exceptions, there is no reason to presume that Congress affirmatively intended to erase such

preferences" (Morton v Mancari, 417 U.S. 535, 41 L Ed 290, 292 (1974)). There is nothing written into the State's sexual abuse of a minor law that shows an intent to negate: 1) the parental protection written into Maryland's possession of child pornography law; or 2) the limits of "the right of the State to protect children against sexual exploitation" as written into the child pornography law (Outmezguine, 36).

When the rule is applied to Bickford's case, Maryland's CL §3-602 nullifies the parental exception from prosecution specifically enunciated under the possession of child pornography law as well as the definite knowledge of what filming constituted sexual exploitation of a minor under the child pornography law. The Sexual abuse of a minor law is a general statute and the child pornography laws are specific. The Mancari Court said, "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment" (Morton v Mancari, 417 US at 550-51). It is impermissible to charge a crime under the broad sexual abuse statute to intentionally nullify a substantial portion of other specific laws that offers protection from prosecution for the conduct at issue.

Because the challenged charging documents charged an offense under a broad statute, which nullifies the lawful criteria and protections of specific statutes, and due process under Morton v Mancari precludes this, the charging document is insufficient to confer subject matter jurisdiction on the Court. When the Maryland Appellate Court found the charging document sufficient despite the sexual abuse statute's nullification of clearly written protections,

that decision conflicted with the decision made in Morton v Mancari.

IV. The Maryland Appellate Court's decision is in conflict with Ashcroft v Free Speech Coalition, 535 U.S. 234, 152 L Ed 2d 403, 1 SCT 1389 (2002). The conflict renders Maryland's sexual abuse of a minor law overbroad.

The Maryland Appellate Court's decision to affirm the lower Court's denial of a dismissal of conviction renders the sexual abuse of a minor law unconstitutionally overbroad under Ashcroft because the sexual abuse law, CL §3-602, prohibits filming that is neither obscene under Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973) nor child pornography under New York v Ferber, 458 US 747 (1982).

The Ashcroft Court Held: (a) a law which prohibits "materials beyond the categories recognized in Ferber and Miller" is overbroad and unconstitutional. A law is overbroad if it "prohibits speech that records not crime and creates no victims by its production" and when "harm does not necessarily flow from the speech, but depends upon some unquantified potential for subsequent criminal acts" (Ashcroft holding (a)(2).

The Ashcroft holdings clearly and unambiguously reinforce the concept that the First Amendment requires a precise restriction applicable to a particular category of unprotected speech.

The State attempts to do an end run around the Constitution by alleging an offense inapplicable to expression to punish Mr. Bickford for his expression. The State Appellate Court claims that if a law does not allege elements required to place expression into a category of unprotected speech, then speech can be prohibited without making

the proper distinction between what is, and is not, protected. In Bickford's Case, the films he produced were not alleged to be obscene under Miller, nor child pornography under Ferber. In Fact, the Trial Court said, "I mean a little girl in the bathroom is not porn" (trial transcrpts vol 1, 196). If it is not within the child pornography exception to the obscenity requirement, then it is protected and any law that prohibits protected speech not within Miller or Ferber is overbroad under Ashcroft.

The Supreme Court of the United States has said that it "is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state-court decisions giving the Constitution to little shrift" (Ferber, 458 at 767). Because the Maryland Appellate Court decision contradicts the bulk of this Court's doctrines and precedents related to filming a minor, Maryland's CL §3-602 should be held overbroad.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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