

No. _____

**In The
Supreme Court of the United States**

OCTOBER TERM, 2017

JOSHUA CALEB SHUE,
Petitioner

v.

THE STATE OF NEVADA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Nevada child pornography laws, which prohibit creating or possessing images of minors as the subject of a vaguely defined "sexual portrayal in a performance," violate the First Amendment of the United States Constitution when the laws do not criminalize creating images depicting minors engaged in actual sexual conduct but instead, criminalize creating any image of a minor whatsoever so long as the image could appeal to some person's prurient interest in sex and thus, regulate a person's private thoughts.

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL AMENDMENTS	iv
SUPREME COURT	iv
FEDERAL CASES	v
STATE CASES	v
OTHER CASES/STATUTES	v, vi
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ...	2
STATEMENT OF THE CASE AND RELEVANT FACTS	3
REASONS FOR GRANTING THE WRIT	-7
CONCLUSION	-16
CERTIFICATE OF SERVICE	-17
WORD COUNT CERTIFICATION	18

TABLE OF AUTHORITIES

CONSTITUTIONAL AMENDMENTS

U.S. CONST. AMEND. I.....2

U.S. CONST. AMEND. XIV.....3

RULES OF THE UNITED STATES SUPREME COURT

Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).....13

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251 (2002)..4, 9, 11

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).....4, 9

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982).5

Jacobson v. U.S., 503 U.S. 540, 551-52 (1992).....12

N.Y. v. Ferber, 458 U.S. 747, 766, fn. 18 (1982).....4, 5, 10, 11

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).....12

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).....9

Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).....13

Stanley v. Georgia, 394 U.S. 557, 566 (1969).....10

U.S. v. Williams, 533 U.S. 285, 289 (2008).....4

Circuit Authority

U.S. v. Villard, 855 F.2d 117, 125 (3rd Cir. 1989)..... 12

U.S. v. Whorley, 550 F.3d 326, 348 (4th Cir. 2008).....12

FEDERAL CASES

Faloon v. Hustler Magazine, Inc., 607 F.Supp. 1341 (N.D.Tex. 1985).....12

Rhoden v. Morgan, 863 F. Supp. 612, 619 (M.D. Tenn. 1994)..13

STATE CASES

Casteel v. State, 122 Nev. 356, 362, 131 P.3d 1, 5 (2006).....7

People v. Hollins, 971 N.E.2d 504 (Ill. 2012).....10

Shue v. State of Nevada, 407 P.3d 332 (2017).....2, 6, 14

U.S. v. Moon, 73 M.J. 382 (C.A.A.F 2014).....9

Wilson v. State, 121 Nev. 345, 350, 114 P.3d 285, 289 (2005)....7

STATE STATUTES

NRS 200.700(4)..... 3, 5, 6, 7, 14

NRS 200.710(2)..... 3, 5, 6, 7, 14

NRS 200.730.....7

Misc. Citations/Publications

Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 961 (2001)

Brain Cash, *Images of Innocence or Guilt?: The Status of Laws Regulating Child Pornography on the Federal Level and in Alabama and an Evaluation of the Case against Barnes & Noble*, 51 Ala. L. Rev. 793, 797 (Winter 2000).8

Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437, 1440 (2014).....9

Harvard Law Review Association, <i>The Supreme Court 2009 Term, Leading Cases, I. Constitutional Law. D. Freedom of Speech and Expression</i> , 124 Harv. L. Rev. 239, 247 (2010).....	11
Lawrence Walters, <i>Symposium, Sexually Explicit Speech, How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation</i> , 9 First Amend. L. Rev. 98, 113-14 (2010).....	11
Rosalind Bell, <i>Reconciling the PROTECT ACT with the First Amendment</i> , 87 N.Y.U. L. Rev. 1879 (December 2012).	9

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PETITION FOR A WRIT OF CERTIORARI

JOSHUA CALEB SHUE respectfully petitions for a writ of certiorari to review the judgment and opinion of the Nevada Supreme Court filed on December 14, 2017.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Nevada Supreme court, whose judgment is sought to be reviewed, are:

- Joshua Caleb Shue, Defendant and Appellant below and Petitioner here.

- Clark County District Attorney's Office, Steve Wolfson, District Attorney of Clark County, Respondents below and Respondents here.
- Adam Laxalt, Attorney General of the State of Nevada.

OPINIONS BELOW

The Nevada Supreme Court's *en banc* opinion affirming Shue's convictions is reported at *Shue v. State of Nevada*, 407 P.3d 332 (2017) and is attached hereto as Appendix A. The Nevada Supreme Court's *en banc* order denying rehearing is unreported and is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The Nevada Supreme Court filed its *en banc* opinion affirming Shue's convictions on December 14, 2017. The Nevada Supreme Court entered an order denying Shue's petition for rehearing on February 23, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech" U.S. Const. amend. I.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. Const. amend. XIV.

B. State Statutory Provisions

Nevada Revised Statutes Title 15, Chapter 200, section 710, subsection 2 prohibits a person from knowingly using, encouraging, enticing, coercing or permitting "a minor to be the subject of a sexual portrayal in a performance." NRS 200.710(2).

Nevada Revised Statutes Title 15, Chapter 200, section 700, subsection 4 defines "sexual portrayal" as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." NRS 200.700(4).

STATEMENT OF THE CASE

On March 12, 2013, the State of Nevada charged Petitioner Shue with, among other offenses, 29 counts of Use of Child in Production of Pornography in violation of Nevada Revised Statutes 200.710(2). The state alleged Petitioner violated NRS 200.710(2) by surreptitiously filming his girlfriend's 17-year-old daughter and 13-year-son as they used the bathroom located within their apartment. Although the minors appeared nude in some videos, the minors were not engaged in any sexual conduct in the videos.

Petitioner's trial began on August 25, 2014. The State presented evidence at trial that Petitioner was attracted to his girlfriend's 17-year-old daughter and Petitioner may have sexually pleased himself while watching the videos depicting the 17-year-old in the bathroom. At the trial's conclusion the jury found Petitioner guilty for all charges. The trial court sentenced Petitioner to life in prison with parole eligibility after 10 years. Petitioner timely filed his Notice of Appeal in the Nevada Supreme Court on February 12, 2015.

On direct appeal Petitioner noted that this Court has repeatedly held that creating and possessing nude images of children, without more, is protected by the First Amendment. *N.Y. v. Ferber*, 458 U.S. 747, 766, fn. 18 (1982) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); see also *U.S. v. Williams*, 533 U.S. 285, 289 (2008) (“[t]he broad authority to proscribe child pornography is not...unlimited.”); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002) (“where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.”)). Accordingly, state laws ostensibly prohibiting child pornography must: (1) adequately define the prohibited conduct; (2) limit the prohibition to works that visually depict sexual conduct of children below a specified age; (3) suitably limit and describe

“the category of sexual conduct proscribed;” and (4) require an element of “scienter on the part of the defendant.” *Ferber*, 458 U.S. at 764-65. Petitioner then argued NRS 200.710(2) and NRS 200.700(4) contravene *Ferber* because the statutes prohibit creating or possessing any image of a minor whatsoever so long as image subjectively appealed to some person’s prurient interest in sex and lacked undefined “serious literary, artistic, political, or scientific value.” Essentially, Petitioner argued non-sexual and non-obscene images of minors, which nevertheless appeal to some person’s prurient interest in sex, cannot be “child pornography” under this Court’s precedent and therefore, are protected under the First Amendment. Accordingly, NRS 200.710(2) and NRS 200.700(4) can only survive under the First Amendment if the statutes are narrowly tailored to promote a compelling government interest. Finally, Petitioner noted if NRS 200.710(2) and NRS 200.700(4) validly proscribed actual child pornography, then the statutes were nevertheless unconstitutionally overbroad because the statutes reach “a substantial amount of constitutionally protected conduct.” See *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982).

In rejecting Petitioner’s arguments the Nevada Supreme Court held that objectively non-sexual and non-obscene images

of minors which appeal to some person's prurient interest in sex, and do not have "serious literary, artistic, political, or scientific value," are categorically unprotected by the First Amendment. *Shue*, 407 P.3d at 339 fn. 10 ("[b]ecause we conclude that such statutes do not implicate protected speech under the First Amendment, we reject the first argument."). Therefore, the State did not have to demonstrate the statutes are narrowly tailored to promote a compelling government interest. Moreover, the Nevada Supreme Court circuitously held NRS 200.710(2) and NRS 200.700(4) are not overbroad because non-sexual and non-obscene images of minors which appeal to some person's prurient interest in sex while lacking "serious literary, artistic, political, or scientific value" are categorically unprotected by the First Amendment. *Id.* at 338 ("we conclude that Nevada's statutes barring sexual portrayal of minors are not overbroad because the type of conduct proscribed under NRS 200.700(4) does not implicate the First Amendment's protection.").

Petitioner filed a Petition for Rehearing on January 2, 2018, arguing that in affirming Petitioner's conviction the Nevada Supreme Court clearly overlooked or this misapplied longstanding precedent from this Court. On February 23, 2018, the Nevada Supreme Court denied the Petition for Rehearing without comment. (App. B). Petitioner subsequently filed a

Motion to Stay the Remittitur Pending Application for Certiorari to the United States Supreme Court. The Nevada Supreme Court granted Petitioner's Motion on March 8, 2018. Appendix C.

REASONS FOR GRANTING THE PETITION

Nevada law prohibits using a minor as the subject of a sexual portrayal in a performance or possessing an image of a minor as the subject of a sexual portrayal in a performance. NRS 200.710(2); NRS 200.730(1); *see also Casteel v. State*, 122 Nev. 356, 362, 131 P.3d 1, 5 (2006); *Wilson v. State*, 121 Nev. 345, 350, 114 P.3d 285, 289 (2005) (explaining NRS 200.710 and NRS 200.730 are Nevada's statutory prohibitions against creating and possessing child pornography.). Nevada law further defines "sexual portrayal" as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value."¹ NRS 200.700(4). Thus, in Nevada an image can constitute child pornography, even if the image does not depict a minor engaging in any clearly defined sexual conduct, if the image could possibly appeal to some unknown person's

unhealthy interest in the minor's sexuality. Consequently, Nevada criminalizes all manner of visual images of minors including, for example: child modeling websites; television shows like *Dance Moms*; photographic artwork like that of David Hamilton and Jacques Sturges;² countless movies including *The Tin Drum*, *American Beauty*, *Kids*, and *Adrian*

¹ Problematically, Nevada law does not specify or explain how to decide whether an image lacks serious literary, artistic, political or scientific value.

² See Brain Cash, *Images of Innocence or Guilt?: The Status of Laws Regulating Child Pornography on the Federal Level and in Alabama and an Evaluation of the Case against Barnes & Noble*, 51 Ala. L. Rev. 793, 797 (Winter 2000).

Lyne's 1997 adaptation of *Lolita*;³ advertisements for Calvin Klein or Abercrombie and Fitch; Britney Spears music videos; any clothing catalog containing images of minors modeling underwear or bathing suits; and even a television news segment regarding a local swimming pool if the segment showed bathing-suit clad children. Indeed, almost any legitimate image could be child pornography under NRS 200.710(2) if the image appeals to a pedophile.

Nevada cannot expansively prohibit images in order to police private pedophilic thoughts. Indeed, the First Amendment expressly prohibits the government from criminalizing speech or expressive conduct because it disapproves the ideas expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). Therefore, "content based regulations are presumptively invalid." *Id.* Nevertheless, some categories of speech, including obscenity and child pornography, i.e., images depicting child sexual abuse, are exempt from First Amendment protection and therefore, can be regulated by the government based upon the image's content. *See R.A.V.*, 505 U.S. at 383-84. However, creating or possessing nude images of children, without more, is protected by the First Amendment. *Ferber*, 458

³ See Rosalind Bell, *Reconciling the PROTECT ACT with the First Amendment*, 87 N.Y.U. L. Rev. 1879 (December 2012).

U.S. at 766 fn. 18 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); see also *U.S. v. Williams*, 533 U.S. 285, 289 (2008) (“[t]he broad authority to proscribe child pornography is not...unlimited.”); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002) (“where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.”); *U.S. v. Moon*, 73 M.J. 382 (C.A.A.F. 2014) (“Unlike child pornography and obscenity, the conduct at issue in this case — possessing images of nude minors that fall into neither of those categories — implicates the protections of the First Amendment.”); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437, 1440 (2014) (“If an image constitutes child pornography, its creation, distribution, and possession may be outlawed [however,] [i]f an image is not child pornography, then those who create, distribute, or possess it may be entitled to First Amendment Protection.”). Additionally, and perhaps more importantly, the government “cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.” *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). Accordingly, State laws prohibiting child pornography must: (1) adequately define the prohibited conduct; (2) limit the prohibition to works that visually depict sexual conduct of children below a specified age; (3) suitably limit and

describe "the category of sexual conduct proscribed;" and (4) require an element of "scienter on the part of the defendant." *Ferber*, 458 U.S. at 764-65.

As opposed to Nevada's exceedingly broad child pornography laws, the New York law in *Ferber* only prohibited "use of child in a sexual performance" while defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." *Id.* at 750-51. New York further defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* The issue before the *Ferber* court was whether possession of non-obscene visual depictions of minors masturbating is protected under the First Amendment. *Id.* at 753. *Ferber* ultimately held non-obscene visual depictions of minors masturbating were not protected under the First Amendment because, although the images were not obscene, they nevertheless visually documented child sexual abuse which is a crime. *Id.* at 759. Furthermore, because protecting minors from sexual abuse is a government interest of surpassing importance New York could validly restrict possession of child pornography without offending the First Amendment. *Id.* at 757.

This Court subsequently reaffirmed *Ferber* in *U.S. v. Stevens*, 559 U.S. 460 (2010), which has been called one of this Court's "most doctrinally significant constitutional opinions[.]" *People v. Hollins*, 971 N.E.2d 504 (Ill. 2012) (J. Burke, dissenting) (citation omitted). In *Stevens*, 559 U.S. at 482, this Court struck down a federal statute that criminalized the creation, sale or possession of certain depictions of animal cruelty. In doing so, *Stevens* rejected the government's request that the Court apply *Ferber* and recognize "depictions of animal cruelty" as a new category of speech wholly exempted from First Amendment protection. *Stevens*, 559 U.S. at 469-471. This Court declined to do so explaining that when *Ferber* exempted "child pornography" from First Amendment protection, it did so because the speech at issue in that case was "intrinsically related" to the "underlying sexual abuse" of children, which was a crime in and of itself. *Id.* at 471 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. at 249-50). Therefore, after *Stevens*, a photograph cannot constitute "child pornography" wholly exempt from First Amendment protection unless that photograph is "an integral part of conduct in violation of a valid criminal statute." *Hollins*, 971 N.E.2d at 520 (J. Burke, dissenting); accord Harvard Law Review Association, *The Supreme Court 2009 Term, Leading Cases, I. Constitutional Law. D. Freedom of Speech and Expression*, 124 Harv. L. Rev. 239, 247

(2010 (“According to *Stevens*, *Ferber* did not affirm a new exception to the First Amendment, but was a special example of the historically unprotected category of speech integral to the commission of a crime”); Lawrence Walters, *Symposium, Sexually Explicit Speech, How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 First Amend. L. Rev. 98, 113-14 (2010) (“Any doubts as to the limits of *Ferber* and [*Osborne v. Ohio*, 495 U.S. 103 (1990)] pertaining to the policy justifications for child pornography prohibitions, were laid to rest by the recent Supreme Court decision in *U.S. v. Stevens*, where the Court made it clear that child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material”).

Unlike the New York law at issue in *Ferber*, Nevada’s child pornography laws do not define any prohibited conduct on the minor’s part, do not limit child pornography to works that visually depict minors engaged in sexual conduct (as defined by state law), nor suitably limit and describe “the category of sexual conduct proscribed.” Additionally, Nevada’s child pornography laws are not “intrinsically related” to the crime of child sexual abuse because the law does not require the minor depicted in an image to be engaged in any sexual conduct. Therefore, Nevada’s

child pornography laws only criminalize a person's private thoughts. Nevada cannot do this. This Court has repeatedly recognized that states cannot constitutionally criminalize images based upon the images' effect upon the viewer. *Jacobson v. U.S.*, 503 U.S. 540, 551-52 (1992); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *U.S. v. Whorley*, 550 F.3d 326, 348 (4th Cir. 2008); *U.S. v. Villard*, 855 F.2d 117, 125 (3rd Cir. 1989) ("[w]hen a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it[,]")(citing *Faloona v. Hustler Magazine, Inc.*, 607 F.Supp. 1341 (N.D.Tex. 1985)); *Rhoden v. Morgan*, 863 F. Supp. 612, 619 (M.D. Tenn. 1994)("A determination that a photograph constitutes child pornography focuses on the photograph itself rather than on the effect such photograph has on an individual viewer."); Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 961 (2001) ("if the subjective viewpoint of the pedophile can turn any depictions of children into erotic pictures, then all representations of children could be child pornography").

Based upon the aforementioned, because Nevada's child pornography laws unconstitutionally regulate a person's private thoughts, the laws lack any "plainly legitimate sweep" and are

facially unconstitutional. See *Stevens*, 559 U.S. at 472; *Stanley*, 394 U.S. at 565 (“Georgia asserts the right to protect the individual’s mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person’s thoughts.”) However, notwithstanding the laws’ lack of legitimate sweep, Nevada could potentially still regulate non-sexual and non-obscene images of minors if the regulation is the least restrictive means to further a compelling interest. See *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (“content-based restrictions on speech are presumed invalid and the Government bear the burden of showing their constitutionality.”). On direct appeal in the Nevada Supreme Court Petitioner addressed Nevada’s potential compelling interests in regulating non-sexual and non-obscene images of minors but also argued how Nevada’s child pornography laws are not the least restrictive means to achieve those interests. Specifically, Petitioner acknowledged Nevada has a compelling interest in protecting children from sexual exploitation. However, NRS 200.710(2) and NRS 200.700(4) are not the least restrictive means of achieving Nevada’s this compelling interest because Nevada’s express legislative goal in enacting NRS 200.710(2) and NRS

200.700(4) was not to protect minors from criminal sexual abuse or exploitation but instead to control the thoughts of persons who used non-sexual images of children for a “pornographic purpose.” The Nevada Supreme Court declined to address Petitioner’s argument after concluding, in a footnote, “[b]ecause we conclude that such statutes do not implicate protected speech under the First Amendment, we reject the first argument.” *Shue*, 407 P.3d at 339 fn. 10.

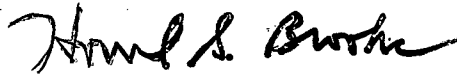
Nevada, like Congress and every other state legislature, has criminalized creating or possessing child pornography. However, unlike Congress and every other state, Nevada uniquely criminalizes creating and possessing not simply images depicting minors engaged in actual or simulated sexual conduct, but also any image whatsoever depicting a minor so long as the image could appeal to some person’s unhealthy interest in the minor’s sexuality. Thus, Nevada’s Orwellian child pornography laws unconstitutionally criminalize a person’s private thoughts and fantasies. No other jurisdiction has similarly defined child pornography so as to flagrantly violate the First Amendment. Accordingly, although Petitioner does not seek to resolve a split among circuits or other states, his case nevertheless presents a compelling issue involving a state’s ability to police its citizens’ private, non-criminal, thoughts. Given the fundamental right to

free speech and expression at issue in Petitioner's case, this Court should grant the instant petition and re-affirm its commitment to protecting the First Amendment.

CONCLUSION

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

Respectfully Submitted,



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