No. _____

Supreme Court of the United States

A.P,

Petitioner,

—v.—

THE STATE OF VERMONT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Vermont's criminalization of lewd and lascivious conduct violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner is A.P., a juvenile who was convicted of violating 13 V.S.A. § 2601, which criminalizes "lewd and lascivious conduct."

Respondent is the State of Vermont, which prosecuted A.P.

There are no related proceedings.

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The published opinion of the Vermont Supreme Court is available at *In re A.P.*, 2020 VT 86. It is included herewith as the first portion of the Appendix. *See* A1.

JURISIDICTION

The opinion of the Vermont Supreme Court was entered on October 9, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **U.S. Const. amendment XIV, § 1**:

No state shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. **13 V.S.A. § 2601**:

A person guilty of open and gross lewdness and lascivious behavior shall be imprisoned not more than five years or fined more than $300.00, or both.

3. **13 V.S.A. § 2601a**:

(a) No person shall engage in open and gross lewdness.

(b) A person who violates this section shall:

(1) be imprisoned not more than one year or fined not more than $300.00, or both, for a first offense; and

(2) be imprisoned not more than two years or fined not more than $1,000.00, or both, for a second or subsequent offense.

4. **13 V.S.A. § 2631(2)**:

As used in this section...the term "lewdness" shall be construed to mean open and gross lewdness.

STATEMENT OF THE CASE

This is a case about bans on "lewdness" and "lascivious behavior" written in the Victorian era, which are intentionally unclear due to the perceived vulgarity of the subject. Without defining what is prohibited, these statutes tell citizens that they must not do anything they should know their community would view as sexually inappropriate.

Those living in more than a dozen states commit a serious sex crime if they violate this amorphous standard, with multiple courts of final review (and Federal District and Circuit Courts) erroneously rejecting the argument that terms like "lewdness," without more, are overly vague. Yet in other state and federal jurisdictions, identical statutes have been properly invalidated for vagueness.

In Vermont, it is a misdemeanor to engage in "lewdness." *See* 13 V.S.A. § 2601a. It is, on the other hand, a felony requiring registration as a sex offender to engage in lewd "and lascivious" behavior. *See* 13 V.S.A. § 2601.

Vermont defines "lewdness" only as "open and gross lewdness." *See* 13 V.S.A. § 2631(3). There is no statutory definition of "lascivious" behavior. It is thus left to the discretion of police, prosecutors, and jurors to decide which types of sexual conduct are not "lewd" or "lascivious," and which are misdemeanors or felonies.

More than 120 million Americans live in states with similarly nebulous bans on "lewdness" or "lascivious" behavior. This is not how a country recognizing the necessity of due process should give notice to its citizens of what they cannot do if they wish to remain free.

A. **Background**

On January 19, 2018, Petitioner was an eighteen-year-old high school senior. (A2). In the empty school hallway, he approached a seventeen-year-old with whom he was acquainted and asked whether he could touch her breast. (A2.)

The trial court found that Petitioner briefly touched his acquaintance's breast over her clothes before she could respond. *Id.* As a result, Petitioner was convicted for violating 13 V.S.A. § 2601 (Vermont's felony prohibition on lewd "and lascivious" behavior).

B. **Lower Court Proceedings**

Petitioner was convicted after a bench trial on May 30, 2019.[1] There, Petitioner asserted that § 2601 was unconstitutionally vague. (A45-A54, A60-A67.) The State noted that it "actually agrees that it's not the statutory language I would have picked had I—had that been my job to write the statutes," before arguing that § 2601 was nevertheless constitutional. (A47.)

The trial court's ruling on Petitioner's constitutional argument and its findings of fact and conclusions of law were made on the record. (A55-A59, A69-A76.) In response to Petitioner's argument that § 2601 was unconstitutionally vague, the trial court said that Petitioner had touched his acquaintance's breast, and the touching was "designed to excite or appeal to lust." (A56-A67.) Although it acknowledged that the language of the statute was "poorly thought out," the trial court noted that "the question is not . . . whether the Court would draft [it] that

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[1] The case was in the Family Court because of Petitioner's age.

way," but rather "whether [statutes relating to lewdness] are appropriate and how to interpret them." (A57.)

Accordingly, the trial court found that "lewdness" was commonly understood to mean "gross and wanton indecency in sexual relations," while lasciviousness was something different: "tending to excite lust." (A58-A59). So, as the trial court put it, "there's nothing that would make this unconstitutional going forward," concluding that Petitioner's conduct did "offend traditional notions of morality." (A59, A73.)

C. Vermont Supreme Court Appeal

Petitioner appealed the trial court's ruling to the Vermont Supreme Court.[2] In addition to other issues not relevant here, Petitioner argued that the statute was unconstitutionally vague. In Petitioner's brief, he relied on both state and federal case law on vagueness, including this Court's decisions in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), and *U.S. v. Davis*, 139 S.Ct. 2319 (2019). (A76-81.) Petitioner also identified jurisdictions which had concluded that statutes prohibiting "lewd" conduct were unconstitutionally vague. *Id.* *See also* A82-A87.

During oral argument, counsel for Petitioner argued that the trial court's analysis was contrary to *Johnson*[3], *Dimaya*[4], and *Davis*[5], and compared the trial court's review of the ban on "lewd and lascivious" behavior to this Court's analyses of

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2 Vermont's highest court of appellate review.
3 *Johnson v. United States*, 135 S.Ct. 2551 (2015).
4 *United States v. Dimaya*, 138 S. Ct. 1204 (2018).
5 *United States v. Davis*, 139 S.Ct. 2319 (2019).

overly vague statutory references to hypothetical "crimes of violence." (A28-30.) Petitioner also addressed vagueness and the right to due process generally:

> If the State is going to wield its power to incarcerate somebody for up to five years, often with mandatory programming to get out; to put them on the sex offender registry, which is the closest thing we have in the modern law to the scarlet letter or banishment; to take away their right to vote; to take away their right to bear arms; to take away their right to serve on a jury or travel to many countries; often to lose their employment, their licensing, and their livelihood, if the State is going to wield that power, it must tell a citizen, "This is what you cannot do."
>
> And telling the citizen something like, "Well, you need to understand you are going to jail if you commit lewd and lascivious conduct," is simply not specific enough in today's world in order to put them on adequate notice sufficient to satisfy the requirements of due process. Moreover, it puts the courts and the prosecutors and the officers charged with enforcing the law in the position of figuring out which offense is or is not lewd and lascivious on each occasion.

(A26.)

On October 9, 2020, a divided court affirmed. The majority did not engage in extensive analysis of federal case law on vagueness and did not mention this Court's opinions in *Dimaya, Davis,* or *Johnson*. Instead, the majority focused on Petitioner's conduct, finding that "while the statute is not a paragon of specificity, and could benefit from legislative review, our case law has defined the words open, gross, lewdness, and lasciviousness with sufficient definiteness that [Petitioner] should have known that groping a girl's breast without her consent in a school hallway constitutes prohibited conduct." (A10.)

The case law to which it referred included affirmations of convictions for lewdness where the facts were distinguishable from Petitioner's conviction (in one, a man masturbated in front of children at a department store; in another, a man exposed his penis to three young girls), and a holding that explained that "lewd" meant "patently offensive" and "known to be patently offensive to any law-abiding person in [the defendant's] situation." (A6-7 (citation omitted).) This, the majority said, satisfied the standard it identified for fair warning: where the warning was made on the basis of the statute itself, "rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants." (A9) (citation omitted).)

Although Petitioner had requested at oral argument that it undertake facial review of the statute pursuant to *Johnson, Dimaya, and Davis*, the majority declined. Instead, it took the position that § 2601 did not invite arbitrary or discriminatory enforcement, concluding that despite "difficulty in specifying the broad range of offensive sexual conduct the law should prohibit, it is possible that '[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." (A10 (citing *Michelson v. United States,* 335 U.S. 469, 486 (1948)).[6]

The only federal precedents cited by the majority in support of its analysis of vagueness were *U.S. v. Bronstein,* 849 F.3d 1101 (D.C. Cir. 2017), and *Bouie v. City of Columbia,* 378 U.S. 347 (1964). *Bronstein* was a case in which the D.C. Circuit

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6 *Michaelson* was not about vagueness. It affirmed a lower court decision refusing to establish guidelines for evidence of the character of the accused; and was later implicitly overturned by the adoption of F.R.E. 413—which has served for more than 70 years as a "rationale edifice."

found that the prohibition set forth at 40 U.S.C. § 6134 against "mak[ing] a harangue or oration, or utter[ing] loud, threatening or abusive language" in the Supreme Court Building gave reasonable notice that disruptive speeches "in staccato bursts" were prohibited while court was in session. *Id.* at 1110-11. *Bouie* examined the constitutionality of a South Carolina statute that stated, in "admirably narrow and precise" language, that trespassing was "entry upon the lands of another . . . after notice . . . prohibiting such entry." *Id.* at 351-52. But there, the Court reversed the petitioners' conviction, because the statute was applied to the act of remaining on the premises after being asked to leave—something it did not explicitly prohibit. *Id.* at 355.

The dissent disagreed with the majority's analysis on vagueness. It asserted that § 2601 was facially invalid, because it was "one of those rare statutes that is impermissibly vague in all its applications." (A15-16.) The dissent pointed out that § 2601 had, due to the failure by the Legislature and the courts to define its terms, "become a stand-in to prohibit any wrongful sexual act, with virtually no discernable standard apart from a general appeal to morality." (A10.)

To illustrate the extent of the § 2601's opacity, the dissent compared it to a hypothetical law that was obviously vague, reading simply: "No person may commit a grossly immoral act." (A10.) Citing relevant federal precedent, which was at the core of *Johnson, Davis,* and *Dimaya,* the dissent recognized that such a prohibition would be "dangerous," setting "a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who

should be set at large." (A10 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972)) (quotation omitted)).

The dissent then asked how such an impermissibly vague statute could be made constitutional by limiting its universe to sexual acts. *Id.* It would, like a general ban on "immoral acts," invite the judiciary to "mandate [its] own moral code" by applying it to any sexual act viewed as wrongful. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quotation omitted).

The dissent examined the history of § 2601, which was originally intended to protect the public from viewing prostitution, exposed genitalia, and open sexual activity.[7] (A11-12.) Over time, the "extraordinarily broad" standard "has been used to fill a void in our criminal law by prosecuting a broad range of nonconsensual touching." (A11.) (Vermont has not adopted statutes that explicitly prohibit groping or similar misconduct.) Indeed, this has "become a primary use of the statute, even though it is theoretically aimed at conduct that 'tends to affront the public conscience and debase the community morality,' and was not originally enacted to address invasions of individual privacy or bodily integrity." (A14 (quoting *State v. Beaudoin*, 2008 VT 133, ¶ 37)).

The dissent noted that the unclear language of § 2601 has been repeatedly challenged for vagueness, and yet no decision has defined it more clearly. (A13.) Instead, the judiciary left "the community" to "define open and gross lewd and

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[7] At common law in England prior to 1776, "lewdness" was defined as either "frequenting houses of ill fame" or "some grossly scandalous and public indecency." William Blackstone, 4 Commentaries on the Laws of England 65 (1st Ed. 1769).

lascivious conduct in each particular case." *Id.* (citing *State v. Discola*, 2018 VT 7 at ¶ 20).

The dissent also noted that there is no meaningful difference between behavior characterized as "lewd" (a misdemeanor) and "lewd and lascivious" (a felony), contrary to the claims of the majority and the trial court. (A22-24 (pointing out that the Merriam Webster definition of "lascivious" used by the majority to purportedly distinguish it from "lewd" in fact cross-references the word "lewd").) Both words define "simply sexual behavior that is offensive to community standards," which is "a broader definition than even the Legislature seems to have intended in 1839." (A14-15).

The dissent then identified a number of decisions spanning more than 50 years invalidating bans on "lewdness" from other jurisdictions. *Id.* at ¶ 42. In *State v. Kueny*, 215 N.W.2d 215, 217-18 (Iowa 1974), the Iowa Supreme Court recognized that "although the words 'lewdness' and 'indecent' have often been defined, the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify those terms." In *District of Columbia v. Walters*, 319 A.2d 332, 337 (D.C. 1974), the D.C. Court of Appeals struck down criminalization of "any other lewd, obscene, or indecent act" for vagueness ("a standard so indefinite that police, court and jury are free to react to nothing more than what offends them").

In *Harris v. State*, 457 P.2d 638, 647 (Alaska 1969), the Supreme Court of Alaska nullified a ban on acts "against nature" because "where the conduct to be prohibited by a criminal statute is capable of objective definition . . . it simply will not

do to use language so ambiguous as to be capable of expansion or contradiction at the whim of the reader." *Id.* at 47.[8] And in *Courtemanche v. State*, the Texas Court of Criminal Appeals struck down a law prohibiting businesses from arranging "entertainment, performances, shows or acts that are lewd or vulgar." 507 S.W. 2d 545, 547 (Tex. Crim. App. 1974).

Florida's Supreme Court struck down a "crime against nature" statute and found it unconstitutional to apply a ban on lewdness and lascivious behavior to consensual touching in a gay bar. *See Franklin v. State*, 257 So. 2d 21, 23 (Fla. 1971); *see also Campbell v. State*, 331 So. 2d 289, 290-91 (Fla. 1976) (England, J., concurring) (noting "[t]his case re-emphasizes the need for legislative review of the unused, vintage sex offense statutes which are still in force in this state").

In addition to the state-level decisions, the dissent noted that the Eighth Circuit has held that the term "indecent or lewd act of behavior" was unconstitutionally vague. *District of Columbia v. City of St. Louis*, 795 F.2d 652, 654-55 (8th Cir. 1986). And the Eastern District of Michigan found that a bar on "other lewd immoral acts" was similarly vague, because "[t]here are no objective standards to measure whether proposed conduct is 'lewd.' " *Morgan v. City of Detroit*, 389 F. Supp. 922, 930 (E.D. Mich. 1975).

The dissent also identified decisions that had limited but not nullified lewdness prohibitions. Massachusetts, for example, found a prohibition on "open and gross

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[8] The terms "lewd and lascivious" taken by themselves were considered equally imprecise, and only permissible because other, more specific provisions of a statute banning lewd and lascivious acts "upon or with the body of a child under 16 years of age" gave fair warning of the conduct proscribed. *Anderson v. State*, 562 P.2d 351, 357-58 (Alaska 1977).

lewdness" to be unconstitutionally vague as applied where a man exposed his buttocks, and in response adopted a series of narrowing requirements that provided exposure would be criminally "lewd" only where it was done intentionally to produce alarm or shock (or with reckless disregard thereof), and the viewer was actually shocked. *Commonwealth v. Quinn*, 789 N.E. 2d at 145-46 (Mass 2003). Similarly, the Supreme Court of California clarified a statute prohibiting solicitation of "lewd or dissolute conduct" as prohibiting touching the genital areas of another for gratification or offense. *Pryor v. Municipal Court*, 599 P.2d 636, 642 (Cal. 1979) (avoiding "vague and far-reaching standards under which the criminality of an act depends upon the moral views of the judge or jury").

Utah and Michigan also have adopted narrowed definitions of lewdness. *See People v. Lino*, 527 N.W. 2d 434 (Mich. 1994); *State in Interest of L.G.W.*, 641 P.d2 127, 131 (Utah 1982). The dissent focused particularly on the former, because Michigan had originally adopted its standard, the "common sense of society," from Vermont's earliest decision interpreting § 2601. (A19-20 (citing *People v. Carey*, 187 N.W. 261, 262 (Mich. 1922), which cited *State v. Millard*, 18 Vt. 574, 577 (1846)).) In reviewing its analogue to Vermont's prohibition on lewdness, a plurality of the Michigan Supreme Court found that giving discretion over sexual propriety to "society" left "the trier of fact free to decide, without any legally fixed standards, what is prohibited and what is not." *People v. Howell*, 238 N.W. 2d 148, 151 (Mich. 1976). Eventually, a majority decision rejected the "common sense of society" standard entirely. *See Lino*, 527 N.W. 2d at 436 ("[W]e cannot allow criminality to depend only

upon the moral sentiment or idiosyncrasies of the tribunal before which a defendant is tried.") (Levin, J., *writing separately*) (quotation and alteration omitted).

Finally, the dissent pointed out that it would have been simple, if Vermont's Legislature wanted to prohibit nonconsensual touching, to do just that, citing clear, specific statutes adopted in each of Vermont's surrounding states (New York, Massachusetts, Maine, and New Hampshire). (A20.)

REASONS FOR GRANTING CERTIORARI

I. THE RULING OF THE VERMONT SUPREME COURT IS AN EXAMPLE OF A SPLIT BETWEEN SEVERAL STATES, AND BETWEEN THOSE STATES AND FEDERAL DISTRICT AND CIRCUIT COURTS, ON A FEDERAL CONSTITUTIONAL ISSUE OF NATIONAL IMPORTANCE.

There are 13 states containing roughly 121.8 million people which prohibit crimes involving some form of "lewdness" or "lewd" or "lascivious" behavior, with penalties as harsh as life imprisonment: Arizona[9], Florida[10], Idaho[11], Kansas[12], Massachusetts[13], Michigan[14], Minnesota[15], Nevada[16], New York[17], South Carolina[18],

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9 A.R.S. § 13-2916(A)(1) (prohibiting suggestion of "any lewd or lascivious act" in an electronic communication).

10 § 798.02, Fla. Stat. Ann (2020) ("If any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree...").

11 Idaho Code. Ann. § 18-1508 ("Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to [acts described], shall be guilty of a felony and imprisoned in the state prison for a term of not more than life.").

12 Kan. Stat. Ann. § 21-5513 (defining "lewd and lascivious behavior" as sexual intercourse viewed by others and public exposure and designating it a misdemeanor).

13 Mass. Gen. Laws. ch. 272, § 16 ("A man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than three hundred dollars.").

14 Mich. Comp. Laws Ann. § 750.335 ("a person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.").

15 Minn. Stat. Ann. § 617.23(1)(3) (penalizing any person who "engages in any open or gross lewdness or lascivious behavior, or any public indecency other than [breastfeeding].").

16 Nev. Rev. Stat. § 201.210 (criminalizing "open and gross lewdness" as a gross misdemeanor for the first offense, and a felony with a mandatory minimum of one year for subsequent offenses).

17 N.Y.P.L. § 245.00(a) ("A person is guilty of public lewdness when he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act" in a public place or while trespassing.).

18 S.C. Code Ann. § 16-15-365 ("Any person who willfully and knowingly exposes the private parts of his person in a lewd and lascivious manner...is guilty of a misdemeanor...").

Texas[19], Utah[20], Vermont, and Wisconsin.[21] Another seven (7) criminalize similarly imprecise "crimes against nature": Idaho[22], Louisiana[23], Massachusetts[24], Michigan[25], Mississippi[26], North Carolina[27], and Oklahoma.[28] In addition, federal laws ban mailing and importation of "lewd" and "lascivious" materials. *See* 18 U.S.C. §§ 1461, 1462(a)-(b) (criminalizing importation of any "obscene, lewd, lascivious or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character" and "any obscene, lewd,

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19 Tex. Alco. Bev. Code § 104.01 ("No person authorized to sell beer...may engage in or permit conduct...which is lewd, immoral, or offensive to public decency, including...permitting lewd or vulgar entertainment or acts.").

20 Utah Code Ann. § 76-9-702(1)(d) (criminalizing a series of defined sexual acts, including "any other act of lewdness.").

21 Wis. Stat. § 944.20 (criminalizing lewd and lascivious behavior, defined as either "committing an indecent act of sexual gratification with another with knowledge that they are in the presence of others" or publicly exposing one's genitals).

22 Idaho Code. Ann. § 18-6605 ("Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.").

23 La. Stat. Ann. § 14:89 ("Crime against nature is the unnatural carnal population by a human being with another of the same sex or opposite sex or with an animal except that anal intercourse between two human beings shall not be deemed a crime against nature when done under [circumstances listed]. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.").

24 Mass. Gen. Laws. ch. 272, § 34 ("Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years.").

25 Mich. Comp. Laws § 750.158 ("Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years, or if such person was at the time of said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.").

26 Miss. Code Ann. § 97-29-59 (1972) ("Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.").

27 N.C. Gen. Stat. § 26-14-177 ("If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.").

28 Okla. Stat. tit. 21, § 21-886 (2019) ("Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment...not exceeding ten years...").

lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound").

State and federal courts are divided on whether prohibitions on lewdness are unconstitutionally vague. Petitioner has cited above case law finding such prohibitions unconstitutional. There are also many state and federal Courts that have upheld identical or indistinguishable statutes. *See Schwartzmiller v. Gardner*, 752 F.2d 1341, 1348-49 (9th Cir. 1984) (upholding statute prohibiting lewd and lascivious conduct with minors); *Commonwealth v. Sefranka*, 414 N.E. 2d 602, 604, 608 (Mass. 1980) (finding statute did not invite discriminatory enforcement); *State v. Coleman*, 915 P.2d 28, 32 (Idaho. Ct. App. 1996) (ban on "lewd and lascivious" acts was not void for vagueness); *State v. Cota*, 408 P.2d 23, 26 (Ariz. 1965) (*en banc*) (upholding prohibition of "lewd or indecent act"); *City of Mankato v. Fetchenhier*, 363 N.W. 2d 76, 79 (Minn. Ct. App. 1985) (upholding statute prohibiting "any open or gross lewdness or lascivious behavior, or any public indecency" against vagueness challenge).

The split between state and federal courts demonstrates the inherent ambiguity of vague prohibitions against "lewdness" or "lasciviousness." What may be considered "lewd" or "lascivious" varies from person to person, from place to place, and over time. Widely held American views about "lewdness" have evolved substantially over time and are likely to change in the future. Because of this inherent ambiguity and variability, simply referring to "lewd" or "lascivious" conduct is insufficient to communicate what is prohibited.

For most of America's history, in large parts of the country, it was "lewd" for a white person to join in a sexual, cohabiting, or marital relationship with a black person. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 185 (1964) (invalidating statute prohibiting "lewd cohabitation," defined to include white and black persons who "habitually live in and occupy in the nighttime the same room").

For even longer, it was generally considered "lewd" to be homosexual. *See, e.g., Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert denied,* 397 U.S. 1039 (1970) ("Any schoolboy knows that a homosexual act is immoral, indecent, lewd and obscene. Adult persons are even more conscious that this is true."); *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960) (allowing federal government to deny employment and security clearance to a man who had been charged with homosexual "lewdness").[29]

Public nudity has been thought by some to acceptable, provided the intent is "not vicious" and "the motive was not bad, but pure." *People v. Burke*, 243 App. Div. 83, 89 (N.Y. 1934) *aff'd* 267 N.E. 585 (N.Y. 1935). But others have argued vigorously that open nudity is inherently lewd because sexual thoughts follow. *Id.* at 92 (Merrell, J., dissenting) ("It cannot be doubted that the parading of persons, male and female, naked, in public places, would raise thoughts of lasciviousness and

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[29] Even more confusing has been what type of homosexual acts were considered immoral, a problem older than our Constitution. In 1533, the Reformation Parliament under Henry VIII made "the detestable and abominable vice of buggery committed with mankind or beast punishable by death." *See* Act of 1533, 25 Hen. 8., ch. 6 (Eng.). The Massachusetts Bay Colony concluded that this meant men could not lie with other men, but rejected the Rev. John Cotton's 1636 proposal that intercourse between women be similarly punished. *See* William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946,* 82 Iowa Law Rev. 1007, at 1013 (citations omitted). The New Haven Colony, on the other hand, prohibited women lying with women, then changed its mind when the Connecticut Colony was formed. *Id.*

lust in many who observed such practices. I do not think this country has yet reached the stage when such practices should be permitted.").

In fact, as recently as 2019, a Utah woman was convicted for lewdness for conduct that most Americans would probably think proper: removing her shirt at home. Laurel Wamsley, *Utah Woman Charged With Lewdness After Being Topless In Her Own Home*, NPR (November 21, 2019), https://www.npr.org/2019/11/21/781703956/utah-woman-charged-with-lewdness-after-being-topless-in-her-own-home. There, the woman and her husband had been installing drywall and removed their shirts after they became itchy from the release of insulation fibers, whereupon they were observed by their children and stepchildren. For this, the woman was charged with lewdness, but the man was not. *Id.* The shirtless drywaller faced incarceration, fines, and the requirement to register as a sex offender for 10 years if convicted; to avoid those risks, she pled guilty (to be held in abeyance) and paid a $600 fine. Jessica Shladebeck, *Utah woman charged with lewdness after stepchildren saw her topless agrees to plea deal*, New York Daily News (Feb. 26, 2020), https://www.nydailynews.com/news/national/ny-utah-lewdness-topless-stepchildren-plea-deal-20200226-wgxeu6yamjhabonefo3aeodwye-story.html.

There are many other examples of specific sexual conduct considered unacceptable in some eras, places, and groups, but thought appropriate in others. For example, in 1880, 37 states deemed children ten (10) years and older capable of consenting to lawful sexual activity. *See* "Age of Consent Laws [Table]," in Children

and Youth in History, Item #24, https://chnm.gmu.edu/cyh/items/show/24 (March 7, 2021). In other words, marital adult-child relationships were not considered lewd. Forty years later, no state permitted such acts, and today we recognize them to be harmful and wrong. *Id.* If these states banned only "lewdness" rather than sexual relations below a certain age, how could a citizen know where the line was drawn, and when it moved?

Polygamy was widely practiced in Utah prior to its statehood, banned as a felony for more than a century, then decriminalized in 2020. *See* Lindsay Whitehurst, *Utah Lawmakers Get Tough on Porn, Ease Up on Polygamy*, ABC News (Feb. 18, 2020, 7:55 p.m.), https://abcnews.go.com/Politics/wireStory/utah-lawmakers-tough-porn-ease-polygamy-69058219. The 2020 revision was attributed in large part to changing public perception in response to the popular television show "Sister Wives," which premiered in 2010. *Id.*[30] Does that mean that polygamy is no longer considered "lewd" in Utah, as it was when, in 1871, Brigham Young was arrested for "lewd and lascivious cohabitation" with his wives? *See* New York Times, "THE MORMONS.; Brigham Young's Case Peremptorily Ordered On for Monday The Murder of Buck.," Nov. 29, 1871 (available at: https://www.nytimes.com/1871/11/29/archives/the-mormons-brigham-youngs-case-peremptorily-ordered-on-for-monday.html.)

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30 *See also* Faucon, Casey E. (2016) "Decriminalizing Polygamy," *Utah Law Review*: Vol 2016: No. 5, Art. 2 (observing the role of "Sister Wives" in challenging the stigmatization of polygamy and its connection to legal challenges to the ban thereon).

The CDC noted in 2009 that "Studies indicate that oral sex is commonly practiced by sexually active male-female and same-gender couple of various ages, including adolescents." *See* Centers for Disease Control, "Oral Sex and HIV Risk," (June 2009) https://web.archive.org/web/20130510210937/http://www.cdc.gov/hiv/resources/Factsheets/pdf/oralsex.pdf. However, until 2014, it was illegal in Alabama for an unmarried couple to engage in consensual oral sex. *See* A.R.S. § 13A-6-65(a)(3) (1975) and its Commentary.[31] In Georgia, it was illegal even for married couples until 1998. *Powell v. State*, 510 S.E. 2d 18, 23-24 (Ga. 1998). And many still contend that oral sex is indisputably lewd. *See, e.g.*, Rev. Robert Buschmiller, "Oral Sex in Marriage" Presentation Ministries (2017), https://web.archive.org/web/20170206194539/http://www.presentationministries.com/publications/OralSex.asp ("First, oral sex is not natural. It is contrary to natural law. If oral sex is OK, then are anal sex or nasal sex also OK?").

As of 2003, 95% of Americans had engaged in premarital sex. Lawrence Finer, *Trends in premarital sex in the United States, 1954-2003*, Public Health Reports at 73 (Wash. D.C. 2007). Yet premarital sex is considered immoral in each of the most widely practiced American religious faiths, and remains illegal in Idaho, Mississippi, and North Carolina (where unmarried couples are said to "lewdly and lasciviously associate"). It was prohibited in Virginia and Utah until 2019, and

[31] Defining "deviate sexual intercourse" to include "sexual gratification involving the sex organs of one person and the mouth...of another" and stating, "consent is no defense."

Massachusetts until 2018.[32] So, is premarital sex lewd? Does it depend on the beliefs of the jurors? Does it depend on geographic location? Did premarital sex used to be lewd, but it's not now? When did that change? If it did not, will it change in the future? And how can a citizen know? There are no clear answers.

This vagueness is particularly concerning because it blurs the line between criminal conduct and conduct that this Court has come very close to characterizing as a fundamental right. Imagine a situation where a married couple was observed in sexual activity in a place they believe to be private, but should have known was visible to others. How could a court or a jury fairly decide whether that conduct should be considered "lewd"? How could a court or a jury fairly decide whether it rose to a felony due to its "lasciviousness"?

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[32] *See* Idaho Code. Ann. § 18-6603; Miss. Code Ann. § 97-29-1; N.C. Gen. Stat. § 14-184; Va. Code. Ann. § 18.2-344 (repealed); Utah Code § 76-7-104 (repealed); and Mass. Gen. Laws. ch. 272, at §§ 18-21 (repealed).

The vagueness is particularly in troubling in states like Vermont, where "lewdness" is a misdemeanor with a light penalty, but it becomes a felony requiring sex offender registration when it is combined with "lasciviousness." *See* 13 V.S.A. §§ 2601, 2601a. The significant difference in penalties suggests a significant difference in meaning. But for hundreds of years, "lewd" and "lascivious" have been used interchangeably to describe an absence of sexual propriety. For example, in 1664, the First Church of Boston excommunicated the minister's son "for lascivious unclean practices with three women."[33] And in 1610, the Statute of 7 James, cap 4 criminalized "lewd women which have any bastard which may be chargeable to the parish."[34] The terms are also defined by each other. "Lascivious" comes from the Latin *Lascivus*, which is defined as, firstly, "lewd."[35] Modern dictionaries still tend to define one word by using the other, or identify the other as a synonym, or use almost identical language to define both, as set forth in the following chart:

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33 Jesus Fernandez-Villaverde, *From Shame to Game in One Hundred Years: A Macroeconomic Model of the Rise in Premarital Sex and its De-Stigmatization*, Univ. Penn Population Studies Center Working Papers Series, PSC-10-02 (2010) at 8.

34 *Id.* at 6.

35 Douglas Harper, "Lascivious," Online Etymology Dictionary, https://www.etymonline.com/word/lascivious.

Dictionary	Definition of "Lewd"	Definition of "Lascivious"
Merriam-Webster[36]	(a) Obscene, Vulgar; (b) Sexually unchaste or licentious.	Filled with or showing sexual desire: LEWD, LUSTFUL.
American Heritage[37]	(a) Preoccupied with sex and sexual desire; lustful. (b) Obscene, indecent.	(1) Given to or expressing lust; lecherous. (2) Exciting sexual desires; salacious.
Oxford Learner's[38]	Referring to or involving sex in a rude or offensive way.	Feeling or showing strong sexual desire.
Cambridge[39]	(of behavior, speech, dress, etc.) sexual in an obvious and rude way. Synonyms: lascivious (formal disapproving), libidinous (formal).	Expressing a strong desire for sexual activity. Synonyms: lewd (disapproving), libidinous (formal).
Wiktionary[40]	(1) Lascivious, sexually promiscuous, rude. (2)-(5) [obsolete].	Wanton, lewd, driven by lust, lustful.
Collins[41]	If you describe someone's behavior as lewd, you are critical of it because it is sexual in a lewd and unpleasant way.	If you describe someone as lascivious, you disapprove of them because they show a very strong interest in sex.
Dictionary.com[42]	(1) Inclined to, characterized by, or inciting to lust or lechery; lascivious. (2) Obscene or indecent, as language or songs; salacious. (3) [obsolete].	(1) Inclined to lustfulness; wanton; lewd. (2) Arousing sexual desire.

36 From: https://www.merriam-webster.com/dictionary/lewd and https://www.merriam-webster.com/dictionary/lascivious.

37 From: https://www.ahdictionary.com/word/search.html?q=lewd and https://www.ahdictionary.com/word/search.html?q=lascivious.

38 From: https://www.oxfordlearnersdictionaries.com/us/definition/english/lewd?q=lewd and https://www.oxfordlearnersdictionaries.com/us/definition/english/lewd?q=lascivious.

39 From: https://dictionary.cambridge.org/us/dictionary/english/lewd and https://dictionary.cambridge.org/us/dictionary/english/lascivious.

40 From: https://en.wiktionary.org/wiki/lewd and https://en.wiktionary.org/wiki/lascivious.

41 From: https://www.collinsdictionary.com/us/dictionary/english/lewd and https://www.collinsdictionary.com/us/dictionary/english/lascivious.

42 From: https://www.dictionary.com/browse/lewd and https://www.dictionary.com/browse/lascivious.

The inherent ambiguity in laws generally prohibiting "lewdness" or "lasciviousness" subject close to half of the American population to what this Court has repeatedly determined to be unconstitutional: "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *U.S. v. Johnson*, 135 S.Ct. 2551, 2557 (2015) (citation omitted). In laws such as Vermont's, where a "lewd" act will be punished as a misdemeanor, but a "lascivious" one will be punished as a felony—even though there is no distinction between the common meanings of "lewd" and "lascivious"—it is not possible to "estimate the risk" posed by sexual conduct that some might consider lewd; it is not possible to know "how much risk it takes for a crime to qualify as a [] felony." *Id.* at 2557-58.

II. THE RULING OF THE VERMONT SUPREME COURT WAS CONTRARY TO THIS COURT'S PRECEDENT.

The disconnect between Vermont's "lewdness" statutes (along with those in similar states) and this Court's analysis of unacceptable facial vagueness is almost a half century in the making. The first major case invalidating an ordinance in its entirety where protected speech was not at issue was *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). There, this Court found that a statute was facially void because it sought to prohibit the presence of a variety of loosely defined immoral actors, like rogues, vagabonds, "persons who use juggling," drunkards, pickpockets, and (among many more classes of people deemed unsavory), "lewd, wanton and lascivious persons." *Id.* at FN1.

The imprecise terms of the ordinance required citizens "to comport themselves according to the lifestyle deemed appropriate by the [] police and the Courts," and established "no standards governing the exercise of discretion granted by the ordinance," leaving unpopular groups open to harsh and discriminatory enforcement. *Id.* at 170. The "rule of law implies equality and justice in its application," and standardless laws "teach that the scales of justice are tipped so that even-handed administration of the law is not possible." *Id.* at 171. Accordingly, it "cannot be squared with our constitutional standards and is plainly unconstitutional." *Id.*

This principle was re-affirmed in *Kolender v. Lawson*, 461 U.S. 352 (1982), which addressed a California statute providing a criminal penalty for anyone who loitered "without apparent reason" or refused to identify themselves upon police

request. *Id.* at 352-53 and FN1. Again, this Court invalidated the statute in all of its applications as in an overbreadth analysis, characterizing overbreadth and void-for-vagueness as "logically related and similar doctrines." *Id.* at 358 n. 8 ("[W]here a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application." (internal citation omitted)).

The *Kolender* decision was strengthened by *City of Chicago v. Morales*, 527 U.S. 41 (1999). There, Chicago enacted an ordinance directing police officers who observed two or more persons, one of whom the officer believed to be in a gang, to disperse. *Id.* at 47 n. 2. Failing to comply with such an order was a crime; so too was loitering, defined as to "remain in one place with no apparent purpose." *Id.* at 48. After the ordinance was struck down by the Illinois Supreme Court, this Court affirmed in a plurality opinion, finding that "the vagueness of this enactment makes a facial challenge appropriate." *Id.* at 55. That was "not because a policeman applied [his] discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case." *Id.* at 71 (Breyer, J., concurring in part and concurring in the judgment) (emphasis in original).

Then came *Skilling v. United States*, 561 U.S. 358 (2010). In that case, the defendant was charged with failing to provide "honest services." *Id.* at 367. He only sought reversal of his own conviction (not facial invalidation), but even so, Justice Scalia noted that the statute was so vague as to have no clear applications whatsoever, so that any future "as applied" challenges would likely succeed—the

functional equivalent of facial invalidation. *Id.* at 424-425 (Scalia, J., concurring in part and concurring in the judgment).

Johnson came five (5) years later, and there this Court applied the same facial analysis used in *Papachristou, Lawson*, and *Morales* to a residual clause penalizing those with prior convictions for crimes presenting "a serious potential risk of physical injury to another." *See Johnson*, 135 S. Ct. 2551 (2015). Justice Scalia, who had previously criticized facial invalidation in his dissent in *Morales*, removed all doubt that facial invalidation was the proper remedy for inherently vague criminal laws:

> In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable" rate void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Id. at 2560-61 (internal citations omitted) (emphasis original).

Sessions v. Dimaya followed. 138 S. Ct. 1204 (2018). There, similar "crime of violence" language in the Immigration and Nationality Act was held facially invalid.

Id. at 1214-15 n. 3.[43] The Majority stated: "[F]undamentally, *Johnson* made clear that our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Id.* (quoting *Johnson*, 135 S. Ct. at 2561). Justice Gorsuch separately advocated for facial invalidation as a necessary implication of due process, citing support from the Constitution's original text and structure. *Id.* at 1223-28 (Gorsuch, J., concurring in part and concurring in the judgment).

Any remaining ambiguity was resolved by *United States v. Davis*, 139 S. Ct. 2319 (2019), which applied the same principles from *Johnson* and *Dimaya*. There, this Court rejected a proposed shift in focus from an "ordinary case" to the particular circumstances of a crime with a "potential risk of violence." *Id.* at 2322.

The statutes examined in *Johnson, Dimaya,* and *Davis* responded to a common problem: the indefiniteness of a crime that presented a hypothetical "serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. at 2557-58; and *Davis*, 139 S. Ct. at 2322 (2019). The Vermont statute at issue here, like the statutes addressed in *Johnson, Dimaya,* and *Davis,* punishes undefinable conduct: types of sexual activity that are, hypothetically, "known to be patently offensive to any law-abiding person in [Petitioner's] situation." (A6.) The impossibility of identifying applicable conduct is exacerbated by the misdemeanor/felony distinction between "lewd" and "lewd and lascivious" conduct: can anyone say what law-abiding people think is lewd, but not lascivious?

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[43] This discussion is in Part III of Justice Kagan's opinion, a Part joined by Justices Ginsburg, Breyer, Sotomayor, and Gorsuch. *Id.* at 1210.

This Court's declaration that to protect the right to due process, courts must invalidate statutes which do not tell citizens what is prohibited, and which invite arbitrary enforcement, should now be applied to Vermont's (and other states') criminalization of "lewdness" and "lasciviousness" (and to similar laws which seek to penalize unspecified conduct like "unnatural acts"). Petitioner's case is an excellent opportunity to do so because the majority did not recognize the relevance of *Johnson, Dimaya,* or *Davis,* even as it conceded (along with the dissent, the trial court, and the prosecutor) the incomprehensibility of Vermont's ill-defined ban on "lewd" and "lascivious" conduct. Petitioner's case also presents a less common but arguably more improper statutory distinction between "lewdness" and "lasciviousness"—often the difference between freedom and felony—that even the majority struggled to explain. Taken together, invalidating these vague laws will give clarity to more than 120 million Americans who lack fair notice of what constitutes a sex crime in their state, forcing Legislators to draft clearer statutes that protect victims and enable obedience to the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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