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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MASSACHUSETTS, Petitioner V. DOUGLAS OAKES

CASE NO: 87-1651

PLACE: WASHINGTON, D.C.

DATE: January 17, 1939

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 MASSACHUSETTS, :
4 Petitioner :
5 v. : No. 87-1651
6 DOUGLAS OAKES :
7 -----x

8 Washington, D.C.

9 Tuesday, January 17, 1989

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 12:59 o'clock p.m.

13 APPEARANCES:

14 JAMES M. SHANNON, ESQ., Attorney General of
15 Massachusetts, Boston, Massachusetts; on behalf of
16 the Petitioner.

17 RICHARD J. VITA, ESQ., Boston, Massachusetts; on behalf
18 of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-1651, Massachusetts v. Douglas Oakes.

General Shannon, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES M. SHANNON

ON BEHALF OF THE PETITIONER

MR. SHANNON: Thank you, Mr. Chief Justice, and may it please the Court.

This case comes to the Court on writ of certiorari to the Supreme Judicial Court of Massachusetts. And it raises the question as to whether the overbreadth of a Massachusetts statute whose purpose is to prevent the sexual exploitation and abuse of children is so real and so substantial as to warrant striking down the whole statute on its face.

The relevant statute, Chapter 272, Section 29A, punishes whoever hires, entices, employs, procures, uses, causes, encourages or knowingly permits a child under the age of 18 to pose or be exhibited in a state of nudity or to participate in sexual conduct for the purpose of any visual representation.

QUESTION: Just so I get it straight, you talk about overbreadth. What's your position on whether the

1 conduct or the -- these -- this -- what this father did
2 -- is it protected or unprotected?

3 MR. SHANNON: It -- it is our position, Your
4 Honor, that although the court below specifically did
5 not reach the question as to whether the Respondent's
6 activity was protected or not -- it is position that it
7 was clearly not protected.

8 QUESTION: And it certainly wasn't under the
9 statute, I gather.

10 MR. SHANNON: It --

11 QUESTION: I mean, the statute would certainly
12 forbid it.

13 MR. SHANNON: That's right, Your Honor. It
14 would -- would forbid it.

15 QUESTION: And you say that it's -- it could
16 constitutionally do that.

17 MR. SHANNON: Yes, Your Honor.

18 QUESTION: (Inaudible) --

19 QUESTION: General Shannon, the statute has
20 been amended in Massachusetts since we took the case,
21 has it not?

22 MR. SHANNON: It has, Your Honor.

23 QUESTION: To add a lasciviousness requirement?

24 MR. SHANNON: There is a requirement now of
25 lascivious intent which didn't exist prior to the

1 Supreme Judicial Court's decision.

2 QUESTION: And I gather, would you think that
3 the defendant in this case would have been subject to
4 prosecution and he could be found guilty under the new
5 statute as amended?

6 MR. SHANNON: I think that the defendant in
7 this case, Your Honor, could have been prosecuted under
8 the nude statute -- the new statute because the
9 definition of lascivious intent in that statute includes
10 inappropriate attire and -- and suggestive poses. And I
11 think he could have been --

12 QUESTION: Right.

13 MR. SHANNON: -- prosecuted.

14 QUESTION: Is there any other state that has a
15 statute as broad as the one at issue in this case?

16 MR. SHANNON: I believe, Your Honor, there are
17 two states that have statutes which would prohibit
18 depicting children in the state of nudity. Kansas is
19 one, and Ohio is the other. Although the wordings of
20 the statutes are -- are a little bit different from
21 Massachusetts, they specifically speak about nudity,
22 depicting a child in a state of nudity being a
23 prosecutable offense.

24 QUESTION: But the Ohio Supreme Court has --
25 has narrowed the interpretation of its statute, has it

1 not?

2 MR. SHANNON: That is -- that is my
3 understanding, Your Honor.

4 QUESTION: But you think Kansas is equivalent
5 to Massachusetts?

6 MR. SHANNON: I do, Your Honor.

7 QUESTION: You phrase the issue as to whether
8 not overbreadth invalidates the statute. Do you concede
9 the statute is overbroad?

10 MR. SHANNON: Yes, Your Honor, we do concede
11 that there is overbreadth. As the court below said,
12 read literally, the statute would reach benign family
13 activity. The one example that they used is the -- the
14 activity of a parent depicting a child -- photographing
15 a child, a toddler, one-year old toddler romping on the
16 beach without a bathing suit on.

17 QUESTION: Well, the statute doesn't say
18 depicts and it doesn't say photograph. It says permits
19 a child to pose or be exhibited.

20 MR. SHANNON: For purposes of visual
21 representation.

22 QUESTION: But that -- that's different than
23 -- than permitting the child to be depicted.

24 MR. SHANNON: Your Honor, the statute does
25 prohibit posing or permitting a child to pose. There's

1 no question about that. And it is our belief that in
2 citing that --

3 QUESTION: What if somebody just snaps the
4 little baby in the wading pool? Is the baby posing?

5 MR. SHANNON: Well, the parent might be
6 permitting the baby to pose or be used for visual
7 representation, and that is the basis for the Supreme
8 Judicial Court's --

9 QUESTION: Well, again, it doesn't say visual
10 representation. It's your statute. If you want to say
11 it's overbroad, I suppose you can. But it says to be
12 exhibited. It's not -- it's not --

13 MR. SHANNON: Well --

14 QUESTION: -- clear to me that a family
15 snapshot is an exhibit.

16 MR. SHANNON: Your Honor, is raising I think a
17 very important question here and that is whether --
18 whether even that which has been suggested by the
19 Supreme Judicial Court as being technically or literally
20 in violation of the statute would be because prosecutors
21 in Massachusetts have certainly never read this statute
22 and the words of this statute as to involve that kind of
23 activity.

24 QUESTION: Well, don't we have to accept the
25 broad interpretation given it by the Massachusetts

1 Supreme Court, and didn't we say in Ferber that we would
2 accept the interpretation of the state court?

3 MR. SHANNON: Your Honor, what we have here I
4 believe is not the construal of the statute really as
5 much as it is a literal reading of the statute --

6 QUESTION: Well, the court read it literally
7 and said it would -- it would be violated by taking a
8 picture of a nude toddler.

9 MR. SHANNON: I think that what the court did
10 below was exactly what this Court has said it shouldn't
11 do. It took one -- one conceivable violation, one
12 conceivable infringement on constitutionally protected
13 activity, and constituted that as substantial
14 overbreadth.

15 QUESTION: Well, are you asking us to
16 reinterpret the statute, or are you willing to have us
17 accept it as it's broadly read by the court?

18 MR. SHANNON: We are asking -- we -- we
19 believe that this Court should accept the statute as it
20 has been interpreted by the court, but make a
21 determination as to whether the overbreadth that the
22 court below spoke of is substantial and real --

23 QUESTION: General Shannon, you mentioned a
24 moment ago that the picture of the toddler on the beach
25 was benign. Is -- is -- are you saying it's protected

1 by the First Amendment or that it was just not intended
2 to be covered by a sensible statute?

3 MR. SHANNON: Your Honor, I think that there
4 is a very substantial argument that could be made that
5 none of the conduct that is implicated by this statute
6 is protected by the Constitution. On the margins,
7 perhaps there are some -- some -- some entwinement with
8 constitutionally protected activity. Now, in the case
9 of a benign family photo, it is arguable I suppose that
10 that kind of activity is protected by a right to
11 privacy. In some other cases, perhaps taking pictures
12 of children in a state of nudity might be protected by
13 some associational rights.

14 But even conceding that this statute
15 implicates protected conduct, we believe that this -- It
16 does not implicate conduct to the degree that what we're
17 talking about here is anything like real and substantial
18 overbreadth.

19 QUESTION: If you're talking about some
20 conduct protected by some guarantee of privacy, there
21 wouldn't be any overbreadth analysis.

22 MR. SHANNON: That's correct.

23 QUESTION: Overbreadth analysis comes only
24 with the First Amendment.

25 MR. SHANNON: That's correct. If we were

1 talking about some associational rights, there might be
2 some possible overbreadth analysis.

3 But even if we were to concede that this
4 implicates the First Amendment on the margin in some
5 way, which we are willing to concede for the purpose of
6 this argument, I feel very comfortable in saying that
7 any overbreadth here is not real and not substantial,
8 that any possible infringements on constitutionally
9 protected activity are best resolved to the case-by-case
10 analysis that was suggested in the Ferber -- in the
11 Ferber case. And that -- and that is what our argument
12 is, Your Honor, because the court below did not go
13 further than to think of this one conceivable
14 impermissible application of the statute, the -- the
15 child on the beach or the child in the wading pool.

16 It then jumped to the conclusion that that one
17 conceivable misapplication of the statute constituted
18 real and substantial overbreadth, and we think in so
19 doing --

20 QUESTION: General Shannon, have you looked at
21 the brief filed by the Law & Humanities Institute in
22 support of Respondent? They have all sorts of pictures
23 in there they claim are great works of art and one thing
24 and another. Do you think any of them are protected by
25 the Constitution?

1 MR. SHANNON: I -- I do not, Your Honor. I
2 believe that the Commonwealth of Massachusetts could
3 prohibit constitutionally the taking of those pictures
4 in -- in Massachusetts. And the reason is that the --
5 those pictures, those very sorts of pictures that are
6 contained in that brief have been shown to do harm to
7 the children who are used as models. Our legislature
8 made that determination, to be sure, back in 1977 and
9 again when the statute was reenacted in 1982, and tried
10 to deal with it --

11 QUESTION: Well, then it's quite clear that
12 under your view there's no requirement of any lascivious
13 intent then. It's quite clear, isn't it, because a lot
14 of these pictures -- there's nothing lascivious about
15 them?

16 MR. SHANNON: That's -- that's right. There
17 should be no requirement of lascivious intent in my --

18 QUESTION: So, it's your -- your position any
19 picture of a -- any picture of a nude person under the
20 age of whatever it is is -- is totally unprotected
21 unless it's an infant. Unless it's an infant, is that
22 it?

23 MR. SHANNON: I would -- I would point out to
24 the Court that there is an affirmative defense in the
25 statute that tracks the language of Ferber for -- for

1 works of art that are produced for -- for a bona fide
2 museum or -- or school.

3 QUESTION: Well, but you've told me none of
4 these would qualify under that.

5 MR. SHANNON: Well, Your Honor, I -- I believe
6 that the question of whether the product of the posing
7 ends up being a legitimate work of art is wholly
8 irrelevant to the consideration of whether making that
9 particular photograph or painting did harm to the
10 children who were involved. And that is the concern
11 that the Commonwealth has in this statute.

12 QUESTION: And you presume that in every such
13 case, there is harm to the child.

14 MR. SHANNON: That is a presumption, Your
15 Honor, that the legislature has made, and I think -- I
16 think that they had a very rational basis for making
17 that presumption because, as we have pointed out in our
18 brief --

19 QUESTION: What is the rational basis?

20 MR. SHANNON: The -- the rational basis, Your
21 Honor, is -- has I think been substantiated by study
22 after study that shows that the use of children in nude
23 photography does do harm to them, does cause them guilt
24 and shame and fear --

25 QUESTION: Does it show that one picture of

1 one nude child harms that child?

2 MR. SHANNON: This is a case --

3 QUESTION: Does that study show that?

4 MR. SHANNON: Yes, Your Honor.

5 QUESTION: Where is that study? Will you tell
6 me please?

7 MR. SHANNON: Your Honor, I -- I would refer
8 Your Honor to the Riceman Report which is contained in
9 the briefs of amici and to the numerous --

10 QUESTION: It says that one picture of a nude
11 child injures the child.

12 MR. SHANNON: Yes, Your Honor. I -- I think
13 that study after study has shown that taking pictures of
14 children in a state of nudity --

15 QUESTION: I didn't say what children. I said
16 a --

17 MR. SHANNON: One child, Your Honor.

18 QUESTION: -- one picture of a, one, child.

19 MR. SHANNON: Your Honor, I believe that the
20 -- that it's clear that the reports, the studies, that
21 have been done both before Ferber and since Ferber show
22 that -- that posing children in that state does do them
23 -- posing a child in that state of nudity does --

24 QUESTION: Well, I want that quote. Where is
25 that quote?

1 MR. SHANNON: I -- I can refer Your Honor to
2 the -- to the Riceman Report.

3 QUESTION: To the report that says the picture
4 of one child taken one time injures that child.

5 MR. SHANNON: That any posing of a child in a
6 state of nudity, Your Honor, can and does in many cases
7 do harm to that child, that the child will experience
8 shame, fear of blackmail, guilt, that pedophiles that
9 typically take pictures of children as a way of lowering
10 their inhibitions so that they can use them for their
11 own sexual gratification.

12 QUESTION: This includes a picture taken by a
13 child that the child didn't know about?

14 MR. SHANNON: If the child later became aware
15 that a picture had been taken. One of the cases in --

16 QUESTION: That was not in my hypothetical.
17 My hypothetical is the child is down on the beach in the
18 nude and he sees nobody else out on the beach and
19 somebody takes a picture, that that injures the child?

20 MR. SHANNON: If the child didn't know that a
21 picture had been taken, I suppose the child would not --
22 would not be injured.

23 QUESTION: Well, so, then your statement is
24 not correct. The child is not injured automatically.

25 MR. SHANNON: The child might not be injured

1 automatically, but the child would be injured if that
2 picture were then used for -- shown to somebody else or
3 If that picture were then kept by the person who took
4 the picture --

5 QUESTION: Have you ever seen baby pictures of
6 a child -- a nude child on a rug, on a bear skin?

7 MR. SHANNON: Yes, Your Honor.

8 QUESTION: A lot of them, haven't you?

9 MR. SHANNON: Yes, Your Honor, and -- and this
10 statute --

11 QUESTION: And those children are all injured?

12 MR. SHANNON: This statute is not aimed at
13 that --

14 QUESTION: Those children are all injured?

15 MR. SHANNON: They are -- they are not
16 injured, Your Honor. But this -- this statute is --

17 QUESTION: But wouldn't they be covered by
18 this statute?

19 MR. SHANNON: As a literal reading of the
20 statute would cover those children, but this statute has
21 never been used for that purpose. It was never aimed at
22 that purpose. It was never in the thinking of the
23 legislature, nor has it been in the thinking of any
24 prosecutors that it would be used for that purpose.
25 When I go around my office in Boston, many, many of my

1 assistants who are well aware of the existence of this
2 statute, have those bear skin rug type pictures of their
3 infants on their desks. They don't have any fear that
4 they're going to be prosecuted, nor does anybody else
5 have any fear that they're going to be prosecuted
6 because every person, as the court below, would view
7 those pictures as being lawful.

8 The question here is does the state have the
9 ability to try to get at activity which has been shown
10 and demonstrated in case after case to be harmful to
11 children. And that's what this statute is -- is all
12 about and that is the way in which it has been used.

13 The record of enforcement in Massachusetts
14 shows very clearly that -- I should point out that in --
15 In making the claim of overbreadth, Respondent has not
16 produced one case where this statute has ever been
17 applied to anything that closely approaches a
18 constitutionally protected activity. We have produced,
19 however, in our -- the appendix to our brief a listing
20 of every prosecution that has been brought under the
21 statute since 1977, 29 prosecutions. And in 26 of those
22 cases, the charges for violation of this statute were
23 accompanied by charges for either statutory rape or
24 indecent assault and battery --

25 QUESTION: Yes, General Shannon, but what that

1 means I suppose is that if you make a charge that's much
2 more serious than this and you're not quite sure you can
3 prove that one, you're sure you can get them on the
4 photograph charge.

5 MR. SHANNON: In some cases --

6 QUESTION: So that it's sort of a nice second
7 weapon to have in those cases.

8 MR. SHANNON: That's right, Your Honor. In
9 some cases that is true. But I would not minimize the
10 harm that is done to a child, even a child --

11 QUESTION: Because if you really have proof
12 beyond a reasonable doubt of all those other offenses,
13 you wouldn't need this statute at all.

14 MR. SHANNON: It is -- it is well-known, Your
15 Honor, that proving cases of statutory rape, a rape on a
16 child or sexual abuse on a child, is very difficult
17 because oftentimes, as in this very case --

18 QUESTION: And this statute enables you to
19 avoid the problem of proving that kind of crime by proof
20 beyond a reasonable doubt.

21 MR. SHANNON: We have to prove beyond a
22 reasonable doubt that a child was posed or photographed
23 in a state of nudity. And -- and even in cases, Your
24 Honor, where there has been some other form of sexual
25 abuse, this is an important charge because it has been

1 shown that this kind of activity does a separate harm to
2 children. Children are afraid that the existence of
3 these photographs or pictures can later come back to
4 haunt them or to blackmail them, and it causes a
5 continuing harm of depression and shame and guilt and
6 all of the things that are referred to in the briefs.

7 So, this is a -- an important statute standing
8 on its own, and it's an important statute when it is
9 used along with other charges to prevent the sexual
10 exploitation and abuse of children. And that is the
11 only purpose for which this statute has -- has ever been
12 used.

13 QUESTION: Mr. Shannon, do you think that the
14 new statute that directs itself to the posing with
15 lascivious intent is adequate to protect the state's
16 interests here?

17 MR. SHANNON: I hope that it is, Your Honor,
18 but I am not sure, to be -- to be very honest because it
19 has --

20 QUESTION: That certainly seems to be the way
21 most states have gone.

22 MR. SHANNON: We -- we passed this statute,
23 Your Honor, because of the importance that we placed on
24 having a tool to prevent this kind of activity while
25 this Court was considering this -- this very case. And

1 we certainly hope that it's going to meet the needs that
2 we have found.

3 But I would also point out to Your Honor that
4 in the briefs that have been filed on the other side in
5 support of the Respondent's position, they have raised
6 questions about whether this statute can be subject to
7 the same kind of attack. And the reason that they have
8 done that and the importance of this Court's deciding
9 this case is that after the Ferber decision, it was
10 pretty clear to states that they could take action to
11 prevent the production of materials using children as
12 models if those materials showed children engaged in
13 sexual conduct.

14 But it left hanging the question of what about
15 nudity? What about other types of activity which has
16 been shown to cause harm to children?

17 QUESTION: Well, Ferber -- the opinion in
18 Ferber said nudity without more is protected expression,
19 did it not?

20 MR. SHANNON: It did, Your Honor, and I
21 believe where it said that it was referring to the
22 Erzoznick opinion, but it wasn't talking I don't
23 believe, Your Honor, about nudity among children. Just
24 as in Ferber the Court said that sexual conduct that
25 didn't meet the obscenity standards of the Court could

1 be prohibited by the state, we believe that the Court
2 should now take the next step and deal with this other
3 body of material which has been shown to do harm to
4 children, which the state has, I would suggest, not just
5 a legitimate interest, but a compelling, surpassing
6 interest in -- in prohibiting, that we should be
7 sanctioned in our efforts to do just that. The same
8 rationale of Ferber applies to this -- this fact
9 situation.

10 QUESTION: If you look at the statute and
11 divide it into two parts, the first part being whoever
12 permits the child to pose or be exhibited in a state of
13 nudity, and then the next part is what the sexual
14 suggestiveness part of the statute, as I understand it
15 -- please correct me if I'm wrong -- the trial court
16 instructed the jury just on the first part of the
17 statute?

18 MR. SHANNON: Yes, Your Honor, that is my
19 understanding. They used the -- the -- they used the
20 words of the statute -- I can't recall at the moment. I
21 guess they just did use the first part of the statute.

22 QUESTION: So, it's only the so-called or the
23 allegedly overly broad statute that was the basis for
24 this conviction.

25 MR. SHANNON: That is right. There was no

1 evidence introduced at the trial that there had been any
2 sexual -- overtly sexual conduct or that the second part
3 of the statute was implicated at all. These were
4 photographs which were taken -- evidence was introduced
5 at the trial that the photographs were taken by the
6 Respondent of his 14-year old stepdaughter topless
7 wearing just a pair of briefs and a red scarf on top of
8 the bar in the family home when they were there alone.
9 And the words of the statute, the first part of the
10 statute, were used as the charge to -- to the jury.

11 So, I would also point out, though, that the
12 -- that the decision of the Supreme Judicial Court, of
13 course, affects the whole statute, including that part
14 which goes exactly at the Ferber -- goes at the Ferber
15 situation.

16 What the Court should do is consider the
17 plainly legitimate sweep of the statute, consider
18 whether there is a -- a criminally -- constitutionally
19 regulable core of activity here -- and I would submit
20 that it is clear that there is -- and then determine
21 whether any overbreadth in the statute is real and
22 substantial and so real and substantial as to
23 necessitate the Court's striking down the whole --

24 QUESTION: Is there a severability clause for
25 this statute that's applicable to it, General Shannon?

1 MR. SHANNON: There is, Your Honor. There's a
2 severability --

3 QUESTION: Why did the Court not refer to the
4 severability clause and sever out any possibly valid
5 portion, do you think?

6 MR. SHANNON: Your Honor, the court didn't
7 answer that question, and it is a baffling question.
8 The dissents referred to the severability clause and
9 said if there's a problem, we can sever those
10 constitutionally protected parts of the statute from
11 those which aren't. Or the court could have put a
12 limiting construction on -- on the statute if it had
13 wanted to do so.

14 And that is why I believe what the court below
15 did was clearly unnecessarily striking down this statute
16 using the federal Constitution to do it.

17 QUESTION: Well, it's not clear to me that if
18 part A is -- is -- is void and part B is valid, if you
19 have it before you to save part B when part A was the
20 only thing the jury was instructed on.

21 MR. SHANNON: I'm -- well, I think, Your
22 Honor, the Supreme Judicial Court of Massachusetts --

23 QUESTION: I mean, why should they go on to
24 explore part B if part A was the only thing presented to
25 the jury?

1 MR. SHANNON: Their decision clearly affects
2 both part A and part B. what they did in this -- in
3 this decision was they struck down the whole statute,
4 29A, which include both depicting children -- picturing
5 children in the state of nudity and -- and picturing
6 children engaged in sexual conduct. So, they -- they
7 struck down the whole statute, including that part which
8 has already I believe been clearly sanctioned by -- by
9 Ferber. And so, the question arises how could they --

10 QUESTION: Well, let me -- let me put it to
11 you this way. Assuming that we have it before us -- I'm
12 not sure that we do since it's a state court statute.
13 Assuming we would somehow say, well, the statute is void
14 in its first part and valid in the second, how does that
15 avail the state here when only the first part was the
16 basis of the charge?

17 MR. SHANNON: It doesn't. It doesn't, Your
18 Honor. And that would leave a whole body of activity
19 that has been shown to harm children which the state
20 would be powerless to prohibit. And that is -- and that
21 is our concern. And that is the nub of our -- of our
22 case.

23 QUESTION: General Shannon, suppose we, on the
24 overbreadth problem, simply said, well, the -- the only
25 reason we have this overbreadth rule is in order to

1 prevent legitimate First Amendment activity from being
2 stifled and deterred. But now that the Massachusetts
3 legislature, the Supreme Court of Massachusetts, the
4 supreme legislative court, has modified the statute,
5 there's no real problem about that anymore. There's --
6 there's no inhibitory effect of this statute anymore, so
7 we shouldn't consider overbreadth. Could we decide the
8 case that way, and if we did, would that -- would that
9 satisfy you?

10 MR. SHANNON: Your Honor, I -- I believe that
11 the statute -- that the case should be decided on -- on
12 overbreadth grounds because there are so many questions
13 as to how what our highest state court did below affects
14 the new statute and how it might affect other statutes.

15 QUESTION: But even if it was overbroad, it is
16 certainly not inhibiting anybody anymore because the
17 Massachusetts legislature has amended it. So, why can't
18 we say -- you know, just send it back and say if this
19 conviction is a valid conviction, it can stand?

20 MR. SHANNON: Well, the --

21 QUESTION: Because there's no overbreadth
22 problem anymore even if there -- you know, even if there
23 --

24 MR. SHANNON: Well, the court -- Your Honor is
25 absolutely correct in suggesting that this statute can

1 no longer inhibit speech, and -- and so, the Court could
2 do that. But I think that the question still remains --

3 QUESTION: You'd be stuck with a new statute
4 though.

5 MR. SHANNON: We have a new statute, and we --
6 we are stuck with it. We don't know how well it's going
7 to -- how well it's going to work.

8 I would point out to the Court we have other
9 prosecutions that we're concerned about which might have
10 to be prosecuted under the old statute, and we have a
11 core of activity that took place prior to the enactment
12 of the new statute which we can't do anything about
13 right now. I've already had inquiries from district
14 attorney's offices about -- about taking a picture,
15 similar situations to the one in this case, that took
16 place prior to the enactment of the new statute, and
17 they're asking me what can -- what can we do. And the
18 answer is right now I'm not sure what we can -- what we
19 can do. So, those I think are also good reasons why the
20 Court should decide this case.

21 But the principal reason is that the court
22 below I think clearly made error when it struck down the
23 whole statute as being substantially overbroad and
24 because this is a question I think of surpassing
25 interests not only to Massachusetts but to other states

1 as well.

2 QUESTION: You -- you think it erred in
3 striking down part 1. You -- you would not be willing
4 to see the judgment stand striking down part 1, but
5 leaving part 2.

6 MR. SHANNON: No, I would not, Your Honor. I
7 think part -- the first part of the statute, the part
8 dealing with nudity is very -- is a very important tool,
9 a necessary tool if we are to adequately protect
10 children. This, as this Court well knows, is an issue
11 that the states have been trying to deal with with some
12 difficulty now for the last decade or more. I don't
13 think we've heard the final word of it from
14 legislatures. And I certainly do hope that the new
15 statute is going to be effective in preventing the
16 activity that we're trying to reach here.

17 But as I suggested, it has already been
18 suggested to us that it's going to be challenged on the
19 same overbreadth -- overbreadth grounds, and I think
20 that the state has such a compelling interest in this
21 area that we should be given some latitude in how -- in
22 trying to reach this activity which has been so clearly
23 and convincingly shown to cause grave and serious and
24 lasting harm to children.

25 I can think of no obligation of the state more

1 important than the state's obligation to take action to
2 prevent the children who live in the state from harm.
3 Section 29A is an important part of our efforts in
4 Massachusetts to do that. And I would ask the Court to
5 reverse the decision of the Supreme Judicial -- Judicial
6 Court.

7 If the Court has no further questions now, I'd
8 like to reserve the balance of my time for rebuttal.

9 QUESTION: Thank you, General Shannon.

10 Mr. Vita, we'll hear now from you.

11 ORAL ARGUMENT OF RICHARD J. VITA

12 ON BEHALF OF THE RESPONDENT

13 MR. VITA: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 It appears at least in argument that my
16 brother has conceded several points that appear to have
17 been in contention in the briefing by the Attorney
18 General's Office. But we can accept his position with
19 regard to the fact that the Massachusetts statute in
20 question in this case is overbroad and -- and also that
21 the activity in taking the photograph involves First
22 Amendment rights.

23 And starting then from -- from that point, I
24 move to the issue of whether or not facial overbreadth
25 in that analysis is appropriate in this case. And the

1 standard, however strict, that the court has noted that
2 its application is strong medicine and that it should be
3 used with great caution --

4 QUESTION: Well, what's the purpose of the
5 overbreadth? Is it to avoid chilling legitimate First
6 Amendment conduct by others?

7 MR. VITA: Yes.

8 QUESTION: Is that the purpose of it?

9 MR. VITA: I believe that that is one of the
10 central purposes --

11 QUESTION: Well, if that statute isn't on the
12 books anymore, as Justice Scalia has suggested, why
13 should we hold it -- hold anything invalid under
14 overbreadth analysis? That statute is gone. How could
15 it inhibit anybody now?

16 MR. VITA: The original statute --

17 QUESTION: Yes.

18 MR. VITA: -- under which Mr. Oakes --

19 QUESTION: That's what's before us.

20 MR. VITA: Were this Court to determine that
21 the new statute with the lascivious intent requirement
22 is an appropriate area of regulation --

23 QUESTION: We don't have the new one in front
24 of us. We only have the old one, and it doesn't exist
25 anymore. It has been replaced.

1 MR. VITA: Well, obviously, most respectfully,
2 were the Court to uphold the decision of the
3 Massachusetts Supreme Court striking down the statute on
4 reasons of overbreadth, then the -- the chilling effect
5 upon the citizens of the Commonwealth would not exist
6 because there would be -- the remainder would be the
7 clear statement of the --

8 QUESTION: Well, I guess that isn't my
9 question. The Massachusetts court found it overly broad
10 and struck it. We're reviewing that decision. In the
11 meantime, the legislature has replaced the statute, has
12 it not?

13 MR. VITA: Yes, it has.

14 QUESTION: So, I'm asking what is there of the
15 original statute to which an overbreadth analysis would
16 now apply?

17 MR. VITA: Well, it would seem that during the
18 -- the pendency of this appeal to the Court, that
19 citizens might be in a quandary with respect to whether
20 or not activities that they would choose to engage in
21 are nonetheless going to be the subject of a potential
22 prosecution. I think the chilling effect during the
23 pendency --

24 QUESTION: I assume you can only prosecute
25 under the new statute. The Commonwealth hasn't said you

1 can prosecute under the new or the old, have they? I
2 mean, isn't the old statute gone now?

3 MR. VITA: Yes, it would be unless this Court
4 reversed.

5 QUESTION: So, there's no -- no inhibitory
6 effect then and there's no possible harm to be done by
7 overbreadth of the old statute. It's gone.

8 MR. VITA: Well, I submit --

9 QUESTION: If your client could -- could
10 properly have been convicted under a narrowly drawn
11 statute, he was properly convicted. And if -- if others
12 were wrongfully deterred by that old statute, it doesn't
13 matter because that statute is not there anymore.

14 MR. VITA: Well, I would submit that the --
15 the --

16 QUESTION: Everybody wins except your client.
17 All -- all your amici will abandon you, and it's just
18 your client that suffers from the old statute.

19 QUESTION: Is that right, Mr. Vita? Isn't it
20 true that if we reverse, the old statute would come back
21 to life and people who were committing these acts before
22 the new statute was passed would be subject to
23 prosecution. The Attorney General said there are a
24 number of pending cases they don't know what to do about.

25 MR. VITA: That's --

1 QUESTION: And they would be prosecuted if we
2 reverse. That's why he wants us to reverse it.

3 MR. VITA: That is correct. And I -- I also
4 think --

5 QUESTION: In other words, the legislative
6 action that was taken was not a repealer of this
7 statute. It was just the enactment of a new one, and
8 this statute remained on the books subject to being
9 stricken by the Supreme Judicial Court?

10 MR. VITA: I believe that it was a repealer of
11 the statute.

12 QUESTION: Well, then it can't come back no
13 matter what we say and no matter what the Supreme
14 Judicial Court says. It's gone.

15 MR. VITA: That is correct. And I think then
16 the issue would relate to the new statute as to whether
17 or not lascivious intent on the part of the person that
18 would take a photograph is --

19 QUESTION: That would have to be in some other
20 case.

21 MR. VITA: That's correct, Your Honor.

22 QUESTION: Do you --

23 QUESTION: But now, under the old statute, is
24 it your position that the acts actually engaged in by
25 your -- your client are protected by the First Amendment?

1 MR. VITA: Yes, Your Honor.

2 QUESTION: And what case of ours do you think
3 supports that?

4 MR. VITA: Well, Your Honor, I would point to
5 -- point to the Ferber decision in which this Court --
6 this Court stated on page 774, "nor will we assume that
7 the New York courts will widen the possibly invalid
8 reach of the statute by giving an expansive construction
9 to the proscription on lewd exhibition of the
10 genitals." The term "lewd exhibition of the genitals"
11 was part of a definition of sexual conduct under the New
12 York statute, and it would appear from that language
13 that the Court was -- was not willing to make an
14 assumption that -- that the State of New York would
15 widen the definition of sexual conduct to go beyond the
16 lewd exhibition of the genitals.

17 QUESTION: But if -- if -- if the -- if the --
18 if overbreadth goes out of the case because the old
19 statute has been repealed and it can no longer itself be
20 a deterrent to any -- anybody who wants to engage in
21 First Amendment activities, the issue then becomes
22 whether the conduct that your client that the Chief
23 Justice asked about is protected or not. And -- and the
24 state court never reached that issue. Your -- your
25 client was -- was convicted and his conviction was

1 reversed because the statute under which he was
2 convicted was held invalid on its face. And the court
3 didn't reach the issue of whether this particular
4 conduct was protected.

5 MR. VITA: It is --

6 QUESTION: And we wouldn't have to decide
7 that. We can go back and we can -- we could remand
8 that, I suppose.

9 MR. VITA: Well, the issue was raised before
10 the Supreme Judicial Court not on a claim under the
11 state constitution whether or not this statute which
12 prohibits the posing or depiction in a state of nudity
13 or semi-nudity. The issue that was addressed by the
14 court was what -- a federal constitutional question
15 under the First Amendment.

16 QUESTION: Counsel, would you concede that
17 lascivious depictions of child nudity can be prohibited
18 by the state?

19 MR. VITA: I would not, and I -- essentially
20 the --

21 QUESTION: And why not?

22 MR. VITA: The -- the aims that have been
23 stated for the banning of this type of activity have
24 been directed towards conduct that will likely result in
25 injury or harm to the child. One can --

1 QUESTION: Well, there's not much doubt, is
2 there, that photographs of the type taken here of a
3 post-pubertal child in this condition could be very
4 harmful to that child? Do you dispute that?

5 MR. VITA: Well, I do dispute that, but if I
6 could just finish the answer to the lascivious intent.

7 Upon analysis, it would matter little to the
8 child in question whether or not the person who had
9 taken the photograph -- the intent of the person in
10 doing so -- if -- if there was to be injury to the child
11 and whether or not that would occur in a given case is
12 certainly not answered by a provision which requires
13 that the photographer have this so-called lascivious
14 intent. So --

15 QUESTION: But our whole law of homicide --
16 the injury is the same in each case. There's a death of
17 a human being. But the punishment for it depends
18 greatly on what the state of mind of the charged
19 defendant was.

20 MR. VITA: The -- the Petitioner in this case,
21 I submit, in its brief and in its argument has failed to
22 articulate a convincing, empirical, scientific or
23 psychological demonstration that proves the rational
24 basis that nudity or semi-nudity does, in fact, result
25 in -- in serious harm to the child. Most of the --

1 virtually all of the authorities in the arguments
2 presented deal with the issue of pornographic materials.

3 QUESTION: Well, I take it they don't have to
4 prove that, or do they, under the law? If it's a
5 rational judgment to be made by the state, that suffices.

6 MR. VITA: Well, I -- I submit that the --

7 QUESTION: I mean, they don't have to prove it
8 one way or the other. If there's evidence on which they
9 might act and it might come to that conclusion, even
10 though we may disagree, that's the end of it.

11 MR. VITA: Most respectfully, Your Honor, I --
12 I believe that the Court is entitled to determine
13 whether or not the aims targeted by the statute are
14 fairly restricted by the type of conduct that is
15 prohibited under the statute. In this particular case --

16 QUESTION: Well, but we were starting out case
17 by case, and you say that even a photograph taken with a
18 lascivious intent is protected. So, you don't even get
19 beyond that point.

20 MR. VITA: That is correct. I -- I believe
21 that -- that the decisions of this Court that have on
22 several occasions held that nudity without more may not
23 be properly limited, that -- that those decisions of the
24 Court carve out an area of protected activity, and that
25 it's only, the Respondent argues, where sexual conduct,

1 as that has been defined in the legislature in
2 accordance with the decisions and pronouncements set
3 down by this Court, may be properly limited.

4 QUESTION: Mr. -- Mr. Vita, may I ask?
5 Assuming as -- as everybody seems to assume, that
6 there's a constitutional right to take a picture of your
7 baby on a bear skin rug, which -- which I'm not sure of,
8 but let's assume that that's so, why is your claim of
9 overbreadth a First Amendment claim of overbreadth as
10 opposed to a claim of overbreadth on -- based on some
11 other constitutional ground?

12 Specifically, you would acknowledge, would you
13 not, that the state could make it unlawful and criminal
14 to take a picture of an individual naked without that
15 individual's knowledge or consent, for somebody to sneak
16 in and use a telephoto lens taking a picture of you or
17 me taking a shower? Can a state make that unlawful?

18 You're not sure about that?

19 MR. VITA: I cannot --

20 QUESTION: I certainly hope it can. You mean
21 the First Amendment requires that people should be able
22 to go around taking photographs of other people in the
23 nude without their knowledge or consent. It doesn't
24 require that, does it?

25 MR. VITA: Well, I -- I don't -- I cannot say

1 that there's any statute that has been enacted that
2 would fall within the example that you have cited. But
3 I would think --

4 QUESTION: I'm sure there are a lot of civil
5 prohibitions which would likewise fall under the First
6 Amendment bar if -- if the First Amendment prevented it.
7 Certainly it would be an invasion of privacy, wouldn't
8 you -- wouldn't it? You're not sure about that?

9 MR. VITA: Well, it might depend on the
10 circumstance. I can think of examples where -- where it
11 -- it might clearly fall within protected activity. I
12 can perhaps mention to the Court at some --

13 QUESTION: Well, let's assume I don't -- I was
14 -- I thought that was an easy question.

15 My second question, which was -- I -- I also
16 thought was easy, could the state make it unlawful for
17 someone to take a picture of a minor without the minor's
18 -- in the nude without the minor's parents' consent?
19 And again, that seems to me like a pretty easy question.
20 Even if you want to take a picture of your own baby in
21 the nude on a bear skin rug, it doesn't seem to me that
22 other people ought to be able to do that if you don't
23 want it done.

24 Now, if all of that is true, then, it seems to
25 me, we have established the principle that the First

1 Amendment does not absolutely mean that people can take
2 pictures of other people in the nude without their
3 consent. And all we're talking about is whether the
4 government can prevent parents from giving that consent.

5 Now, that be a constitutional prohibition.
6 Maybe the government can't. Maybe the government can't
7 prevent parents from giving their consent, but if that's
8 a problem, it's not a First Amendment problem. It's a
9 problem to what extent the government can intrude into
10 the parent-child relationship. It has nothing to do
11 with the First Amendment. And therefore, the
12 overbreadth problem wouldn't exist unless, of course,
13 you disagree in your answer to the other two questions
14 which I -- I gather you do and were wise to do.

15 MR. VITA: Well, I -- I submit that the
16 analysis that we have argued that the -- the process of
17 photography involves expression. In some cases it's
18 more marginal than in others, but nonetheless --

19 QUESTION: Yes, but your expression stops at
20 my body. And if I don't want particularly want you to
21 take a picture of me in the nude, I don't have to, do I?

22 MR. VITA: No, that's correct.

23 QUESTION: I don't think you're talking about
24 the First Amendment with the bear skin rug examples. I
25 think you're talking about some ability of parents to --

1 to -- to control their relationship with their child.
2 But that's not the First Amendment anymore.

3 MR. VITA: Well, there are many other examples
4 of the type of conduct that would be restricted and this
5 statute would prohibit beyond the -- the one that was so
6 plainly cited by the Massachusetts Supreme Court, beyond
7 the toddler who is romping nude on the beach.

8 There could be pictures taken for the purpose
9 of -- of demonstration or discussion in a forum
10 precisely on the subject of whether or not given
11 photographs fall within the area of child exploitation
12 or child pornography.

13 There also could be a potential claim
14 involving artists, painters or sculptors whose works
15 frequently do not become involved in museum or libraries
16 until sometimes after their death --

17 QUESTION: Do you think --

18 MR. VITA: -- far after the time of the taking
19 of the photograph.

20 QUESTION: Do you think if I'm -- if I'm a
21 painter, I could, contrary to state law, induce the
22 minor daughter of the people next door to come over and
23 pose for me and say that's -- even though the state law
24 forbids it and say that's the First Amendment?

25 MR. VITA: Well, I think that when the issue

1 is framed in terms of manipulation, coercion --

2 QUESTION: Well, I'm not talking about -- I'm
3 talking about --

4 MR. VITA: -- and those types of activities,
5 were a statute to be properly limited and the type of
6 nudity were -- were described in a manner that would --
7 would satisfy the Court's concern about areas that --
8 that would be clearly protected --

9 QUESTION: Well, supposing Massachusetts
10 enacted a statute saying that no one shall induce a
11 minor child without the consent of the parents to pose
12 in various nude things, just like Massachusetts has
13 said, does the First Amendment protect that?

14 MR. VITA: In that particular case, it -- it
15 -- it may not protect it depending on the -- the type --
16 the type of -- of portrayal.

17 QUESTION: Well --

18 MR. VITA: The content of the photograph.

19 QUESTION: Well, why should it make any
20 difference at all how the photograph turns out if the
21 evil at which the state is aiming is the posing of a
22 minor child in that way without the consent of the
23 parents? Whether it's an impressionist, a
24 representation or abstract will make no differences to
25 the injury.

1 MR. VITA: Well, in some given circumstances,
2 there may be some minor children who, without the
3 consent of their parents, that would have permitted
4 themselves to be photographed that may not result in
5 injury. It may depend on -- on --

6 QUESTION: You say the state can't generalize
7 from the -- the material it has, that it would have to
8 show some sort of injury in every case?

9 MR. VITA: Well, I believe that if the -- the
10 state would have to show that the banning of mere nudity
11 alone by the very act of permitting someone to pose in
12 nudity is, in fact, harmful to the child. Can we say
13 that those, however in the minority they might be, that
14 choose the rudist lifestyle -- can we say that in all
15 circumstances that -- that a photograph of such a child
16 who enjoys the -- the -- and chooses in a family way the
17 benefit of -- of that type of -- of expression -- can we
18 say and be sure that it's harmful to the child?

19 QUESTION: No, and I suppose I can't say
20 categorically that every young woman below the age of --
21 of -- of legal consent who -- who is statutorily raped
22 is harmed either. I can't say that, but I can make a
23 generalization and make it a crime to have intercourse
24 with a young woman below a certain age even though I
25 can't -- I can't absolutely swear that every -- every

1 young woman below that age who -- who gives her consent
2 doesn't know what she's doing and is therefore being
3 harmed. But I can make it a crime anyway, can't I, on
4 the basis of general assumptions?

5 MR. VITA: well, you -- you -- you could make
6 that analogy to a statutory rape type of case.

7 But I submit that this area of protecting the
8 subject matter of nudity has long been safeguarded by
9 this Court. And even though it's a -- an issue that
10 generally is one that is unpopular, is perhaps not
11 exercised by a great many Americans, it nonetheless will
12 still require this -- this Court to be careful not to
13 infringe upon the rights of -- of those who may
14 legitimately have their conduct chilled or be
15 encompassed within such a draconian statute.

16 I point out to the Court for purposes of the
17 issue of whether it's substantial that the statute is
18 punishable by not less than ten nor more than 20 years
19 or fines or both. This Court in *Ferber* has -- has
20 indicated that the --

21 QUESTION: But, counsel, do you admit that
22 there is a psychological damage to these children who
23 are photographed in the nude?

24 MR. VITA: I do not admit that in -- in --

25 QUESTION: well, what do you say in contrast

1 to what they say --

2 MR. VITA: well --

3 QUESTION: -- in the opinions and briefs and
4 all of the lot?

5 MR. VITA: The photographs that -- and the
6 studies that have been cited and the reports referred to
7 almost exclusively deal with the subject matter of using
8 child models in pornographic pictures. And this Court
9 has -- has stated in Ferber that it would require at
10 least a lewd exhibition of the genitals by way of one
11 example of what is pornographic.

12 There are also references in their reports
13 with regard to harm that deal with the Miller test or
14 obscenity issues. However, this Court, I submit, cannot
15 feel comfortable in banning a -- an area of expression
16 that is much a part of our culture and has been over the
17 years clearly protected.

18 QUESTION: What's the difference between
19 taking the picture of a child frolicking in the sand in
20 the nude and being taken upstairs, downstairs and put on
21 a bar and told to take her clothes off?

22 MR. VITA: I do see a difference.

23 QUESTION: You do see a difference, don't you?

24 MR. VITA: .And I can -- I can -- I believe
25 that a statute can be drawn that could meet the

1 legitimate aims of the state to avoid the -- the issue
2 of child exploitation in the example that you're talking
3 about where --

4 QUESTION: (Inaudible).

5 MR. VITA: -- the language of the statute --

6 QUESTION: Isn't that this case?

7 MR. VITA: Well, as -- as --

8 QUESTION: (Inaudible).

9 MR. VITA: -- applied to this case, if the --
10 If the statute --

11 QUESTION: (Inaudible) case?

12 MR. VITA: I believe that the statute as
13 applied in -- in this particular case under Ferber is --
14 is unconstitutional and that is because the -- the --
15 the conduct that is depicted in the photographs in this
16 case involve the exposure of a -- of a young woman's
17 breasts and that there --

18 QUESTION: So, if this 15-year old had said to
19 her stepfather, daddy, I don't want to do this, and he
20 said don't worry. It's -- you've got to do it because
21 this is not going to be a lascivious photograph. And
22 she says I -- I just really don't -- I don't want to.
23 There's nothing the state can do to protect that child?

24 MR. VITA: ,No, Mr. --

25 QUESTION: I find that --

1 MR. VITA: Justice Scalia, it -- my point is
2 -- is that a statute could be carefully crafted that
3 would be limited to circumstances where the child is
4 coerced, is -- is otherwise compelled to submit against
5 her will, poses that are in a sexually exploitive
6 portrayal, that the Court would define is --

7 QUESTION: If they're sexually exploitive.

8 MR. VITA: -- within the legitimate sweep of --

9 QUESTION: Only if they're sexually
10 exploitive, otherwise the child must submit to the -- to
11 the parent's desire to take the photograph.

12 MR. VITA: In the example that you have cited
13 where the -- the child is -- is saying no and is being
14 compelled by the parent, of course, that's not an issue
15 in the facts of our case.

16 QUESTION: What -- what about the facts in
17 this case? Could the legislature by a properly,
18 narrowly drawn statute punish the conduct that occurred
19 in this case?

20 MR. VITA: (Inaudible).

21 QUESTION: The jury has before it just the
22 evidence it has here, nothing more.

23 MR. VITA: In --

24 QUESTION: Can this --

25 MR. VITA: With a different statute carefully

1 drawn?

2 QUESTION: Punish the conduct in this case.

3 MR. VITA: I believe if there was a carefully
4 drawn statute, that it could.

5 QUESTION: That must -- that must be because
6 there are other elements than pure speech involved.

7 MR. VITA: No, I believe that -- most
8 respectfully, that this Court could define a core of
9 conduct in which it could delineate sexually explicit
10 actions by the -- the young woman which would take it
11 out of the area of -- of protected speech. It could
12 define that the nudity in the statute --

13 QUESTION: May I interrupt?

14 MR. VITA: -- must be of a type that it would
15 create the kind of harm that the purpose of the child
16 pornography statute --

17 QUESTION: May I ask you again? I'm not --
18 there seems to me some tension between your answer to
19 Justice Kennedy and part 2 of your brief. Are you
20 taking the position that the conduct in this case is not
21 constitutionally protected?

22 MR. VITA: No, I'm not, Your Honor.

23 QUESTION: So, no matter what the statute
24 said, you --

25 MR. VITA: I thought the question was --

1 QUESTION: You say no matter how narrowly
2 drawn the statute is you still would win according to
3 your argument.

4 MR. VITA: Yes, Your Honor.

5 QUESTION: Well, that's not what I understood
6 you --

7 MR. VITA: I took it as a hypothetical
8 question, could any statute be fashioned that could
9 proscribe the kind of activity.

10 QUESTION: This activity, and your answer to
11 that is no, isn't it?

12 MR. VITA: That's correct, Your Honor.

13 QUESTION: Yes, that's what I thought.

14 QUESTION: So -- so then this conduct could
15 not be punished?

16 MR. VITA: That's correct, Your Honor.

17 QUESTION: (Inaudible) that. What if -- I
18 mean you can volunteer it?

19 MR. VITA: Well, Your Honor, there's no --
20 there's no authority, a court decision of this Court or
21 other authorities that -- that would squarely address
22 the issue.

23 And I might say that this particular statute
24 is virtually unique among -- among states. I might
25 point out that --

1 QUESTION: You mean the state cannot prohibit
2 a father from taking his child downstairs in the
3 basement, telling her to get up on a bar, take her
4 clothes off and put a shawl around her? And the state
5 can't prohibit that?

6 MR. VITA: Well, in this particular case, Your
7 Honor --

8 QUESTION: No. I said can a state prohibit
9 that action?

10 MR. VITA: No, Your Honor.

11 QUESTION: With properly drawn statutes?

12 MR. VITA: Yes, Your Honor.

13 QUESTION: Yes -- yes, what?

14 MR. VITA: Yes, it cannot be -- It cannot be
15 -- a state cannot proscribe that type of conduct.

16 QUESTION: There's no -- you can't draw a
17 statute on that?

18 MR. VITA: Yes, Your Honor.

19 QUESTION: And your -- your answer is the
20 same, if I understand you correctly, if it weren't the
21 father. If it were -- if it were a stranger who -- who
22 induced the young woman to do that so long as he didn't
23 twist her arm, of course, the state could not prohibit
24 that either.

25 MR. VITA: Well, I think that once you're

1 getting beyond the parents, it would depend upon whether
2 or not there was --

3 QUESTION: What does the parents or not have
4 to do with the First Amendment? That's a different
5 issue.

6 MR. VITA: Well --

7 QUESTION: If that's -- if that's the claim of
8 overbreadth, it's not overbreadth that we take
9 cognizance of.

10 MR. VITA: Much of the Petitioner's argument
11 is directed towards instances where the child has been
12 manipulated, coerced, forced or compelled to submit to
13 the -- to the degrading photographs. I submit that in
14 the absence of any evidence that would show that that is
15 occurring within the ambit of the statute is -- is
16 protected.

17 For all of those reasons, the Respondent asks
18 the Court to affirm the decision of the Massachusetts
19 Supreme Court.

20 QUESTION: Thank you, Mr. Vita.

21 General Shannon, you have three minutes
22 remaining.

23 REBUTTAL ARGUMENT OF JAMES M. SHANNON

24 MR. SHANNON: Your Honor, unless the Court has
25 further questions, I have nothing further to add.

1 QUESTION: Very well. The case is --

2 QUESTION: I have one. May I ask just one?

3 Would you clarify, General, just exactly what
4 Is the status of the new statute? Did it repeal the
5 earlier statute, amend it? Exactly what is it?

6 MR. SHANNON: It -- the old statute can be
7 used, Your Honor, to prosecute those activities which
8 took place prior to the enactment date of the -- of the
9 -- of the new statute.

10 QUESTION: So that if we were to reverse, as
11 you ask us to, that would revive some prosecutions or
12 potential --

13 MR. SHANNON: Yes. Yes, Your Honor.

14 QUESTION: Thank you.

15 QUESTION: Whatever prosecutions are -- are
16 pending, all the acts have taken place I take it.

17 MR. SHANNON: Any -- any acts that would be
18 prosecuted under the old statute have already -- have
19 already taken place.

20 QUESTION: And it doesn't seem to me like the
21 old statute would be any basis whatsoever for a finding
22 of overbreadth. It's not about -- as Justice Scalia has
23 said, it's just not about to deter anybody else. It's
24 gone. So, I don't know why the -- these cases that are
25 pending shouldn't turn on the specific conduct that's at

1 issue.

2 MR. SHANNON: The -- the old statute, of
3 course, Your Honor, did not have a lascivious intent
4 requirement which --

5 QUESTION: I -- I know that, but it's gone.

6 MR. SHANNON: Except for purposes of
7 prosecution.

8 QUESTION: Yes, but the reason for overbreadth
9 is --

10 MR. SHANNON: Yes.

11 QUESTION: -- the state has to get rid of its
12 -- its price for having the statute unnarrowed is you
13 can't prosecute anybody. But once it's narrowed, you
14 can prosecute anyone you want.

15 MR. SHANNON: The old statute will have no
16 chilling effect on future conduct. That is correct,
17 Your Honor.

18 QUESTION: Was the old statute repealed?

19 MR. SHANNON: It was -- it was reenacted. I
20 think -- my -- my understanding of it is there is a new
21 statute on the books which supplants the old statute.
22 The old statute applies only to -- only to activity that
23 took place prior to the effective date of the new
24 statute. So, the new statute will not -- not be used
25 without further -- the old statute will not be used

1 without further action by the legislature to revive it,
2 Your Honor.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, General
5 Shannon.

6 The case is submitted.

7 (Whereupon, at 1:58 o'clock p.m., the case in
8 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-1651 - MASSACHUSETTS, Petitioner V. DOUGLAS OAKES

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BY Judy Freilicher

(REPORTER)

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