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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2548-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW HIGGINBOTHAM,

Defendant-Appellant.

APPROVED FOR PUBLICATION
March 24, 2023
APPELLATE DIVISION

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Argued February 6, 2023 – Decided March 24, 2023

Before Judges Whipple, Mawla and Marczyk.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 22-02-0502.

Diane DePietropaolo Price, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alison Gifford and Taylor L. Napolitano, Assistant Deputy Public Defenders, and Diane DePietropaolo Price, of counsel and on the briefs).

Jason Magid, Assistant Prosecutor, argued the cause for respondent (Grace C. MacAulay, Camden County Prosecutor, attorney; Jason Magid, of counsel and on the brief).

Mercedes N. Robertson, Deputy Attorney General, argued the cause for amicus curiae Attorney General

of New Jersey (Matthew J. Platkin, Attorney General, attorney; Mercedes N. Robertson, of counsel and on the briefs).

The opinion of the court was delivered by

WHIPPLE, J.A.D.

With limited exceptions that do not apply to this case, the First and Fourteenth Amendments to the U.S. Constitution prohibit a State from passing any law that abridges free speech. U.S. Const. amends. I and XIV. This protection is not "confined to the expression of ideas that are conventional or shared by a majority." Stanley v. Georgia, 394 U.S. 557, 566 (1969) (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959)). A law that prohibits protected speech, no matter how abhorrent and distasteful society considers that speech, is overbroad and cannot stand. See State v. Carter, 247 N.J. 488, 518 (2020).

Defendant Andrew Higginbotham appeals from the trial court's March 17, 2022 order denying his motion to dismiss an indictment, which charged him with fifteen counts of second-degree child endangerment, N.J.S.A. 2C:24-4(b)(4), (5)(a)(i), (5)(a)(ii); and one count of third-degree child endangerment, N.J.S.A. 2C:24-4(b)(5)(b)(iii). These provisions were enacted in 2018 as part of the child erotica amendment to the endangerment statute. L. 2017, c. 141

(the child erotica amendment). Finding that the statute is both unconstitutionally vague and overbroad, we reverse.

The Brooklawn police began investigating defendant because he had a journal with a school picture of a young girl on the cover. Written over the photo were disturbing sexually explicit statements. Defendant provided a statement to the police, wherein he admitted the notebook belonged to him. He said it was a journal, a way to express himself.

Though defendant initially denied knowing the identity of the child on the cover, he eventually told police she was his friend's daughter. Police identified her as B.R., born in 2008. Defendant spent time with B.R. when she was younger, but police found no evidence defendant ever sexually abused her. Defendant said his journal was for writing down the sexual fantasies he had about young girls.

After obtaining a warrant for the data from his Facebook accounts, the police discovered conversations defendant had with four different people on Facebook in which he sent several pictures and one video of B.R., each accompanied by sexually graphic narratives describing B.R. performing oral sex on him. Every photo of B.R. defendant sent was innocuous. She was always clothed. For instance, several times he sent a picture of her wearing a

black and white striped shirt and a pink tutu. Other photos depicted B.R. in jeans and a t-shirt.

However, several of these photos had explicit text superimposed over them. He once sent the photo of B.R. in the pink tutu with a 264-word sexual fantasy superimposed over it. Text on the other photos describe "wanting to molest" her. He also sent a video compilation of several photos of B.R. in a bikini, pictured with other girls also wearing bikinis, with the words "masturbating my life away" superimposed over the photos.

Additionally, he twice sent a photo collage which included a photo of his aroused penis under his sweatpants, surrounded by several pictures of B.R. This collage had text superimposed over a picture of B.R., again describing her performing oral sex on him. A second collage, the top photo being his aroused penis under his sweatpants, had pictures of B.R. with text over them reading "girl lover" and "how many inches you think I could put in her little [lips emoji]." Defendant also sent another picture of underwear for young girls. He sent the picture of his sweatpants with superimposed text describing the excitement he gets when B.R. sits on his lap superimposed on it, but next sent a message saying "most [of] that actually [n]ever happened with her."

Defendant additionally sent explicit messages with text alone—not superimposed over photos—in conversation with others on Facebook. These,

like text superimposed over the pictures, referred to oral sex with B.R., defendant's receiving pleasure from having her sit on his lap, and a statement about masturbating "on top of her with her little panties while she laid in her bed sleeping." Much of the explicit content, however, was superimposed over photos of B.R., as described above.

Though defendant initially denied sending pictures of B.R., he then clarified he had never sent "nudes." He downloaded the pictures from B.R.'s mother's Facebook page or took them himself and wrote the text superimposed on the pictures. Defendant denied ever masturbating near B.R., adding he put that in the captions to "increase shock value."

The State presented the case to the grand jury, who returned a superseding indictment charging defendant with the above-mentioned counts for portraying a child "in a sexually suggestive manner by otherwise depicting [her] for the purpose of sexual stimulation or gratification of any person who may view the depiction where [it] does not have serious literary, artistic, political or scientific value," contrary to N.J.S.A. 2C:24-4(b).

Defendant moved to dismiss the indictment. The trial court denied the motion and issued a written opinion after oral argument. The trial court reasoned, while the photos themselves do not "portray a child in a sexually suggestive manner" under N.J.S.A. 2C:24-4(b), "once . . . defendant

reconstructs the original photographs and video by inserting sexual content or commentary on the reproduced picture or video, he converts that picture or video into a new depiction.[]" These depictions, the court reasoned, "portray[ed] a child in a sexually suggestive manner" because they "clearly demonstrate[d] his intention to be sexual[ly] stimulat[ed] or gratified" and "[had] no serious literary, artistic, political, or scientific value." The court also noted defendant was not being prosecuted solely for his words, but for "[t]he defaced photographs and video" he created.

As to defendant's contention N.J.S.A. 2C:24-4(b) was vague and overbroad due to the phrase "portray in a sexually suggestive manner," the trial court rejected both of those arguments, determining "persons of common intelligence would not guess at the meaning of" the definition. Additionally, the statute provides officials with "guidelines to prevent arbitrary and erratic enforcement." The court added:

> [T]he statute informs a citizen that when he or she defaces an otherwise non-sexually explicit image of a child by adding sexually explicit language for the purpose of your or other[']s sexual gratification, he or she has created a depiction that portrays a child in a "sexually suggestive manner." Such images are violative of the endangering statute because they "otherwise depict a child for the purpose of sexual stimulation or gratification." Simply, the statute is not unconstitutionally vague.

This appeal followed on leave granted. Defendant raises the following arguments:

> POINT I
>
> THE TRIAL COURT ERRED IN FINDING THAT THE CONDUCT ALLEGED CONSTITUTES THE CRIME OF ENDANGERING THE WELFARE OF A CHILD CONTRARY TO N.J.S.A. 2C:24-4.
>
> POINT II
>
> ALTERNATIVELY, THE TRIAL COURT ERRED IN HOLDING THAT THE DEFINITION OF "PORTRAY A CHILD IN A SEXUALLY SUGGESTIVE MANNER" WAS NOT UNCONSTITUTIONALLY VAGUE, AND IN NOT ADDRESSING UNCONSTITUTIONALITY DUE TO OVERBREADTH IN VIOLATION OF THE FIRST AMENDMENT.

I.

On appeal, defendant argues his conduct was not proscribed by the child erotica amendment because the photographs of B.R. were innocuous. Alternatively, defendant argues that—on its face[1]—the amendment is unconstitutionally vague, as it does not provide adequate notice of proscribed conduct, and overbroad, as it infringes on protected speech.

[1] At oral argument, defense counsel advanced an as-applied constitutional challenge that we do not reach.

The State charged defendant with four types of crimes under the child erotica amendment of the endangerment statute: creation; distribution; possession with intent to distribute; and simple possession of the proscribed material.

Creation is prohibited by N.J.S.A. 2C:24-4(b)(4), which provides:

> A person commits a crime of the second-degree if he photographs or films a child in a prohibited sexual act or in the simulation of such an act or for portrayal in a sexually suggestive manner or who uses any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act or for portrayal in a sexually suggestive manner.

The statute does not define "reproduced" or "reconstructed," but instructs that "reproduction" "means, but is not limited to, computer generated images." N.J.S.A. 2C:24-4(b)(1).

N.J.S.A. 2C:24-4(b)(5)(a)(i) prohibits "knowingly distribut[ing] an item depicting the sexual exploitation or abuse of a child[.]" N.J.S.A. 2C:24-4(b)(5)(a)(ii) prohibits "knowingly possess[ing] an item depicting the sexual exploitation or abuse of a child with the intent to distribute that item . . . ." And N.J.S.A. 2C:24-4(b)(5)(b)(iii) prohibits possession of less than 1,000 "items depicting the sexual exploitation or abuse of a child."

"[I]tem depicting the sexual exploitation or abuse of a child" refers to

> a photograph, film, video, an electronic, electromagnetic or digital recording, an image stored or maintained in a computer program or file or in a portion of a file, or any other reproduction or reconstruction which:
>
> > (a) depicts a child engaging in a prohibited sexual act or in the simulation of such an act; or
> >
> > (b) portrays a child in a sexually suggestive manner.
>
> [N.J.S.A. 2C:24-4(b)(1) (emphasis added).]

Finally, and most importantly, to "[p]ortray a child in a sexually suggestive manner" means:

> (a) to depict a child's less than completely and opaquely covered intimate parts, as defined in N.J.S.A. 2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
>
> (b) to depict any form of contact with a child's intimate parts, as defined in N.J.S.A. 2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
>
> (c) to otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.
>
> [N.J.S.A. 2C:24-4(b)(1).]

This appeal centers on the meaning of the phrase "portray a child in a sexually suggestive manner." Defendant argues it applies only to images, or pictures, that show an actual child engaged in a sex act or in a sexually suggestive pose. The State and Attorney General argue the phrase instead applies to a mental image created with words that conveys the image of a child in a sex act or in a sexual manner. Thus, resolution of this appeal begins with the statutory construction of the crimes charged, and more specifically, what is meant by the phrase "portray a child in a sexually suggestive manner."

II.

"When we interpret a statute, our goal is to 'effectuate legislative intent.'" State v. F.E.D., 251 N.J. 505, 526-27 (2022) (quoting Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 171 (2016)). "To determine the Legislature's intent," we first consider the statute's words and afford them "their plain and ordinary meaning," because the language chosen by the Legislature is the best indicator of intent. Id. at 527 (quoting State v. J.V., 242 N.J. 432, 442-43 (2020)). "If the language is clear, the court's job is complete[,]" and it enforces the statute as written. Ibid. (quoting In re D.J.B., 216 N.J. 433, 440 (2014)).

Where the statutory terms are ambiguous or "lead[] to more than one plausible interpretation[,]" we may consider extrinsic evidence, such as

legislative history, in an effort to decipher intent. Ibid. (quoting In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 274 (2017)). Extrinsic evidence may also be used "if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language." DiProspero v. Penn, 183 N.J. 477, 493 (2005). Further, "[s]tatutory language is to be interpreted 'in a common sense manner to accomplish the legislative purpose.'" State v. Olivero, 221 N.J. 632, 639 (2014) (quoting N.E.R.I. Corp. v. N.J. Highway Auth., 147 N.J. 223, 236 (1996)).

The common meaning of the operative terms in the phrase "portray a child in a sexually suggestive manner" renders it susceptible to more than one plausible interpretation. The ordinary meanings of the terms "portray" and "depict" support numerous tenable interpretations. Thus, we consider legislative history to decipher the Legislature's intent in adopting this phrase. F.E.D., 251 N.J. at 527.

In 2017, the Legislature amended the definition of child pornography, "an item depicting the sexual exploitation or abuse of a child," to include items which "portray[] a child in a sexually suggestive manner." S. L. & Pub. Safety Comm. Statement to S. 3219 1 (June 15, 2017). According to the accompanying Statement, the amendment was intended to "criminalize[] the possession and distribution of 'child erotica,'" which the Statement says,

"refers to images that depict nearly naked, suggestively-posed, and inappropriately sexualized children." Ibid. The Legislature provided no other guidance on what qualifies as child erotica.[2] However, there are legally—and constitutionally—significant distinctions between child erotica, child pornography, and obscenity.

III.

We presume statutes are constitutionally valid. State v. Buckner, 223 N.J. 1, 14 (2015). The party challenging the validity of the statute bears the "heavy burden" of proof. Ibid. (quoting State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505, 526 (1999)). "Where a statute 'criminalizes expressive activity,' we construe it 'narrowly to avoid any conflict with the constitutional right to free speech.'" State v. B.A., 458 N.J. Super. 391, 407 (App. Div. 2019) (quoting State v. Burkert, 231 N.J. 257, 277 (2017)).

A criminal statute challenged as vague is subject to "sharper scrutiny and given more exacting and critical assessment under the vagueness doctrine than civil enactments." State v. Cameron, 100 N.J. 586, 592 (1985). "A statute is facially or perfectly vague if 'there is no conduct that it proscribes with

[2] The Attorney General asserts testimony from committee hearings prior to the amendment's passage provides clarifying evidence of legislative intent. However, the testimony's usefulness is limited because it represents the statement of an individual, not the legislative body.

sufficient certainty.'" State v. Saunders, 302 N.J. Super. 509, 521 (App. Div. 1997) (quoting Cameron, 100 N.J. at 593).

Overbroad statutes, by contrast, "suffer from a different flaw. They invite 'excessive governmental intrusion into protected areas' by 'extend[ing] too far.'" Carter, 247 N.J. at 518 (alteration in original) (quoting Karins v. Atlantic City, 152 N.J. 532, 544 (1998)). As our New Jersey Supreme Court has explained, "[t]he two claims differ analytically[.]" Ibid.

> The vagueness concept . . . rests on principles of procedural due process; it demands that a law be sufficiently clear and precise so that people are given fair notice and adequate warning of the law's reach. The overbreadth concept, on the other hand, rests on principles of substantive due process; the question is not whether the law's meaning is sufficiently clear, but whether the reach of the law extends too far. The evil of an overbroad law is that in proscribing constitutionally protected activity, it may reach farther than is permitted or necessary to fulfill the state's interests.
>
> [Ibid. (alteration in original) (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 125 n.21 (1983)).]

"If a statute 'is susceptible to two reasonable interpretations, one constitutional and one not,' [we] assume[] that the Legislature would want" the statute to be interpreted in a manner that conforms to the Constitution. Carter, 247 N.J. at 513 (quoting State v. Pomianek, 221 N.J. 66, 90-91 (2015)). "In appropriate cases, [we have] the power to engage in 'judicial surgery' or

narrow construction of a statute to free it from constitutional doubt or defect." N.J. State Chamber of Com. v. N.J. Election L. Enf't Comm'n, 82 N.J. 57, 75 (1980). "However, this procedure applies only 'if we fairly can do so'" based on the Legislature's purpose in enacting the statute. State v. Grate, 220 N.J. 317, 335 (2015) (quoting State v. Fortin, 198 N.J. 619, 631 (2009)).

Due to the obscenity and child pornography jurisprudence developed over the past sixty-six years by the Supreme Court of the United States, we conclude we cannot surgically resect the statute here to free it from doubt or defect.

IV.

The First Amendment to the United States Constitution prohibits the federal government from passing any law that abridges free speech. U.S. Const. amend. I.[3] That said, while the right to free speech is guaranteed, it is not unlimited. As the Court said in Chaplinsky v. New Hampshire:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ["]fighting["] words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

[3] The First Amendment is made applicable to the States by the Fourteenth Amendment. U.S. Const. amend. XIV.

[315 U.S. 568, 571-72 (1942) (footnotes omitted).]

These forms of speech serve "no essential part of any exposition of ideas" and have "such slight social value" that "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. at 572.

While the Court has always recognized the First Amendment does not protect certain types of speech, it was not until 1957 that the Court directly addressed whether the government may criminalize the public advertising, publication, and distribution of obscene material. Roth v. United States, 354 U.S. 476, 481 (1957). Finding the government could, the Court reiterated obscene material does not relate to the exchange of ideas, has virtually no social importance, and any importance it may have is outweighed by the social interest in order. Id. at 484-85. The Court then attempted to define obscenity by explaining material "is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion" that "goes substantially beyond customary limits of candor in description or representation . . . ." Id. at 487 n.20 (quoting Model Penal Code § 207.10(2) cmt. at 10 (Am. L. Inst., Tentative Draft No. 6, 1957)). Material about sex that has an artistic, literary, or scientific value does not fall within that definition. Id. at 487.

Twelve years later, in Stanley v. Georgia, 394 U.S. 557, 565 (1969), the Court qualified the government's ability to regulate obscenity by holding that free speech and privacy rights protect the viewing of obscene material in one's home. Georgia had enacted a statute criminalizing possession of obscene material. Id. at 558. The Court found the statute, without valid justification, violated the right to privately view material of one's choice implicit in the First and Fourteenth Amendments. Id. at 565. The Court further recognized States have a valid interest in regulating the public dissemination of obscenity, as explained in Roth, but Georgia's attempt to regulate what a person reads or views in his or her home exceeded that interest. Ibid. As such, the statute amounted to an unconstitutional attempt to control thought. Id. at 565-66. The Court explained:

> [W]e think that mere categorization . . . as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> [Id. at 565.]

Georgia's attempt to justify the statute based on the "effects of obscenity" "misconceive[d] what it is that the Constitution protects." Id. at 566. The First Amendment "guarantee is not confined to the expression of ideas that are conventional or shared by a majority." Ibid. Nor is it limited to material that is deemed moral or ideologically worthy. Ibid. "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Ibid.

Georgia's alternative rationale—that viewing obscene material may lead to crime or deviant behavior—was speculative and unsupported by empirical evidence. Id. at 566. "[T]he State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." Id. at 567.

In Miller v. California, 413 U.S. 15, 23-24 (1973), the Court attempted to clarify the definition of obscene material in relation to a California statute that made it a misdemeanor to distribute obscenity. In reaffirming its ruling that States may regulate the public dissemination of obscenity, the Court told us "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a

significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." Id. at 18-19 (footnote omitted). But such statutes "must be carefully limited" to avoid infringement on protected speech. Id. at 23-24.

The Court gave a revised test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable State law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
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> [Id. at 24 (internal citations omitted).]

The community standard is not a national standard, but rather, a local one. Id. at 30. Examples of material that may fall under part (b) include "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "[p]atently offensive representation[s] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Id. at 25. Material that has "serious literary, artistic, political, or scientific value" will remain protected by the First Amendment, "regardless of whether the government or a majority of the people approve of the ideas these works represent." Id. at 34.

Nine years later, in New York v. Ferber, 458 U.S. 747 (1982), the Court issued its first decision directly addressing child pornography. The New York statute challenged in that case "prohibit[ed] persons from knowingly promoting sexual performances by children under the age of [sixteen] by distributing material which depict[ed] such performances," regardless of whether the material was obscene. Id. at 749. The statute defined "sexual performance" as any performance that portrayed sexual conduct with a child less than sixteen years of age. Id. at 750. "Sexual conduct" referred to traditional sex acts as well as lewd exhibition of genitals. Ibid.

The Court recognized, "[l]ike obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." Id. at 756. However, the Court concluded that "States are entitled to greater leeway in the regulation of pornographic depictions of children" than permitted under the Miller obscenity standard, and it gave five reasons to support that conclusion. Ibid.

First, the Court said, States have a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." Id. at 756-57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). A democratic society depends upon "the healthy, well-rounded

growth of young people into full maturity as citizens." Id. at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)). The New York Legislature had determined "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child[,]" and that determination was supported by evidence. Id. at 758. Thus, "[t]he prevention of sexual exploitation and abuse of children constitute[d] a government objective of surpassing importance." Id. at 757.

Second, distribution of material depicting sexual activity of children "is intrinsically related to the sexual abuse of children in at least two ways": the material serves as a "permanent record of the children's participation" in the sexual activity; and the harm that flows from that participation is "exacerbated" by continued circulation of the material. Id. at 759. Thus, to "effectively control[]" production, "the distribution network . . . must be closed . . . ." Ibid. Prosecuting only those who produce the images is not enough. Ibid. "The most expeditious if not the only practical method" that law enforcement may have "to dry up the market" may be the imposition of "severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Id. at 760.

The Miller obscenity standard did not "reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." Id. at 761. The Court explained

> the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value."
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> [Ibid. (alterations in original) (citation omitted).]

The third reason why the Court found the Miller standard did not adequately address the child pornography issue was that the Miller standard did not recognize the economic motive underlying child pornography. Ibid. The Court explained the economic motive was an "integral part of the production of" child pornography, and all States criminalized child sexual abuse. Ibid. Thus, the production and promotion of child pornography was the promotion and recording of a crime. Ibid. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid

criminal statute." Id. at 761-62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

The fourth reason why Miller did not adequately address child pornography was that there was "exceedingly modest, if not de minimis" value in permitting children to participate in performances of sexual activity. Id. at 762. The Court considered it "unlikely" the inclusion of children in sex acts would be a necessary or important part of any literary, educational, or scientific performance. Ibid. If it were, young adults could play the role. Id. at 763.

Fifth and finally, the Court said "[r]ecognizing and classifying child pornography as a category of material" not entitled to First Amendment protection was consistent with precedent, which focused on the content of the speech in determining whether it was protected speech. Ibid. The Court explained:

> [I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.
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> [Id. at 763-64.]

Proscribed speech must be "adequately defined[,]" however, and in the context of children engaged in sexual activity, the material must "visually depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described." Id. at 764 (footnote omitted).

Accordingly, the Court "adjusted" the Miller standard for purposes of child pornography, explaining:

> The test for child pornography is separate from the obscenity standard enunciated in Miller, but may be compared to it for the purpose of clarity. The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.
>
> [Id. at 764-65 (citations omitted).]

The Court concluded the New York statute was not unconstitutionally overbroad because it was premised on the State's compelling interest in

protecting children from sexual exploitation and was appropriately limited to adequately described conduct. Id. at 765.

Thereafter, in Osborne v. Ohio, 495 U.S. 103, 109-11 (1990), the Court expanded the State's ability to control child pornography by permitting the proscription of possession in one's home. The Ohio statute criminalized the possession of an image of a nude child by a person who was not the child's parent or guardian, unless the parent or guardian provided written consent or the image had a "bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose . . . ." Id. at 106. Based on the purpose of the statute and the exceptions to it, the Ohio Supreme Court read into the statute a requirement that the image "involve[] a lewd exhibition or graphic focus on a minor's genitals," as opposed to portraying nudity, which was generally protected speech. Id. at 107.

The Ohio Legislature justified the statute on the ground the child pornography market was "driven underground" in the wake of Ferber, which made it difficult, "if not impossible, to solve the . . . problem by only attacking production and distribution." Id. at 110. Precluding possession would thus aid in elimination of the market. Id. at 109-10. The Court found this rationale reasonable. Id. at 110-11.

In so ruling, the Court distinguished Stanley, where it held adults have a privacy right in the possession of obscene material inside the home. Id. at 109. In Osborne, unlike in Stanley, the purpose of the statute was not to regulate the private viewing of material that the State believed "would poison the minds of its viewers," but rather, "to protect the victims of child pornography" and eliminate the child pornography market. Ibid. As the Court explained in Ferber, the value of child pornography was "exceedingly modest, if not de minimis," and the State's interest in safeguarding children from the physical and psychological harm caused by participation in sexual activity was "compelling." Id. at 108-09 (citation omitted). Further, the statute did not broadly apply to images of nudity, which the Court noted is generally considered protected speech. Id. at 112. Thus, the Court found "the interests underlying child pornography prohibitions far exceed[ed] the interests justifying the Georgia law at issue in Stanley." Id. at 108. The Ohio statute, as interpreted by the Ohio Supreme Court, did not proscribe a substantial amount of protected speech so as to render it unconstitutionally overbroad. Id. at 113-14.

Then, in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239 (2002), the Court limited the definition of child pornography to images created with actual children, as opposed to computer generated images of children or

pictures of adults who could be mistaken for children. There, the Free Speech Coalition and others successfully advanced a facially overbroad challenge to two sections of the federal Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2251 to 2260A (amended 2003). Id. at 239, 243. The sections criminalized the possession, 18 U.S.C. § 2256(8)(B), and promotion, 18 U.S.C. § 2256(8)(D), of pornographic images that "appeared" to depict children, regardless of whether the images were created with real children. Id. at 239-40.

More specifically, section 2256(8)(B) prohibited "'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,' that 'is, or appears to be, of a minor engaging in sexually explicit conduct[.]'" Id. at 241 (quoting 18 U.S.C. § 2256(8)(B)). According to the Court, the section "[did] not depend at all on how the image [was] produced." Ibid. It applied to

> a range of depictions, sometimes called "virtual child pornography," which include[d] computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace[d] a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibit[ed] Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated . . . sexual intercourse." § 2256(2).

[Ibid. (fourth alteration in original).]

However, the Court underscored, "[t]hese images do not involve, let alone harm, any children in the production process . . . ." Ibid. Thus, they were categorically different from child pornography. Ibid.

With respect to section 2256(8)(D), the Court noted the statute "broad[ly]" defined child pornography as "any sexually explicit image that was 'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts 'a minor engaging in sexually explicit conduct.'" Id. at 242 (quoting 18 U.S.C. § 2256(8)(D)). Its purpose was to target "sexually explicit images pandered as child pornography." Ibid. However, the Court said:

> The statute is not so limited in its reach, . . . as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.
>
> [Id. at 242-43.]

To support the sections, Congress claimed pedophiles may use child pornography to encourage their intended victims to engage in sexual activities or pose for sexually explicit photos. Id. at 241. Additionally, it was often difficult to distinguish child pornography made with and without real children;

thus, to eliminate the market, both types of images had to be precluded. Id. at 242, 254.

The Court found these justifications unpersuasive because none were based on the manner in which the images were created. Id. at 250. In other words, because no child was required to produce the image, no child was harmed in the process. Id. at 250, 254. The Court explained:

> In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in Ferber. [458 U.S. at 759]. While the Government asserts that the images can lead to actual instances of child abuse, . . . the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.
>
> [Id. at 250.]

Nevertheless, protected speech may not be proscribed to target unprotected speech or crime that might happen in the future. Id. at 251-52. As the Court explained: "There are many things innocent in themselves . . . that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused." Id. at 251. "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Id. at 253.

The Court held that the CPPA sections could not be "saved" by interpreting them as proscribing obscene material because neither section of the statute incorporated the Miller obscenity standard. Id. at 249. The sections "lack[ed] the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity." Ibid. Because they "abridge[d] the freedom to engage in a substantial amount of lawful speech[,]" they were overbroad. Id. at 256.[4]

V.

Based on this survey of law, we are constrained to conclude New Jersey's child erotica amendment is overbroad because it unconstitutionally: (1) expands the definition of child pornography to include images of children who are not engaged in sex acts or whose genitals are not lewdly displayed; and (2) regulates the private possession of child erotica, which, in addition to not qualifying as child pornography, is not defined using the terms of the Miller obscenity standard. While the Legislature's goal to protect children is

[4] A third section of the CPPA, 18 U.S.C. § 2256(8)(C), proscribed child pornography created with "computer morphing," which entailed the altering of "innocent pictures of real children so that the children appear to be engaged in sexual activity." Id. at 242. The Court issued no decision on this section because the respondents did not challenge it. However, the Court commented that, unlike images created without an actual child, morphed images "implicate the interests of real children and are in that sense closer to the images in Ferber" than images created without a real child. Ibid. To date, Congress has not repealed 18 U.S.C. § 2256(8)(C).

laudable, the effect of the amendment is to criminalize protected speech by way of its definition of child erotica and its proscription of private possession of child erotica.

To begin, the amendment's expanded definition of child pornography, which includes child erotica (i.e., images that "portray a child in a sexually suggestive manner"), is at odds with Ferber, Osborne, and Free Speech Coalition. Ferber and Osborne define child pornography as an image of a child engaged in a sex act or the image of a child with their genitals lewdly displayed. Ferber, 458 U.S. at 764-65; see Osborne, 495 U.S. at 109-13. Free Speech Coalition adds that the image must be of a real child because, if no child was involved in their creation, then no child suffered the harm that results from creation and circulation of the images. 535 U.S. at 239.

The child erotica amendment does not define "portray a child in a sexually suggestive manner" in a way that complies with the foregoing definition of child pornography. Instead, the phrase refers to images that depict: (1) a child's covered or opaquely covered intimate parts, which, by way of formatting or posing, "emits sensuality with sufficient impact to concentrate prurient interest on the child;" or (2) contact with a child's intimate parts, which, by way of formatting or posing, "emits sensuality with sufficient impact to concentrate prurient interest on the child;" or (3) a child in some

other way "for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value." N.J.S.A. 2C:24-4(b)(1). "Intimate parts" is not limited to exposed genitals, but also refers to the "inner thigh, groin, buttock or breast of a person." N.J.S.A. 2C:24-4(b)(1) (incorporating the definition set forth in N.J.S.A. 2C:14-1).

Thus, the definition of child erotica extends far beyond images that portray a child in a sex act or portray a child's genitals in a lewd manner. Indeed, none of the three sections require the child's genitals be visible in the image or the child be engaged in any type of sexual activity. The second definition, which refers to contact with a child's intimate parts, comes closest to the sex-act element, but it goes far beyond that element as well. A picture taken on a public beach, which includes children or teenagers in swimsuits, applying sunscreen on each other or themselves, could violate the statute.

Another example would be photographs taken for telehealth medical diagnostic purposes—like a rash or other skin condition. Depictions of certain types of sporting events—such as wrestling, cheerleading, gymnastics, or track and field—could be said to violate the statute as well, depending on the design of participants' athletic uniforms.

Yet, no child in those examples would be subjected to sexual abuse or the type of exploitation that occurs when a child's genitals are lewdly portrayed. Further, photographing a child in public is not unlawful, even if the child is scantly clothed. Being sexually aroused by an image of a scantly clothed child is abhorrent, but it is not illegal. To find otherwise would be to punish thought, which Stanley holds is plainly prohibited by the First and Fourteenth Amendments. 394 U.S. at 565-66.

Moreover, the child erotica amendment is overbroad because it proscribes possession of protected speech. Because the amendment's definition of child erotica does not require the depiction of a real child engaged in a sex act or the lewd portrayal of a child's genitals, the statute is not subject to the Ferber standard for child pornography, and the State may only regulate the distribution of child erotica if the child erotica amendment complies with the Miller standard for obscenity. It does not comply with that standard.

Stanley secures an adult's right to view and possess obscene material in the privacy of their home. 394 U.S. at 560-61. Osborne adds if the obscene material rises to the level of child pornography, then the State may preclude private possession based on its compelling interest in protecting children from the sexual abuse that is at the center of child pornography and the

accompanying market. 495 U.S. at 109-10. By statutory definition, child erotica is not child pornography and does not require any child to be subject to sexual abuse or similar sexual exploitation in its production. N.J.S.A. 2C:24-4(b)(1). The State, therefore, does not have the same type of compelling interest, described in Ferber, in regulating child erotica as it has in regulating child pornography. As such, the State may not proscribe the private viewing or possession of child erotica in the privacy of one's home. Stanley, 394 U.S. at 565-66.

Yet, three sections of the child erotica amendment do just that. N.J.S.A. 2C:24-4(b)(4) makes it a second-degree crime to photograph or film a child in a sexually suggestive manner, which necessarily requires the viewing and possession of such material. N.J.S.A. 2C:24-4(5)(a)(ii) makes it a second-degree crime to possess child erotica with intent to distribute it. Logically, if the State may not criminalize the possession of child erotica, it may not criminalize possession with intent to distribute it because the material possessed is lawful. Finally, N.J.S.A. 2C:24-4(5)(b)(iii) makes it a third-degree crime to possess child erotica.

These possessory offenses are overbroad because they preclude the private possession of material the United States Supreme Court has said is protected by the First and Fourteenth Amendments. As the Stanley Court

explained, the First and Fourteenth Amendments protect an individual's right to view obscene material in the privacy of one's home. A State's attempt to thwart that right amounts to regulation of thought, which is plainly unconstitutional. 394 U.S. at 565-66.

The Attorney General attempts to distinguish Stanley because the obscene material in that case did not involve a child. He argues, unlike the statute in Stanley, the child erotica amendment is based on the State's compelling interest in protecting children from sexual exploitation.

This argument muddies the relevant principles. The State does have a compelling interest in protecting children from child pornography, which is categorically different from child erotica. See Free Speech Coalition, 535 U.S. at 249-51 (explaining that images of what appear to be children engaged in sexual conduct is different from child pornography). Because no child is made to engage in sexual conduct or to lewdly expose their genitals to create child erotica, the State does not have the same type of compelling interest in protecting children from it. Thus, the State does not enjoy the greater leeway that Ferber provides, and it may only regulate the distribution of child erotica if the statutory definition of child erotica complies with the Miller obscenity standard. It does not.

As Roth instructs, the First Amendment does not prohibit the government from regulating the public distribution of obscene material. 354 U.S. at 485. The Miller Court defined obscene material as that which (1) an average person, under contemporary community standards, would find appeals to prurient interest when considered as a whole, (2) depicts or describes sexual conduct in a patently offensive manner, and (3) lacks serious literary, artistic, political, or scientific value. Miller, 413 U.S. at 24. All elements of the standard must be set forth in the statutory definition of the proscribed speech to comply with the First Amendment. Free Speech Coalition, 535 U.S. at 246-49.

None of the three types of material that "[p]ortray a child in a sexually suggestive manner[,]" N.J.S.A. 2C:24-4(b)(1), require the depiction of "patently offensive" sex acts or exhibition of genitals (the second element of the Miller standard). Nor do they require the work, taken as a whole, appeal to prurient interests based on community standards (the first element of the Miller standard). Only subsection (c) of N.J.S.A. 2C:24-4(b)(1) contains the third element of the Miller standard—that the work lacks serious literary, artistic, political, or scientific value. Because subsection (c) lacks the first and second elements, it is still insufficient. See Free Speech Coalition, 535 U.S. at 249. Additionally, the third Miller element is absent from subsections (a) and

(b). The effect of these omissions is to define child erotica in a manner that exceeds the definition of obscenity and thus proscribes protected speech.

The Attorney General argues the amendment is not overbroad because if "properly interpreted, only words that themselves meet the standard for obscenity suffice to transform an otherwise innocuous image into one that illegally 'portray[s] a child in a sexually suggestive manner.'" He further urges us to read an objective standard into the requirement that the image's purpose be for sexual stimulation or gratification and asserts courts from other jurisdictions have found that this type of objective standard "sufficiently limits the reach of a statute from proscribing constitutionally protected speech."

But one cannot read the obscenity standard or an objective standard into the child erotica amendment without completely changing the terms of the amendment. Further, the legislative history of the amendment candidly says the purpose of the amendment is to expand the meaning of child pornography to include child erotica, which, as we have explained, is inconsistent with Ferber. Thus, "judicial surgery" cannot save the statute. See N.J. State Chamber of Com., 82 N.J. at 75; Grate, 220 N.J. at 335.

VI.

We also reject the State's argument that the images in this case constitute "morphed" child pornography solely by virtue of defendant's addition of the

superimposed text. As the Court explained in Free Speech Coalition, morphed child pornography is created when one pastes the image of an actual child's face onto the body of another—usually an adult—to make it appear as though the child is engaged in a sex act. 535 U.S. at 242.[5]

Here, B.R.'s face was not pasted onto an image of anyone engaged in a sex act. Indeed, her photographic image was not edited at all. Defendant simply added text to her picture. While defendant's text paints a mental picture of a child engaged in a sex act, he did not edit B.R.'s image to convey that picture. His words alone created the mental picture.[6] We do not doubt the potential for reputational and emotional harm to B.R. is certainly present here,

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[5] We recognize nearly all federal and state courts that have addressed the issue have found that morphed child pornography is not subject to First Amendment protection. These courts have focused on the reputational and emotional harm that children suffer when their identifiable image is pasted onto an image of another engaged in a sex act and then distributed. See, e.g., United States v. Mecham, 950 F.3d 257, 265-67 (5th Cir. 2020); United States v. Anderson, 759 F.3d 891, 895-96 (8th Cir. 2014); Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012); United States v. Hotaling, 634 F.3d 725, 729-30 (2d Cir. 2011); United States v. Hotaling, 599 F. Supp. 2d 306, 321 (N.D.N.Y. 2008), aff'd, Hotaling, 634 F.3d 725; People v. McKown, 180 N.E.3d 909, 926 (Ill. App. Ct. 2021), aff'd, 127683, 2022 WL 17244079 (Ill. Nov. 28, 2022), reh'g denied (Jan. 23, 2023); McFadden v. State, 67 So. 3d 169, 184 (Ala. Crim. App. 2010); State v. Coburn, 176 P.3d 203, 222-23 (Kan. Ct. App. 2008); State v. Tooley, 872 N.E.2d 894, 903-04 (Ohio 2007).

[6] Undoubtedly, defendant's text falls within the obscenity statute, N.J.S.A. 2C:34-2. But the State did not charge him with a violation of that statute.

but it is not a record of past abuse, even fake abuse. Thus, defendant's conduct is more appropriately categorized as child erotica than morphing.

There is no dispute, under federal law at least, that child erotica is legal and protected speech. See United States v. Fechner, 952 F.3d 954, 958 (8th Cir. 2020) ("The district court recognized that the possession of the child erotica was not illegal" under federal law); United States v. Edwards, 813 F.3d 953, 963 (10th Cir. 2015) (invalidating a warrant to search a home for child pornography where the supporting affidavit alleged only that the defendant had child erotica, which, unlike child pornography, was legal to possess under federal law); United States v. Williams, 444 F.3d 1286, 1304 (11th Cir. 2006), rev'd, 553 U.S. 285 (2008) (describing child erotica as "legal" images of children that were sexually arousing in the minds of certain viewers).

VII.

Finally, because of its overbroad definition of proscribed conduct, the child erotica amendment has the effect of being impermissibly vague. Based on the amendment's definition of "portray a child in a sexually suggestive manner," any image of a child could appeal to sexual interests and thus be proscribed. A person of ordinary intelligence would therefore not understand the limits of permissible conduct. As our Court explained in State v. Lee,

> [a] penal statute should not become a trap for a person of ordinary intelligence acting in good faith, but rather

> should give fair notice of conduct that is forbidden. A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police that law enforcement is so uncertain as to become arbitrary.
>
> [96 N.J. 156, 166 (1984) (citations omitted).]

Although defendant's reprehensible conduct in no way constitutes "acting in good faith," the thrust of the holding in Lee demonstrates that on its face, the child erotica amendment fails to provide adequate notice of proscribed conduct and is, therefore, unconstitutionally vague. We need not reach either party's remaining arguments. R. 2:11-3(e)(2).

Reversed. We do not retain jurisdiction.