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IN THE SUPREME COURT OF OHIO

STATE OF OHIO	**CASE NO. 2014-2028**
Plaintiff-Appellee	**ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT COURT OF APPEALS**
vs.	
TERRY L. MARTIN	
Defendant-Appellant	**CASE NO: 26033**

AMENDED MERIT BRIEF OF THE STATE OF OHIO, APPELLEE

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ISSUE CERTIFIED FOR REVIEW

With respect to R.C. 2907.323(A)(1), which proscribes the creation or production of nudity-oriented material involving a minor, which definition of nudity applies; the statutory definition (R.C. 2907.01(H)), or the narrower definition set forth in *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988), which requires additional elements of "lewd depiction" and "graphic focus on the genitals."

PROPOSITION OF LAW

Ohio may ban the conduct proscribed by R.C. 2907.323(A)(1), without altering the legislature's definition of nudity set forth in R.C. 2907.01(H), because no fundamental right to create or produce material or performances using someone else's nude child, without parental consent and for no proper purpose, is constitutionally infringed by that subsection.

STATEMENT OF FACTS

Terry Lee Martin, Sr., age 51, was charged and convicted under R.C. 2907.323(A)(1), for creating an iPod video in which he recorded a naked eleven-year-old girl. The iPod video's contents are as follows.

The recording begins with an unshaven older man, Terry Martin. In the video, Martin hides the video-recording device in a stack of towels in the bathroom. He positions the iPod in such a way that he is able to record the minor victim in the bathroom, as she undresses to take a shower. Martin can be seen urinating in the toilet, and then bringing the victim into the bathroom.

Martin speaks with the minor victim. Martin can be heard promising to get the girl's "hair done." He tells her she is pretty. He mentions her lips. Martin tells the

victim that "I seen a sexy pair of shorts." "Sexy," he exclaims again. He then tells her that the shorts are "daisy dukes." "I thought of you," he says.

The shower is turned on, and Martin leaves the bathroom. The minor victim undresses. She is nude in the video: her breasts, pubic area, and buttocks are visible, both when she undresses before the shower, and afterwards as well, when she dries herself off. The victim dresses. She then leaves the bathroom. Within seconds, Martin immediately reenters the bathroom, and retrieves his iPod from its concealed location.

The victim's mother, who perused the iPod's contents after Martin had lent it to the victim's brother, later discovered the video. *State v. Martin,* 2d Dist. Montgomery No. 26033, 2014-Ohio-3640, ¶ 4. As a result, Martin was charged for its creation, in a two-count indictment by a Montgomery County grand jury. *Id.* at ¶ 1. He was charged under R.C. 2907.323(A)(1), for creating the iPod video using someone else's nude minor child, without parental permission, and for no proper purpose. R.C. 2907.323(A)(1). He was also charged with felony possessing criminal tools, for using his iPod to commit this offense. R.C. 2923.24(A).

Martin subsequently waived his right to a jury trial. *Martin* at ¶ 5. Both parties stipulated to the following facts. The parties stipulated that Martin recorded this video; that he recorded a nude minor; that he did so for no proper purpose, and that he did so without parental consent, among other things. *Id.* at ¶ 6.

At trial, the arguments focused on one issue: whether Martin's iPod video of a naked eleven-year-old girl was lewd or graphically focused on the genitals. *Martin* at ¶ 6. The parties argued this issue because in *State v. Young*, this Court restricted the definition of nudity for R.C. 2907.323(A)(3), to include a lewdness or graphic focus on the genitals requirement, due to First Amendment concerns implicated by that subsection. *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988).

The trial court found Martin guilty as charged. *Martin*, 2014-Ohio-3640 at ¶ 1. It sentenced Martin to a concurrent five-year prison term: five years for illegally using a minor in nudity-oriented material or performance; and nine months for possessing criminal tools. *Id.*

Martin appealed this decision. In his appeal, Martin argued that his conviction was contrary to law, because if the proper definition of nudity were applied, the State failed to prove the offense of illegal use of a minor in nudity-oriented material. *Martin* at ¶ 8. The State argued that this Court had yet to decide whether lewd exhibition or graphic focus on the genitals was required for R.C. 2907.323(A)(1). Appellee Br. at 5. The State also argued that, regardless, Martin's video was lewd. *Id.*

The Second District Court of Appeals ("Second District") affirmed Martin's convictions, without determining whether the iPod video was lewd. *Martin* at ¶ 24. It held that under First Amendment principles, creating child pornography is sufficiently

different from possessing it, such that the narrowed *Young* definition of nudity did not apply. *Id.*

This decision created a conflict with *State v. Graves,* a decision from the Fourth District Court of Appeals. *State v. Graves,* 184 Ohio App.3d 39, 2009-Ohio-974, 919 N.E.2d 753 (4th Dist.). As opposed to the Second District's decision, *Graves* concluded that there is "no difference" between the subsections with respect to the definition of nudity. *Id.* at ¶ 9. Thus, it held that the lewd exhibition or graphic focus on the genitals interpretation "applies equally to both subsections. . . ". *Martin,* 2014-Ohio-3640 at ¶ 17; *Graves, supra.*

The question certified now asks this Court to consider whether there is a First Amendment difference between creating versus possessing child pornography. And if not, whether this Court is required by the First Amendment to narrow the definition of nudity set forth in R.C. 2907.01(H), as the *Young* Court did for R.C. 2907.323(A)(3), to include a lewd exhibition or graphic focus on the genitals requirement, for R.C. 2907.323(A)(1). *Young,* 37 Ohio St.3d 249.

ARGUMENT

Introduction

R.C. 2907.323 was born out of the Ohio legislature's desire to stamp out the blight that is child pornography. *Osborne v. Ohio,* 495 U.S. 103, 110, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). In fact, by 1981, the exploitive use of children in the production of

pornography had already become a "serious national problem"; one catalyzed by a multimillion dollar industry operating on a nationwide scale. *New York v. Ferber*, 458 U.S. 747, 749, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

From this serious national problem sprung the state's compelling need to regulate it. Originally, most states sought to address this problem by enacting legislation that prohibited the production and distribution of it alone. *Osborne* at 110. But in truth, it was not enough. This is due in part to the very legislation that aimed at its demise, legislation that drove the child pornography industry underground. *Id.*

States soon realized that attacking just production and distribution was an inadequate solution to an ever-growing problem. Thus, to truly combat child pornography, states began to aim its legislation at the child pornography market's end-user: the consumer. *Osborne* at 110 ("it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 States have found it necessary to proscribe the possession of this material").

Ohio was one such state. Like many states, Ohio sought to strike at the problem at all levels of the distribution chain. R.C. 2907.323 is but one product of that design. The statute prohibits illegally using a minor in nudity-oriented material, by targeting the child pornography market's differing components: from its production or creation in R.C. 2907.323(A)(1); to its consumer, by prohibiting the possession or viewing of it in R.C. 2907.323(A)(3).

But by targeting its consumer, R.C. 2907.323(A)(3) implicated a fundamental right not previously addressed in case law on child pornography's production. *Ferber,* 458 U.S. 747. The concern was in mere private possession: that is, a person's established fundamental "right to receive information and ideas" in the privacy of one's own home, and the affect this right had, on a state's compelling need to eradicate the child pornography market. *Stanley v. Georgia,* 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (reasoning that the "right to receive information and ideas" is fundamental to a free society); *see generally Osborne,* 495 U.S. 103.

In Ohio, these concerns were addressed by two cases. First was *State v. Meadows.* 28 Ohio St.3d 43, 45, 28 Ohio St.3d 354, 503 N.E.2d 697 (1986). *Meadows* examined what affect an offender's fundamental right to receive information and ideas had, on an Ohio statute that banned child pornography's "mere possession". *Id.* Despite this otherwise fundamental right, *Meadows* held that Ohio may outlaw even the mere possession of child pornography, due to Ohio's compelling need to safeguard its children from the market's sexual exploitation. *Id.* at 49.

The second case was *State v. Young.* 37 Ohio St.3d 249. *Young* examined R.C. 2907.323(A)(3), a different subsection of the same statute at issue here. *Id.* The question was whether R.C. 2907.323(A)(3) was constitutionally overbroad, because Young alleged his right to "mere possession" was not protected by the Ohio legislature's definition of nudity. *Id.* Nudity, as defined in R.C. 2907.01(H), includes bare breasts,

the pubic area, or the buttocks—not just genitalia, and not just when it is lewd or graphically focused on the genitals. R.C. 2907.01(H). Because of the First Amendment "right to receive information and ideas" in private, *Young* narrowed the definition for R.C. 2907.323(A)(3). *Osborne, supra,* at 108; *see Stanley, supra,* at 564.

But no matter what component of the market states have sought to regulate—be it production or possession, statutes that regulate the child pornography industry have withstood constitutional attack. *E.g., Osborne,* 495 U.S. 103 (affirming a state's right to ban the mere possession of child nudity-oriented material); *e.g., Ferber,* 458 U.S. 747 (affirming a state's right to ban the production of non-obscene child pornography). Without exception, the State's compelling need to safeguard its children from the industry's devastating impact, is why. *E.g., Meadows,* 28 Ohio St.3d 43; *e.g., Young, supra.*

Yet particularly in the context of child pornography's creation, this need is at its height. To be sure, it is in this context that an offender has direct contact with the nude minor—the very root of the harm Ohio rightfully seeks to quash.

Today, Ohio's specific need to regulate the type of video Martin created is paramount. Indeed, since the time of this Court's *Young* decision, technological advancement and the Internet have permeated American life. *Young, supra.* These advancements have exacerbated the child pornography market, such that nudity-oriented material—like the iPod video that Martin created—is readily available to

anyone, at the click of a button. *See* Child Exploitation & Obscenity Section, the United States Department of Justice, (Feb. 23, 2015), http://www.justice.gov/criminal/ceos/subjectareas/childporn.html.

It is in this setting that this Court is now asked to consider conduct like Martin's: the conduct of creating nudity-oriented material using someone else's nude minor child, without parental consent and for no proper purpose. R.C. 2907.323(A)(1). The certified question asks whether he has a fundamental right to do this. And if so, whether that right is equal to the historically established right to "receive information and ideas" into the privacy of one's home; a right implicated by statutes such as R.C. 2907.323(A)(3), which prohibit "mere possession." *Young*, 37 Ohio St.3d 249.

Summary of Argument

The First Amendment does not require this Court to restrict the Ohio legislature's definition of nudity for R.C. 2907.323(A)(1), like it did for R.C. 2907.323(A)(3) in *Young*, to include a lewd exhibition or graphic focus on the genitals requirement. *Young*, 37 Ohio St.3d 249. This is true for several reasons.

First, the First Amendment justification that the *Young* Court had to narrow that definition does not apply to R.C. 2907.323(A)(1). *Young, supra*. Rather, cases on the mere possession of child pornography, such as *Young*, implicate a particular First Amendment right: the established "right to receive information and ideas" in the privacy of one's own home. *Stanley*, 394 U.S. at 564, 89 S.Ct 1243.

Second, unlike R.C. 2907.323(A)(3), the offender has no fundamental liberty interest at stake. No fundamental right to take pictures of someone else's nude child without parental consent has been historically recognized. And, if there is such a right, it is sufficiently protected by statutory exemptions, which exempt those who create this material from prosecution, when they do so with parental consent and with a proper purpose.

Third, this Court is not required to narrow the definition of nudity for R.C. 2907.323(A)(1), because it is not overbroad. As opposed to Martin's asserted right, which is neither real, nor substantial; the broad sweep of what the subsection criminalizes is plainly legitimate.

Finally, Ohio's role in protecting its children from sexual exploitation by the child pornography industry is indisputably compelling, especially in this context. Child pornography's creation is the root of the harm that the child pornography market exploits, and Ohio seeks to prevent. What is more, because creating nudity-oriented material with someone else's nude child necessarily involves an offender's direct contact with a nude minor, no lewd exhibition or graphic genitals focus of the minor's nudity should be required.

I. This Court is not required to narrow the Ohio legislature's definition of nudity in R.C. 2907.01(H) to include a lewd exhibition or graphic focus on the genitals requirement for R.C. 2907.323(A)(1), because there is no First Amendment basis to do so

The Ohio legislature's definition of nudity should not be altered for R.C. 2907.323(A)(1), if the reason for doing so is the First Amendment. Neither the offender's fundamental liberty interest in *Young*, nor any First Amendment right to create nudity-oriented material using someone else's child, applies to this case. And even if there were some right to create what the subsection proscribes, it is protected, by the subsection's proper purposes and parental consent exemptions.

A. *Young*'s definition of nudity does not apply to R.C. 2907.323(A)(1), because the First Amendment interest in *Young* was the offender's established fundamental liberty interest in "mere possession"

Martin argues that likeness in language between the two subsections should compel this Court to alter the Ohio legislature's definition for R.C. 2907.323(A)(1), like it did for R.C. 2907.323(A)(3) in *Young*.

But at their core, cases on the mere possession of child pornography implicate a particular First Amendment right, which is not at issue in this case: the fundamental right to receive information and ideas in the privacy of one's home, regardless of their worth. *See Osborne*, 495 U.S. at 108, 110 S.Ct. 1691 (recognizing that the "right to receive information" in the privacy of one's home, is the fundamental liberty interest involved

with statutes that criminalize mere possession); *see Stanley,* 394 U.S. at 564, 89 S.Ct. 1243. Case law supports this conclusion.

Though raised in the context of possessing obscene material, not child pornography, *Stanley* was first to address how statutes that ban mere possession of particular material implicate a person's First Amendment right to merely possess what he wishes. *Stanley* at 564. Stanley was prosecuted and convicted under a Georgia law that prohibited him from possessing obscene material. *Id. at* 564. Stanley appealed his conviction, arguing that he had a fundamental right to be free from governmental intrusion in the privacy of his own home, and that this right included the right to possess obscene material. *Id.* at 565. The United States Supreme Court agreed. *Stanley* at 568.

Importantly, the Court reasoned that when it comes to criminalizing "mere possession" of particular material, the right to possess or view what one wishes in the privacy of one's own home "takes on an added dimension." *Id.* at 564. The *Stanley* Court consequently struck down the Georgia law, basing its decision on the offender's fundamental liberty interest in "mere possession": "the States retain broad power to regulate obscenity; that power simply does not extend to **mere possession** by the individual in the privacy of his own home." (Emphasis added.) *Id.* at 568.

That right was soon raised in Ohio, in the context of child pornography. *Meadows,* 28 Ohio St.3d at 45, 503 N.E.2d 697. Like Stanley, Meadows argued that he

had a First Amendment right to merely possess what he wished, except that Meadows argued that this right included the right to possess child pornography. *Meadows* at 44. Yet child pornography is material that the Supreme Court of the United States had previously held was unprotected expression. *Ferber*, 458 U.S. at 763, 102 S.Ct. 3348 (reasoning that the content of child pornography is "a category of material outside the protection of the First Amendment . . ."). And since Ohio had a compelling interest in protecting children from being victimized by the child pornography industry, the *Meadows* Court held that Ohio may ban the mere possession of child pornography, despite the offender's otherwise valid liberty interest. *Meadows, supra.*

But no matter the material's content, the fundamental liberty interest implicated by statutes that prohibit the mere possession of particular material is the same: the fundamental "right to receive information and ideas" in the privacy of one's home. *Stanley*, 394 U.S. at 564, 89 S.Ct. 1243; *Meadows* at 44-5.

Young was no different. The *Young* Court was asked to consider whether R.C. 2907.323(A)(3) was constitutionally overbroad, because that statute banned the "mere possession" or viewing of material or performances that illegally used a nude minor, without restricting the nudity to that which is lewd or graphically focused on the genitals. *Young*, 37 Ohio St.3d 249. Again, the "threshold question" was whether Ohio could constitutionally proscribe the possession or viewing of child pornography in light

of the "right to receive information in the privacy of one's home". *Osborne,* 495 U.S. at 108, 110 S.Ct 1691; *Young* at 252.

Thus, even if the words "state of nudity" in (A)(1) and (A)(3) of R.C. 2907.323 are the same, the justification for the *Young* Court's decision to restrict the definition of nudity—the offender's First Amendment interest, is not.

B. **A person has no historically established fundamental right to take pictures of someone else's nude child without parental consent and for no proper purpose**

In contrast to the right to possess and view what one wishes in the freedom of one's own home, the right to create or produce material that depicts someone else's nude child without parental consent has not historically been considered a fundamental right. *Ferber,* 458 U.S. at 763, 102 S.Ct. 3348; *see Stanley,* 394 U.S. 557. Indeed, such a right did not emerge from *Ferber,* the seminal case on the production of child pornography. *Ferber* at 751-52.

Rather, the reasoning underlying *Ferber* suggests that such a right does not exist at all. In that case, Ferber argued he had a right to promote child pornography, particularly when the statute at issue did not require the state to prove that the minor's sexual conduct he was promoting was obscene. *Ferber* at 743. Notably, *Ferber* recognized the State's compelling right to ban the production of such material, which it discussed in great detail. *Id.* at 758-64.

But never did the *Ferber* Court discuss a right to produce or promote such material. Instead, in the context of child pornography's production, the *Ferber* Court seemed to place no First Amendment value on that act:

> The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "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." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 688, 93 L.Ed. 834 (1949). We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

New York v. Ferber, 458 U.S. at 761-62, 102 S.Ct. 3348.

That is, so strong was the state's need for "enforceable production laws", and so valueless was the promotion or production of this material, that no fundamental right to produce it emerged. *Ferber* at 761-62.

In fact, placing no First Amendment value on an offender's conduct in creating R.C. 2907.323(A)(1) material makes sense. After all, if there is any fundamental liberty interest at risk in this context, the risk lies with the parent: whose right to refuse consent to their own children being used in this way is but a part of "perhaps the oldest of the fundamental liberty interests recognized". *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (reasoning that the "liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the

fundamental liberty interests recognized by this Court."). And surely, a parent's fundamental liberty interest in the "management of their offspring" includes the right to protect their child's nakedness from being exploited in material or performances that have no legitimate purpose, by refusing their consent. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 372, 1998-Ohio-389, 696 N.E.2d 201 (1998) ("parents have a fundamental liberty interest in the care, custody, and management of their offspring").

Simply put, a person has no established fundamental right to take pictures of someone else's nude child without their consent, and for no proper purpose. Nor should he. Particularly when a parent's right to protect their child's nakedness by refusing consent to its use, is a part of a historically recognized right, to the "management of their offspring". *Zivich* at 372.

C. If there is a First Amendment interest in creating or producing material that depicts someone else's nude child, that right is already protected by the statute's express parental consent and proper purposes exemptions

Even if there is a fundamental liberty interest in taking pictures of someone else's nude child, it is already protected by the statute's parental consent and proper purposes exemptions set forth in R.C. 2907.323(A)(1)(a)-(b).

These limitations exempt a person who creates or produces material or a performance that illegally uses someone else's nude child from prosecution, when two circumstances are present:

> (a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this

> state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, **or other proper purpose**, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, **or other person having a proper interest** in the material or performance;
>
> (b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.
>
> (Emphasis added.) R.C. 2907.323(A)(1)(a)-(b).

Put differently, the statute does not prohibit taking pictures of someone else's nude child when it is done (a) for a proper purpose, and (b) with parental consent as defined therein. R.C. 2907.323(A)(1). These exemptions sufficiently protect any First Amendment right implicated by R.C. 2907.323(A)(1), for several reasons.

First, the "proper purposes" exemption protects the offender's interest in creating this material, if he creates it for legitimate reasons. By the very language of the proper purposes exemption in subdivision (a), the range of legitimate purposes in its creation is wide: The statute provides an exemption for any "proper purpose", for those with any "proper interest" in it. R.C. 2907.323(A)(1)(a). Thus, any literary, artistic, or other value in its creation is already exempted by statute. *See Ferber*, 458 U.S. at 762-63, 102 S.Ct. 3348.

Second, the parental consent limitation protects both the offender's asserted interest, and the parents established one. It protects the offender's asserted right, by exempting that person from prosecution if there is written parental consent. R.C. 2907.323(A)(1)(b). And, it also protects the parents' established right to rear their children as they choose, by protecting their right to refuse consent to their child's nudity being used for an illegitimate purpose. *See Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (reasoning that parents have a fundamental liberty interest in raising their children); *See In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 32 (2007) (same).

So, considering these two limitations, Martin's proposed concerns are covered. To cite but one example, Martin supports *Young*'s narrowed definition of nudity, by arguing that "[i]t is morally innocent for a preschool teacher to take a picture of a child finger-painting with her shirt off." Appellant Br. 9. Yet even without narrowing the definition of nudity, a preschool teacher would be exempted from prosecution for this act: by having parental consent, and by having a proper purpose for it. Appellant Br. 9.

Moreover, *Osborne* supports the conclusion that such exemptions sufficiently protect the right Martin asserts. *Osborne* suggests that because of the statute's exemptions and proper purposes provisions, R.C. 2907.323(A)(3) would have survived overbreadth attack, even without *Young* having narrowed the definition of nudity:

> Osborne argues that [R.C. 2907.323(A)(3)] as written is substantially overbroad. **We are skeptical of this claim because, in light of the statute's exemptions and "proper purposes" provisions, the statute may not be substantially overbroad under our cases. . . .**
>
> (Emphasis Added.) *Osborne,* 495 U.S. at 112, 110 S.Ct. 1691.

Provided that is true, then the limitations set forth in R.C. 2907.323(A)(1)(a)-(b) are surely sufficient. Especially when considering that here, as opposed to the interest implicated in R.C. 2907.323(A)(3), the right asserted is not fundamental.

II. This Court need not narrow the definition of nudity for R.C. 2907.323(A)(1), because the subsection is not constitutionally overbroad

Martin asserts R.C. 2907.323(A)(1) substantially infringes upon his right to take pictures of someone else's nude child, without parental permission and for no proper purpose.

But the overbreadth doctrine is "strong medicine". *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Indeed, because this subsection regulates conduct, not pure speech, the State has a "freer hand" in its regulation. *Texas v. Johnson,* 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989);*Young,* 37 Ohio St.3d at 251 (reasoning that R.C. 2907.323 regulates conduct). Thus, the scope of a statute does not render it unconstitutionally overbroad unless the overbreadth is not only "real, but substantial, judged in relation to the statute's plainly legitimate sweep." *Osborne,* 495 U.S. at 112, 110 S.Ct. 1691 quoting *Broadrick, supra,* at 615. Conversely, a

statute is not overbroad if it only marginally infringes upon protected expression, while the statute itself covers "easily identifiable and constitutionally proscribable" conduct. *Osborne, supra* quoting *Ferber,* 458 U.S. at 770, n. 25, 102 S.Ct. 3348.

Here, the scope of the conduct R.C. 2907.323(A)(1) regulates is plainly legitimate. *Osborne, supra.* To be sure, the very sweep of the conduct proscribed under this subsection is creating or producing child pornography, which is unprotected expression. *See, e.g., Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 249, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (reasoning that the content of child pornography is unprotected expression, which can be banned without regard to whether it depicts works of value).

Yet even at the outskirts of this subsection's reach, the offender's conduct is conduct Ohio may regulate. Irrespective of the definition of nudity, creating or producing material using someone else's naked child, without parental consent and for no proper purpose, is a criminal act; and not just punishable under this subsection. R.C. 2907.323(A)(1). It is a crime just as much as voyeurism is a crime. R.C. 2907(B); *e.g., State v. Wilson,* 192 Ohio App.3d 189, 2011-Ohio-155, 948 N.E.2d 515, ¶ 61 (11th Dist.) (affirming a voyeurism conviction for secretly videotaping a naked minor without consent); *e.g., State v. Nunez,* 6th Dist. No. H-09-019, 2010-Ohio-3435, ¶ 58(same). And, it is no less a crime without the definition of nudity being narrowed.

To say otherwise would be to say, for instance, that secretly videotaping someone else's naked child, to harass that child, is not a criminal act. It is. R.C.

2917.21(B) ("No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person").

Furthermore, Martin's assertion that his rights are being infringed is neither real, nor substantial. It is not real, because Martin's asserted right to take pictures of someone else's nude child, as opposed to a parent's fundamental right to refuse their consent to having their child used in this way, has not been historically recognized. Nor is his right infringed. Even if there is some First Amendment value in its creation or production, the right is protected by exemptions that preclude the state from prosecuting him when those limitations are present. R.C. 2907.323(A)(1)(a)-(b).

In sum, the conduct proscribed is easy to identify, and justifiably prohibited. Whereas the right sought to be protected by narrowing the definition of nudity, is neither substantial, nor infringed. Thus, the overbreadth doctrine is "strong medicine", that in this case, should not be administered. *Broadrick,* 413 U.S. at 612, 93 S.Ct. 2908.

III. The State's interest in banning the production or creation of child nudity-oriented material or performances under R.C. 2907.323(A)(1) is indisputably compelling, such that no lewdness or graphic genital focus should be required

There is no doubt that Ohio has a compelling interest in regulating child pornography. Often articulated is why: courts have repeatedly emphasized that 'safeguarding the physical and psychological well-being of a minor' is an interest so compelling that it is "beyond the need for elaboration", one that "easily passes muster

under the First Amendment." *Osborne* 495 U.S. at 112, 110 S.Ct. 1691 quoting *Ferber* 458 U.S. at 756-58, 102 S.Ct. 3348.

Several reasons support this need. For one, child pornography sexually exploits children. *Ferber* at 759-60. Thus, it is "intrinsically related" to their abuse. *Id.* For another, materials produced by child pornographers "permanently record" the child's sexual exploitation, which causes these children continual harm by "haunting" them for years to come. *Osborne* at 111. Furthermore, evidence suggests that pedophiles use child pornography to "seduce other children into sexual activity", which perpetuates the harm from child-to-child. *Id.*

But more so today than ever, Ohio's need to regulate this market grows. Two aspects of the child pornography market further deepen the continuing harm done. First, is economics: the industry has financial incentive and the means to circulate these permanent recordings of Ohio's sexually exploited children to its consumers, worldwide. *Ferber* at 759-60. The second reason is related to the first: the Internet's prevalence in today's society.

Indeed, modern life is now saturated by the web's prevalence. As a result, depictions of nude children being used in material and performances besiege Internet's consumers; a venue that makes home videos—like Martin's—readily available to anyone, at any time. Child Exploitation & Obscenity Section, the United States

Department of Justice, (Feb. 23, 2015),

http://www.justice.gov/criminal/ceos/subjectareas/childporn.html.

Yet particularly in the context of creating or producing this material, the State's compelling need applies with even greater force. *Osborne,* 495 U.S. at 111, 110 S.Ct. 1691. The Second District in *Martin* aptly stated why. *Martin,* 2014-Ohio-3640. In contrast to the mere possessing or viewing child pornography, the creation or production of child pornography necessarily involves "direct contact" with the minor. *Id.* at ¶ 19. This direct contact, by the very nature of what R.C. 2907.323(A)(1) proscribes, is with a nude minor—who is not the offender's child; whom the offender has no consent to create nudity-oriented material with; and who has no legitimate purpose to do so. R.C. 2907.323(A)(1).

To also require that the minor's nudeness be lewdly exhibited, or graphically-focused on the genitals, would only leave those children whose direct contact with the offender is most intrusive, with recourse. And it would leave those children, whose nakedness is still being exploited by the offender, without it.

At bottom, harm to Ohio's children is what makes the State's right to ban child pornography compelling. How much more compelling, then, is Ohio's right to ban someone from exploiting a child's nudity, through direct contact with the child, by creating or producing permanent recordings of it, without the consent of the parent, for illegitimate purposes. After all, it is under these conditions that the child's harm

originates; the very wrong Ohio has a compelling need to prevent. *See Martin* at ¶ 19. That harm is then perpetuated, by mass dissemination of this created material, trickled down to a market of people who seek to possess it. *See Osborne,* 495 U.S. at 110, 110 S.Ct. 1691.

In short, not only is there no First Amendment need to narrow the legislature's definition of nudity for R.C. 2907.323(A)(1). But perhaps more importantly, considering the harm that is particular to its creation, such narrowing should not be required.

CONCLUSION

The State respectfully requests that this Court resolve the certified conflict by finding that the Ohio legislature's definition of nudity, set forth in R.C. 2907.01(H), applies to R.C. 2907.323(A)(1).

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CERTIFICATE OF SERVICE

I hereby certify that this Appellee's Merit Brief was electronically filed and a copy was sent by regular U.S. mail this 26th day of May, 2015, to: Valerie Kunze, 250 East Broad Street Suite 400, Columbus, OH 43215.

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