PUBLIC

Case No. 20180386-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL SCOTT HATFIELD,
Defendant/Appellant.

Brief of Appellee

Certified appeal from convictions for four counts of sexual exploitation of a minor, second degree felonies, and three counts of accessing pornographic or indecent material on school property, class A misdemeanors, in the Third Judicial District, Salt Lake County, the Honorable L. Douglas Hogan presiding

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INTRODUCTION

Defendant Michael Hadfield was a middle school English teacher. He made a series of collages that combined pictures of real children with adult pornography. He kept a scrapbook of those collages at school and used them there for his sexual gratification.

The Sexual Exploitation Act forbids possessing child pornography, which includes pictures of real children that have been "created, adapted, or modified to appear" that they are "engaging in sexually explicit conduct." Sexually explicit conduct includes "simulated" sex acts and nudity meant to cause sexual arousal. "Simulated," in turn, means "a feigned or pretended act

. . . which duplicates, within the perception of the average person, the appearance of an actual act of sexually explicit conduct."

Hadfield argues that his collages do not meet the statutory definition of child pornography because they are not realistic enough—they do not "duplicate" the appearance of sex acts because it is obvious that the children did not actually participate in a sex act, and no one seeing the pictures would think that they did. He also argues that unless the statute is read to require something approximating true-to-life images, it would be unconstitutionally overbroad and vague. Hatfield is wrong.

Duplicating the appearance of a sex act does not require something that could be mistaken for reality—just that it be close enough for an average person to know what it depicts. This reading does not create overbreadth problems because the value of such images is nearly non-existent, the harm to the children of depicting them in even a non-realistic sex act is real, and artistic and other lawful purposes can be met without using real children. Hatfield lacks standing to raise a vagueness claim because he crossed two lines that the statute clearly draws: using pictures of real children to make images duplicating sex acts, and using pictures of real nude children for the purpose of sexual arousal. Even if he had standing, the statute is not vague

because it provides ample notice to both the public and law enforcement of what is prohibited.

STATEMENT OF THE ISSUES

1. Does the Sexual Exploitation Act encompass the child pornography collages that Hatfield made?

Standard of Review. The meaning of a statute is a question of law. *Bank of Am., N.A. v. Sundquist*, 2018 UT 58, ¶15, 430 P.3d 623.

2.a. Does Hatfield have standing to challenge the Act as vague, where it clearly proscribes his conduct of using real children to depict sex acts?

2.b. If read to encompass Hatfield's collages, is the Act overbroad or vague?

Standard of Review. Constitutional challenges also present questions of law. *State v. Allgier*, 2017 UT 84, ¶13, 416 P.3d 546.

STATEMENT OF THE CASE

A. Summary of relevant facts.[1]

Defendant Michael Hatfield was an English teacher at a charter school. R80. His classroom had a surveillance camera in it. On three different days,

[1] Because there was no trial, the State takes the facts from relevant trial court documents.

the surveillance footage showed Hatfield pull a black bag from his desk drawer and cover up the camera. R9. The audio recording made it "apparent" that Hatfield was "likely" going through the bag's contents and masturbating. R9. This took place during school hours. R10. School officials called police. R7.

Police searched the bag and found "a small bottle of lotion, a DVD of what appeared to be commercially available adult pornography, and two photo albums." R7. The photo albums contained various pornographic collages, three of which are at issue here. R7-9.[2] The children in the collages are approximately the same age as Hatfield's students. R10.

State's exhibit 1: On the left side of the page, Hatfield placed a picture of a man's torso with a nude, erect penis. On the right side, he placed a picture of a young girl standing completely nude. He also speckled the page with heart- and bow-shaped stickers. SE1; R8; *see also* R129.

State's Exhibit 2: This collage is on pink construction paper. On the left side of the page, Hatfield placed a cutout photograph of a man's nude erect

[2] State's exhibits 1, 2, and 3 are identified in the probable cause statement as pages 4, 7, and 10, respectively, of the gray and white photo album. R8.

penis sticking out from unzipped pants. He then placed a picture of a clothed girl that appears to be between 8 and 12 years old. Hatfield positioned the picture of the girl so that her hand is placed over the penis as though she were holding it. He also placed a conversation bubble above her head that reads, "Is this right, mister?" At the bottom, he placed a caption reading, "Teach her well!" SE2; R8.

State's Exhibit 3: This collage is on light blue construction paper. On the top left, Hatfield placed a cutout photograph of a woman with a nude erect penis close to her mouth. On the top right Hatfield placed a photo of penile-vaginal penetration. At the center of the page, Hatfield placed a close-up picture of a nude, erect penis with two fully-clothed girls flanking it; the girl on the right is made to appear as though she is hugging the penis, and the girl on the left is made to appear as though she is standing next to it.[3] At the bottom right of the page, Hatfield placed a picture of a nude girl who appears to be between 11 and 14. SE3; R8; *see also* R86-87.

[3] The picture of the penis is real, but its relative size is exaggerated.

The girls in exhibits 1 and 2 were photos of real children taken from art or photo books. R134.

B. Summary of proceedings and disposition of the court.

The State charged Hatfield with four counts of sexual exploitation of a child, second degree felonies, and three counts of accessing pornography at a school, class A misdemeanors. R74-78. The four counts were for four of the actual children depicted in the State's three exhibits described above. *See* R134; *see also* Utah Code Ann. § 76-5b-201(3)(a) ("It is a separate offense under this section[] for each minor depicted in the child pornography.").

Hatfield filed a motion to dismiss, arguing (1) that the collages did not meet the statutory definitions of sexually explicit conduct; and (2) that if they did, the statute was unconstitutionally vague and overbroad. R79-97.[4] The trial court denied the motion, ruling that the collages fit the statutory

[4] The motion was captioned, "Motion to Quash the Bindover," R79, but there was no bindover to challenge, as there was never a preliminary hearing or (it seems) a waiver of that hearing—other than the implicit waiver of pleading guilty. *See* Docket. Courts construe motions not by their captions, but by their substance. *See Frito-Lay v. Labor Commission*, 2009 UT 71, ¶27, 222 P.3d 55. In substance, Hatfield sought dismissal of the sexual exploitation counts. R79. And at any rate, the State agreed to let Hatfield reserve these issues for appeal by entering into a *Sery* plea.

definition of child pornography, and that the statutory definitions were neither vague nor overbroad. R128-31, 218-21.

Hatfield entered a conditional guilty plea, reserving the right to appeal the trial court's denial of his motion to dismiss. R125-27, 132-40; *see generally State v. Sery*, 758 P.2d 935, 938-40 (Utah App. 1988). He was sentenced to four concurrent terms of 1-15 years in prison on the felony counts, and to time served on the misdemeanor counts.[5] R160-63. He timely appealed. R168-73. The court of appeals certified the appeal to this Court. R178-79.

SUMMARY OF ARGUMENT

Hatfield's pornographic collages meet the statutory definition of child pornography: he used pictures of real children to duplicate the appearance of sex acts and to portray child nudity in a way to make it sexually arousing to him. The statute does not require real or true-to-life images, merely images of real children that the average person would understand are portraying sex acts and nudity for sexual arousal.

This reading does not create constitutional issues. Overbreadth is not a concern because such images have no value, harm real children, and are

[5] He does not challenge the misdemeanor convictions on appeal.

achievable without using real children. Further, whatever protected uses the speech may deter are not substantial when compared to what the statute legitimately forbids. Hatfield lacks standing to raise a vagueness claim because his conduct is clearly covered, and the statute is not vague at any rate—it gives the average person fair warning that it is criminal to use pictures of real children to create a sexual tableau.

ARGUMENT

I.

Hatfield's pornographic collages with pictures of real children meet the statutory definition of "child pornography."

Hatfield first argues that the three collages do not meet the statutory definitions of child pornography, making the evidence insufficient to prove sexual exploitation of a minor. Aplt.Br. 11-28. Hatfield is mistaken.

In a run-of-the-mill sufficiency claim, the defendant argues against submitting a case to a jury because the State has allegedly not provided enough evidence to prove the elements of an offense. *See, e.g., State v. Montoya*, 2004 UT 5, ¶¶28-35, 84 P.3d 1183. But there was no jury trial here. Whether the evidence sufficed to prove sexual exploitation turns entirely on the meaning of the sexual exploitation statute. *See, e.g., State v. Trujillo*, 2019

UT 5, ¶¶10-25, 883 Utah Adv. Rep. 26 (reversing witness retaliation conviction based on court's interpretation of witness retaliation statute).

When interpreting statutes, this Court's primary purpose is to "give effect to the intent of the Legislature." *Trujillo*, 2019 UT 5, ¶13 (cleaned up). The best evidence of the Legislature's intent is the statute's plain language as evidenced by dictionary definitions and other linguistic resources. *See e.g., id.* at ¶21 (looking to dictionary definition); *State v. Rasabout*, 2015 UT 72, ¶12, 356 P.3d 1258 (using etymology, morphology, and dictionary definitions); *Fire Ins. Exch. v. Oltmanns*, 2018 UT 10, ¶57 n.9, 416 P.3d 1148 (discussing corpus linguistics and statutory interpretation); *State v. Canton*, 2013 UT 44, ¶27 n.6, 308 P.3d 517 (using Google News search). But those meanings must be selected in light of relevant statutory structure, context, and history. *Canton*, 2013 UT 44, ¶217 (considering statutory context and structure); *Maxfield v. Herbert*, 2012 UT 44, ¶31, 284 P.3d 647 (considering statutory history). Legislative history can be helpful either to confirm plain meaning or to clarify ambiguous terms. *Belnap v. Howard*, 2019 UT 9, ¶¶9, 13, 885 Utah Adv. Rep. 14 (legislative history can clarify ambiguity); *State v. Outzen*, 2017 UT 30, ¶22, 408 P.3d 334 ("We may also look to the legislative history to support our conclusions[.]").

Sexual exploitation of a minor is part of the Sexual Exploitation Act. *See* Utah Code Ann. §76-5b-101 et seq. When it passed the Act, the Legislature found that child pornography "is excessively harmful to the minor's psychological, emotional, social, and mental development," "regardless of whether it is classified as legally obscene." *Id.* at § 76-5b-102(1)(a), (d). The Act's express purpose is "to prohibit the production, possession, possession with intent to distribute, and distribution of materials that sexually exploit a minor" in order to "eliminate the market for those materials and to reduce the harm . . . inherent in the perpetuation of" a record of sexual abuse. *Id.* at §§ (1)(e), (2).

It is a second-degree felony to knowingly possess child pornography. Utah Code Ann. § 76-5b-201(1), (2). "'Child pornography' means," in relevant part, "any visual depiction . . . whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where . . . the visual depiction has been created, adapted, or modified *to appear* that an identifiable minor is engaging in sexually explicit conduct." Utah Code Ann. § 76-5b-103(1)(c) (emphasis added).

"'Sexually explicit conduct' means actual or *simulated*[] sexual intercourse . . .; masturbation; bestiality; sadistic or masochistic activities" as

well as "visual depiction[s] of nudity or partial nudity for the purpose of causing sexual arousal of any person; [or] the fondling or touching of the genitals, pubic region, buttocks, or female breast." *Id.* at § (10)(a)-(d), (f), (g) (emphasis added). "'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct." *Id.* at § (11).

Finally, in "determining whether material is in violation of this chapter, the material need not be considered as a whole, but may be examined by the trier of fact in part only."[6] Utah Code Ann. § 76-5b-301(1). "It is not an element of the offense of sexual exploitation of a minor that the material appeal to the prurient interest in sex of the average person nor that the prohibited conduct need be portrayed in a patently offensive manner." *Id.* at § (2).

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[6] Hatfield cites *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) for the proposition that the images must be considered "as part of the whole work." Aplt.Br. 19, 23. But that is not what the statute says. The statute permits looking to the work as a whole or in part. And the citation to *Erznoznik* discusses obscenity law. Obscene materials must be considered as a whole. *Erznoznik*, 422 U.S. at 211 n.7. But as explained below, child pornography need not be legally obscene in order to be unprotected. *New York v. Ferber*, 458 U.S. 747, 773-74, 749 (1982).

The verb form of "duplicate" means to "make a copy of" or "produce something equal to." *Duplicate (verb)*, https://www.merriamwebster.com/dictionary/duplicate, last visited Apr. 9, 2019; *see also Duplicate (v.)*, https://www.etymonline.com/word /duplicate, last visited Apr. 9, 2019, "to repeat, produce a second (like the first)"; from the Latin *duplicare*, "to double" (literally "two-fold").

But the statute is more specific than that—the image must "duplicate[], . . . the *appearance* of an actual act of sexually explicit conduct." Utah Code Ann. § 76-5b-103(11) (emphasis added). "Appearance" means an "external show" or "outward aspect." *Appearance (noun)*, https://www.merriam-webster.com/dictionary/appearance, last visited Apr. 9, 2019. That is, something that looks like something else.[7]

[7] In the Corpus of Contemporary American English, forms of the verb "duplicate" collocate with "appear" or "appearance" only six times. *See* https://www.english-corpora.org/coca/, last visited Mar. 25, 2019 (searches: "duplicates" collocated with "appearance"—0 results; "duplicate" collocated with "appearance"—2 results; "duplicate_v*" collocated with "appear"—4 results; "duplicates" collocated with "appear"—0 results). Four of them emphasize the duplication part, and speak of mimicking, cutting-and-pasting, or seeing similar patterns. The other two emphasize the appearance part, and speak of appearances being deceiving—in one case, the abstract appearing realistic; in the other, categories appearing duplicative, but actually being distinct.

Thus, a depiction duplicates the appearance of a sexually explicit act when the average person would conclude that the depiction portrays a feigned act in a way that reproduces what the real act looks like. Hatfield's collages fit this bill.

State's exhibit 1: Hatfield placed a picture of a man's torso with a nude erect penis next to a young girl standing completely nude. SE1; R8; *see also* R129. Pairing a picture of a sexually excited penis with a picture of a nude girl shows that the visual depiction is intended to elicit a sexual response from the viewer, and that the setting is sexually suggestive. *See State v. Morrison*, 2001 UT 73, ¶18, 31 P.3d 547. It is thus a "visual depiction of nudity . . . for the purpose of causing sexual arousal of any person." Utah Code Ann. § 76-5b-103(10)(f).

State's Exhibit 2: Hatfield positioned a picture of a girl that appears to be between 8 and 12 years old so that her hand is placed over a nude, erect penis to make it look as though she is holding it. He placed a conversation bubble above her head that reads, "Is this right, mister?" At the bottom, he placed a caption reading, "Teach her well!" SE2; R8. This collage consists either of simulating a young girl masturbating an adult male or "the fondling

or touching of the genitals." Utah Code Ann. § 76-5a-103(10)(b), (g).[8] While State's Exhibit 2 is not so sophisticated as to appear real, it certainly duplicates the appearance of an actual act of masturbation that is sexually suggestive, designed to elicit a sexual response from the viewer, and suggests a willingness on part of the child to engage in sexual activity (smiling, asking "Is this right, mister?"). *Morrison*, 2001 UT 73, ¶18. And the bubble and caption clearly identify it as an act of sexual abuse of a minor—teaching a minor how to sexually gratify adult men.

State's Exhibit 3: On the top left Hatfield placed a cutout of a woman with an erect penis close to her mouth. On the top right, he positioned a photo of penile-vaginal penetration. At the center of the page he placed a close-up of a nude, erect penis with two girls flanking it; the girl on the right is made to appear as though she is hugging the penis, and the girl on the left is made to appear as though she is standing next to it. At the bottom right of the page, he placed a picture of a nude girl who appears to be between 11 and 14. SE3;

[8] The trial court applied only subsection (f)—visual depiction of nudity or partial nudity for the purpose of causing sexual arousal—in concluding that the images constituted child pornography. R130. But this Court may affirm on any basis apparent in the record. *Bailey v. Bayles*, 2002 UT 58, ¶20, 52 P.3d 1158. The images in the record are all that is needed to analyze how they fit (or don't) the whole statute.

R8; *see also* R86-87. This collage shows simulated masturbation, "the fondling or touching of the genitals," as well as "the visual depiction of nudity . . . for the purpose of causing sexual arousal of any person." Utah Code Ann. § 76-5a-103(10)(b), (f), (g).

As with exhibit 1, context shows that coupling the nude photo of the actual girl with pictures of sexually aroused genitals—three nude penises, two of which were engaged in actual sex acts including vaginal and apparent oral penetration— is an actual "visual depiction of nudity . . . for the purpose of causing sexual arousal of any person." Utah Code Ann. § 76-5b-103(10)(f).

The simulated masturbation involving two of the girls would appear to be a closer call. Given the scale, no one would think that the two girls are masturbating an actual oversized penis. But the average person would see what appears to be an act of masturbation, particularly given that both the children and the penis are real. It is not unusual to refer to larger- (or smaller) than-life representations as duplicates or replicas—for example, a model train or a toy insect. The exaggeration doesn't make it any less sexually suggestive or less likely to arouse the viewer. The sexually exited genitals show that it is sexually suggestive, intended to elicit a sexual response from the viewer, and

the girls' portrayed fondness for a penis suggests that they are willing to engage in sexual activity. *Morrison*, 2001 UT 73, ¶18.

State v. Cobb, 732 A.2d 425 (N.H. 1999), presented similar interpretive issues. Cobb created images of, among other things, children's heads on adult nude bodies doing sexual acts. *Id.* at 430. He was charged under New Hampshire's sexual exploitation statue, which proscribed "visual representation[s] of a child engaging in sexual activity," such as masturbation, touching the genitals, intercourse, and lewd exhibition of the genitals. *Id.* at 430-31. The New Hampshire Supreme Court upheld the convictions, explaining that the photos made it appear as though the children were engaging in sexual activity, and thus satisfied the statute, even though "no children were used in sexual performances in order to create them." *Id.* at 431-32.[9]

Hatfield argues that *Dost* factors weigh against a finding that the materials were designed for sexual arousal. Aplt.Br. 15-18; *see United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986). In *Morrison*, this Court adopted the *Dost*

[9] The court also upheld the convictions to the extent that the materials made it appear as though real children were used. *Cobb*, 732 A.2d at 431-32. That holding did not survive *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

factors to analyze the sexual arousal element in the Act. Those six factors are (1) whether the focus is on the child's genital area; (2) whether the setting of the image is sexually suggestive; (3) whether the child is in an unnatural pose or age-inappropriate attire; (4) whether the child is nude; (5) whether the image "suggests sexual coyness or willingness to engage in sexual activity"; and (6) "whether the visual depiction is intended or designed to elicit a sexual response from the viewer." *Morrison*, 2001 UT 73, ¶18.

Though this Court considered the *Dost* factors in *Morrison*, but it did so with caveats. The Court cautioned that they "should not be viewed as establishing a rigid test," and that they were neither "comprehensive nor necessarily applicable in every situation," and that other factors may be "equally if not more important" in a "case-specific inquiry." *Id.* (cleaned up).[10]

[10] This keeps with this Court's more recent holdings about other balancing tests. *See, e.g., State v. Fullerton*, 2018 UT 49, ¶23 & n.5, 428 P.3d 1052 (emphasizing need for case-specific inquiry in *Miranda* custody analysis); *State v. Lucero*, 2014 UT 15, ¶32, 328 P.3d 841 (discussing balancing test under evidence rule 403: "some . . . factors may be helpful in assessing" the overall question in one context, "they may not be helpful in another"), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016.

And not all six factors are helpful under Utah's statute. Broadly speaking, the first factor is never necessary because Utah's statute criminalizes not just the exhibition of the genitals, but depictions of "nudity or partial nudity." *Id.* at ¶20; *see also* Utah Code Ann. § 76-5b-103(10)(f). The fourth factor is unhelpful because nudity is a separate element. *Morrison*, 2001 UT 73, ¶20 n.5. And the sixth factor is merely a re-statement of the initial inquiry. *See Id.* at ¶19; *see also State v. Bagnes*, 2014 UT 4, ¶42 n. 8, 322 P.3d 719. As to the other factors, they may be helpful or may not, depending on the case. *See, e.g., United States v. Frabrizio*, 459 F.3d 80, 86-89 (1st Cir. 2006) (urging caution in applying *Dost* factors). As shown above, weighing the relevant factors shows that Hatfield's collages are child pornography.

Hatfield next contends that none of the images meets the statutory definitions because they are not realistic enough—no one would think that the girls were actually engaging in sexually explicit acts. Aplt.Br. 20-28. But

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It also squares with *Dost* itself, which stated that "the trier of fact should look to the following factors, *among any others that may be relevant in the particular case*," and that "a visual depiction need not involve all of these factors in order be" a lascivious exhibition. *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986) (emphasis added).

visual depictions of nudity do not have to include sexually explicit acts if the depictions were constructed for the purpose of causing sexual arousal.

And as explained, for the images of the clothed children positioned as though they are performing sexual acts, the statute does not require true-to-life depictions of those acts. The material must merely duplicate the appearance of the proscribed acts to the point that the average viewer would understand what is being depicted. The images here meet that standard.

II.

Hatfield has not proven beyond a reasonable doubt that the sexual exploitation statute is constitutional.

Hatfield alternatively argues that if the images do fit the statutory definition of child pornography, then the statute "raises both First Amendment (overbreadth) and due process (void for vagueness) issues." Aplt.Br. 29. Thus, he says, this Court should adopt his construction of the statute under the canon of constitutional avoidance. *Id.* at 28-29.

The constitutional avoidance canon is a prudential doctrine courts use to limit their decisions not because they must, but because it serves other interests, like institutional legitimacy, interbranch comity, or judicial modesty. *See generally* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. Colo. L. Rev. 1401, 1403 (2001) (discussing

these and other, less laudable motives for judicial "restraint") (Easterbrook); *see also State v. Rowan,* 2017 UT 88, ¶56, 416 P.3d 566 (Lee, A.C.J., concurring) (referring to canon as exercise in "judicial humility").

Hatfield invokes a strain of this doctrine under which this Court construes a statute in a way that avoids "grave doubts as to its constitutionality." *Utah Dep't. of Trans. v. Carlson*, 2014 UT 24, ¶23, 332 P.3d 900. This is also called the "constitutional doubt canon." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 247 (Thompson/West 2012). Though it chooses between readings, this canon is not license to rewrite a statute; rather, the court must "interpret the statute as the legislature wrote it." *State v. Garcia*, 2017 UT 53, ¶59, 424 P.3d 171; *see also Orlando Millenia, LC v. United Title Servs. of Utah, Inc.*, 2015 UT 55, ¶84, 355 P.3d 965 (similar). And to even apply, "the statute must be genuinely susceptible to two constructions." *Carlson*, 2014 UT 24, ¶24.

Further, Hatfield must overcome another canon: the presumption of constitutionality. It is a cardinal principle of Utah law that statutes are presumed to be constitutional, and one challenging them must prove unconstitutionality beyond a reasonable doubt. *See Brown v. Cox*, 2017 UT 3, ¶11, 387 P.3d 1040 (We presume the statute is constitutional, and we resolve

any doubts in favor of constitutionality.") (cleaned up); *State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995) (similar); *Summit Cnty. v. Rich Cnty.*, 195 P. 639, 644 (Utah 1921) ("We are not unmindful of the fact that before we can declare an act of the Legislature unconstitutional it is our solemn duty to solve every reasonable doubt in favor of the act."). This also follows from his status as appellant, under which he the burden on appeal to persuade this Court to overturn a final judgment. In the absence of a persuasive argument, the presumption of validity accorded that judgment stands. *See generally Utah Physicians for a Healthy Environment v. Executive Director of the Utah Department of Environmental Quality*, 2016 UT 49, ¶36, 391 P.3d 148 (holding that petitioners failed to carry burden of persuasion by not engaging with agency findings, "because there is no way for [the court] to determine what the alleged errors" were).

Thus, Hatfield must show that there is an ambiguity in the statute, that the ambiguity can be interpreted in two ways, and that one of those interpretations would render the statute unconstitutional beyond a reasonable doubt. He has not shown this.

A. The sexual exploitation statute is not overbroad.

Hatfield asserts that unless the Court reads the statute to criminalize only images of actual acts of abuse or those that appear realistic enough to seem that abuse actually took place, then the statute would be unconstitutionally overbroad. Aplt.Br. 28-41. Not so.

Overbreadth is an exception to the general rule of standing—that parties can only assert their own rights. In an overbreadth claim, a defendant asserts that, while a statutory proscription may be constitutionally applied to him, yet it sweeps in too much constitutionally protected expression. *See generally Hill v. Colorado*, 530 U.S. 703, 731-32 (2000); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *State v. Frampton*, 737 P.2d 183, 192 (Utah 1987). The intrusion into constitutionally protected activity must be not only "real, but substantial as well, judged in relation to the statue's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Overbreadth is "strong medicine" to be used only as a "last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982).

The statute's sweep is addressed above—the material must either be a record of actual abuse, duplicate the appearance of the proscribed acts to the

point that the average viewer would understand what the depiction is of, or be constructed to elicit sexual arousal in the viewer.

Child pornography statutes are allowed greater latitude in how broadly they sweep. Some history explains why. By the late 1970's, child pornography had become "a serious national problem." *Id.* at 749. Though States could already ban obscene adult materials under *Miller v. California*, 413 U.S. 15 (1973), many went a step further with materials involving children, banning the production and distribution of non-obscene images as well. *Ferber*, 458 U.S. at 749 & n.2 (citing statutes). The Supreme Court upheld these statutes. It explained that "States are entitled to greater leeway in the regulation of pornographic depictions of children" for several reasons, including: the States' compelling interests in "safeguarding the physical and psychological well-being" of minors; the harm to children in creating a permanent record of their abuse; the need to close down the market for such materials; and the exceedingly low societal value of child pornography. *Id.* at 754-63.

After *Ferber*, "much of the child pornography market [was] driven underground," and it became "difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution."

Osborne v. Ohio, 495 U.S. 103, 110 (1990). So States began to criminalize mere possession. *Id.* at 111 n.6 (citing State statutes). The Supreme Court upheld these statutes for many of the same policy reasons it gave in *Ferber*. *Id.* at 111-12.

Child pornographers then began to turn more to technology, altering images of adults in sexual activities to make them appear to be children, or using images of real children to make it appear as though they were engaging in sexual activities—commonly called "morphing." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239, 242 (2002). In response, Congress amended the federal child pornography statute to make it a crime to possess images that are "*or appear[] to be*, *of a minor* engaging in sexually explicit conduct," as well as to possess images that have been "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *Id.* at 241 (emphasis added); *see also* 18 U.S.C. 2256(8)(C). The Supreme Court struck down the "appears to be of a minor" provision, saying that because no children were actually abused in the production of those materials, that provision was overbroad under the First Amendment. *Id.* at 250-57. The Court did not address the "identifiable minor" provision, but intimated that

it would survive constitutional challenge, as it "implicate[d] the interests of real children." *Id.* at 242.

The identifiable minor language in Utah's statute was copied from the federal statute. *See* House Floor Debate, Feb. 14, 2001, Rep. Katherine M. Bryson, 1:37:30-1:38:00, available at https://le.utah.gov/av/floorArchive.jsp?markerID=9506, last visited March 25, 2019; *see* Utah Code Ann. § 76-5b-103(1)(c) ("'Child pornography' means any visual depiction . . . of sexually explicit conduct where the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.") (cleaned up). The purpose of copying the federal statute was to ensure that more cases would be charged and punished at the state level. *See* House Floor Debate. Because Utah's law has deep federal roots, federal and similar state cases can be helpful both as a backdrop and to analyze the constitutional issues here. *See, e.g.*, *Morrison*, 2001 UT 73, ¶20.

The sexual exploitation statute is not overbroad when read to encompass images of actual children and actual genitals collaged together to create images of simulated sexual activity or of nudity designed to elicit a sexual response from the viewer. *McFadden v. State*, 67 So.3d 169 (Ala. Crim. App. 2010), illustrates this. McFadden—like Hatfield—created collages or

montages of both "*naked and clothed* children cut from catalogues, magazines, and other print" sources "juxtaposing adult nude body parts, including genitalia, often engaged in sexual acts." *Id.* at 178. He was charged and convicted under Alabama's child pornography statute.

On appeal, he claimed—like Hatfield—that the statute was overbroad. The Alabama Court of Criminal Appeals disagreed, likening the collages to morphed images that the *Ashcroft* dicta strongly intimated were not constitutionally protected. *Id*. at 182. Because the collages had pictures of real children, they implicated the same concerns in protecting the children's emotional and psychological well-being discussed in both *Ferber* and *Ashcroft*. *Id.* at 182-84. Though the depicted acts did not actually happen, this meant that the children in the images belonged to a "different class of victims" than children who had been actually abused. *Id.* at 182-83. But they were still victims.

Other courts have agreed that fabricated images that still use real children harm real children. *See also United States v. Hoatling*, 634 F.3d 725, 729-30 (2d Cir. 2011) (holding that minors were at risk of reputational and psychological harm from images of their faces placed on nude adult bodies engaging in sexually explicit conduct); *Doe v. Boland*, 698 F.3d 877, 884 (6th

Cir. 2012) (similar, involving innocent children's photos made to appear pornographic); *Cobb v. Caplan*, case no. Civ. 03-017-M, 2003 WL 22888857, *8 (D. N.H. Dec. 8, 2003) (upholding state child pornography convictions based on collaged images containing real children and stating that the children were victimized each time their pictures were "displayed or exhibited"); *State v. Coburn*, 176 P.3d 203, 222-23 (Kan. Ct. App. 2008) ("The images, even if altered to simulate sexually explicit conduct, implicate the interests of real children and could harm their physiological, emotional, and mental health."); *cf. United States v. Stewart*, 729 F.3d 517, 528 (6th Cir. 2013) (citing cases holding that "a jury may consider evidence of composition, framing, and focus" from manipulated and cropped images to find them lascivious); *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005) (holding that boy whose face had been superimposed on another boy's body was "victimized every time the picture is displayed").

This makes sense. It would be highly traumatizing for a child to see themselves depicted as engaging in sexual acts. *See Coburn*, 176 P.3d at 223. And that harm would be magnified if the images are discovered by others and distributed—which is always a danger. *See id.* (explaining that a child could "suffer irreparable harm to his or her emotional and mental health"

from discovering that morphed images with him or her have been shown to others).

Further, morphed images have "relatively weak expressive value." *Boland*, 698 F.3d at 883. And those involving identifiable minors have no value at all. Unlike images of those who "appear to be" minors, images of actual children are "never necessary to achieve an artistic goal," because virtual children or adult actors may be used in whatever play or movie calls for such a display. *Id.* at 883-84.

Given the low value of the images, the availability of legal alternatives not involving real children, and the harm to real victims, Utah's statute does not sweep in any protected speech, let alone a substantial amount of it. The "balance between competing social costs" therefore favors upholding the statute. *United States v. Williams*, 553 U.S. 285, 292 (2008).

In arguing to the contrary, Hatfield cites several cases for the proposition that "images are protected speech where" they are "unrealistic and were not prepared for distribution." Aplt.Br. 33. Several of the cases he cites involved putting children's heads on adult bodies, *id.*, which is not the case here. And as shown above, at least one federal circuit court and one State supreme court have held such images not protected. *See Hoatling*, 634 F.3d at

729-30; *Cobb*, 732 A.2d at 431-32. He also cites *Commonwealth v. Rex*, an unpublished state trial court decision. The images in that case had no sexual context at all—they were of naked children, but were taken from family photo albums, an issue of National Geographic, and a sociology textbook. *Rex*, case no. 12-049, 2012 WL 6178422, *3 (Mass. Super. Ct., Aug. 8. 2012). Unlike here, there was no context showing sexual intent or depicting anything sexually explicit. And regardless of the similarities of these cases, their reasoning is unpersuasive because they ignore the real harm done to real children.

Hatfield also points out that the images here did not involve real abuse, and thus fall outside of *Ferber*'s rationale of protecting child abuse victims. Aplt.Br. 35-36. Granted, that particular rationale is not applicable here. But as the *McFadden* court pointed out, that the children here were not also abuse victims does not mean they are no victims at all. *McFadden*, 67 So.3d at 182-84.. And the other rationales of protecting their emotional and psychological welfare apply with full force. *Id.*; *see also* Utah Code Ann. § 76-5b-102(1)(a) (finding that child pornography is "excessively harmful to the minor's psychological, emotional, social, and mental development").

Finally on this point, Hatfield argues that a substantial amount of constitutionally protected conduct would be prohibited under the State's

interpretation, including: "suggestive doodles in teen magazines or yearbooks; gluing adult pornography into teen magazines"; depicting teen celebrities in sexually explicit conduct; and "drawing hearts or other indicia of sexual interest on a photograph of a teen celebrity whose buttocks" is partially revealed. Aplt.Br. 37. Even if all this conduct were protected—and the State does not concede that it would be—Hatfield hasn't shown that the statute would sweep in a substantial amount of it, especially when compared to the legitimate sweep of the statute. This legitimate sweep includes not just the images at issue here, but child pornography depicting actual abusive acts. The existence of a few instances of overbreadth does not facially invalidate an entire statute. *See Ferber*, 458 U.S. at 773 ("[W]e seriously doubt . . . that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.").

B. Hatfield lacks standing to argue that the sexual exploitation statute is vague; at any rate, it is not vague.

Hatfield also argues that his reading prevents the sexual exploitation statute from being unconstitutionally vague. Aplt.Br. 38-41. Hatfield lacks standing to bring this claim. But he is also wrong on the merits.

Vagueness is a due process notice doctrine. Some vagueness is inherent in language—"[c]ondemned to the use of words, we can never expect

mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Thus, the Constitution "does not require impossible standards" and the elimination of any possible vagueness. *United States v. Petrillo*, 332 U.S. 1, 7 (1947). A statute is only unconstitutionally vague if it either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or because "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732; *see also City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). If a statute requires a guilty mental state, the chances that it is vague decrease substantially. *Village of Hoffman Estates*, 455 U.S. at 499 ("And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice" that his conduct is proscribed).

A vagueness challenge does not enjoy the standing exception that an overbreadth challenge does. Rather, it is well-established that a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* at 495. "A court should therefore examine the [defendant's] conduct before analyzing other hypothetical applications of the law." *Id.* If the defendant's conduct is

clearly prohibited, then he lacks standing to challenge the statute based on another's hypothetical conduct. *State v. Ansari*, 2004 UT App 326, ¶44, 100 P.3d 231.

Hatfield lacks standing to challenge the sexual exploitation statute because it clearly prohibits his conduct. As explained above, he has created images simulating real children masturbating or fondling the genitals of real adults, and images of nude children that he indisputably intended to view for his sexual gratification.

And the sexual exploitation statute is not vague in any event. It has a mental state requirement, which militates against vagueness. *See* Utah Code Ann. § 76-5b-201(1)(a)(i) ("A person is guilty of sexual exploitation of a minor when the person *knowingly* produces, possesses, or possesses with intent to distribute child pornography[.]") (emphasis added) (cleaned up). It is more definite in its terms than obscenity statutes, which have long withheld vagueness challenges. *See, e.g., Ward v. Illinois*, 431 U.S. 767, 771-77 (1977) (holding state obscenity statute tracking *Miller* test not vague); *Smith v. United States*, 431 U.S. 291, 308-09 (1977) (holding federal obscene mailing statute tracking *Miller* not vague). And federal child pornography provisions have repeatedly withstood vagueness challenges. *See, e.g., Williams*, 553 U.S. at 304-

07 (holding federal solicitation of child pornography statute not vague); *United States v. Lamb*, 945 F. Supp. 441, 452-53 (N.D.N.Y. 1996) (citing many cases rejecting vagueness challenges to federal child pornography statute).[11]

Hatfield asserts that not adopting his statutory construction "would create uncertainties about the boundaries of child pornography," and he cites the hypotheticals he suggested in his overbreadth argument. Aplt.Br. 39-41. But those examples are not relevant to this claim because it is *his* conduct at issue in a vagueness challenge, not others'.

He also likens his case to *Bagnes*, 2014 UT 4. Bagnes (an adult) wore a children's diaper, which he revealed to two nine-year-old girls by dropping his pants in front of them. *Id.* at ¶2. He was charged with two different crimes: lewdness involving a child and sexual exploitation. *Id.* at ¶8. Since flashing one's diaper was not an enumerated act of lewdness, the State proceeded on that count under the catchall provision ("any other act of lewdness"). *Id.* at ¶11. Because all of the other terms dealt with sexual displays, the court

[11] Before the statute specifically defined "simulated sexual conduct," this Court held that term was not vague, meaning simply, "looking or acting like." *State v. Jordan*, 665 P.2d 1280, 1285 (Utah 1983).

interpreted the catchall to proscribe similar behavior—lewd acts of a sexual nature. *Id.* at ¶18-19 (citing *ejusdem generis* canon of construction).

The Court supported this holding with (among other things) reasoning that a broader reading of the term "lewdness" to include non-sexual conduct would raise vagueness concerns because the criminality of conduct would "depend[] on each judge's—or each jury's private sense of the bounds of social propriety." *Id.* at ¶17. On the sexual exploitation count, the State's theory was that he had "exhibited" his genitals. The Court interpreted "exhibit" to mean "making the pubic region visible to public perception." *Id.* at ¶38. This also found support in the constitutional avoidance canon because there were a great many daily activities in which people exposed their (covered) public region to public view. *Id.* at ¶¶35-36.

Unlike *Bagnes*, the conduct here is nowhere near the edge of proscribed behavior. No reasonable person reading the sexual exploitation statute would wonder whether they could make the images here without violating it. And the statute does not turn on an individual's private sense of social propriety. Both would-be offenders and law enforcement are on notice that someone cannot lawfully (1) make a visual depiction that looks like an actual child is

engaging in a sexual act; or (2) depict a nude child in a way that a reasonable person would think it was done for the "purpose of causing sexual arousal."

CONCLUSION

The sexual exploitation statute's plain terms encompass Hatfield's child pornography collages—they "duplicate . . . the appearance" of sexual acts, and depict child nudity "for the purpose of causing sexual arousal." Reading the statute in this way does not render the statute overbroad because it is never necessary to use real children in such images, the value of the speech is low, and the instance of protected activity is rare. Hatfield lacks standing to raise a vagueness challenge because his collages clearly fall within what the statute prohibits. And the statute gives ample notice to both the public and law enforcement of what it prohibits. This Court should affirm.

Respectfully submitted on April 24, 2019.

SEAN D. REYES
Utah Attorney General

/s/ John J. Nielsen
JOHN J. NIELSEN
Assistant Solicitor General
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7,431 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☐ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☑ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ John J. Nielsen
JOHN J. NIELSEN
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 24, 2019, the Brief of Appellee was served upon appellee's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellee by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellee.

☐ will be filed with the Court on a CD or by email and served on appellee within 14 days.

/s/ Melanie Kendrick

Addenda

Addendum A

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5B. Sexual Exploitation Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § 76-5b-101

§ 76-5b-101. Title

Currentness

This chapter is known as the "Sexual Exploitation Act."

Credits

Laws 2011, c. 320, § 13, eff. May 10, 2011.

U.C.A. 1953 § 76-5b-101, UT ST § 76-5b-101
Current with the 2018 Third Special Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5B. Sexual Exploitation Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § 76-5b-102
Formerly cited as UT ST § 76-5a-1

§ 76-5b-102. Legislative determinations--Purpose of chapter

Currentness

(1) The Legislature of Utah determines that:

(a) the sexual exploitation of a minor is excessively harmful to the minor's physiological, emotional, social, and mental development;

(b) the sexual exploitation of a vulnerable adult who lacks the capacity to consent to sexual exploitation can result in excessive harm to the vulnerable adult's physiological, emotional, and social well-being;

(c) a minor cannot intelligently and knowingly consent to sexual exploitation;

(d) regardless of whether it is classified as legally obscene, material that sexually exploits a minor, or a vulnerable adult who does not have the capacity to consent to sexual exploitation, is not protected by the First Amendment of the United States Constitution or by the First or Fifteenth sections of Article I of the Utah Constitution and may be prohibited; and

(e) prohibition of and punishment for the distribution, possession, possession with intent to distribute, and production of materials that sexually exploit a minor, or a vulnerable adult who lacks the capacity to consent to sexual exploitation, is necessary and justified to eliminate the market for those materials and to reduce the harm to the minor or vulnerable adult inherent in the perpetuation of the record of the minor's or vulnerable adult's sexually exploitive activities.

(2) It is the purpose of this chapter to prohibit the production, possession, possession with intent to distribute, and distribution of materials that sexually exploit a minor, or a vulnerable adult who lacks capacity to consent to sexual exploitation, regardless of whether the materials are classified as legally obscene.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5B. Sexual Exploitation Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § 76-5b-103
Formerly cited as UT ST 76-5a-2

§ 76-5b-103. Definitions

Currentness

As used in this chapter:

(1) "Child pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;

(b) the visual depiction is of a minor engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(2) "Distribute" means the selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presenting child pornography or vulnerable adult pornography with or without consideration.

(3) "Identifiable minor" means a person:

(a)(i) who was a minor at the time the visual depiction was created, adapted, or modified; or

(ii) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.

(4) "Identifiable vulnerable adult" means a person:

(a)(i) who was a vulnerable adult at the time the visual depiction was created, adapted, or modified; or

(ii) whose image as a vulnerable adult was used in creating, adapting, or modifying the visual depiction; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.

(5) "Lacks capacity to consent" is as defined in Subsection 76-5-111(1).

(6) "Live performance" means any act, play, dance, pantomime, song, or other activity performed by live actors in person.

(7) "Minor" means a person younger than 18 years of age.

(8) "Nudity or partial nudity" means any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered.

(9) "Produce" means:

(a) the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography; or

(b) the securing or hiring of persons to engage in the photographing, filming, taping, directing, producing, creating,

designing, or composing of child pornography or vulnerable adult pornography.

(10) "Sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) masturbation;

(c) bestiality;

(d) sadistic or masochistic activities;

(e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person;

(f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person;

(g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or

(h) the explicit representation of the defecation or urination functions.

(11) "Simulated sexually explicit conduct" means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.

(12) "Vulnerable adult" is as defined in Subsection 76-5-111(1).

(13) "Vulnerable adult pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a vulnerable adult engaging in sexually explicit conduct;

(b) the visual depiction is of a vulnerable adult engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable vulnerable adult is engaging in sexually explicit conduct.

Credits

Laws 2011, c. 320, § 15, eff. May 10, 2011; Laws 2013, c. 290, § 1, eff. May 14, 2013.

U.C.A. 1953 § 76-5b-103, UT ST § 76-5b-103
Current with the 2018 Third Special Session.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5B. Sexual Exploitation Act (Refs & Annos)
Part 2. Sexual Exploitation

U.C.A. 1953 § 76-5b-201

§ 76-5b-201. Sexual exploitation of a minor--Offenses

Effective: May 8, 2018

Currentness

(1) A person is guilty of sexual exploitation of a minor:

(a) when the person:

(i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or

(ii) intentionally distributes or views child pornography; or

(b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).

(2) Sexual exploitation of a minor is a second degree felony.

(3) It is a separate offense under this section:

(a) for each minor depicted in the child pornography; and

(b) for each time the same minor is depicted in different child pornography.

(4) It is an affirmative defense to a charge of violating this section that no person under 18 years of age was actually depicted in the visual depiction or used in producing or advertising the visual depiction.

(5) In proving a violation of this section in relation to an identifiable minor, proof of the actual identity of the identifiable minor is not required.

(6) This section may not be construed to impose criminal or civil liability on:

(a) an entity or an employee, director, officer, or agent of an entity when acting within the scope of employment, for the good faith performance of:

(i) reporting or data preservation duties required under any federal or state law; or

(ii) implementing a policy of attempting to prevent the presence of child pornography on any tangible or intangible property, or of detecting and reporting the presence of child pornography on the property;

(b) a law enforcement officer acting within the scope of a criminal investigation;

(c) an employee of a court who may be required to view child pornography during the course of and within the scope of the employee's employment;

(d) a juror who may be required to view child pornography during the course of the individual's service as a juror;

(e) an attorney or employee of an attorney who is required to view child pornography during the course of a judicial process and while acting within the scope of employment;

(f) an employee of the Department of Human Services who is required to view child pornography within the scope of the employee's employment; or

(g) an attorney who is required to view child pornography within the scope of the attorney's responsibility to represent the Department of Human Services, including the divisions and offices within the Department of Human Services.

Credits

Laws 2011, c. 320, § 16, eff. May 10, 2011; Laws 2016, c. 116, § 1, eff. May 10, 2016; Laws 2018, c. 285, § 12, eff. May 8, 2018.

U.C.A. 1953 § 76-5b-201, UT ST § 76-5b-201
Current with the 2018 Third Special Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5B. Sexual Exploitation Act (Refs & Annos)
Part 3. Miscellaneous

U.C.A. 1953 § 76-5b-301

§ 76-5b-301. Determination whether material violates chapter

Currentness

(1) In determining whether material is in violation of this chapter, the material need not be considered as a whole, but may be examined by the trier of fact in part only.

(2) It is not an element of the offense of sexual exploitation of a minor that the material appeal to the prurient interest in sex of the average person nor that prohibited conduct need be portrayed in a patently offensive manner.

(3) It is not an element of the offense of sexual exploitation of a vulnerable adult that the material appeal to the prurient interest in sex of the average person nor that prohibited conduct need be portrayed in a patently offensive manner.

Credits

Laws 2011, c. 320, § 18, eff. May 10, 2011.

U.C.A. 1953 § 76-5b-301, UT ST § 76-5b-301
Current with the 2018 Third Special Session.

End of Document

Addendum B

The Order of the Court is stated below:
Dated: March 08, 2018 02:33:16 PM
/s/ L DOUGLAS HOGAN
District Court Judge

Heather J. Chesnut (6934)
424 East 500 South #300
Salt Lake City, UT 84111
801-532-5444 (phone)
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IN THE THIRD DISTRICT COURT, STATE OF UTAH SALT LAKE COUNTY, SALT LAKE DEPARTMENT	
THE STATE OF UTAH Plaintiff. v. MICHAEL HATFIELD, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW (STIPULATED AS TO FORM)** Case No.: 171401406FS JUDGE DOUGLAS HOGAN

This case, having come before the Court on a Motion to Quash the bindover[1] for factual and legal arguments, is decided as follows: the material at issue is child pornography as a matter of fact, and this factual finding does not render the statutory definition of child pornography unconstitutional as a matter of law.

FINDINGS OF FACT

1. Between April 6 and April 20, 2017, in Salt Lake County, Mr. Hatfield possessed two scrapbooks in his classroom at a charter school, where he was an English teacher. One scrapbook has a gray-and-white cover.

1 A preliminary hearing was not held in this case, but the Motion to Quash was preserved by stipulation of the parties.

2. The charges of Sexual Exploitation of a Minor, at issue here, are based on three pages from the gray-and-white scrapbook reviewed by the Court at the evidentiary hearing on this matter. The pages are marked in order as Exhibits 1, 2 and 3, and are located in the custody of the Utah Attorney General investigator.

3. Exhibit 1, the basis for Count 1, is a scrapbook page showing a profile of an adult male, mostly clothed, but with an erect penis visible. An extended hand is cut-and-pasted onto this figure. On the other side of the page, a nude photograph of what appears to be a pre-pubescent girl standing facing frontwards is pasted onto the page. The scrapbook page is decorated with pink and red hearts.

4. Exhibit 2, the basis for Count 2 is a scrapbook page showing what appears to be an adult male in profile, again mostly clothed but with an erect penis visible. On the other side of the page is what appears to be a pre-pubescent girl fully clothed. Her hand is in a reaching motion and is pasted over the penis.

5. Exhibit 3, the basis for counts 3 and 4, relate to a scrapbook page where photographs of two girls [redacted] are cut and pasted onto the page. They are fully clothed. One girl appears to be hugging something or someone. Under this image an erect male penis is cut-and-pasted. In the upper right-hand corner of the page a photo of adult heterosexual intercourse is pasted. An adult pornographic image is also pasted in the upper left-hand corner. In the bottom right-hand corner is a photograph of what appears to be a nude pre-pubescent girl standing facing frontwards.

6. Images from these exhibits are cut from adult pornography publications for the sexual

images, and art and photography books for the images of children. The images of [redacted] are from [redacted]

7. None of these images, taken alone, constitute child pornography.
8. However, this Court finds that, cut-and-pasted together, the pages constitute child pornography. Specifically, the court finds that the pages are visual depictions "that have been created, adapted, or modified to appear than an identifiable minor is engaging in sexually explicit conduct," in violation of Utah Code Ann. 76-5b-103(1). The "sexually explicit conduct" is that identified in Utah Code Ann. 76-5b-103(10)(f), which is "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person."

CONCLUSIONS OF LAW

1. The Court concludes that the Findings of Fact do not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the First Amendment of the U.S. Constitution.
2. The Court also concludes that the Findings of Fact do not render the statutory definitions of child pornography in Utah Code Ann. 76-5b-103(1) and 76-5b-103(10)(f) unconstitutional under the Due Process provision of the U.S. Constitution.

END OF ORDER – SIGNATURE/DATE AT TOP OF FIRST PAGE

MAILED/DELIVERED a copy of the foregoing to the Salt Lake District Attorney's Office, via the court's electronic filing system, this 8th day of March, 2018.

Stacie Misner