STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: April 3, 2024]

STATE OF RHODE ISLAND	:	
	:	
VS.	:	**Case No. P3-2022-2476A**
	:	
JESUS OCASIO	:	
		Consolidated with:
STATE OF RHODE ISLAND	:	
	:	
VS.	:	**Case No. P3-2022-4229A**
	:	
FELIX BERARDIS, JR.	:	

DECISION

LANPHEAR, J. This action is before the Court on appeal of two criminal cases originally filed in the Rhode Island District Court. Two defendants were separately charged, in two distinct actions, with possession of materials in violation of the child erotica statute, G.L. 1956 § 11-9-1.6. They each challenged the constitutionality of the Rhode Island statute. They each filed motions to dismiss. This Court has consolidated the two actions for purposes of argument and decision of this particular issue. Their rights to separate trials are preserved.

I

Facts and Travel

In July 2022, Detective Baccari of the Rhode Island State Police received a CyberTipline report from the National Center for the Missing and Exploited Children (NCMEC) stating that on July 19, 2022, Google became aware that one of its users had uploaded files of suspected child erotica to his Gmail account. State Police Headquarters Narrative for Investigator Baccari 1-2,

Nov. 2, 2022. The account was linked by IP address to Mr. Berardis. *Id.* at 2. Upon reviewing one of the images and determining that its content was consistent with the definition of child erotica found in § 11-9-1.6, Detective Baccari expanded his inquiry regarding Mr. Berardis, further confirming his identity and discovering more imagery fitting the definition of child erotica stored in a Google Photos account. *Id.* at 1-3. After conducting some surveillance, Det. Baccari prepared a search warrant for Mr. Berardis' Cranston address and an arrest warrant for Mr. Berardis, both signed by a District Court Associate Judge on October 25, 2022. *Id.* at 4.

Jesus Ocasio was charged with one count of violating the statute. *See* Docket, *State v. Ocasio*, P3-2022-2476A. The notice of appeal lists an offense date of November 16, 2021. *See* Notice of Appeal or Transfer to Superior Court. *Id.* Mr. Ocasio entered a plea of nolo contendere and filed an appeal on March 28, 2022.

II

Standing and Jurisdiction

The initial inquiry of the Court is to consider whether several constitutional laws raised by the defendants are appropriate for adjudication at this time. The defendants are directly questioning the constitutionality of a statute prior to their criminal adjudications—before the facts of their cases have been determined.

Upfront, this Court is aware of our high court's directive to avoid immersing itself into constitutional issues and does so because it is necessary in this instance. "This Court has consistently applied rules of statutory construction to avoid constitutional issues and to render the provisions consistent and valid, even when a 'literal reading of [a] statute[] . . . would defeat or frustrate the evident intendment of the legislature." *Town of Scituate v. O'Rourke*, 103 R.I. 499, 507, 239 A.2d 176, 181 (1968).

The first inquiry is whether the defendants have standing to question the constitutionality of the statutes. "Standing is a threshold inquiry into whether the party seeking relief is entitled to bring suit." *Narragansett Indian Tribe v. State of Rhode Island*, 81 A.3d 1106, 1110 (R.I. 2014) (citing *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 452 A.2d 931, 932-33 (R.I. 1982)).

The general rule, first set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) by the United States Supreme Court and subsequently adopted by the Rhode Island Supreme Court, requires that the party suffer an actual injury which can be redressed by a favorable decision from the court. *See, e.g., Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997); *McKenna v. Williams*, 874 A.2d 217, 226 (R.I. 2005); and *Apex Oil Company, Inc. v. State, by and through Division of Taxation*, 297 A.3d 96, 110 (R.I. 2023). However, the courts have altered this general rule to lower the threshold for plaintiffs who seek to bring First Amendment challenges. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In *Broadrick*, the United States Supreme Court held that a party may challenge a statute without showing that their own rights of free expression were violated "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." S*ee also Cranston Teachers Alliance Local No. 1704 AFT v. Miele*, 495 A.2d 233, 235 (R.I. 1985) (citing *Cummings v. Godin*, 119 R.I. 325, 339, 377 A.2d 1071, 1078 (1977)).[1]

[1] In *Lujan*, the United States Supreme Court held that a plaintiff bringing a lawsuit has the burden to establish that: (1) they suffered an injury in fact, defined as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical[;]"' (2) a causal connection between the injury and the conduct complained of; and (3) that it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." 504 U.S. at 560-61.

Broadrick is the authoritative case setting the requirements for standing in First Amendment challenges. 413 U.S. at 611-13. Recognizing that restrictions on "the exercise of First Amendment rights must be narrowly drawn," the high court held that plaintiffs could bring "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* at 611-12. In *Broadrick*, the plaintiffs alleged that an Oklahoma statute which prohibited certain government employees from receiving contributions for any political organization, candidacy, or other political purpose, violated the First Amendment for being overbroad and impermissibly vague. *Id.* at 603-06, 610. The Court reasoned that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Id.* at 612. Therefore, when determining whether a particular claimant has standing to challenge a statute, the Court is more permissive in allowing a case to move forward when the statute being challenged clearly regulates "'only spoken words,"' as opposed to challenges to statutes regulating expressive conduct. *Id.* at 612 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520 (1972)).

In *Cummings*, the Rhode Island Supreme Court held that an individual plaintiff had standing to challenge a statute for violating the First Amendment because the challenged statute was "substantially overbroad." 119 At 339, 377 A.2d at 1078. Our high court relied on the lower threshold for First Amendment challenges. *Id.* at 1077-80. Rather than considering whether the

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The Rhode Island Supreme Court adopted the test set forth in *Lujan*, 504 U.S. at 560, to determine whether a claimant has standing to bring a claim in state court. Our Supreme Court first applied the test in *Pontbriand* in which it used the language from *Lujan* to clarify the state's existing "'injury in fact' requirement." 699 A.2d at 862 (quoting *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 22-23, 317 A.2d 124, 128 (1974))

plaintiff had standing under the traditional *Lujan* analysis, the Court applied the standard established in *Broadrick* without considering whether the plaintiff suffered an injury.[2] *Id.* at 1078. The Court in *Cummings* ultimately stated that a claimant has standing to assert a First Amendment challenge when "the challenged statute [is] 'substantively overbroad." Under this test, a defendant who engaged in 'hardcore' conduct nonetheless has standing to raise the issue of overbreadth where the restrictions at issue are "substantially overbroad." *Id.*

Cummings reasoned that it was proper for the Court to begin its standing analysis by considering whether the challenged statute is "substantially overbroad." 119 R.I. at 339, 377 A.2d at 1078. In determining whether the Child Erotica Statute is "substantially overbroad," the Court is more permissive in allowing the Defendants to pursue their challenges if it finds the Child Erotica Statute regulates expression in the form of "pure speech," rather than "expressive conduct." *See Broadrick*, 413 U.S. at 615.

Defendants argue that the Child Erotica Statute, which prohibits possession of photos and videos of partially clothed minors used for sexual arousal or gratification, places an unconstitutional content-based restriction on protected speech. (Ocasio's Mem. in Supp. of Def.'s Mots. Dismiss (Ocasio Mem.) 3-5; Berardis' Mem. in Supp. of Def.'s Mots. Dismiss (Berardis Mem.) 4-6.) Moreover, Defendants argue that the Child Erotica Statute is vague and overbroad, and as a result, prohibits protected forms of expression in violation of Free Speech Clauses of the First Amendment of the United States Constitution and article I, section 21 of the Rhode Island Constitution. (Ocasio Mem. 5-9; Berardis Mem. 6-9.) Specifically, Defendants argue that the

[2] The case does not clearly state whether the plaintiff suffered any consequences as a result of the violation at work or from the legislature. *See Cummings*, 377 A.2d 1072-78.

term "partially clothed" is not clearly defined and the "used for" element is ambiguous. (Ocasio Mem. 7-8; Berardis Mem. 7-9.)

In the cases at bar, the facts are not completely established, but the defendants are pending criminal adjudication. They face significant and direct harm if the statutes are applied. The standing requirements are more relaxed where significant First Amendment challenges are raised. Therefore, this Court finds that the defendants have sufficient standing to challenge the statutes at this point and the issue is ripe for adjudication.

III

The Child Erotica Statute

Defendants question the constitutionality of § 11-9-1.6 as applied to their cases. The statute provides, in its entirety, that:

> "(a) Definitions as used in this section:
>
> > "(1) 'Minor' means any person not having reached eighteen (18) years of age.
> >
> > "(2) 'Produces' means produces, directs, manufactures, issues, publishes, or advertises.
> >
> > "(3) 'Visual portrayal' means any visual depiction as defined in § 11-9-1.3, including, but not limited to, any photograph, film, video, picture, or computer-generated image or picture whether made or produced by electronic, mechanical, or other means.
>
> "(b) Any person age eighteen (18) or over who knowingly and voluntarily, without threat or coercion, produces, possesses, displays, or distributes, in any form, any visual portrayals of minors who are partially clothed, where the visual portrayals are used for the specific purpose of sexual gratification or sexual arousal from viewing the visual portrayals, is guilty of a misdemeanor and, upon conviction, shall be confined in jail for not more than one year, or fined not more than one thousand dollars ($1,000), or both.
>
> "(c) **Affirmative defenses.**
>
> > "(1) It shall be an affirmative defense to a charge of violating this section that:
> >
> > > "(i) The alleged child erotica was produced using an actual person or persons who was an adult at the time the material was produced;

> "(ii) The defendant promptly and in good faith and without retaining or allowing any person, other than a law enforcement agency, to access any visual portrayal or copy of it;
>
> "(A) Took reasonable steps to destroy each such visual portrayal; or
>
> "(B) Reported the matter to a law enforcement agency and afforded that agency access to each such image.
>
> "(iii) That the possessor, displayer, or distributor of child erotica is the parent or legal guardian of the child depicted in the visual portrayals and there is no competent evidence to prove an intent to use the visual portrayals for sexual gratification or sexual arousal from viewing the visual portrayals.
>
> "(d) **Severability.** If any provision or provisions of this section, or the application of this section to any person or circumstance is held invalid by a court of competent authority, that invalidity does not affect the other provisions or applications of this section which can be given effect without that invalid provision or provisions or application of the provision or provisions, and to this end the provisions of this section are declared to be separable and severable. Section 11-9-1.6.

IV

Issues Presented

Defendants open their memoranda by arguing that the State is required to prove the law's constitutionality. (Defs.' Mem. 2.) They proceed to contend that the statute reaches material that is not categorically excluded from First Amendment protection, inferring that First Amendment scrutiny applies. *See id.* at 2-3. Defendants then assert that the statute draws distinctions between permitted and forbidden speech with reference to the speech's content, to claim that strict scrutiny is therefore the applicable standard of review. Analogizing this statute to a similar enactment invalidated by the Texas Court of Appeals, Defendants contend that means-end fit between the interests served by the statute and its scope is poorly measured; as such, Defendants believe the

statute cannot overcome strict scrutiny because the state's interest is not sufficiently compelling and because it is not narrowly tailored to achieve its desired goals.

Defendants further assert that the statute is both unconstitutionally vague and overbroad. *Id.* at 5-6.

The State posits that child pornography is a category of speech wholly outside First Amendment protection. *Id.* at 3. Looking to *State v. Hansen*, 272 A.3d 1040, 1046 (R.I. 2022), a recent Rhode Island Supreme Court case that applied the rule of decision from the landmark *Ferber* case, the State submits that the interests undergirding criminal penalties for possessing child pornography justify the child erotica statute under consideration. *New York v. Ferber*, 458 U.S. 747 (1982). The State stresses that child pornography statutes enjoy special solicitude and need not criminalize obscene material to comply with the First Amendment. *Id.* at 5.

Alternatively, the State rejoins that even if the Court finds that strict scrutiny applies, the statute should still be upheld as proper content-based speech restriction. *Id.* at 5; *see also id.* at 6-7. Lastly, the State argues that the statute is neither unconstitutionally vague nor overly broad.

V

Standard of Review

When the constitutionality of a statute faces a free speech challenge, "content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115-16 (1991)). The burden of showing the regulation to be constitutional falls to the Government. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). A regulation is content based when "(1) 'on its face' draws distinctions based on the message a speaker conveys; (2) it 'cannot be justified without reference to the content of the regulated speech'; [or] (3) it was

'adopted by the government because of disagreement with the message the speech conveys.'" *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163-64 (2015). The Rhode Island Supreme Court applies the standard of strict scrutiny when reviewing the constitutionality of a content-based regulation. *See Ahlburn v. Clark*, 728 A.2d 449, 453 (R.I. 1999). This standard requires the State to show that the statute is "necessary to serve a compelling state interest, and that the Legislature has carefully crafted [it] to achieve such an end. *Id.* at 453 (*see also Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (citing *Reed*, 576 U.S. at 163-64).

A

Free Speech Protections

The First Amendment to the Constitution of the United States provides that,

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

This case concerns clause two, the free speech clause. *Id.* The free speech clause has been incorporated to be applicable to the states through the Due Process Clause of the Fourteenth Amendment and applies with full force in state criminal proceedings. *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). While a criminal defendant bears the burden of raising the First Amendment as an affirmative defense at the threshold, if a law is content based, the government just "bears the burden of proving the constitutionality." *Playboy Entertainment Group, Inc.*, 529 U.S. at 816.

Underscoring the importance of the First Amendment in our republic, the United States Supreme Court declared:

> "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through

> regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).
>
> and
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Notwithstanding the above, some types of speech are categorically excluded from First Amendment protection. Included are offers to engage in illegal transactions, *United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.") (citations omitted) (upholding a federal child pornography solicitation statute against an overbreadth challenge); child pornography, *Ferber*, 458 U.,S. at 747 ("child pornography [i]s a category of material outside the First Amendment's protection"; obscenity, *see Miller v. California*, 413 U.S. 15, 21 (1973), *reaffirming Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press."

All speech not subject to a categorical exception is within the First Amendment's scope. *United States v. Stevens*, 559 U.S. 460, 470, 473 (2010) (invalidating as overbroad a statute which criminalized depictions of animal cruelty, and rejecting the notion that categories of speech are outside the First Amendment merely because the benefit of the speech is outweighed by the burdens). However, some types of speech, such as commercial speech, are subject to a more deferential standard of review when targeted by governmental regulation. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

B

Scrutiny of the Statute

Once a regulation of non-categorically unprotected speech is determined to be content based (i.e., the law or regulation permits distinctions based on a message's content), strict scrutiny applies. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014). A law can be content based not merely on its face but also if intended to target particular speech. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994). Laws which discriminate among viewpoints also trigger strict scrutiny. *R.A.V.*, 505 U.S. at 386 ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."); *see also* Geoffrey R. Stone, et al., *Constitutional Law* 1225 (4th ed. 2001) (characterizing the holding in *R.A.V.* and saying that even when the government regulates categories of speech entitled to no First Amendment protection whatsoever, it must do neutrally.

To pass a First Amendment strict scrutiny analysis, the law in question must serve both a compelling government interest and be tailored narrowly to do so. *R.A.V.*, 505 U.S. at 395; *see also Ahlburn*, 728 A.2d at 453. Protecting children from the harmful psychological effects of sexual exploitation is a compelling government interest. *See Ferber*, 458 U.S. at 756-57. However, by banning all imagery used for the specific purpose of sexual gratification or sexual arousal from viewing the visual portrayals, the statute's language is too sweeping. This phrase attempts to criminalize possession or production of imagery even if it is not demonstrated to be used for the producer's own sexual gratification or arousal, and even when the image in question is not created or intended for that purpose.

While this Court recognizes the very legitimate goal of protecting children, the statute fails to serve that the compelling interest it is designed. It does not criminalize the most exploitative

aspect of the process of producing and disseminating child erotica. Even if the statute is found to serve a compelling state interest, it cannot be considered narrowly tailored. It criminalizes a far wider range of expression that simply serving to protect children. *See Simon & Schuster Inc.*, 502 U.S. 105 at 119 (holding a law barring criminals from profiting from books about their crimes before victims are fully compensated unconstitutional because, as written, the law applied to a wide range of literature from which criminals would not have profited prior to victims being compensated).

Section 11-9-1.6 has the potential to criminalize the creation of a wide range of images of children that are not exploitative in and of themselves and therefore do not have any negative psychological impact on the children portrayed.[3]

C

Overbreadth

In *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985), the high court held "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is 'substantial,' the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* at 503-04.

[3] To be clear, the statute provides an affirmative defense protecting parents and guardians in such instances. Section 11-9-1.6(c)(1)(iii).

Overly broad laws implicating speech are unconstitutional for several reasons. First, they vest excessive enforcement discretion in bureaucrats, granting them license to selectively target perceived opponents. *See Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450-53 (1938). Overly broad laws also threaten First Amendment values because law-abiding citizens are presumed to know and follow the law and would ostensibly self-censor rather than run afoul of a broad law and risk prosecution. *See Broadrick*, 413 U.S. at 612 ("it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."). Unlike in ordinary facial challenges, where a person must show that the law has no constitutional application or lacks a plainly legitimate sweep, *Stevens*, 559 U.S. at 472, in the First Amendment context, a person must show that a substantial number of the applications are unconstitutional in relation to the law's plainly legitimate sweep. *See id.* at 472-73.[4]

The cases at bar are readily distinguishable. The statute does much more than restricting either sexual conduct with children or depictions of sexual conduct. It restricts the possession of visual portrayals of partially clothed children if those portrayals are ever used (by the possessor or

[4] For other examples of overbreadth challenges, *see City of Houston, Tex. v. Hill*, 482 U.S. 451, 465 (1987) (invalidating an ordinance that prohibited bothering of policemen); *Board of Airport Commissioners of City of Los Angelis v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (invalidating an ordinance banning all First Amendment activities in an airport); *National Endowment for the Arts (NEA) v. Finley*, 524 U.S. 569 (1998) (declining to invalidate a statute on overbreadth grounds). Nevertheless, the high court recently rejected a finding by the Ninth Circuit Court of Appeals that a statute was overbroad. *United States v. Hansen*, 599 U.S. 762 (2023). Focusing extensively on the legislative history and the criminal law definition of the phrase "encourages or induces" violations of law, does not "prohibit a substantial amount of protected speech." *Hansen*, 599 U.S. at 770 (quoting *Williams*, 553 U.S. at 292, and therefore had a "valid reach."

anyone else) for sexual arousal. Clearly, the state has a valid interest in protecting victims of child pornography—but this statute goes much further.[5]

In *Broadrick*, 413 U.S. 601 at 612, the court held,

> "It has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."

D

Vagueness

While overbreadth is concerned with ensuring that the law does not criminalize constitutionally protected activity, vagueness focuses on gauging a reasonable person's ability to discern what the law requires. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

"'It is well settled that a statute is unconstitutionally vague if it lacks explicit standards from its application and thus delegates power that enables enforcement officials to act arbitrarily with unchecked discretion."' *Moreau v. Flanders*, 15 A.3d 565, 582 (R.I. 2011) (quoting *Fitzpatrick v. Pare*, 568 A.2d 1012, 1013 (R.I. 1990)); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Further, "a statute is unconstitutionally vague if it compels 'a person of average intelligence to guess and to resort to conjecture as to its meaning and/or as to its supposed mandated application.'" *Flanders*, 15 A.3d at 583 (quoting *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 10 (R.I. 2005)); *see also Trembley v. City of Central Falls*, 480 A.2d 1359, 1365 (R.I. 1984).

[5] Child pornography is criminalized in a separate chapter. Section 11-9-1.3.

Vague laws both "trap the innocent by not providing fair warning" and "inhibit the exercise of (those) freedoms" by "lead[ing] citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."' *Grayned*, 408 U.S. at 108-09.

It is unclear whether the phrase "knowingly and voluntarily" is meant to modify the production, possession, dissemination, etc. itself, or the production, etc. "for the specific purpose of sexual gratification or sexual arousal." Section 11-9-1.6(b). In other words, the phrase can be read to mean two very different things—either anyone who knowingly produces or distributes child erotica that is at some point used for someone's sexual arousal or gratification (whether or not the producer/possessor intended for or knew it would be used in such a manner) or anyone who produces, etc. child erotica knowing it may be used for sexual gratification is criminally liable.

The defendants note two areas where the statute appears to be improperly vague. The defense homes in on the term "partially clothed" in the statute, saying that it is vague because it depends on a person's culture and their setting. Defs.' Mem. at 7-8 ("the layman's understanding of the meaning of 'fully clothed' and 'partially clothed' varies depending on the culture, climate, setting, or traditions."). While it is true that fashion trends vary based on the season, the religious tradition to which a person subscribes, and the prevailing fashion trends in a given milieu, the phrase "partially clothed" challenges a reasonably intelligent person's comprehension.

To be "partially clothed" means that a person is not fully clothed. *See* Webster's Third New International Dictionary 1646 (3d ed. 1971) (*Partially*—"to some extent."); *see id.* at 428 (*Clothe*—"to put garments on; cover with clothes."). Being "partially clothed" is implicitly defined in contradiction to being "fully clothed" (which means wearing all of one's clothes) and being "nude" (which means not wearing any clothes). Ordinarily intelligent people understand

what these terms mean in common parlance and apply them as a matter of course as day-to-day life.

As "partially clothed" could be interpreted to a more reasonable, plausible meaning, "[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Court does not find this phrase to be unconstitutionally vague.

The other section which the defense questions is in § 11-9-1.6(b), specifically whether the term "knowingly and voluntarily" is intended to modify. It is unclear whether the phrase "knowingly and voluntarily" is meant to modify the production, possession, distribution itself, or the production, and distribution "for the specific purpose of sexual gratification or sexual arousal." Section 11-9-1.6(b). In other words, the phrase can be read to mean two very different things—either anyone who knowingly produces child erotica that is at some point used for someone's sexual arousal or gratification (whether or not the producer/possessor intended or knew it would be used in such a manner) is guilty or anyone who produces or possesses child erotica knowing it will be used for sexual gratification would be criminally liable. The former reading casts a much wider net than the latter, thereby giving law enforcement officials the arbitrary, unchecked discretion required to establish unconstitutional vagueness. *Flanders*, 15 A.3d at 582. Frankly, the former reading is more consistent with normal and grammatical sentence structure.

Statutes need clarity. Nowhere is that more important than in the criminal context, where individuals should be able to ascertain whether their acts risk criminal sanctions and where the police must know whether prosecution is appropriate. This portion of the statute—the key sentence which establishes the criminal act—fails to provide "adequate warning to a person of ordinary intelligence that his conduct is illegal by common understanding and practice." *State v.*

Authelet, 120 R.I. 42, 45, 385 A.2d 642, 644 (1978) (citing *Roth*, 354 U.S. at 491). Even though the statutory chapter contains a severability clause, § 11-9-1.6(b) is the key provision which defines the crime. The entirety of subsection (b) is therefore overly vague.

VI

Conclusion

When called upon to consider the constitutionality of a statute, a court stands in an awesome yet uncomfortable role. The court applies the basic rights inherent in our republic as clarified by centuries of court precedents to determine if our legislature, the elected policy-making branch, has strayed too far. On many such occasions, the legislature is well-intentioned and seeks to step into an area worthy of its consideration. Regardless of the personal predilections or the need for legislation, courts must consider the established, time-honored standard in our Constitution and determine whether the resultant statute stands muster.

Child erotica, broadly defined by § 11-9-1.6, is protected expression under the First Amendment because it does not qualify as child pornography under the *Ferber* analysis adopted by the Rhode Island Supreme Court in their decision in *Hansen*. It likewise does not fall into any of the other categories of unprotected speech.

Section 11-9-1.6 is a content-based restriction on speech because it regulates a form of speech based on its subject matter. Therefore, the statute is presumed unconstitutional and deemed valid only if it stands up to a strict scrutiny analysis. Under strict scrutiny, a law must be found to both serve a compelling government interest and be narrowly tailored to do so. Section 11-9-1.6 fails to meet a strict scrutiny analysis because, although it seeks to serve a compelling government interest, it is not narrowly tailored to do so. Rather, it applies to a wide swath of images, the criminalization of which does not serve to protect children from sexual exploitation.

Finally, § 11-9-1.6 is unconstitutional because its language is vague. As written, certain modifiers in the key provisions are unclear in their application resulting in multiple potential interpretations of the statute. Such ambiguity gives the state an unconstitutional level of discretion in its enforcement of the law and requires individuals to guess as to its meaning and application.

For the foregoing reasons, this Court grants the Defendants' motions to dismiss.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Jesus Ocasio** **State of Rhode Island v. Felix Berardis, Jr.**
CASE NO:	**P3-2022-2476A (Consolidated with) P3-2022-4229A**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 3, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**Meghan E. McDonough, Esq.**
For Defendants:	**Curtis R. Pouliot-Alvarez, Esq.; Piper M. Pehrson, Esq.**