Supreme Court of Texas

No. 23-1040

In re Magdoline Elhindi,
Relator

On Petition for Writ of Mandamus

JUSTICE YOUNG, joined by Justice Lehrmann, Justice Devine, and Justice Blacklock, dissenting from the denial of the petition for writ of mandamus and motion for temporary relief.

I would grant the requested stay because I believe that this case should establish the following important legal principle: A Texas court may not compel a party who fears having received child pornography to further distribute that content until law enforcement first examines it and confirms that it is not child pornography. In my view, whether this principle is correct is "a question of law that is important to the jurisprudence of the state." Tex. Gov't Code § 22.001(a). This case presents that question because the district court's ruling departed from the principle I have described. The FBI, which was brought in by the Houston Police Department, has asked to examine an alleged child-pornography video in relator Magdoline Elhindi's possession before it is further disseminated. The district court nonetheless ordered Elhindi *not* to provide law enforcement with even a copy of it *until* she provides

a copy to the other party to the litigation.

The core facts underlying this sordid case are as follows. Elhindi met real party in interest Hamilton Rucker in July 2020. They commenced an intimate relationship and Rucker became Elhindi's lawyer; among other things, he assisted in her divorce, which was finalized in July 2021. Elhindi alleges that, in May 2021, Rucker surreptitiously filmed Elhindi engaging in sexual activities with a third party at Rucker's home. She also alleges that Rucker then sent the video to yet another party, also without Elhindi's knowledge or consent. Rucker does not dispute the encounter or that he filmed it. He heatedly disputes, however, Elhindi's purported lack of consent or lack of control over the images.

The parties' legal and sexual relationships deteriorated, evidently ending at some point around March 2022. Rucker married another woman in June 2022. In January 2023, that woman and Elhindi began corresponding and met in person. According to Elhindi, Rucker sent her an email on January 15 that, among other things, threatened to divulge confidential information he obtained while representing her. In May 2023, Elhindi brought statutory and common-law claims against Rucker for invasion of privacy, seeking damages and injunctive relief. Her lawsuit largely focuses on the May 2021 video recording and the January 2023 threats.

The ensuing litigation has been acrimonious, filled with salacious and distasteful allegations flung between the parties. Relevant to the question before this Court, Rucker demanded that Elhindi produce any videos in her possession depicting Rucker. Elhindi resists producing only

one such video, apparently filmed in June 2021, which Elhindi claims Rucker had sent her. Elhindi contends that she cannot transfer the video because it likely constitutes child pornography—something she believes, she says, because Rucker told her that the video was of him with a fourteen-year-old girl in Egypt: "My understanding of the content of this video is based solely on Mr. Rucker's representations to me. I do not know if the person in the video that Mr. Rucker is engage[d] in sex with is in fact a minor."

Rucker now claims that the video shows him engaging in sexual activity with his wife, who is of small stature but not underage. Rucker's wife has filed a declaration claiming that Elhindi "stated that she had a video recording of me having sex with my husband . . . taken in Egypt in June 2021." In a declaration of her own, Elhindi, who has met Mrs. Rucker, rejected this assertion: "I do not know who the girl was in the video. Thus, Defendant's argument that the woman in the video is a twenty-eight year old woman that I know is incorrect. Additionally, the girl in the video *was not Ms. Rucker*." (Emphasis added.)

If these statements all address the same video, they may all be false, but they cannot all be true. If Elhindi's understanding is accurate, then the video was unlawful to film and remains unlawful to possess or distribute. *See* 18 U.S.C. § 2252A(a).

The district court nonetheless ordered Elhindi to produce the video and expressly ordered that she *not* share it with the FBI *until* she first provided it to Rucker: "[It] [d]oesn't go to the FBI until [Rucker's counsel] gets a copy and [counsel] respond[s] or repl[ies] to the Court that [he is] satisfied that [he] ha[s] a complete copy of what's going to be turned over

to the FBI."

Elhindi comes to this Court by petition for a writ of mandamus and for a stay of the district court's order. I would grant the stay pending the FBI's determination of whether the video constitutes child pornography. The FBI quite properly requested that no transmissions of the video be made pending that review. The FBI supervisory special agent's correspondence with counsel for Elhindi included the following:

> . . . FBI Houston has not independently reviewed the video to determin[e] its origins and authenticity. Because of that, FBI Houston respectfully requests to review the video and [its] contents because it would help FBI Houston determine [its] next courses of action. FBI Houston understands this is only an allegation at this time, but FBI Houston cautions the further distribution of the video as [its] contents may contain CSAM [*i.e.*, child sexual assault material] which is illegal to possess and/or distribute. FBI Houston certainly respects the court['s] current order, but the sooner we can review and examine the video the sooner a determination can be made. FBI Houston cautions against the further distribution or sharing of the video until further investigative steps are taken to determine if the video contains CSAM.
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> FBI Houston certainly understands the courts want to share the video as a matter of fairness and transparency, but as we discussed Special Agents and investigators only allow defense counsel to view videos and images in criminal proceedings in preparation for trial. Special Agents and investigators are not authorized to distribute CSAM and counsel is not allowed to possess CSAM. These steps are taken to prevent the potential of further distribution and control of CSAM (contraband).

Perhaps the FBI will quickly conclude that the video is not child pornography, as Rucker now claims. If Rucker had created child

pornography, he presumably would not work so hard to focus judicial attention on it. On the other hand, Elhindi has met Mrs. Rucker, and has sworn under oath that she is not the woman in the video.

There is no certain way to resolve the question without analyzing the video, which presumably is why the FBI does not regard the matter as insignificant. Even if it is *highly* unlikely that the video constitutes child pornography, verifying that would be sensible. If the FBI concludes that the video does not depict child sexual assault, the district court could then require Elhindi to produce to Rucker a copy of his own pornographic video. But if the FBI determines that the video *is* child pornography, then it should be handled in the usual way—which does not include retaining possession and transferring copies to private parties, and which presumably would lead to far more consequential proceedings than this tort lawsuit.

The briefing before us largely concerns whether Elhindi would *really* be liable under federal criminal law if she retained and distributed copies of it only because she was compelled to do so by a Texas court order. I doubt that federal prosecutors would charge Elhindi for obeying the order—especially one that she has worked so hard to challenge, all the way to this Court. But her view of the conduct she is being ordered to undertake is at least not frivolous. Likely contemplating the affirmative defense in 18 U.S.C. § 2252A(d), she has testified that "I thought I had deleted this video shortly after I received it. However, I discovered the video when I searched for documents relevant to this lawsuit." For unintentionally received child pornography, federal law appears to allow either destroying it immediately *or* giving it to law enforcement, "without

retaining, or allowing *any* person, other than [the] law enforcement agency, to access any image or copy" of it. *Id.* § 2252A(d)(2) (emphasis added). For very sound reasons, federal law does not provide for such videos to remain in private hands.

But my concern reaches deeper than Elhindi's personal liability or lack thereof: I cannot see why any Texas court should order someone who has purportedly received child pornography to do anything *other* than provide it to law enforcement. An allegation of child sexual abuse is no minor irritant but is among the most deplorable of crimes. Recording such a crime is an additional crime. No Texas court *should* order purported child pornography to be handled other than through law enforcement, regardless of whether doing otherwise would subject parties like Elhindi to federal criminal prosecution. An order that instead requires transferring alleged child pornography to private parties *before* giving it to law enforcement would be reckless and needless. If we knew for certain that the video was child pornography, ordering it to be privately retained and further distributed would be unimaginable—no less than directing that alleged illegal drugs or other contraband be handed over to a private party. And if it was certain that the video is *not* child pornography, involving the FBI at *any* stage would be wasteful. But the order here anticipates involving the FBI—just later.

In the face of *any* doubt about where our next step will lead, why in the world would we not look before we leap? While I cannot imagine a justifiable basis in any context to handle purported child pornography other than as I have described, I am especially doubtful here. After all, the video came *from Rucker*. He claims to *already* have possession of his

own video (unsurprisingly, since he acknowledges being the one to have made it)—and even that his wife has it. Possessing another copy of that video has no obviously vital role to play in defending against Elhindi's claims against Rucker for illicitly recording *Elhindi*. At least, Rucker has not explained why this new copy would be essential or even helpful at the impending trial. So what is the urgency of further transmitting it to Rucker's counsel before proper law-enforcement review? If Rucker has the video, rushing to give him another copy is of no great import; if it is *not* the same video, then Mrs. Rucker's apparent belief that she (and not an underage girl) is depicted in it would be meaningless, and the need for law-enforcement review would be heightened.

Either way, every Texas court should turn the sharpest of corners upon any allegation of child pornography. If an allegation turns out to be malicious, courts can, of course, deal with it in the fullness of time. Rucker's counsel has asserted that he "believe[s he] can prove that Ms. Elhindi knew the identity and age of the person depicted at the time she made this report to law enforcement." Counsel further asserted to Elhindi's counsel in August 2023 his understanding that a special agent "concluded that Ms. Elhindi made a false report to a federal agent" with respect to certain allegations she had reported to the FBI about Rucker. Yet in October 2023, an FBI supervisory special agent specifically urged Elhindi's lawyer *not* to disseminate the video at issue here pending the FBI's review—the correspondence block-quoted above. If the FBI concludes that Elhindi's allegation is not just mistaken or frivolous but even purposefully false, she would be subject to serious consequences.

I can only make sense of the district court's order as a reflection of

a strong expectation that the FBI will in fact conclude that the video is not child pornography. But such a hunch—even from a court that, as the record reflects, has well and patiently managed this unpleasant case—does not justify treating the material as if it *already* has been cleared (or, at least, found not to be child pornography). The consequences of being mistaken are simply too high, and treating a child-pornography allegation as just a routine discovery ruling is too egregiously wrong, to not let the process play out.

My view, however, has not carried the day. Accordingly, with respect, I must dissent.

Evan A. Young
Justice

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