THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0464

State of New Hampshire

v.

Timothy Barr

Appeal Pursuant to Rule 7 from Judgment
of the Carroll County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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I. AS APPLIED, RSA CHAPTER 649-A VIOLATES THE RIGHT TO FREEDOM OF SPEECH BECAUSE THE IMAGES AT ISSUE WERE CREATED AND PRIVATELY POSSESSED BY BARR AND A.L. TO CHRONICLE THEIR OWN LAWFUL, CONSENSUAL SEXUAL RELATIONSHIP.

Barr files this reply brief to address three topics: (a) the State's characterization of Barr's relationship with A.L.; (b) its description of his legal arguments; and (c) its representations of federal case law.

The State claims that Barr "pressured," "controlled" and "cajoled" A.L. to take sexually explicit pictures and videos. SB* 8, 16. The record does not support these assertions. When the prosecutor asked A.L., "[D]id you feel pressured to send these photos?", A.L. answered, "Kind of." T 140. A.L. later testified that she, not Barr, "would usually be the one to take pictures." T 164. When Barr requested photographs or video from A.L., A.L. felt free to decline, and sometimes did. T 179. Barr never got angry when A.L. declined. T 179. There was no evidence that Barr "cajoled" A.L. SB 16 (citing T 41, a rhetorical question in defense counsel's opening statement). Nor was there evidence that Barr "controlled" A.L. SB 16 (citing T 50, defense counsel's description of prosecutor's opening).

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* Citations to the record are as follows:
"DB" refers to Barr's opening brief;
"SB" refers to the State's brief; and
"T" refers to the transcript of trial on June 11 and 12, 2018;

The State claims that Barr "exploited," "abus[ed]" and "harmed" A.L. T 15–17. But it was A.L. who persistently sought out a sexual relationship with Barr, not the other way around. T 144–48. During the relationship, it was A.L. who demanded that Barr remain in the relationship, telling Barr, "I don't want to lose you and see you with someone else," and "I love you. You better love me back. . ." T 170.

The record reflects that A.L. felt comfortable exerting her will and taking the upper hand. When Barr requested a sexually explicit photograph, joking, "Daddy needs it to survive the day, LOL," A.L., declined, joking back, "You'll be fine, LMAO." T 168. After telling Barr, "I love you. You better love me back," A.L. called Barr "you little bitch." T 169–70.

By attempting to pigeonhole A.L. into the stereotype of a meek, helpless victim of sexual "exploitation" and "abuse," the State sells her short. The record reflects that A.L. was a determined, independent young woman, fully in control of her sexual autonomy, who was willing and able to assert herself in her dealings with Barr.

The State also misconstrues Barr's legal argument. It asserts that Barr argues that "the government [may] . . . ban speech only when it is integral to independently criminal conduct," SB 20, and that he "implicitly argues that chapter 649-A is more broadly unconstitutional applied to anyone who manufactures, possesses, or distributes pornography

that depicts actual children who legally consented to the depicted sexually explicit conduct." SB 14–15. The State is mistaken on both counts.

If speech does not fall within a categorial exception to the First Amendment, that does not necessarily mean that the government cannot impose a content-based ban. DB 15. It means that strict scrutiny applies; any content-based ban must be narrowly tailored to serve a compelling state interest. DB 15. Private sexual images of consenting adults, for example, do not fall within any First-Amendment exception. DB 28. But RSA 644:9-a, which prohibits the "nonconsensual dissemination of private sexual images," is still constitutional because the nonconsensual dissemination of such images causes relational harm, the State has a compelling interest in preventing that harm, and the statute is narrowly tailored to serve that interest. DB 27–28.

As Barr concedes in his opening brief, "[t]he State may also have a compelling interest in prohibiting even the consensual public dissemination of sexual images of sixteen- and seventeen-year-olds." DB 28. Thus, the government may prohibit the dissemination of such images to — and the receipt of such images by — persons who were not partners in the sexual relationship that produced them.

Barr's argument is narrow: Partners in any lawful, consensual sexual relationship have a constitutional right to

create and privately possess images of that relationship. Nothing less, nothing more.

The State's argument, in contrast, is broad: Whenever either partner in any sexual relationship involving one or two 16- or 17-year-olds photographs sexual activity, either partner — including the 16- or 17-year old(s) — can be prosecuted for "manufacturing child sexual abuse images" and sentenced to up to 15 to 30 years in prison. See RSA 649-A:3-b (prohibiting both the "creat[ion]" of, and "participation in," such images); RSA 169-B:4, VII (State may charge adults with crimes committed before they turned eighteen).

Although the prosecutor here has chosen, so far, to prosecute only Barr, there is no valid legal basis to maintain that Barr is guilty, but A.L. is not. Under the State's argument, Barr and A.L. had no right to photograph their own lawful sexual activity, so nothing prevents the prosecutor from also prosecuting A.L., who is now eighteen years old and subject to prosecution as an adult.

Like the government's argument in United States v. Stevens, 559 U.S. 460 (2010), the State's argument here is "startling and dangerous." Id. at 470. Although lawful sexual activity among young people is nothing new, the convenience of modern, cell-phone-based cameras has caused a recent surge in the popularity of photography and videography. The

State may promise prosecutorial restraint, but "the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. [The United States Supreme Court] would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." Id. at 480.

Finally, the State misinterprets federal case law. The State claims that United States v. X-Citement Video, 513 U.S. 64 (1994), supports its central premise. SB 14. But the defendants in that case were not partners in a sexual relationship; they were a pornographic video store and its proprietor. Id. at 66. They did not privately possess the images at issue; they shipped over 50 sexually explicit videos to an undercover officer. Id. As Barr has made clear, his argument does not apply to individuals who are not partners in the sexual relationship depicted, nor does it apply to distribution of the images to others. X-Citement, moreover, primarily involved an issue of statutory construction — whether the statute's mental state requirement applied to age. Id. at 67–78. Finally, the opinion was issued in 1994, not "2012," SB 13, before the Court held that, "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment," Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252 (2002), and before the Court clarified that the analysis employed in

its prior child pornography cases was in fact "grounded . . . in a previously recognized, long-established category of unprotected speech" — that "used as an integral part of conduct in violation of a valid criminal statute." Stevens, 559 U.S. at 471.

The State repeatedly claims that "[t]he Court" recognized a "distinct," "freestanding," child-pornography exception in United States v. Alvarez, 567 U.S. 709 (2012). SB 10, 19, 23. The Court did no such thing. Justice Kennedy's opinion was joined by just three other justices; he did not write for the Court. Id. at 713. The other opinions said nothing at all about child pornography, and for good reason. Unlike Stevens, Alvarez did not involve photographs or video; it involved the defendant's false claim to have received the Congressional Medal of Honor. Id. There was no reason for the Court to address whether "child pornography" was a "distinct," "freestanding" exception to the First Amendment, SB 10, and no justice, including Justice Kennedy, purported to do so. Id.

The State also claims that two federal circuit court cases "have addressed th[e] precise question" presented in this appeal. SB 17–18. They did not.

In United States v. Laursen, 847 F.3d 1026 (9th Cir. 2017), the defendant did not challenge his conviction based

on the First Amendment or freedom of speech. Id. at 1031–36.

In United States v. Bach, 400 F.3d 622 (8th Cir. 2005), the defendant offered a 16-year-old boy money to pose for sexually explicit photographs. Id. at 625, 628. His convictions were based on both (a) his possession of those photographs and (b) his receipt, from someone in Italy, of a "morphed" image of two different boys, one whom was a celebrity, and neither of whom the defendant knew personally. Id. at 625–26, 630. The defendant did not raise a First-Amendment or freedom-of-speech challenge to the photographs of the 16-year-old he offered to pay. Id. at 628–29. Although he did raise a First-Amendment challenge to the morphed photograph he received from Italy, id. at 629–32, the facts of that conviction are not analogous to this case. In any event, Bach was decided in 2005, before the United States Supreme Court clarified that the analysis employed in its prior child-pornography cases was in fact "grounded . . . in a previously recognized, long-established category of unprotected speech" — that "used as an integral part of conduct in violation of a valid criminal statute." Stevens, 559 U.S. at 471.

CONCLUSION

WHEREFORE, Timothy Barr respectfully requests that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

This reply brief complies with the applicable word limitation and contains 1,465 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: August 5, 2019