No. 12-348

IN THE
Supreme Court of the United States

ERIC LEON BUTT, JR.

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Utah

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit organizations, including educational, literary, professional, artistic, labor, religious and civil liberties groups[2] that are united in their commitment to freedom of expression. Founded in 1974, NCAC has worked to protect the First Amendment rights of thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country. NCAC produces legal and scholarly analyses of important free speech cases and controversies; educates policy-makers, scholars, professional groups, and the general public on a wide range of free expression issues; assists individuals and community organizations confronting censorship; and promotes discussion and dialogue among diverse stakeholders in the free speech community.

To further its interest in protecting artistic expression, NCAC has established the Arts Advocacy Project and the Sex and Censorship Project, which focus on combating the wrongful censorship of sexual

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[1] Pursuant to Rule 37.2(a), the parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] The positions advocated by NCAC in this brief do not necessarily reflect the views of any of its members.

images and information, including nudity and so-called obscenity in art, literature, and film. Because this case directly relates to the issues NCAC confronts on a daily basis, participation as *amicus* in this case falls squarely within NCAC's mission.

NCAC has a strong interest in the interpretation and application of harmful-to-minors laws. NCAC submits this brief in support of certiorari because the decision of the Supreme Court of Utah reflects the pervasive confusion in the courts and among local officials about the scope of harmful-to-minors laws, and the unjust facts of the case epitomize the need for independent appellate review of convictions under harmful-to-minors statutes. Because the current framework presents frequent opportunities for the chilling of protected speech, NCAC presents this brief to illustrate the widespread danger to First Amendment rights posed by the lack of clear and definitive guidance from this Court.

SUMMARY OF ARGUMENT

Speech that is considered "harmful to minors" is a narrow category of expression that may be lawfully restricted only when it falls within the strict limits of the Court's jurisprudence. Since *Miller v. California*, 413 U.S. 15 (1973), it has been settled that material depicting certain kinds of sexually explicit content is considered obscene and therefore falls outside the protection of the First Amendment if that material "appeal[s] to the prurient interest in sex, . . . portray[s] sexual conduct in a patently offensive way, and . . . , taken as a whole, do[es] not have serious literary, artistic, political, or scientific value." *Id.* at

24. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court held that "[m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children." *Id.* at 636 (quotation marks omitted). Most states have enacted statutes that combine the *Miller* and *Ginsberg* standards to criminalize the dissemination of material that is "harmful to minors"—a term of art defined in Utah as that material which: (1) "taken as a whole, appeals to the prurient interest in sex of minors"; (2) "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors"; and (3) "taken as a whole, does not have serious value for minors." Utah Code Ann. § 76-10-1201(5); *see also* Pet. at 4-6 (describing various state harmful-to-minors laws).

A finding that material appeals to the prurient interest in sex of minors is therefore a precondition to liability in a harmful-to-minors case. In the adult context, this Court has defined "prurient interest" as "'a shameful or morbid interest in nudity, sex, or excretion'"—those "sexual responses over and beyond those that would be characterized as normal." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985) (quoting *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957)). And, "even as to minors," the Court has made clear that "all nudity cannot be deemed obscene." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 & n.10 (1975). Indeed, "[m]aterial appeals to the prurient interest [of minors] . . . only if it is in some sense erotic." *Ashcroft v. ACLU*, 535 U.S. 564, 579 & n.9 (2002) (rejecting the idea that

"every depiction of nudity—partial or full—is in some sense erotic with respect to minors" (quotation marks omitted)).

Given these narrow parameters for determining when material appeals to the prurient interest in sex of minors, it is clear that the Utah jury that convicted Petitioner applied the prurient interest requirement in a way that is simply too expansive to be constitutionally viable. The jury necessarily concluded that Petitioner's hand-drawn pictures appealed to the prurient interest of a five-year-old. However, the drawings contain rough, unrealistic depictions of Petitioner's genitals that at most amount to non-erotic portrayals of nudity. The Utah Supreme Court would almost certainly have reached that conclusion if it had not deferred to the jury's finding;[3] indeed, as the Petition notes, even the trial court expressed skepticism that a five-year-old could have a prurient interest in sex. *See* Pet. at 7.

The Court should grant Petitioner's writ of certiorari to clarify that the appellate courts must conduct an independent review of jury determinations of all three prongs of the harmful-to-minors standard, including prurient interest and patent offensiveness. In other contexts involving so-called exceptions to the First Amendment, like

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[3] The Utah Supreme Court recognized that "[t]he plain language of this [harmful-to-minors] statute clearly indicates that a representation of nudity alone may not be 'harmful.' Instead, the representation of nudity must meet each of the three listed criteria." *State v. Butt*, 284 P.3d 605, 612 (Utah 2012).

defamation, the Court has emphasized that independent appellate review is necessary to ensure that juries, possibly motivated by moral disapproval or personal offense, do not improperly tread on free speech. The facts of this case—where Petitioner was convicted of a crime based on two non-sexual stick-figure drawings—abundantly illustrate why judicial review is needed to protect core First Amendment principles. Independent appellate review will also ensure that harmful-to-minors laws are interpreted narrowly to prevent chilling of protected speech. As set forth below, examples abound of local officials seeking to censor art, books, advertisements, and even Halloween costumes, all under the pretext of enforcing harmful-to-minors laws. Clear limits on these laws are needed to prevent such inappropriate censorship.

ARGUMENT

I. The Court Should Grant Certiorari to Establish that Independent Appellate Review Is Required in Harmful-to-Minors Cases.

Petitioner's improper conviction highlights the vital role that an appellate court should play in reviewing harmful-to-minors convictions to ensure that those convictions do not violate free speech rights. In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), this Court held that in defamation cases, an appellate court must make an "'independent examination of the whole record' in order to ensure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *New York Times Co.*

v. Sullivan, 376 U.S. 254, 284-86 (1964)); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) ("As in other First Amendment cases, the court is obligated 'to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'") (quoting *Bose*, 466 U.S. at 499). This requirement, which "preserve[s] the precious liberties established and ordained by the Constitution," exists because "the stakes [of certain largely factual findings]—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact." *Bose*, 466 U.S. at 501 & n.17, 511. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," courts must "decide for [themselves] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 567-68 (1995). Thus, "*de novo* review [is] required in obscenity cases." *Bose*, 466 U.S. at 507 n.26 (construing *Jacobellis v. Ohio*, 378 U.S. 184, 187-190 (1964)).

Bose reaffirmed the Court's decision to apply independent appellate review in two prior cases reversing convictions under obscenity statutes. *See Jenkins v. Georgia*, 418 U.S. 153, 159-61 (1974) (applying independent appellate review to conclude that the film *Carnal Knowledge* did not meet the three-part *Miller* standard); *Kois v. Wisconsin*, 408 U.S. 229, 231-32 (1972) (per curiam) (applying independent appellate review to conclude that a

sexually themed poem accompanying two photographs containing nudity was not obscene, because "it can[not] be said that the dominant theme of this poem appeals to prurient interest"). Taken together, *Bose*, *Jenkins*, and *Kois* stand for the proposition that an appellate court must take seriously its role in independently reviewing obscenity convictions in order to protect First Amendment rights. And since harmful-to-minors laws are simply "a variable from the formulation for determining obscenity," *Ginsberg*, 390 U.S. at 635, they require the same treatment.

But despite these decisions emphasizing the importance of independent appellate review, the Utah Supreme Court, joining several other courts around the country, refused to review the basis for Petitioner's conviction, instead deferring to the jury's finding that the material at issue appeals to the prurient interest of and is harmful to minors.[4] This case provides an important opportunity for the Court to establish, in no uncertain terms, that the questions of prurient interest and patent offensiveness, both of which are highly susceptible to error when applied by juries because of their subjective nature, require independent appellate review. Without such review, there is a real "danger that decisions by triers of fact may inhibit the

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[4] *See, e.g.*, *State v. Canal*, 773 N.W.2d 528, 532 (Iowa 2009) (deferring to a jury's determination that a picture sent via text message was obscene as to minors); *State v. Grainge*, 918 P.2d 1073, 1077 (Ariz. Ct. App. 1996) (deferring to a jury's determination that a video was harmful to minors).

expression of protected ideas." *Bose*, 466 U.S. at 505. Only close appellate scrutiny will ensure that the crucial line between personal moral judgments and legally prohibited actions remains distinct.

As this case amply demonstrates, independent review of only the third prong of the harmful-to-minors test—whether or not the material lacks "serious value" for minors—is not enough to protect the First Amendment values at stake. Although it is unclear whether a court applying independent review would find that the drawings have serious value, it stretches credulity to suggest that the drawings appeal to a minor's prurient interest in sex. Had the Utah Supreme Court applied independent review to the prurient interest or the patently offensive prongs, the outcome would likely have been different.

II. The Court Should Grant Certiorari to Limit the Chilling Effect of Threatened Prosecution Under Harmful-to-Minors Laws.

Setting clear limits on the scope of harmful-to-minors laws will also ensure that the threat of prosecution under such laws is not used to chill free expression for children and adults alike.[5] Due to

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[5] Clear limits would also protect the due process right of individuals to be provided with fair notice of the types of prohibited expression. As the Court recently explained:

> Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. The lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. . . . While perfect

uncertainty about how to apply the First Amendment, government officials commonly invoke harmful-to-minors laws any time there is nudity that can be viewed by children. This lingering threat of prosecution has chilled constitutionally protected speech, thereby threatening artistic freedom and adults' access to expression.[6] *See Reno v. ACLU*, 521 U.S. 844, 872 (1997) ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."); *see also Multimedia Holdings Corp. v. Circuit Court*, 544 U.S. 1301, 1304 (2005) ("A threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected

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> clarity and precise guidance have never been required even of regulations that restrict expressive activity, government may regulate in the area of First Amendment freedoms only with narrow specificity. These principles apply to laws that regulate expression for the purpose of protecting children.

Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2743 (2011) (citations and quotation marks omitted); *see also United States v. Williams*, 553 U.S. 285, 306 (2008) (explaining that when a statute requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," that statute is rendered vague).

[6] This Court has recognized that the governmental interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults. . . . [T]he Government may not 'reduce the adult population . . . to . . . only what is fit for children.'" *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

speech . . . by putting that party at an added risk of liability.").

In addition to the persistent threat of prosecution, "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 & n.8 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Given the importance of free speech to both individuals and society—and the particular emotional sensitivities at issue in prosecutions under harmful-to-minor statutes—this Court should grant certiorari to clarify the "prurient interest" standard so that "legitimate speech is not chilled or punished." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

Threats of prosecution using some vague reference to harmful-to-minors laws have directly chilled artistic, literary, and promotional expression. What follows in this section are several examples of government action that has been taken or threatened under the misapprehension that constitutionally protected speech is harmful to minors. These examples illuminate just how prevalent the misunderstanding of the "prurient interest" standard is, underscoring the need for the Court's guidance.

Nude artwork has become a routine target for those seeking to censor speech in the name of protecting minors from harmful material. For example, in Pilot Point, Texas, in 2003, art gallery owner Wesley Miller displayed an outdoor mural depicting a variation on the Biblical story of creation,

showing the hand of God offering a nude Eve the forbidden apple. Mark Donald, *All About Eve: Settlement Allows Outdoor Display of Nude Painting*, TEXAS LAWYER, Dec. 5, 2005. The police sent Miller a notice threatening to arrest and prosecute him, alleging that the mural was harmful to minors because of its representation of a woman's bare breast. Josh Baugh, *Mural Has Gotten Under City's Skin*, DALLAS MORNING NEWS, July 25, 2003, at 1B. In order to avoid arrest and prosecution, Miller was forced to cover Eve's bare breasts. *Nude Eve Gets Covered With Temporary Censorship*, ASSOCIATED PRESS STATE & LOCAL WIRE, Aug. 21, 2003. The police were satisfied, but Miller sued for a declaratory judgment and injunctive relief to prevent the police from arresting him for displaying the mural in its original form, and it was only after ten months of litigation that the Pilot Point officials finally agreed that Miller could display the mural in its original artistic form. Donald, *supra*.

Similar censorship of artwork involving mere nudity is commonplace. Officials in Temecula, California, prevented a partially-nude portrait from being displayed in a city-owned gallery; "their rationale was to shield young children from nude images." Ashley Cook, *Nude Denied Showing at Temecula Art Gallery*, FALLBROOK VILLAGE NEWS, Mar. 5, 2010, *available at* http://www.thevillagenews.com/story/46010/. And in Kansas City, Kansas, the American Family Association gathered signatures to require a grand jury review of a semi-nude statue, alleging that it "violates state law against promoting obscenity to

children." Edward M. Eveld, *The Naked Truth About Kansas City's Nude Art*, KANSAS CITY STAR, Sept. 15, 2012.

Such events are commonplace and reflect the widespread misunderstanding that artistic representations of nudity are not fully protected expression that adults have a right to see if children will also be able to view them. For example, the public library in Manhasset, New York, banned nude paintings from an art exhibition because it took place in a room "frequently used by children." Susan Konig, *Library Sued Over Ban on Nude Art*, N.Y. TIMES, May 8, 1994. City officials in Lubbock, Texas, banned the display of two pencil-sketched images—one of a fully-clothed mother breast-feeding and the other of a nude pregnant woman—at a cultural facility that "hosts events attended by children." Betsy Blaney, *Lubbock Censors Art for Display at City's Buddy Holly Center*, ASSOCIATED PRESS STATE & LOCAL WIRE, Dec. 12, 2007. Likewise, city officials in Nevada City, California, dismantled a public art exhibit containing five nude works of art, stating: "[i]t's not about the art being lewd or obscene. . . . But children come into that building every day. We have to take their sensibilities into consideration." Dorothy Korber, *Some Controversies—Like Nude Art—Defy Compromise*, SACRAMENTO BEE, Oct. 6, 2003, at A1. And Tennessee Arts Commission officials in Nashville, Tennessee, explained that "we are a state agency that has schoolchildren coming through here" in order to defend their policy prohibiting nude art. Alan Bostick, *Anti-Censorship*

Group Objects to Ban on Nude Subjects, TENNESSEAN, Mar. 28, 2002, at 2B.

Artwork is not the only type of expression to be chilled by a misunderstanding of the permissible reach of harmful-to-minors statutes. Literature in schools has also come under attack as "harmful," sometimes resulting in bans on serious literature merely because it contains sexual content. For example, in 2007, a Riverside, California, high school banned the Jamaica Kincaid novel "Lucy," calling it "overly suggestive" for students. Rasha Aly, *Books Deemed Too Racy Banned By the Schools*, PALM SPRINGS SUN, Oct. 26, 2007, at 11S. Last month, a school district in Idaho removed the famous book "Like Water for Chocolate" from its ninth grade curriculum after parents complained that its descriptions of sexual encounters rendered the novel a "vile piece of work" with "an immense amount of pornography."[7] *SW Idaho School District Bans Book Amid Complaints*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 25, 2012. And the East Penn School Board in Pennsylvania is considering removing Curtis Sittenfeld's "Prep" and Tom Wolfe's "Electric Kool-Aid Acid Test" from a high school summer

[7] Although different language may be used to describe the material at issue in these examples, they all reflect a pervasive uncertainty about what type of sexual content is considered "harmful." The lack of clarity in the school context results in the removal of educationally valuable books by school officials who are understandably confused about what the First Amendment does and does not protect. The result—censorship—affects the education of students who are deprived of the right to read books selected by their teachers.

reading list after parents complained about sexual content. Patrick Lester, *East Penn Mom Behind Book Ban Attempt*, MORNING CALL, Sept. 29, 2012, at A6. One school board member stated that the books contained "explicit sexual content" and "[i]f I read these passages to a 13-, 14- or 15-year-old student, I would be charged with corruption of the morals of minors." Patrick Lester, *National Groups Spread Word on East Penn Book Challenge*, MORNING CALL, Sept. 21, 2012, at A1.

Censorship of books under the guise of protecting against harmful-to-minors materials has bordered on the absurd. For example, in Annville, Pennsylvania, an award-winning book called "The Dirty Cowboy," which depicted a cowboy taking a bath but showed no private body parts, was banned from school libraries after parents alleged that "[c]hildren may come to the conclusion that looking at nudity is OK and therefore pornography is OK." *'Dirty Cowboy' Book Pulled From Schools*, UPI, Apr. 30, 2012. Further, a New York school took a "Where's Waldo" book off the library shelf after a parent complained that one of the hundreds of illustrations on the "beach page" was a woman with a breast partially exposed; the exposure was the size of the lead tip of a pencil. Michael Granberry, *Besieged by Book Banners*, L.A. TIMES, May 10, 1993, at A1.

There are also instances of actual prosecutions under harmful-to-minors laws for the distribution of plainly harmless material containing images of nudity. For example, in 2004, Gordon Lee, the owner of a comic shop in Rome, Georgia, passed out free comic books at a Halloween trick-or-treat event, one

of which contained depictions of Pablo Picasso painting in the nude. George Gene Gustines, *When Picasso Went Down to Georgia*, N.Y. TIMES, May 6, 2007. The parents of a minor who received the comic filed a complaint with the police, who arrested Lee. *Id.* The case went to trial on two counts of "exhibition of harmful materials to a minor," but ended in a mistrial. *Id.*; Calvin Reid, *Judge Declares Mistrial in Gordon Lee Case*, PUBLISHERS WEEKLY, Nov. 7, 2007. Prosecutors vowed to retry the case, but eventually agreed to drop the charges if Lee wrote a letter of apology, which he did. *CBLDF Case Files* – Georgia v. Gordon Lee, Comic Book Legal Defense Fund, http://cbldf.org/about-us/case-files/gordon-lee/.

Truthful advertisements have also come under attack for violating harmful-to-minors laws. For example, in 2008, Virginia police removed two photo displays from an Abercrombie & Fitch store, charging the store's manager with displaying "obscene materials in a business that is open to juveniles." *Abercrombie & Fitch Photos of Scantily Clad Men, Woman Pulled in Va.*, ASSOCIATED PRESS FINANCIAL WIRE, Feb. 4, 2008. One photo showed a man's upper buttocks, and the other image showed a woman's breast partially exposed. *Id.* Police subsequently dropped the charges after the deputy city attorney concluded that "it would be difficult" to prove the case under the state's harmful-to-minors statute. *City to Drop Complaint Over Risqué Store Display*, RICHMOND TIMES DISPATCH, Feb. 5, 2008, at B1. By that point, however, the damage had already been done.

Another business whose advertising came under attack was a Halloween costume store in Overland Park, Kansas. In 2007, a grand jury indicted the store's owner for violating a harmful-to-minors law by displaying four "adult" costumes "where children could see them." Deb Gruver, *Johnson Co. Grand Jury Deems 'Adult' Costumes Obscene*, WICHITA EAGLE, Oct. 11, 2007, at A1. The costumes included one that had an image of a serpent in the crotch area. *Id.* The district attorney agreed to drop the charges when the store agreed to move the costumes to a place in the store where minors would not see them. *Obscenity Charges Dropped After Halloween Store Moves Costumes*, ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 11, 2007.

The preceding examples, which are by no means exhaustive, demonstrate that ambiguity in the scope of harmful-to-minors laws has not just made room for censorship, but has virtually invited it. Indeed, "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). While the First Amendment requires that "speech . . . not be prohibited because it concerns subjects offending our sensibilities," *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002), this foundational principle has been eroded in communities across the country, as books are banned and art is removed all in the name of "protecting" minors from content that is not, but is assumed to be, harmful merely because it contains nudity or sexual content. The effect is felt by

students of all ages who are deprived of the ability to study important literature in school, and by adults and children who lose the opportunity to see meaningful artwork, all because someone thinks something is "harmful" and local officials are both confused and risk-averse. This trend creates "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012). *Amicus* therefore respectfully urges this Court to grant the Petition for Certiorari to provide direction and clarity on this important First Amendment issue.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari and reverse the judgment of the Supreme Court of the State of Utah.

Respectfully submitted,

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