

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA - CRIMINAL DIVISION

COMMW. OF PENNSYLVANIA,

v.

DANIEL LOVE,

Defendant.

} CP-02-CR-4622-2025
} R 854776-2
}
} HON. E. HOWSIE
} TRIAL: 4/2/2026

**BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS ON
CONSTITUTIONAL GROUNDS**

Filed on the Behalf of:
Daniel Love

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AND NOW COMES the defendant, Daniel Love, through his counsel, Andrew M. Sherman, Esq., who presents this Brief in Support of his November 6, 2025, Motion to Dismiss on Constitutional Grounds.

Summary

Pennsylvania's sexual abuse of children statute, 18 Pa.C.S. § 6312, is overbroad and falls afoul of the protections of the First Amendment and Article I, Section 9 because its new AI-generated material provision outlaws a significant quantity of protected speech.

The overbreadth doctrine allows a litigant to challenge a statute regulating speech on the basis that the statute would prohibit protected speech, even if the litigant's own speech is not protected. Neither obscene materials nor child pornography are protected speech. In *Miller v. California*, the Court found that obscene materials can be regulated despite the First Amendment because they lack any redeeming social value. In *New York v. Ferber*, the Court found that child pornography can be regulated despite the First Amendment because its production and distribution entail actual harms to real children. In *Ashcroft v. Free Speech Coalition*, the Court determined that a 'child pornography' statute which criminalized materials which were neither obscene nor involved the abuse of real children could not withstand an overbreadth challenge under the First Amendment.

The AI-generated material provision of Pennsylvania's sexual abuse of children statute bans a significant quantity of speech which is not obscene under the *Miller* test. Likewise, AI-generated materials do not involve the abuse of real children as in *Ferber*. As such, under *Ashcroft*, the statute as amended is overbroad and should be struck down.

The Statute Itself

Pennsylvania’s sexual abuse of children statute was amended, effective in January 2025, to prohibit the production or possession of “Artificially generated child sexual abuse material.” Act of October 29, 2024, PL 1095, No. 125, § 3. The AI provision bans:

A[ny] book, magazine, pamphlet, slide, photograph, videotape, film, computer depiction or other material:

(1) that appears to authentically depict a child under 18 years of age engaging in a prohibited sexual act or in the simulation of such act that did not occur in reality; and

(2) the production of which was substantially dependent upon technical means, including artificial intelligence or photo editing software, rather than the ability of another person to physically impersonate the child.

18 Pa.C.S. § 6312(g) (Definitions).

A “prohibited sexual act” includes:

Sexual intercourse as defined in section 3101 (“In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required”), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.

Id. (definition of sexual intercourse inserted from 18 Pa.C.S. § 3101).

Overbreadth Doctrine

The overbreadth doctrine is a narrow exception to the rule that a litigant may not challenge a statute on the basis that it would outlaw someone else’s constitutionally-protected behavior. *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973). Because “the

First Amendment needs breathing space,” the overbreadth doctrine allows litigants whose own speech is not protected to mount a facial challenge to a statute on the basis that it would chill the protected speech of others. *Id.* at 611–12. In order for a statute to be found overbroad, it must on its face prohibit a “substantial amount of protected expression.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

Obscenity and Child Pornography

A statute will survive an overbreadth challenge if it outlaws only, or mostly only, unprotected speech. Neither obscenity nor child pornography are protected speech.

In *Miller v. California*, the Supreme Court found that states may permissibly criminalize the distribution of “obscene” materials. 413 U.S. 15, 25–26 (1973). The Court defined “obscene” materials as “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Id.* at 24.

In *New York v. Ferber*, the Court held that states may permissibly ban the distribution of child pornography. 458 U.S. 747, 773–74 (1982). *Ferber* concerned an overbreadth challenge to a New York statute which criminalized the production or distribution of “any play, motion picture, photograph or dance” involving a “sexual performance,” including “actual or simulated sexual intercourse,” by a minor under sixteen. *Id.* at 750–51. Because New York had separately prohibited obscene materials,

the Court specifically considered whether a state could ban such depictions *even if* they were not obscene. *Id.* at 751–53.

The Court found that states could regulate and ban “child pornography,” even when not obscene, for five reasons:

(1) Production of child pornography involves the abuse of children, and the “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *Id.* at 757–58.

(2) The distribution of child pornography is “intrinsically linked to the sexual abuse of children” in two distinct ways. First, photographs and films are an ongoing record of the abuse. Second, in order to shut down the production of child pornography, states must be allowed to shut down the places or avenues through which it is sold. *Id.* at 759–60.

(3) Relatedly, states must be allowed to attack the abuse of children inherent in the production of child pornography by drying up the revenue from selling it. *Id.* at 761–62.

(4) To the extent that the Court was considering non-obscene child pornography, it found it “unlikely that visual depictions of children performing sexual acts...would often constitute an important and necessary part of a literary performance or scientific or educational work,” and to the extent that it would, substituting an older actor would have to serve as an acceptable substitute

because the potential for harm to the child outweighed whatever additional artistic merit the child might contribute. *Id.* at 762–63.

(5) Finally, because the Court had previously recognized content-based categories of speech outside the First Amendment, its new categorization of child pornography as unprotected was “not incompatible with [its] earlier decisions.” *Id.* at 763.

The Court did not at any point cleanly define “child pornography” beyond developing these five reasons why it could be regulated notwithstanding the First Amendment. *Id.* at 757–65.

In *Ashcroft v. Free Speech Coalition*, the Court laid out a “*Romeo and Juliet* test” for obscenity in statutes outlawing sexual depictions of minors, and held that *Ferber*’s “definition” of “child pornography” was that children actually be involved in its production. *Ashcroft* concerned an overbreadth challenge to a federal statute which outlawed “any visual depiction...of a minor engaging in” or appearing to be engaging in “actual or simulated...sexual intercourse,” including depictions generated by computers or in which the “minors” were portrayed by adult actors. 535 U.S. at 241.

Like the New York statute in *Ferber*, the federal law did not cabin its prohibitions to obscene materials, so the Court first considered whether it would criminalize speech with serious literary, artistic, political, or scientific value. *Id.* at 246–47. In answering the question, Justice Kennedy formulated a kind of *Romeo and Juliet* test, checking whether the statute would outlaw the “no less than 40 motion pictures” inspired by the

Shakespeare play, “some of which suggest that the teenagers consummated their relationship.” *Id.* at 247. (citing *Romeo + Juliet*, Baz Luhrmann, Director, 1996). Justice Kennedy found that it would. *Id.* The Court then pointed out that *Traffic*, which depicted a 16-year-old engaging in sexual activity, had been nominated at the previous year’s Oscars, and that *American Beauty*, likewise depicting teen sex, won Best Picture the year before, and that the federal law would have criminalized the production or possession of both movies. *Id.* at 247–48 (cleaned up). The Court thus found that the statute could not survive an overbreadth challenge on the ground that it criminalized only or largely only obscene materials. *Id.*

The Court then considered whether the same five reasons that the *Ferber* Court cited to allow the regulation of child pornography in that case would apply to the federal statute at issue. *Id.* at 249. In discussing *Ferber*, Justice Kennedy emphasized that the prior decision’s focus was not on the content of any given photograph but on the abuse of actual children in its production. *Id.* Unlike the New York law in *Ferber*, permissible under the First Amendment because of the five-factor state interest in curtailing the abuse of children, the federal law at issue in *Ashcroft* would “prohibit speech that records no crime and creates no victims by its production.” *Id.* at 250. The Court then effectively found that material which apparently depicts minors engaged in sexual activity but whose production did not involve minors was not “child pornography” within the category laid out by *Ferber*. *Id.* at 250–51. Thus, the statute could not survive an

overbreadth challenge on the basis that it only targeted “child pornography” as defined by that case. *Id.*

Because the federal statute criminalized a significant quantity of speech that was neither obscenity nor “child pornography” under *Ferber*, it was overbroad and had to be struck down. *Id.* at 251–53.

The AI provision of Pennsylvania’s child sexual abuse law is overbroad and must be struck down and the case against Mr. Love must be dismissed.

Pennsylvania’s child sexual abuse statute bans materials which do not fit within the *Ferber* and *Ashcroft* definition of “child pornography” and criminalizes a significant amount of speech with serious literary, artistic, political, or scientific value, and thus is overbroad.

Justice Kennedy’s analysis of *Ferber* in *Ashcroft* makes very clear that “child pornography” is a category unprotected by the First Amendment specifically, and only, because it has to do with the abuse of real children. *Ashcroft*, 535 U.S. at 249–51. The federal government in that case argued that because the depictions outlawed by the statute at issue were “virtually indistinguishable from child pornography,” the law should be upheld. *Id.* at 249. Justice Kennedy replied that no, the crucial element making speech “child pornography” is that the depictions constituting the speech “are themselves the product of child sexual abuse.” *Id.* Materials which “depict a child under 18 years of age engaging in a prohibited sexual act...that did not occur in reality” and which were produced by “artificial intelligence or photo editing software” do not

involve the abuse of anyone, let alone children. 18 Pa.C.S. § 6312. As such, they are not “child pornography” within the definition of *Ferber* and are not for that reason unprotected by the First Amendment.

The AI provision of the Pennsylvania statute also fails Justice Kennedy’s *Romeo and Juliet* test. Were someone to ask an AI to generate an adaptation of that play where the titular characters had sex, that film would fall afoul of the statute. So would adaptations of literary works as varied as *Lolita*, some versions of *Tristan and Isolde*, Stephen King’s *IT*, *The Perks of Being a Wallflower*, *Call Me by Your Name*, *The House on Mango Street*, *Middlesex*, *Twilight*, *Game of Thrones*, *Their Eyes Were Watching God*, and practically all of Zadie Smith’s novels, to name eleven on a list of thousands. This year’s Oscars featured Best Picture nominations for *Dune: Part Two* and *Nickel Boys*, both of which, if re-adapted by AI, would violate the Pennsylvania statute. The Pennsylvania statute thus fails Justice Kennedy’s *Romeo and Juliet* test—it would outlaw large quantities of material which are not obscene because they have significant literary or artistic value.

Because the statute criminalizes speech which is neither obscene nor classified as “child pornography” under *Asbcroft* and *Ferber*, it is overbroad and must be struck down.

Respectfully Submitted:

Allegheny County Office of the Public
Defender

A handwritten signature in blue ink, appearing to be the initials 'AD' or similar, written in a cursive style.

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ORDER OF COURT

AND NOW, to-wit, this _____ day of _____, 2026, after due consideration, Defendant's Motion to Dismiss on Constitutional Grounds is GRANTED. Counts 1 and 2 are hereby DISMISSED.

BY THE COURT:

_____, J

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CERTIFICATE OF SERVICE

I, Andrew M. Sherman, Esquire, of the Allegheny County Public Defender's Office, certify that a true and correct copy of this pleading has been served upon the following by **hand or electronic delivery** on the 10th day of February 2026:

The Honorable Elliot Howsie (via PACFile & E-mail)
Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA, 15219

Allegheny County District Attorney's Office (via PACFile)
436 Grant Street, Room 303
Pittsburgh, PA 15219

Allegheny County Criminal Court Administrator (via PACFile)
436 Grant Street, Room 535
Pittsburgh, PA 15219



Andrew M. Sherman, Esq.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



Andrew M. Sherman, Esq.
Assistant Public Defender