

No. 12-348

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**In the Supreme Court of the United States**

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ERIC LEON BUTT, JR.,

*Petitioner,*

v.

UTAH,

*Respondent.*

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

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**BRIEF AMICUS CURIAE OF  
PROFESSOR PAUL R. ABRAMSON  
IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST**

With the written consent of all parties, reflected in letters on file with the Clerk, Dr. Paul R. Abramson submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of this Court.<sup>1</sup>

Dr. Abramson has a direct interest in determining what constitutes sexually harmful matter to children and in the legal rules governing the content of sex education materials for children.

Dr. Abramson has been a professor of psychology at the University of California at Los Angeles (UCLA) since 1976. He teaches the UCLA courses on Human Sexuality and Sex and the Law, and has taught nearly 25,000 students. Dr. Abramson was the Editor of *The Journal of Sex Research* and technical advisor to the World Health Organization's Global Program on AIDS. Dr. Abramson is also the author of ten books and over one hundred scientific or scholarly articles, many of which relate to sex education. Dr. Abramson was the supervisor of one study in particular that examined the consequences of exposure to parental nudity in a large

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<sup>1</sup> Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. Pursuant to Rule 37.6 of this Court, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and his counsel made such a monetary contribution to its preparation or submission.



group of children who were assessed over an eighteen-year time frame.

Dr. Abramson has also served as an expert witness in state and federal courts in matters relating to child sexual abuse. Dr. Abramson was retained by Pacific Bell in its dial-a-porn cases to determine whether specific phone messages were harmful to minors in relation to Pacific Bell's efforts to block messages harmful to minors on parental request.

### **SUMMARY OF ARGUMENT**

This Court recognized in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211, 212-14 (1975), that mere nudity is not harmful to minors and does not render material obscene and outside First Amendment protection. Petitioner's anatomically correct drawings – far more rudimentary than the live nude images in *City of Jacksonville* and showing no sexual activity—are not obscene for minors under this standard, as the psychological literature demonstrates that such images do not appeal to minors' shameful or morbid interest in sex and present no risk of harm to minors. Anatomically correct drawings showing genitals are widely used in public education to educate young children about the body and in law enforcement to elicit information from children about possible abuse.

Far from obscene, the drawings here were a parent-child communication conveying basic and age-appropriate information about the human body. Finding these images to be obscene for minors risks a dangerous chilling effect on healthy and essential communications between parents and educators and

young children. Educating young children about the body, including by identifying sex organs in line drawings, is widely acknowledged by experts and the public as essential to children's healthy development and important for equipping children to identify and combat child abuse.

The parent-child context of these drawings, which were sent by Petitioner to his five year-old daughter in response to her request after viewing a documentary on cave art that Petitioner draw himself "naked like on the cave walls," Trial Tr. 107, App. B, at 28a, makes the Utah Supreme Court's characterization of these drawings as obscene particularly troubling and contrary to this Court's precedent. This Court has made clear that parent-child communications are entitled to heightened protection from state interference, grounded in parents' "fundamental right ... to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). Parents are widely recognized to have a clear right, if not a social imperative, to educate their children about the human body and about sex. This Court has also recognized that parental rights may shield even the transmission of obscene materials outside the First Amendment's protection. *See Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968).

In light of the important interests in free speech and parental control violated by the Utah Supreme Court's incorrect finding that the drawings here were obscene for minors and therefore subject to criminal sanction, this Court should ensure clear guidance for future cases by mandating independent appellate

review of obscenity findings in trial courts and by providing a benchmark ruling in this case.

## **ARGUMENT**

### **I. Anatomically Correct Drawings Do Not Appeal to Children's Shameful or Morbid Interest in Sex and Present No Risk of Harm**

#### **A. Anatomically Correct Human Drawings and Dolls Are Mainstream**

The mainstream use and acceptance of anatomically correct human drawings and dolls as educational tools for children shows the fallacy of the Utah Supreme Court's finding that such materials are properly classified as obscene for minors.

Anatomically correct human representations – both drawings and dolls – are a logical and useful tool for providing basic sexual instruction to young children and are frequently included in lesson plans recommended by doctors and educators for use in educating young children about the body. *See, e.g.*, Resource Center for Adolescent Pregnancy Prevention, <http://recapp.etr.org/recapp/index.cfm?fuseaction=pages.LearningActivitiesHome> (including links to a variety of sex education lesson plans incorporating anatomically correct drawings, including lesson plans designated as appropriate for children aged five through eight); Needham Public Schools Reproductive Anatomy Lesson Plan, <http://rwd1.needham.k12.ma.us/wellness/documents/curriculum/2%20Grade%2009%20Anatomy.pdf> (sex education lesson plan incorporating drawings of the male and female

reproductive organs). Anatomically correct dolls intended for children are widely available for purchase in stores, from widely-used websites such as Amazon.com, and from educational websites such as www.teach-a-bodies.com.

**B. Anatomically Correct Drawings Do Not Appeal to a Five Year-Old's Shameful or Morbid Interest in Sex and Present No Risk of Harm**

This Court has recognized that nudity by itself, without more, is not obscene for minors. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211, 212-14 (1975), this Court found unconstitutional a law that “sweepingly forbids display [to minors] of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness,” finding that mere nudity is not obscene for minors and is therefore protected under the First Amendment. This Court noted that “to be obscene, ‘such expression must be, in some significant way, erotic.’” *Id.* at 213 n. 10 (citation omitted).

The anatomically correct drawings at issue here are more rudimentary and opaque than the live-action nudity found not to be obscene or harmful to minors in *City of Jacksonville* and, therefore, even less appropriately classified as obscene for minors. Petitioner’s drawings did not incorporate sexual activity, were anatomically accurate, and were communicated from father to daughter in the context of the daughter’s interest in human representations in cave art. Clearly, if all nudity cannot be deemed obscene for minors, anatomically correct drawings in

this context, devoid of sexual activity, may not be considered obscene.

The classification of the drawings at issue here as obscene for minors is also inconsistent with research finding that these types of images do not appeal to the shameful or morbid interest of minors in sex and present no risk of harm to minors. For example, psychological studies have shown that parental nudity, sleeping in a family bed, or inadvertently observing parental sexual activity had no adverse effect on a child's psychological development. *See, e.g., Okami et al., Sexual Experiences in Early Childhood: 18-Year Longitudinal Data from the UCLA Family Lifestyles Project*, 34 *J. Sex Res.* 339, 339-47 (1997) (a cohort of children were repeatedly studied over an 18-year period); Okami et al., *Early Childhood Exposure to Parental Nudity and Scenes of Parental Sexuality ("Primal Scenes"): An 18-year Longitudinal Study of Outcome*, 27 *Archives of Sexual Behav.* 361, 361-84 (1998) (same). If parental nudity is not harmful to minors, merely observing anatomically correct drawings is not harmful to minors either. *See Paul R. Abramson, Sex Appeal: Six Ethical Principles for the 21st Century* 3-22 (Oxford Univ. Press 2010); John Bancroft, *Sexual Development in Childhood* 121-200 (Indiana Univ. Press 2003).

**C. Anatomically Correct Drawings Are Less Likely to Appeal to a Child's Shameful or Morbid Interest in Sex When Provided by a Parent**

Not only are anatomically correct drawings a mainstream educational tool that present no risk of

harm to minors, the context here – a father-daughter communication responding to the daughter’s interest in the naked figures in a cave art documentary, Trial Tr. 107, App. B, at 28a – gives the drawings added legitimacy and undermines any argument that they appeal to the minors’ shameful or morbid interest in sex. The United States Constitution recognizes a fundamental right on the part of parents to “make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). While this Court has upheld state laws regulating the distribution of obscene materials to minors, the Court has observed in doing so that government is more limited in its ability to regulate parents’ decisions to distribute obscene materials to their children. *Ginsberg v. State of N.Y.*, 290 U.S. 629, 639 & n.7 (1968) (noting that the upheld law regulating the distribution of obscene materials to minors supported parents’ authority to direct the rearing of their children and did not prevent parents from purchasing the materials at issue for their children).

Thus, parent-child communications warrant more, not less, protection under the law than communications between non-family parties, and a parent’s decision to provide to a son or daughter a drawing of the naked human body comes with a presumption, due to the parent-child context, that it will not be harmful to the child nor appeal to the child’s shameful or morbid interest in sex.

The Utah Supreme Court’s decision to affirm a criminal sanction for a father-daughter communication where the anatomically correct drawings could not be

considered obscene for minors even outside the family context is out of step with the generally accepted principle that parents are given broad deference in decisions concerning the care of their children. As discussed in greater detail below, decisions like the one in this case risk chilling important and worthwhile family communications that are vital to children's psychological development.

**D. Petitioner's Reference to a Family Joke  
About Biting His Daughter's Butt Does Not  
Render the Material Obscene for Minors**

One of the two drawings at issue here was an anatomically correct drawing purporting to show the petitioner, Mr. Butt, biting his daughter's "butt" cheek. At trial, the petitioner explained the context for this drawing:

Where that even stems from is me tickling my children, particularly my daughter. Every night before she goes to bed I tickle her. She—I usually—I'm nibble—holding her hands up and nibbling all over her stomach, and she's laughing and giggling, and she'll roll over. I'll say, "Roll back over or I'm going to bite your butt cheek," so she'll roll back over. That's all that has ever been said about it, done about it, and it's nothing more than that.

Trial Tr. 110, App. B, at 28a-29a.

The drawing cannot be interpreted as obscene for minors in light of petitioner's explanation that it referred to an innocent family joke with his five-year-

old daughter. This drawing should furthermore be interpreted in the context of the family name of petitioner and his daughter – Butt – that renders petitioner’s use of the word “butt” more understandable and, in context, more humorous. Viewed in context, the drawing and notations can certainly not be viewed as appealing to a minor’s shameful or morbid interest in sex, or as posing a risk of harm to minors. See Abramson, *supra*, at 3-22; Bancroft, *supra*, at 121-200.

## **II. The Utah Supreme Court’s Incorrect Application of the Obscene-For-Minors Standard Risks Chilling Healthy Family and Educational Communications**

### **A. Family Communications About Anatomy and Sex Are Widely Recognized as Vital to Children’s Healthy Development**

As noted above, the Constitution protects “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel*, 530 U.S. at 66.

Courts have also recognized that “[p]arents have a right to inform their children when and as they wish on the subject of sex ....” *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) *opinion amended on denial of reh’g sub nom. Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006). While the appropriate scope and content of sex education in public schools continues to be a source of controversy, it is generally accepted that “parents are – and ought to be – their children’s primary sexuality educators.” Sexuality Information and Education Council of the



United States, National Guidelines Task Force, *Guidelines for Comprehensive Sexuality Education* 13 (3d Ed. 2004) (hereinafter “SIECUS”). At least some states expressly require that any sex education in schools include instruction encouraging parent-child communication about sexuality. *See, e.g.*, Cal. Educ. Code § 51933(a)(6). The website of the Utah State Office of Education notes that “Parents should be the primary source of human sexuality instruction and values relating to this subject.” Utah State Office of Education Human Sexuality Law and Policy Frequently Asked Questions, <http://www.schools.utah.gov/CURR/healthpe/Human-Sexuality-Law-and-Policy/2009Questions-UtahHumanSexualityInstruction.aspx>.

Most states, including Utah, permit parents to opt out of any sex education programs offered in the public schools. *See* Utah Admin. Code, R277-474-1(H)(3) (requiring Utah public schools to issue a parental notification form allowing parent to exempt child from classes covering sexuality); *see also* State Mandates & Coalitions, National Coalition to Support Sexuality Education, <http://www.ncsse.com/index.cfm?pageid=939> (providing links to different states’ regulations concerning sex education).

Educating children about the body and about sex is vital for children’s psychological development and sexual maturation. *See* Paul R. Abramson & Steven Pinkerton, *With Pleasure: Thoughts on the Nature of Human Sexuality* 131-33 (Oxford Univ. Press 2002); Paul R. Abramson et al., *Sexual Rights in America: The Ninth Amendment and the Pursuit of Happiness* 175-85 (NYU Press 2003); Bancroft, *supra* at 121-200. Some

children, in fact, spontaneously produce anatomically correct drawings on their own, further undermining the claim that viewing an anatomically correct drawing would, on its own, be harmful to a child. *Handbook of Clinical Psychology* 134 (Michel Hersen & Alan M. Gross eds., 2008).

Providing anatomically correct labels for the genitals has the effect of acknowledging their existence and function, thereby equating the genitals with other labeled body parts. Paul R. Abramson & Steven Pinkerton, *Sexual Illiteracy*, 3 *Am. Sexuality Mag.* 4 (2005). Labeling itself is especially important because it facilitates learning. Gary Lupyan et al., *Language is Not Just for Talking*, 18 *Psychol. Sci.* 1077, 1077-83 (2007). Educating children about the sexual anatomy also equips children to protect themselves from sexual assault by teaching the private nature and function of the genitals and providing children a vocabulary for describing the circumstances surrounding sexual abuse. See Abramson 2010, *supra*, at 3-22. Anatomically correct dolls or drawings assist both goals and are valuable learning tools for children.

The value and propriety of teaching children to identify features of the reproductive anatomy is widely accepted. Guidelines for Comprehensive Sexuality Education developed by the National Guidelines Task Force of the Sexuality Information and Education Council of the United States recommend that appropriate education for children aged five to eight include instruction on male and female reproductive anatomy, including the correct names for each part of the reproductive anatomy. SIECUS at 25. Similarly, a guide to on sex education published by the United

Nations Educational, Scientific and Cultural Organization (UNESCO) based on a rigorous review of sexuality education programs across different countries and cultures noted that children ages five to eight should be taught to “distinguish between male and female bodies” and that by “learning the correct names for parts of the body” young children lay the foundation for healthy sexual development in the future. UNESCO, *International Technical Guidance on Sexuality Education* 8, 21 (Dec. 2009) (hereinafter “UNESCO”).

Flowing from the precepts that parents should be their children’s primary sex educators and that educating children about sex and the body is vital to their healthy development, parents must be free to use appropriate teaching tools, such as anatomically correct drawings and dolls, in educating their children about human anatomy and sex. *See Bancroft, supra*, at 121-200. It is essential that the tools used to teach children about the body be age appropriate, UNESCO at 8, and anatomically correct drawings serve as simple and age-appropriate tools for this instruction. They convey vital information about the genitals, gender differences, and bodily functions without recourse to, or inclusion of, sexual activity.

### **B. Use of Anatomically Correct Drawings to Educate Children Even Outside the Family Is Widely Accepted**

The finding that anatomically correct drawings can be classified as obscene for minors risks chilling not only healthy communications within the family, but also widely accepted education practices, which

recognize instruction on the sexual anatomy to be age appropriate for children as young as five. SIECUS at 25; UNESCO at 8, 21. As discussed above, such education is important for children's healthy development, and anatomically correct drawings are a useful tool for conveying age-appropriate anatomical information.

### **C. Use of Anatomically Correct Drawings to Combat Child Sexual Abuse Has Been Endorsed by the U.S. Government**

The finding that anatomically correct drawings are obscene for minors further risks chilling the use of such materials to combat child sexual abuse, a critical child welfare goal. Such a chilling effect would be particularly perverse in light of the fact that laws regulating distribution of obscene-for-minors materials purport to protect child welfare.

Law enforcement investigative materials rely on anatomically correct drawings to assist children in recalling and describing possible sexual abuse. The Administration for Children and Families, a division of the U.S. Department of Health & Human Services – a federal government agency tasked with, according to the agency website, promoting “the economic and social well-being of families, children, individuals and communities,” <http://www.acf.hhs.gov> – has explicitly recommended the use of anatomically correct drawings, as well as anatomically explicit dolls, for these purposes. *See Techniques for the Child Interview and a Methodology for Substantiating Sexual Abuse*, <http://www.childwelfare.gov/pubs/usermanuals/sexabuse/sexabusee.cfm> (describing strategies for using

anatomically correct drawings and dolls in interviewing children about possible sexual abuse).

Endorsement of the use of anatomically correct drawings in law enforcement by the Administration for Children and Families undermines any contention that exposing children to anatomically correct drawings poses a risk of trauma or harm to children. The agency's endorsement further highlights the negative consequences for children if the state of Utah is permitted to suppress the drawings at issue here as "obscene for minors." As anatomically correct drawings serve as a valuable tool in safeguarding child welfare, the Utah Supreme Court's incorrect classification of these drawings as obscene risks chilling beneficial uses of anatomically correct drawings and thereby increasing, rather than decreasing, harm to children.

### **III. Clear Guidance on the Obscene-For-Minors Standard Is Needed in Light of the Emotional Public Response to Allegations of Sex-Related Conduct With Minors**

Highly emotional public response to the specter of child sexual abuse makes the balancing of First Amendment interests with child welfare interests in the context of alleged distribution of obscene-for-minors materials particularly complex and difficult. *See, e.g.,* Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L. Rev. 19, 20 (1985) ("The last three years have brought the public to a state of awareness, often bordering on hysteria, concerning child sexual abuse."); Laura Shapiro et al., *Rush to Judgment*, Newsweek, Apr. 19, 1993, at 54

(“Americans are at fever pitch over child sex abuse these days: we haven't done very well at preventing it, but we're frantic to root it out and stomp it to death no matter where it lurks – or doesn't.”); Bryan Kim-Butler, *Fiction, Culture and Pedophilia: Fantasy and the First Amendment After United States v. Whorley*, 34 Colum. J.L. & Arts 545, 547-48 (2011) (noting that child sexual abuse is “a prominent, even central issue in our culture” seen by some as “a devastating and widespread social problem” and by some as “a ‘moral panic’ full of exaggeration and hysteria”).

Indeed, some scholars have noted that the stigma connected with accusations of child sexual abuse severely hampers the enforcement of First Amendment rights in that context. *See, e.g.*, Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 227 (2001) (observing that “if you mention the First Amendment” in the context of child pornography, “someone might accuse you of being a pedophile”). In this climate, it is clear that jury determinations of what constitutes obscene-for-minors materials should be guided by clear standards and receive careful appellate review.

The complexity of the task of balancing First Amendment interests with child welfare interests, together with the emotional response of jurors to alleged violations of obscene-for-minors statutes, heightens the importance of appellate review and standard-setting in this area. Thus, independent appellate review of obscenity findings by juries is particularly critical.

For the same reason, the Court should take this opportunity to provide a clear benchmark ruling finding that the anatomically correct drawings here are not obscene for minors and are, rather, protected by the First Amendment. Without this review, parents' and educators' communications with children will be chilled, as they reasonably may fear that showing non-obscene anatomically correct drawings, or even fine art that shows human genitals, could lead to criminal prosecution.

### CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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