STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP002084-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER J. OATMAN,

Defendant-Appellant.

On Notice of Appeal From the Judgment of Conviction and Sentences Entered in the Circuit Court, Brown County, the Honorable Marc A. Hammer, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Must the eight convictions for violating Wis. Stat. § 948.14, which prohibits a registered sex offender from intentionally photographing a minor without parental consent, be vacated because the statute is unconstitutional both on its face and as applied in that it substantially restricts and burdens protected expression in violation of the state and federal constitutions?

The trial court denied Mr. Oatman's constitutional challenge to Wis. Stat. § 948.14.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant anticipates the issue presented in this appeal will be adequately addressed by the parties' briefs. Therefore, oral argument is not requested. Publication is warranted, however, to address constitutional issues that have not yet been specifically considered in prior Wisconsin appellate decisions.

STATEMENT OF THE CASE AND FACTS

This case formally commenced on January 14, 2013, with the filing of a criminal complaint charging Christopher Oatman with three counts of being a registered sex offender who intentionally photographed a minor without the parent's consent contrary to Wis. Stat. § 948.14(2)(a). The complaint also charged one count of burglary contrary to Wis. Stat. § 943.10(1m)(a). (2). About a week later, an

amended complaint was filed charging Mr. Oatman, as a repeater, with sixteen counts of photographing a minor without parental consent and one count of burglary. (3).

The events underlying the sixteen counts of photographing a minor allegedly occurred on six dates during the Summer and Autumn of 2010. (3). In February, 2011, a search of Oatman's upstairs apartment in Green Bay was initiated by his probation and parole agent. During this search authorities seized a cell phone, digital camera, a camcorder and memory cards. A subsequent search of these items produced the images underlying the charges. (3:7-8; 10:1-2; 22:1-2; 24:1-2).

The amended complaint does not allege that any of the sixteen counts of photographing a minor involved obscenity, child pornography, or nudity. (3). There is no indication any of the charged images involved children in anything other than an outdoor public setting. (3; 10:1-2). In the amended complaint, the detective reported that all of the photographs and videos captured images "just outside the residence of Christopher Oatman." (3:9-10). The images described in the complaint consist of children engaged in various forms of outdoor play. The children were photographed while skateboarding, jumping rope, riding tricycles and bicycles, playing in the leaves, dropping stones in a soda bottle and sitting against a tree. (3:8-9). According to the detective, most of the videos tended to focus on the buttocks, crotch and panty area of the children. (3:8-9).

On February 6, 2013, Oatman waived a preliminary hearing, whereupon an information was filed renewing the seventeen counts in the amended complaint. (4; 13:2-4). In the meantime, defense counsel filed a "Motion to Declare Sec. 948.14 Unconstitutional & Dismiss Counts 1-16." (10).

A week later counsel filed a supplement to his motion. (12). The State subsequently filed a response brief whereupon defense counsel submitted a short reply. (22; 23).

On June 14, 2013, the Honorable Marc A. Hammer issued a written decision and order denying Oatman's motion challenging the constitutionality of Wis. Stat. § 948.14. (24; see appendix). The trial court ruled Wis. Stat. § 948.14, regulated conduct, not speech, and therefore was not subject to First Amendment scrutiny. (24:3-4). The court alternatively ruled that even if the statute implicated the First Amendment, it was content-neutral and satisfied intermediate scrutiny. (24:4-7). The court further ruled the statute was constitutional even if strict scrutiny applied. (24:7-8). Finally, the court concluded the statute was not overbroad. (24:8). Oatman's petition for leave to appeal from the trial court's non-final order was denied in an order dated July 17, 2013. (26; 28).

To preserve Mr. Oatman's right to challenge the constitutionality of Wis. Stat. § 948.14 on appeal, the prosecutor and defense counsel agreed to a form of stipulated trial, which the parties labeled a "Confessional Stipulation." (45). Pursuant to this written agreement, signed by both the prosecutor and defense counsel, Oatman agreed to waive a jury trial and his related trial rights, whereupon the matter would be presented to the court based on stipulated evidence that would support a finding of guilt. Pursuant to this agreement, Oatman would be found guilty on the charges of photographing a minor without parental consent alleged in counts 1, 2, 3, 6, 7, 9, 12, and 15, as well as on the burglary charge in count 17. (45:1). Consistent with "[t]he purpose of this stipulation" "to permit Oatman to appeal, after conviction and sentence, the constitutionality of Sec. 948.14, Wis. Stats.," the written agreement further provided that "the

State agrees not to challenge any appeal by Oatman after conviction because Oatman waived the issue by virtue of this stipulation but may oppose an appeal on any other lawful grounds." (45:2).

Consistent with the stipulated agreement, on February 17, 2014, Oatman was found guilty, as a repeater, of eight counts of photographing a minor without parental consent and one count of burglary. (73:26-27). On May 2, 2014, Judge Hammer imposed consecutive prison terms on the eight photographing counts, each term consisting of one and a half years of initial confinement and two years of extended supervision. On the burglary charge, the court imposed a concurrent term of four years imprisonment consisting of two years of initial confinement and two years of extended supervision. (55; 75:20).

This case is before the Court of Appeals, District III, pursuant to a notice of appeal from the judgment of conviction and sentences. (55; 59).

ARGUMENT

The Convictions Entered on Eight Counts of Violating Wis. Stat. § 948.14, Which Prohibits a Registered Sex Offender from Photographing a Minor Without Written Parental Consent, Must be Vacated Because the Statute is Unconstitutional on its Face and as Applied to Mr. Oatman in that it Substantially Restricts and Burdens Protected Expression in Violation of the State and Federal Constitutions.

A. Introduction: The statute in question.

Christopher Oatman was found guilty under Wis. Stat. § 948.14, of eight counts of being a registered sex offender who intentionally captures "a representation of any minor without the written consent of the minor's parent, legal custodian or guardian." This prohibition, created by 2005 Wis. Act 432, provides:

> 948.14 Registered sex offender and photographing minors.
>
> **(1)** Definitions. In this section:
>
> (a) "Captures a representation" has the meaning given in s. 942.09(1)(a).[1]
>
> (b) "Minor" means an individual who is under 17 years of age.

[1] Pursuant to Wis. Stat. § 942.09(1)(a), the term "'[c]aptures a representation' means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image."

> (c) "Representation" has the meaning giving in s. 942.09(1)(c).[2]
>
> (d) "Sex offender" means a person who is required to register under s. 301.45.
>
> **(2)** Prohibition. (a) A sex offender may not intentionally capture a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian. The written consent required under this paragraph shall state that the person seeking the consent is required to register as a sex offender with the department of corrections.
>
> (b) Paragraph (a) does not apply to a sex offender who is capturing a representation of a minor if the sex offender is the minor's parent, legal custodian, or guardian.
>
> **(3)** Penalty. Whoever violates sub. (2) is guilty of a Class I felony.

Significantly, the prohibition set forth in Wis. Stat. § 948.14, is not restricted to capturing an image or representation of a child that is obscene, pornographic, or even just involves nudity. Indeed, the statute does not require that the forbidden representation be obscene or pornographic in any manner. Rather, the statute prohibits capturing *any* representation of a minor without the requisite written consent.

Pursuant to the plain language of Wis. Stat. § 948.14, anyone who is required to register as a sex offender, unlike any other citizen, is, absent the requisite written consent, effectively prohibited from creating photographic or video

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[2] Pursuant to Wis. Stat. § 942.09(1)(c), the term "'[r]epresentation' means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image."

images to record or portray a vast array of activities that form the fabric of our culture. The broad scope of potential images restricted by this statute is beyond quantification and description. The range of subjects that would be off limits would include common youth sports activities such as soccer, hockey and little league baseball games as well as most junior high and high school sports, artistic and cultural events such as school concerts, plays, and dance recitals, and the multitude of community events, festivals and parades in which minors participate.

The statute also restricts the expressive freedom to take photographs or videos in a multitude of other community and religious settings where minors are likely to be present. For instance, Oatman and other registered sex offenders would be effectively foreclosed from taking pictures at a farmer's market, the zoo, a National or local park, Disneyland, a Brewers game, a baptism, a confirmation celebration, or even a Christmas pageant.

In addition to effectively foreclosing a broad range of photographic subjects, the statute restricts the right of individuals such as Mr. Oatman to engage in the artistic and intellectual expression embodied in the process of capturing an image. The statute is not limited to forbidding the creation of obscene or pornographic images, or even just restricting images created with the intent to facilitate the commission of some other criminal offense. Rather, the statute forecloses even the artistic, academic, or whimsical desire to create images capturing the uninhibited joy, curiosity, and movements of children, including photgraphing children who are not inhibited or otherwise influenced by an awareness of the presence of a camera.

Oatman moved the trial court pursuant to the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 8 of the Wisconsin Constitution to declare Wis. Stat. § 948.14 unconstitutional either on its face or as applied to the facts of this case. (10). In his motion, Oatman pointed out that none of the images charged in this case involved pornography or nudity. Rather, the images, which are described in the criminal complaint, primarily involve children playing in the neighborhood where Oatman lived. The subjects were photographed in a public not a private setting. Oatman did not invade any home or private space to secure these pictures. While the visual recordings often appear to focus on clothed areas covering children's buttocks, crotch, and panty line area, there is no indication Oatman staged any of the photographs or communicated with any of the children.

Oatman submits the prohibition set forth in Wis. Stat. § 948.14, is unconstitutional on its face and as applied because it substantially restricts and burdens his right to engage in expression protected by the state and federal constitutions. The statute is overbroad in that authorizes criminal punishment for a wide range of otherwise protected expression. The statute substantially restricts the right of individuals who are required to register as sex offenders to engage in commonplace expressive activities available to other citizens. As applied in this case, the statute is unconstitutional because it punishes the otherwise protected form of expression exercised by Mr. Oatman.

In the argument sections below Mr. Oatman will outline why Wis. Stat. § 948.14, is unconstitutional both on it face and as applied. First, contrary to the conclusion of the court below, the process of creating photographic and video images constitutes expressive activity protected by the

First Amendment. Second, Wis. Stat. § 948.14, is not content neutral, but rather, forbids a specific subject category of expression, creating representations of children. Consequently, Wis. Stat. § 948.14, must, but cannot, satisfy strict scrutiny. Third, inasmuch as the prohibition set forth in Wis. Stat. § 948.14, is not limited to obscene or pornographic representations, the statute is overbroad in that it restricts and substantially burdens a wide range of expression protected by the First Amendment. Fourth, even if Wis. Stat. § 948.14, is considered content neutral, it cannot withstand intermediate scrutiny because the statute is not narrowly tailored, but rather, substantially burdens or chills a significant range of protected expression.

B. Applicable constitutional provisions and governing standards.

"The First Amendment of the United States Constitution, applicable to the states under the Due Process Clause to the Fourteenth Amendment, provides in pertinent part that 'Congress shall make no law . . . abridging the freedom of speech.'" ***State v. Robert T.***, 2008 WI App 22, ¶6, 307 Wis. 2d 488, 493, 746 N.W.2d 564. ***See also***, ***State v. Baron***, 2009 WI 58, ¶12, 318 Wis. 2d 60, 67, 769 N.W.2d 34. Meanwhile, "Article I, § 3 of the Wisconsin Constitution provides in pertinent part that '[e]very person may freely speak, write and publish his [or her] sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.'" ***Robert T.***, 307 Wis. 2d at 493, ¶6. Notwithstanding differences in language between these two constitutional provisions, the Wisconsin Constitution has been construed to provide the same freedoms as the federal constitution. ***Id.***

"As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234, 245 (2002). However, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." ***Id.***, at 245-246. Yet, "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." ***Id.***, at 244. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." ***Id.***, at 255. ***See also, Robert T.***, 307 Wis. 2d at 493, ¶7.

"The First Amendment does not permit the imposition of criminal sanctions when doing so would substantially chill protected speech." ***State v. Weidner***, 2000 WI 52, ¶35, 235 Wis. 2d 306, 321-322, 611 N.W.2d 684. At issue in this appeal is whether Wis. Stat. § 948.14, is unconstitutional because it impermissibly restricts or substantially burdens protected expression in violation of the state and federal constitutions.

The constitutionality of a statute presents a question of law subject to independent review. ***State v. Baron***, 2009 WI 58, ¶10, 318 Wis. 2d 60, 66, 769 N.W.2d 34; ***State v. Trochinski***, 2002 WI 56, ¶33, 253 Wis. 2d 38, 64, 644 N.W.2d 891; ***State v. Weidner***, 235 Wis. 2d at 312, ¶7. Statutes generally enjoy a presumption of constitutionality. "However, when a statute infringes on rights afforded by the First Amendment . . . the State shoulders the burden of proving the statute constitutional beyond a reasonable doubt." ***Weidner***, at ¶7; ***Trochinski***, at ¶33; ***Baron***, at ¶10.

Because of "the critical importance of First Amendment rights in our society," reviewing courts employ an overbreadth analysis to foreclose the undesirable harm to society that results from the chilling effect of a statute that restricts protected expression. Accordingly, a defendant may challenge a statute as being overbroad even though his own conduct may not be constitutionally protected. ***State v. Janssen***, 219 Wis. 2d 362, 371-373, 388, ¶¶19-21, 52, 580 N.W.2d 260 (1998)(Concluding the flag desecration statute was "overbroad and therefore unconstitutional on its face."). ***State v. Stevenson***, 2000 WI 71, ¶¶11-13, 236 Wis. 2d 86, 92-94, 613 N.W.2d 90 (Concluding the statute prohibiting making a videotape depicting a person in a state of nudity without the person's consent was facially overbroad in that it potentially restricted visual expressions of nudity involving works of art, educational materials, political satire and newsworthy images). Application of the overbreadth doctrine is "strong medicine" not to be employed lightly. ***Janssen***, at 373, ¶22; ***Stevenson***, at 94, ¶14; ***Robert T.***, 307 Wis. 2d at 493-494, ¶8.

In assessing whether the State has met its burden of proving a statute regulating speech is constitutional beyond a reasonable doubt, it is necessary to address whether the statute is "content neutral." If a statute is content-based, the statute must withstand strict scrutiny. ***State v. Baron***, 318 Wis. 2d at 68, 77, ¶¶14, 31. If the statute is content-neutral, the statute is subject to intermediate scrutiny. ***Id.***

"To survive strict scrutiny, the State has the burden to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" ***Baron***, 318 Wis. 2d at 82-83, ¶45, *quoting* ***Boos v. Barry***, 485 U.S. 312, 321 (1988). As the Supreme Court recently declared, to satisfy strict scrutiny the provision "must

be the least restrictive means of achieving a compelling state interest." ***McCullen v. Coakley***, 134 S.Ct. 2518, 2530 (2014). Not surprisingly, "it is the rare case in which" the Court has "held that a law survives strict scrutiny." ***Burson v. Freeman***, 504 U.S. 191, 211 (1992); ***Baron***, 318 Wis. 2d at 84, ¶48 (Though concluding the identity theft statute was narrowly tailored to achieve a compelling interest, the Court observed: "this is one of those 'rare cases' that a government regulation survives strict scrutiny.").

To satisfy intermediate scrutiny, a content-neutral provision must be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels for communication of the information." ***Ward v. Rock Against Racism***, 491 U.S. 781, 791 (1989); ***Doe v. Marion County Prosecutor***, 705 F.3d 694, 698 (7th Cir. 2013). To be narrowly tailored, the provision "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" ***McCullen v. Coakley***, 134 S.Ct. at 2535, *quoting* ***Ward***, 491 U.S. at 799.

C. Issues not presented in this appeal.

Before addressing Oatman's constitutional challenge it is important to note what is *not* at issue in this appeal. First, Oatman's constitutional challenge to Wis. Stat. § 948.14, does not implicate the State's authority to prohibit images that are obscene or constitute child pornography. Significantly, as a prerequisite to imposing liability, Wis. Stat. § 948.14, does not require that the alleged images be obscene or constitute pornography.

In ***Ashcroft v. Free Speech Coalition***, ***supra***, the Supreme Court concluded the Child Pornography Prevention Act (CPPA) was unconstitutionally overbroad insofar as it prohibited the possession or distribution of images that were

neither obscene under the definition of ***Miller v. California***, 413 U.S. 15 (1973), nor constituted child pornography as defined in ***New York v. Ferber,*** 458 U.S. 747 (1982). The Court further determined that the CPPA was unconstitutional insofar as it proscribed sexually explicit images created by using adults who looked like minors or by using computer imaging to depict minors rather than using actual children. ***Ashcroft*** explained that the decision in ***Ferber*** upholding the prohibition of child pornography--sexually explicit images of children independent of whether the images were otherwise obscene—was premised on the fact that the sexually explicit images involved actual children who were "themselves the product of child sexual abuse." ***Ashcroft***, 535 U.S. at 249, *citing* ***New York v. Ferber***, 458 U.S. at 761, n. 12.[3] Unlike virtual images, the prohibited images in ***Ferber*** were "intrinsically related" to the sexual abuse of children. ***Ashcroft***, 535 U.S. at 249, 250. Indeed, the regulated speech in ***Ferber*** [the sexually explicit image of an actual child] was itself "the record of sexual abuse." ***Ashcroft***, at 250. As the Court explained:

> ***Ferber***'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed 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, at 250-251.

As the decision in ***Ashcroft*** further points out: "***Ferber*** did not hold that child pornography is by definition without

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[3] Consistent with the definition employed in ***Ferber*** and ***Ashcroft***, Wis. Stat. § 948.12(1m), defines child pornography as images of "a child engaged in sexually explicit conduct."

value. On the contrary, the Court recognized some works in this category might have significant value," provided actual children were not employed in their creation. ***Ashcroft***, 535 U.S. at 251, *citing* ***Ferber***, at 761, 763. The Court noted that movies based on Shakespeare's "Romeo and Juliet" as well as other academy award winning films have involved themes of teenage sexual activity and the sexual abuse of children. ***Ashcroft***, 535 U.S. at 247-248.

Second, Oatman is not challenging the State's authority to enforce variable obscenity statutes which prohibit displaying or communicating to children information that would not be obscene if directed to an adult audience. The notion of variable obscenity recognizes that the State, in fulfilling its interest to protect the physical and psychological well-being of children, may impose greater restriction on the types of sexual expression that may be displayed to children. ***State v. Thiel***, 183 Wis. 2d 505, 523-527, 515 N.W.2d 847 (1994); ***State v. Weidner***, 2000 WI 52, ¶¶9-10, 235 Wis. 2d 306, 313-314, 611 N.W.2d 684 (Nevertheless concluding Wis. Stat. § 948.11(2), chilled First Amendment expression in the internet context given the absence of an element requiring defendant's knowledge of the recipient's age); ***State v. Stuckey***, 2013 WI App 98, 349 Wis. 2d 654, 837 N.W.2d 160 (Absent a *scienter* element, a statute prohibiting exposing genitals to a child violated the First Amendment when applied to defendant's sending of a photograph of his penis via the internet). The statute at issue here, Wis. Stat. § 948.14, does not involve displaying information to or otherwise communicating with children. In any case, there is no indication Mr. Oatman ever contacted or communicated with any of the children shown in the images he created.

Third, Oatman's constitutional challenge only addresses the government's authority to initiate a prosecution

under Wis. Stat. § 948.14. Oatman is not contesting a sentencing court's or the Department of Corrections' authority to impose a condition of probation, extended supervision, or parole that restricts a sex offender's freedom to photograph children. It is well established that a person in the Department's custody on probation, parole, or extended supervision may be subject to supervision conditions that impinge upon constitutional rights. ***State v. Purtell***, 2014 WI 101, ¶¶22-23, n. 18, ___ Wis. 2d ___, 851 N.W.2d 417, 425 (Because probationers are in the "legal custody" of the Wisconsin Department of Corrections their rights "against warrantless searches and seizures are significantly curtailed."). *See also*, ***Edwards v. State***, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976)(condition restricting defendant's freedom of association); ***State v. Miller***, 175 Wis. 2d 204, 499 N.W.2d 215 (Ct. App. 1993)(condition prohibiting telephoning any woman not a family member without agent's permission); ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 658-661, 517 N.W.2d 540 (Ct. App. 1994)(upholding sex offender treatment condition notwithstanding defendant's religious objections); ***Krebs v. Schwarz***, 212 Wis. 2d 127, 130-131, 568 N.W.2d 26 (Ct. Ap. 1997)(condition requiring agent's permission before engaging in a sexual relationship); ***State v. Rowan***, 2012 WI 60, 341 Wis. 2d 281, 814 N.W.2d 854 (condition authorizing suspicionless searches for firearms). If a person in the Department's custody takes photographs of a child in violation of a supervision rule, the Department of Corrections may seek revocation or pursue some other department sanction.[4] The independent prosecution of

[4] This basic point is recognized in the series of cases that have addressed an Indiana statute that prohibits sex offenders from using any social media that allows access to minors. As will be discussed later in this brief, in ***Doe v. Marion County Prosecutor***, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit invalidated this provision as a facially

Oatman under Wis. Stat. § 948.14, is, however, prohibited because the statute is unconstitutional on its face and as applied.

D. Applying either a strict scrutiny or an intermediate scrutiny analysis, Wis. Stat. § 948.14 is unconstitutional on its face and as applied to Mr. Oatman.

For the reasons outlined in greater detail in the argument sections below, Wis. Stat. § 948.14 impermissibly restricts and substantially burdens exercise of the First Amendment right to create non-obscene, non-pornographic photographs or videos recording public images of children. First, creating photographic and video images constitutes expressive conduct subject to First Amendment protection. Second, Wis. Stat. § 948.14, is not content-neutral, and therefore, must satisfy strict scrutiny. Third, even applying an intermediate scrutiny analysis, Wis. Stat. § 948.14 is overbroad because it substantially restricts and burdens a wide range of otherwise protected expression. Fourth, rather than being narrowly tailored, Wis. Stat.

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overbroad restriction of free speech. Nevertheless, subsequent Indiana appellate decisions have upheld probation supervision rules that similarly restrict use of the internet. As these courts recognize, a person serving probation is "in a significantly different position." Supervision conditions "may impinge upon" the "right to exercise an otherwise constitutionally protected right because probationers simply do not enjoy the freedoms to which ordinary citizens are entitled." ***State v. Patton***, 990 N.E.2d 511, 515-516 (Ind. Ct. App. 2013); ***Bratcher v. State,*** 999 N.E.2d 864, 878 (Ind. Ct. App. 2013). *See also*, ***Doe v. Harris***, 772 F.3d 563, 570-572 (9th Cir. 2014)(Recognizing that prison inmates and individuals serving probation and parole supervision are subject to restraints on their constitutional rights, whereas registered sex offenders who have completed their terms enjoy the full protection of the First Amendment).

§ 948.14 unduly burdens and chills a wide range of otherwise protected speech. Indeed, the statute's written consent requirement is not only burdensome and essentially unworkable in most settings; practical application of this consent requirement potentially compromises the State's claimed interest in protecting children.

Oatman's contention that Wis. Stat. § 948.14 is facially overbroad and burdens First Amendment rights is supported by the decisions in ***State v. Bonner***, 138 Idaho 254, 61 P.3d 611 (Ct. App. 2002), and ***Ex Parte Thompson***, 442 S.W.3d 325 (Texas Criminal Appeals). In both ***Bonner*** and ***Thompson***, the court held that a criminal provision that restricted the right to create photographic and video images violated the First Amendment.

In ***Bonner***, defendant was arrested outside the home of a sixteen-year-old girl in possession of a video camera and a stepstool. Bonner had secretly videotaped the girl in various states of undress through a gap in the window blinds. Bonner was charged under a felony provision that prohibited a person who was five years or more older than the subject from photographing or making a video recording of a sixteen or seventeen year old child "with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desire of such person, minor child, or third party." ***Bonner***, 61 P.3d at 613-614. The court concluded this statute was overbroad because it prohibited and chilled constitutionally protected speech. ***Id.***, at 616.

In ***Ex Parte Thompson***, defendant was charged with 26 counts of violating a Texas statute that prohibited recording a visual image of another by means of photographs or videotape, at a location that is not a bathroom or a private dressing room, without the other person's consent and with

intent to arouse or gratify the sexual desire of any person. ***Ex Parte Thompson***, 442 S.W.3d at 330, 333. The charges against Thompson were based on photographs he had taken of individuals in public settings, including individuals in bathing suits at a water park. ***Id.***, at 330, 350. The court concluded the Texas statute constituted a content-based restriction on protected expression that failed to satisfy strict scrutiny. The court then independently concluded that the statute's restriction on creating photographs and recordings was unconstitutionally overbroad on its face. ***Id.***, at 349, 351.

1. Contrary to the conclusion of the court below, the creation of photographic or video images constitutes expression protected by the First Amendment.

The free speech guarantees of the state and federal constitutions are not restricted to the spoken and written word, but extend to a wide range of expressive conduct.[5] Thus, criminal statutes prohibiting flag desecration have been invalidated as unconstitutionally overbroad because they suppress expressive communication protected by the First Amendment. ***State v. Janssen***, 219 Wis. 2d 362, 378, 580 N.W.2d 260 (1998); ***United States v. Eichman***, 496 U.S. 310 (1990); ***Texas v. Johnson***, 491 U.S. 397, 406 (1989).

[5] Correspondingly, in rejecting a First Amendment challenge to a conviction for child enticement based on defendant incidental use of words, the Wisconsin Supreme Court observed that the constitution does not foreclose punishing illegal conduct simply because the offense is carried out by means of language. ***State v. Robins***, 2002 WI 65, ¶¶41-42, 253 Wis. 2d 298, 318-319, 646 N.W.2d 287. ***Accord***, ***State v. Hemmingway***, 2012 WI App 133, ¶16, 345 Wis. 2d 297, 825 N.W.2d 303 (Rejecting a challenge to the stalking statute).

The trial court's written ruling denying Oatman's motion to dismiss rests on the faulty legal premise that Wis. Stat. § 948.14, does not trigger First Amendment scrutiny because the statute "does not regulate speech" or "expressive conduct," but "solely regulates conduct." (24:3-4). As the decisions in ***Bonner*** and ***Thompson*** persuasively explain, First Amendment protections apply to the creation of photographs and other visual images. In ***Bonner***, the court declared:

> it is clear that the creation of photographs, paintings, and other nonverbal productions is expressive activity that ordinarily qualifies for First Amendment protection. ***Kaplan v. California***, 414 U.S. 115, 119-20, . . . (stating that "pictures, films, paintings, drawings and engravings . . . have First Amendment protection" if not obscene). *See also* ***Massachusetts v. Oakes***, 491 U.S. 576, 591-92, . . . (1989)(photographs); ***Schad v. Mount Ephraim***, 452 U.S. 61, 66, . . . (1981)(stating that "nude dancing is not without its First Amendment protections from official regulation"); ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234, . . . (2002)(computer-generated images and photographs).

Bonner, 61 P.3d at 614.

In ***Ex Parte Thompson,*** the court similarly recognized "that photographs and visual recordings are inherently expressive." ***Ex Parte Thompson***, 442 S.W.3d at 336. Noting that "photographs are much like paintings for communicative purposes, at least when a person is consciously involved in making the photograph," the court observed that "a number of lower courts have held that the First Amendment fully protects visual art, and photographs and video recordings in particular." ***Id.***, at 334, 335 (footnotes omitted). Citing ***Mastrovincenzo v. City of New York***, 435 F.3d 78, 84-85, 93 (2nd Cir. 2006), ***Thompson*** further

declared "that certain items—such as photographs—are always sufficiently expressive to trigger First Amendment review." ***Id.***, at 335, n. 41 (footnote omitted). The court rejected the argument that the creative process of taking a photograph is somehow severable from the resulting image.

> The camera is essentially the photographer's pen or paintbrush. Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying a brush to canvass to create a painting. In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes. This is a situation where "regulation of a medium inevitably affects communication itself." We conclude that a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves.

Ex Parte Thompson, 442 S.W.3d at 337 (footnote omitted).

In support of its conclusion that the First Amendment protects both the creation of a photograph and the photograph itself, the ***Thompson*** court cited the Supreme Court's declaration that "it makes no difference in the First Amendment analysis whether government regulation applies to 'creating, distributing, or consuming'" speech. ***Id.***, at 336, n. 46, *citing* ***Brown v. Entertainment Merchants Association***, 131 S.Ct. 2729, 2734, n. 1 (2011). The court further observed that both the Seventh and Ninth Circuits recognize that regulations "'may operate at different points in the speech process,'" and "that there is 'no fixed First Amendment line between the act of creating speech and the speech itself.'" ***Ex Parte Thompson***, 442 S.W.3d at 336-337, (footnotes omitted), *citing* ***ACLU of Illinois v. Alvarez***, 679 F.3d 583, 595-596 (7th Cir. 2012) and ***Anderson v. City***

of Hermosa Beach, 621 F.3d 1051, 1061-1062 (9th Cir. 2010).

As in ***Bonner*** and ***Thompson***, Oatman's creation of non-obscene, non-pornographic images of children in public places constitutes expressive activity protected by the First Amendment. The trial court's conclusion to the contrary ultimately conflicts with the Wisconsin Supreme Court's decision over a decade ago in ***State v. Stevenson***, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90, wherein the Court implicitly recognized that creating a video or photographic image constitutes expressive conduct protected by the First Amendment. The ***Stevenson*** Court held that the statute prohibiting making a videotape depicting a person in a state of nudity without the person's consent was facially overbroad. Obviously, to even consider whether the statute in question was overbroad, the ***Stevenson*** Court had to first conclude that creating video images constituted protected expression.[6]

Certainly Oatman's creation of the challenged images in this case was far less invasive than the methods employed in ***Bonner***. Unlike Bonner, Oatman did not invade the privacy of the subjects' homes, a locker room, a restroom, or some other private location.[7] The images Oatman created

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[6] *See*, ***State v. Hemmingway***, 2012 WI App 133, ¶12, 345 Wis. 2d 297, 307-308, 825 N.W.2d 303 (Recognizing that the threshold step in an overbreadth analysis is to determine if the First Amendment applies. If the statute addresses conduct, not expression, the First Amendment does not come into play.)

[7] Oatman's constitutional challenge does not address whether the State, as in Wis. Stat. § 942.09(5), may prohibit taking photographs of another in a locker room, rest room, or some other private location without consent.

involved public activities he could observe from his own apartment.

2. Strict scrutiny is required because Wis. Stat. § 948.14 is not content-neutral.

"Content-based regulations are presumptively invalid." ***R.A.V. v. City of St. Paul, Minnesota,*** 505 U.S. 377, 382 (1992). As noted earlier, if a challenged statute is content-based rather than being content-neutral, the statute must satisfy strict scrutiny. ***State v. Baron***, 318 Wis. 2d at 68, 77, ¶¶14, 31. Contrary to the conclusion of the trial court below, strict scrutiny is required in this case because Wis. Stat. § 948.14 is not content-neutral. Rather, the statute authorizes punishment based on the content of the image contained in the defendant's visual creation. While Oatman and other registered sex offenders retain the right to create photographic or video images of other subjects, they are substantially restricted in their right to create photographic or video images that include representations of children.

The content-based nature of this restriction is much like the content-based regulations addressed in ***Boos v. Barry***, 485 U.S. 312 (1988) and ***Burson v. Freeman***, 504 U.S. 191 (1992), wherein the Supreme Court concluded strict scrutiny was required. In ***Boos***, the Court concluded that a statute that restricted displaying signs within 500 feet of an embassy that "bring into public odium any foreign government" was content based and required strict scrutiny. The Court observed that "[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government." ***Boos***, 485 U.S. at 318-319. In ***Burson***, strict scrutiny was applied to a statute that prohibited the solicitation of votes

and the display of campaign materials within 100 feet of the entrance of a polling place. The Court recognized the statute was content based because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." ***Burson***, 504 U.S. at 197. Likewise, in this case Oatman's right to create photographic or video images depends on whether the images include children.

In ***Ex Parte Thompson***, the court concluded a Texas statute that broadly prohibited capturing non-consensual images of another was content-based and therefore subject to strict scrutiny because it only prohibited a subset of nonconsensual images that were created with the intent to arouse or gratify sexual desire. Indeed, the statute discriminated based on sexual thought, which is protected by the First Amendment. ***Ex Parte Thompson***, 442 S.W.3d at 347. Interestingly, the court further observed that while a statutory provision that penalized all non-consensual visual recordings would be content neutral, "it is doubtful that such a broad prohibition would satisfy intermediate scrutiny." ***Id***.

Like the statutes addressed in ***Boos***, ***Burson***, and ***Thompson***, Wis. Stat. § 948.14 establishes a content-based restriction on the creation of photographic and video images. Therefore strict scrutiny is required. For the reasons discussed below, this restriction on expression cannot survive even intermediate scrutiny, much less withstand strict scrutiny.

3. Wis. Stat. § 948.14 is overbroad because rather than being limited to the creation of obscene or pornographic images, the statute restricts a substantial amount of otherwise protected expression.

Citing ***Ashcroft v. Free Speech Coalition,*** the appellate court in ***Bonner*** concluded an Idaho statute was impermissibly broad because it "bars the creation of photographs or electronic recordings without regard to whether those materials are obscene or constitute child pornography." ***Bonner***, 61 P. 3d at 616. Highlighting this substantive shortcoming, the court observed:

> Indeed, the statute's proscription extends to photographs or electronic recordings of minors having no sexual or offensive content at all. Nor is the statute focused to proscribe only photographs and recordings that harm the child subjects; it sweeps within its prohibition even photographs of innocuous content which are taken without the child's knowledge and which are not distributed or otherwise used in a manner that could inflict physical or psychological injury to the child. Such an undifferentiating ban is inconsistent with the First Amendment. Because the sweep of [the statute] is not limited as to the content of the proscribed photographs and recordings of minors, it may chill much protected expression.

Bonner, 61 P.3d at 615-616.

In ***Thompson***, the court similarly concluded a Texas statute forbidding nonconsensual photographs was impermissibly overbroad, characterizing the potential reach of the statute as "breathtaking." ***Ex Parte Thompson***, 442 S.W.3d at 350. The court explained:

> The statutory provision at issue is extremely broad, applying to any non-consensual photograph, occurring anywhere, as long as the actor has an intent to arouse or gratify sexual desire. This statute could easily be applied to an entertainment reporter who takes a photograph of an attractive celebrity on a public street. But the statute operates unconstitutionally even if applied to someone who takes purely public photographs of another for personal reasons with the requisite intent.

Ex Parte Thompson, 442 S.W.3d at 350 (footnotes omitted).

Interestingly, the ***Thompson*** court declined the State's request to save the statute by construing consent to mean that anyone who goes out into the public has effectively given constructive consent to the taking of photographs. ***Id.***, at 339-342. Characterizing the improper reach of the Texas statute as real and substantial, the court indicated it could not uphold the statute based on government promises to apply it responsibly. Indeed, as an example of the potential overbreadth of the statute, the court pointed to the fact that the charges against Thompson were based on photographs of people in a public place, a water park. ***Id***., at 350. As the court observed: "Photographs are routinely taken of people in a public place: including at public beaches, where bathing suits are also commonly worn, and at concerts, festivals, and sporting events." ***Id***., at 351.

Wisconsin Statute § 948.14, embodies the same overbreadth shortcomings as the statutes invalidated in ***Bonner*** and ***Thompson***. The statute is facially defective because it fails to differentiate between obscene and pornographic images which are recognized as being harmful to minors and otherwise protected photographs that simply capture public images of children. The statute's broad categorical restriction substantially burdens or chills the

freedom of registered sex offenders to engage in common forms of creative expression available to other citizens.

4. Wis. Stat. § 948.14 is not narrowly tailored in that it burdens the exercise of a substantial amount of otherwise protected speech.

In ***Bonner***, the court concluded the statutory restriction on photographing teenagers could not be saved simply because it only prohibited photographs made with the intent of arousing lust, passion or sexual desires. As the Court explained.

> With its ban on photos and recordings unlimited as to content, the provision . . . that narrows the statute's scope is, in essence, a prohibition of particular thoughts. Such legislation is impermissible.

Bonner, 61 P.3d at 616, *citing* ***Stanley v. Georgia***, 394 U.S. 557, 565-566 (1969). The court further noted that "because the requisite offensive intent can be easily hypothesized and ascribed to an accused by prosecuting authorities, the mental element of [the statute] does little to prevent the chilling effect on entirely innocent, protected expression." ***Id***.

In ***Thompson***, the court rejected a similar contention that the existence of an intent element somehow salvaged the constitutionality of the restriction on otherwise protected expression. Citing ***Ashcroft***, the court explained:

> [T]he statute at issue here does not require that the photographs or visual recordings be obscene, be child pornography, or even be depictions of nudity, nor does the statute require the intent to produce photographs or visual recordings of that nature. Banning otherwise

> protected expression on the basis that it produces sexual arousal or gratification is the regulation of protected thought, and such a regulation is outside the government's power.

Ex Parte Thompson, 442 S.W.3d at 339 (footnote omitted).

Unlike the constitutionally deficient provisions invalidated in ***Bonner*** and ***Thompson***, Wis. Stat. § 948.14 does not even attempt to limit the scope of the statute's prohibition against photographing children to representations created with the subjective intent to arouse sexual desires. Rather, Wis. Stat. § 948.14, broadly forbids creating **any** representation of a child without parental consent regardless of the nature of the picture or the motivation for its creation. The scope of the statute's restriction on protected expression is, as the ***Thompson*** court declared, "breathtaking."

While Wis. Stat. § 948.14 may have been adopted with the noble intent to deter registered sex offenders from abusing children, its sweeping restriction on protected expression cannot stand. In ***Ashcroft***, the Supreme Court rejected the government's proffered deterrence rationale for restricting virtual images that were neither obscene, nor pornographic, because the images might "whet the appetites" of pedophiles and encourage them to engage in illegal conduct.

> This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." ***Stanley v. Georgia***, 394 U.S. 557, 566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and

> speech must be protected from the government because speech is the beginning of thought.

Ashcroft, 535 U.S. at 253. The Court further declared: "The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" ***Ashcroft***, at 253.

While the State undoubtedly has an interest in protecting children, Wis. Stat. § 948.14 is not narrowly tailored to satisfy even intermediate scrutiny. Unlike a commitment under Chapter 980, which requires a particularized finding of dangerousness, Wis. Stat. § 948.14 restricts the First Amendment rights of all registered sex offenders without any assessment of individual risk. The statute restricts the rights of *all* persons required to register, regardless of whether the particular subject, either individually or as part of an identifiable class, actually poses a particularized threat to children. The sex offender registry applies to a wide range of offenses, not simply sex offenses involving children. ***See,*** Wis. Stat. § 301.45(1d)(b) & (1g). Indeed, sex offender registration includes individuals who were not even convicted of a sex offense. ***State v. Smith***, 2010 WI 16, 323 Wis. 2d 377, 780 N.W.2d 90 (false imprisonment).

The prohibition set forth in Wis. Stat. § 948.14, ultimately rests on a set of dubious assumptions. First, the statute assumes that *all* registered sex offenders pose a danger to children. Second, the statute further assumes that *any* registered sex offender who takes a photograph or video of a child, regardless of the content or the setting, poses a threat to said child or other children. Surely the statute's sweeping restriction on expressive freedom cannot be justified based on such stereotypes.

Finally, and perhaps most notably, the substantial burden Wis. Stat. § 948.14, places on otherwise protected expression cannot be justified based on the remote possibility that a registered sex offender would actually be willing to seek out, and would then actually be able to secure, the statutorily mandated written parental consent. In most circumstances, any effort to comply with the written consent requirement would be quite burdensome if not completely unworkable. As a result, the written consent requirement functions as a form of prior restraint, effectively foreclosing the opportunity to spontaneously create photographic or video images before the requisite consent is secured.

The practical obstacles to satisfying the written consent requirement are readily apparent. Does a registered sex offender have to carry around a set of suitable written consent forms in order to have a realistic opportunity to secure the requisite written consent when a photographic opportunity happens to arise? Obviously, this requirement can only be satisfied when a parent or guardian is known and available. Even when that is the case, the process of securing written consent would substantially foreclose the opportunity to create a genuinely spontaneous picture.

The likelihood of satisfying the written consent requirement becomes even more untenable when the photographic image being sought involves more than one child. If a registered sex offender wants to take a photograph at a little league baseball game, at Disneyland, at a school concert, or in any other public setting involving multiple children, would the offender need written consent from the parents of all of the children who would be in the photo? If the parent or guardian of one of the children in the group is not available, or if one parent declines to give consent, is the offender foreclosed from taking a group photo? Obviously,

as a practical matter, in any group setting it would be extraordinarily burdensome if not impossible for an offender to track down and secure written consent from all of the relevant parents. In the little league context, for example, even if the aspiring photographer remained undeterred, by the time the requisite consent forms could be completed the game would be over.

Moreover, if the statute does not completely chill the effort to engage in otherwise protected expression, the written consent requirement may actually undercut the State's interest in protecting children by compelling direct interaction between the registered sex offender and the child. Except in those circumstances where the child is with a parent or the registered person knows the identity of the parent, the only way a person can comply with the statute is to locate a parent. In many instances, the only way this could be accomplished is by directly asking the child the identity and location of his/her parent. Curiously, the statute does not prohibit actual contact with a child.

The burden imposed by the statute extends beyond merely obtaining a parent's written approval. To secure consent the registered offender must expressly advise the parent in writing that the person seeking consent is required to register as a sex offender with the department of corrections. The humiliation and fear that would accompany such an encounter is likely to chill any effort to engage in this form of expression. Indeed, compliance with the statute could potentially endanger the registered offender. In ***State v. Bollig***, 2000 WI 6, ¶24, 232 Wis. 2d 561, 575-576, 605 N.W.2d 199, the Wisconsin Supreme Court, in rejecting Bollig's claim that sex offender registration constituted punishment, emphasized that the registration statute "does not automatically grant the public carte blanch access" to

information. While acknowledging "that sex offenders have suffered adverse consequences, including vandalism, loss of employment, and community harassment," the Court noted the registration scheme was designed to limit such hostile interactions.

> The principles outlined in the DOC proposal indicate the desire to discourage acts of "vigilanteism." *Sex Offender Community Notification*, at 2. The summary of recommendations also suggested "limited" access to the sex offender registry, discouraging the use of "mass media releases, distribution of door-to-door fliers, or any other method of notification that may be described as 'intrusive.'" *Id*. at ii.

Bollig, 232 Wis. 2d at 576, ¶¶26, 25. It is difficult to imagine a more "intrusive" and potentially volatile encounter than for a registered sex offender to approach a parent, a person who may be a total stranger, and seek written consent to photograph said parent's child.

In ***State v. Weidner***, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, the Court concluded the availability of an affirmative defense that defendant had reasonable cause to believe based on exhibited documentation that the recipient of "harmful materials" was 18 years old was inadequate to preserve the constitutionality of Wis. Stat. § 948.11(2). The Court recognized that the practical difficulty of successfully satisfying this affirmative defense would substantially chill protected internet communication. ***Weidner,*** 235 Wis. 2d at 320-322. The written consent requirement set forth in Wis. Stat. § 948.14, likewise poses "too grave a burden" on protected expression and compels "self-censorship."

5. In addition to being overbroad on its face, Wis. Stat. § 948.14 is unconstitutional as applied to Mr. Oatman.

Mr. Oatman was criminally charged for engaging in the otherwise lawful and constitutionally protected expressive activity of creating photographic and video images of children. The images he created were neither obscene, pornographic, nor involved depictions of nudity. He did not engage in any trespass to create these images. At the time the images were created the subjects were in a public place. There is no indication Oatman attempted to entice these children. There is no indication he attempted to display harmful materials to these children. Indeed, there is no indication Mr. Oatman ever had any type of direct interaction with any of these children. In accordance with the teaching of ***Ashcroft***, Mr. Oatman cannot, consistent with the First Amendment, be punished for engaging in otherwise protected expression based on speculative assumptions concerning his private thoughts and motivations.

E. Oatman's constitutional challenge is supported by related rulings invalidating restrictions on registered sex offenders using the internet.

Further support for Mr. Oatman's overbreadth challenge can be found in recent decisions striking down statutory provisions that restrict the ability of a registered sex offender to utilize the internet. These statutory restrictions have been declared to be overbroad even though they seemingly fall within the government's broader authority to restrict direct communications with children.

In ***Doe v. Marion County Prosecutor***, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit invalidated as facially overbroad an Indiana statute that prohibited registered sex offenders, sexual predators, and persons convicted of certain sex offenses, from using a social networking web site or an instant messaging or chat room program that the offender knows allows access or use to persons under 18 years of age. In reaching its conclusion, the Seventh Circuit considered the internet provision to be "content neutral" in that it restricted speech without regard to its content. ***Id.***, at 698. Therefore, in analyzing the statute the court applied "a variant of intermediate scrutiny" that addresses whether the statute is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of the information. ***Id.***, *citing* ***Ward v. Rock Against Racism***, 491 U.S. 781, 791 (1989).

The Seventh Circuit concluded the internet statute was not narrowly tailored to serve Indiana's interest "in shielding its children from improper sexual communication." ***Doe v. Marion County Prosecutor***, 705 F.3d at 698. The ban precluded not only expression through social media, it also limited the right to receive information and ideas. ***Id.***, at 697. Noting that illicit communications with minors "comprises a miniscule subset of the universe of social network activity," the court observed that a subject's use of social media is not problematic "as long as he does not improperly communicate with minors." ***Id.*** at 699. In other words, "the Indiana law targets substantially more activity than the evil it seeks to redress." ***Id***.

The Seventh Circuit further observed that the Indiana internet statute was not narrowly tailored in that there were other means available to precisely target illicit communications with children. Indeed, as in Wisconsin,

Indiana statutes already included other specific provisions prohibiting solicitation of children and prohibiting certain forms of inappropriate communication with children. Recognizing that "the goal of deterrence does not license the state to restrict far more speech than necessary to target the prospective harm," the court concluded this sweeping ban on various forms of social networking violated the First Amendment. ***Id***., at 701, 702.

Several other courts have, consistent ***Doe v. Marion County Prosecutor***, have similarly concluded that statutes restricting registered sex offenders' access to internet social networking and chat room sites violated the First Amendment. ***See, Harris v. State***, 985 N.E.2d 767, 779-781, 785 (Ind. Ct. App. 2013)(Applying ***Doe***, the court concluded the Indiana statute restricting registered sex offenders' use of social media violated the First Amendment as applied); ***State v. Packingham***, 748 S.E.2d 146, 154 (N.C. Ct. App. 2013)(Concluding a North Carolina statute prohibiting registered sex offenders from accessing a social networking site was unconstitutional on its face and as applied because it was not narrowly tailored. "Instead, it arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal."); ***Doe v. Nebraska***, 898 F.Supp.2d 1086, 1109-1112 (D.Neb. 2012)(Concluding a Nebraska statute prohibiting registered sex offenders from using social networking and chat room sites accessible to minors was overbroad and not narrowly tailored. "The risk posited by the statute is far too speculative when judged against the First Amendment."); ***Doe v. Jindal***, 853 F.Supp.2d. 596, 605 (M.D.La. 2012)(Declaring a Louisiana statute that precluded registered sex offenders from accessing social networking sites facially overbroad.).

More recently, in ***Doe v. Harris***, 772 F.3d 563 (9th Cir. 2014), the Ninth Circuit upheld an injunction barring enforcement of a new California law that required registered sex offenders to provide and update a list of all their "internet identifiers" and "all Internet service providers" they used. The Ninth Circuit ruled that the parties challenging the law were likely to succeed on the merits of their claim that the Californians Against Sexual Exploitation Act (CASE) violated their First Amendment rights to free speech. ***Id.***, at 570. In assessing the California law, the Ninth Circuit recognized that registered sex offenders who have completed their terms of probation or parole enjoy full First Amendment protection. ***Id.***, at 570-571. The court ultimately concluded that the Act's notification requirements significantly burdened the registrants' "ability and willingness" to engage in protected speech on the internet. ***Id.*** at 572-574.

As the Seventh Circuit observed in ***Doe v. Marion County Prosecutor***, foreclosing the prosecution of registered sex offenders under Wis. Stat. § 948.14 does not leave authorities powerless to deter and punish unlawful predatory conduct against children. As noted earlier, if an individual is on probation or extended supervision the sentencing court or the Department of Corrections can impose rules restricting contact with or even photographing children. Anyone who entices a child, produces or possesses child pornography, causes a child to view sexual activity, exposes himself to a child, or has sexual contact with a child, can, of course, be prosecuted under the applicable criminal provision. Taking or possessing a nude photograph obtained in a private place without knowledge and consent of the person displayed can be prosecuted under Wis. Stat. § 942.09. Peering into a private place either directly or aided by a surveillance device may be prosecuted under Wis. Stat. § 942.08. Even in a public place, if someone disruptively persists in taking

photographs of a child notwithstanding vehement objections from the child or the child's parent, a disorderly conduct charge might be warranted under Wis. Stat. § 947.01. The state may not, however, prosecute some citizens for creating otherwise constitutionally protected photographs and video recordings of a child

CONCLUSION

For the reasons set forth above, Mr. Oatman respectfully requests the Court to declare Wis. Stat. § 948.14(2)(a), unconstitutional and to vacate the convictions and sentences entered on counts 1, 2, 3, 6, 7, 9, 12, and 15, and to remand the case to the trial court with directions to dismiss these charges.

Dated this 20th day of January, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,294 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of January, 2015.

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T O
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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of January, 2015.

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