



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Regarding N.J.S.A. 2C:24-4: Constitutionality of the Definition of “Portray a child in sexually suggestive manner”

September 16, 2024

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **November 16, 2024**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary¹

In New Jersey, it is a crime to photograph, record, reproduce, or reconstruct a child “engaging in a prohibited sexual act,” in the “simulation of such an act,” or being portrayed in a “sexually suggestive manner.”² This criminal offense is codified in N.J.S. 2C:24-4, and provides three definitions of “portray[ing] a child in a sexually suggestive manner” in subsections (a), (b) and (c).³ Subsection (c) of the statute criminalizes “depict[ing] a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.”⁴

In *State v. Higginbotham*, the New Jersey Supreme Court addressed whether subsection (c) was unconstitutionally overbroad in violation of the First Amendment of the United States Constitution.⁵ The *Higginbotham* defendant was found in possession of a journal that contained several innocuous pictures of a friend’s daughter, to which he had added sexually graphic and explicit statements or stories detailing the defendant’s sexual fantasies of the minor child.⁶

The Court held that subsection (c) was unconstitutionally overbroad because it had the potential to criminalize what would otherwise be constitutionally protected speech by capturing a large swath of material that is neither obscenity nor child pornography.⁷ Proposed modifications to N.J.S. 2C:24-4 that reflect this holding are set forth in the Appendix.

Statute Considered

N.J.S. 2C:24-4 provides, in relevant part, that:

* * *

b. (1) As used in this subsection:

* * *

“Portray a child in a sexually suggestive manner” means:

(a) to depict a child's less than completely and opaquely covered intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or

(b) to depict any form of contact with a child's intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or

¹ Initial work on this project was done by Michael Fuccile during his time as a Legislative Law Clerk with the Commission.

² N.J. STAT. ANN. § 2C:24-4(b)(1) (West 2023).

³ N.J. STAT. ANN. § 2C:24-4.

⁴ N.J. STAT. ANN. § 2C:24-4(b)(1)(c).

⁵ *State v. Higginbotham*, 257 N.J. 260, 267 (2024).

⁶ *Id.* at 267-70.

⁷ *Id.* at 267.

animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or

(c) to otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.⁸

* * *

Legislative History

Prior to February 2018, an item depicting the sexual exploitation or abuse of a child was defined as an image that “depicts a child engaging in a prohibited sexual act or in the simulation of such an act.”⁹ In 2017, the Legislature amended N.J.S. 2C:24-4 to expand the definition to include an image that “portrays a child in a sexually suggestive manner”¹⁰ because of “changes in the child pornography industry which [we]re not adequately addressed by current law” and the lack of statutory coverage for “images that depict nearly naked, suggestively-posed, and inappropriately sexualized children.”¹¹

Background

In *Higginbotham*, the police investigated the defendant following a report that he had a journal with a young girl on the cover with disturbing and sexually explicit statements written over the photo.¹² The girl was the young daughter of defendant’s friend.¹³ The defendant told police that the journal was his way of expressing himself.¹⁴ He also admitted that he sent his captioned photos to others electronically.¹⁵

The defendant was indicted on sixteen counts of child endangerment in violation of N.J.S. 2C:24-4 pursuant to “subsection (c) of the definition of ‘portray a child in a sexually suggestive manner.’”¹⁶ He moved to dismiss the indictment on the grounds that “subsection (c) was unconstitutionally vague and overbroad” and the trial court denied his motion.¹⁷ The defendant was granted leave to appeal.¹⁸

The Appellate Division explained that child erotica was protected speech under the First Amendment.¹⁹ The Court *sua sponte* held that all three subsections defining “to portray a child in a sexual manner” were unconstitutional because they could be construed to criminalize images

⁸ N.J. STAT. ANN. § 2C:24-4 (emphasis added).

⁹ N.J. STAT. ANN. § 2C:24-4(b)(1) (2017).

¹⁰ S. L. & Pub. Safety Comm. Statement to S.B. 3219 (Jun. 15, 2017).

¹¹ *Id.*

¹² *Higginbotham*, 257 N.J. at 267.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 266-67.

¹⁷ *Id.* at 269.

¹⁸ *Id.* at 270.

¹⁹ *Id.* at 270-71.

that were neither pornography nor obscenity.²⁰ The Appellate Division reasoned that the statute's definition was broader than the United States Supreme Court's definition of "obscenity," such that the statute could potentially prohibit conduct that is protected by the First Amendment.²¹ The court also concluded that, even if the statute complied with the definition of "obscenity," the prohibition on viewing certain obscene material in private is also unconstitutional.²² Finally, the Appellate Division rejected the State's argument that the defendant created "morphed" child pornography, which would be prohibited by law, because the young girl's images were not edited.²³

The State filed a petition to the New Jersey Supreme Court, which the Supreme Court granted to address the constitutionality of subsection (c).²⁴ The Supreme Court declined to address the other subsections defining the phrase "to portray a child in a sexual manner" because the defendant was not charged under subsections (a) or (b) and the defendant did not challenge those subsections in either the trial court or the Appellate Division.²⁵

Analysis

The New Jersey Supreme Court initially acknowledged that child pornography is "categorically unprotected by the First Amendment."²⁶ "Obscenity," as defined by the United States Supreme Court, may be regulated if the regulation meets constitutional standards.²⁷ To determine whether subsection (c) of N.J.S. 2C:24-4 passed constitutional muster, the *Higginbotham* Court examined several United States Supreme Court opinions addressing the government's ability to restrict speech without violating the First Amendment.²⁸

Child Pornography and the First Amendment

In *Miller v. California*, the U.S. Supreme Court outlined a three-pronged approach to determine whether material is "obscene," and therefore may be proscribed by the government.²⁹ Under *Miller*, material is obscene if (1) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) "the

²⁰ *Id.* at 270 (holding unconstitutional "subsection (c), which defendant had challenged, but also subsections (a) and (b), which he had not").

²¹ *State v. Higginbotham*, 475 N.J. Super. 205, 233-34 (App. Div. 2023), *aff'd as modified*, 257 N.J. 260 (2024) (noting that the definitions could criminalize: (1) innocuous pictures of children or teenagers in swimsuits on a beach; (2) "photographs taken for telehealth medical diagnostic purposes -- like a rash or other skin condition"; and (3) pictures of sporting events such as wrestling, cheerleading, gymnastics, or track and field).

²² *Id.* at 233, 235-36, (citing *Stanley v. Georgia*, 394 U.S. 557, 560-61 (1969)). *See also Osborne v. Ohio*, 495 U.S. 103, 106-07 (1990) (approving the criminalization of viewing child pornography in one's own home, breaking with the traditional notion that the government may not restrict someone from viewing obscene material in private).

²³ *Id.* at 238 (explaining that "morphed child pornography is created when one pastes the image of an actual child's face onto the body of another—usually an adult—to make it appear as though the child is engaged in a sex act").

²⁴ *Higginbotham*, 257 N.J. at 281.

²⁵ *Id.* at 266.

²⁶ *Id.* at 275.

²⁷ *Id.* at 274-75 ("Whereas states may constitutionally proscribe the distribution of obscene material, "mere possession [of obscene material] by the individual in the privacy of his own home" is constitutionally protected.") (citing *Stanley*, 394 U.S. at 568).

²⁸ *Id.* at 274-78.

²⁹ *Miller v. California*, 413 U.S. 15, 24 (1973).

work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”³⁰ A statute intended to regulate obscenity must satisfy all three elements of the *Miller* standard to withstand constitutional scrutiny.³¹

Later, in *New York v. Ferber*, the U.S. Supreme Court determined that “States are entitled to greater leeway in the regulation of pornographic depictions of children.”³² The Court has upheld statutes that define child pornography as the “portrayal of sexual conduct or sexual acts by children, which includes the lewd or lascivious exhibition of, or graphic focus on, a child’s genitals or pubic area.”³³ *Ferber* also emphasized, however, that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”³⁴

In *Ashcroft v. Free Speech Coalition*, the U.S. Supreme Court held that images that “do not involve, let alone harm, any children in the production process” do not implicate the same state interests as child pornography and therefore, must comply with the *Miller* “obscenity” standard to meet the constitutional requirements of the First Amendment.³⁵

Finally, in *United States v. Hansen*, the U.S. Supreme Court held that “a court may hold a law facially overbroad under the First Amendment ‘[i]f the challenger demonstrates that the statute ‘prohibits a substantial amount of protected speech’ relative to its ‘plainly legitimate sweep.’”³⁶

State v. Higginbotham

The New Jersey Supreme Court, in *Higginbotham*, addressed whether subsection (c) must comply with the *Miller* standard banning “obscenity,” rather than be treated as prohibiting child pornography and, if so, whether the subsection is unconstitutionally overbroad because it criminalizes material that is neither obscene nor child pornography.³⁷

The State argued that subsection (c) was not overbroad “because ‘properly construed,’ it targets only child pornography.”³⁸ The State contended that because of the use of the word

³⁰ *Id.*

³¹ *Higginbotham*, 257 N.J. at 271, 282.

³² *New York v. Ferber*, 458 U.S. 747, 756 (1982). *See also Higginbotham*, 257 N.J. at 275-76 (quoting *Ferber*, 458 U.S. at 756-61) (explaining that (1) “states have a compelling interest in ‘safeguarding the physical and psychological well-being’ of children” and “preventing their sexual exploitation and abuse”; (2) the “distribution of child pornography is ‘intrinsically related to the sexual abuse of children’” and constitutes a “permanent record” of abuse which causes “continuing harm by haunting the children in years to come”; and (3) it is “irrelevant” to the child-victim “whether the final product has ‘literary, artistic, political, or social value’”).

³³ *Higginbotham*, 257 N.J. at 282 (citing *Ferber*, 458 U.S. at 764, 751-53, 762).

³⁴ *Id.* at 764-65.

³⁵ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239-54 (2002).

³⁶ *United States v. Hansen*, 599 U.S. 762, 770 (2023).

³⁷ *Higginbotham*, 257 N.J. at 274-88.

³⁸ *Id.* at 284.

“otherwise,” subsection (c) is a “catch-all” clause.³⁹ As a catch-all, the State asserted that the limitations found in subsections (a) and (b) should be read into subsection (c), as well.⁴⁰

The N.J. Supreme Court disagreed with the State, explaining that “otherwise” does not mean “in a similar manner” but rather means “in a different way or manner” or “in different circumstances” or “in other respects.”⁴¹ The Court also noted that if the Legislature’s intention was to carry the language over from subsection (a) to the latter subsections, then there was no reason to include identical language in subsection (b).⁴² Thus, the Court concluded the Legislature’s omission was intentional.⁴³

The *Higginbotham* Court concluded that, because subsection (c) is not limited to the *Ferber* definition of child pornography⁴⁴ the statute must be analyzed using the *Miller* obscenity standard.⁴⁵ Although subsection (c) incorporates *Miller*’s third prong that “the depiction does not have serious literary, artistic, political, or scientific value,” it does not incorporate either of the first two prongs of the *Miller* standard.⁴⁶ The Court explained that “where the only limit is that the depiction lacks ‘serious literary, artistic, political, or scientific value,’ large swaths of protected material are conceivably ensnared.”⁴⁷

Consequently, the *Higginbotham* Court held that, “[b]ecause the application of subsection (c) to images that constitute neither obscenity nor child pornography is realistic . . . and is substantially disproportionate to subsection (c)’s lawful sweep . . . subsection (c) is substantially overbroad.”⁴⁸

The Court agreed with the State that “[s]ubsections (a) and (b) are independent of subsection (c), do not depend on subsection (c) for their meaning, and can stand on their own without subsection (c).”⁴⁹ Therefore, given the “presumption of severability” contained in N.J.S. 1:1-10,⁵⁰ the Court concluded that subsection (c) is severable because “the remainder of the statute,

³⁹ *Id.* (“rel[ying] on what it calls the ‘familiar canon of statutory construction that catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated’”).

⁴⁰ *Id.*

⁴¹ *Id.* at 284-85.

⁴² *Id.* at 285.

⁴³ *Id.*

⁴⁴ *Id.* at 283.

⁴⁵ *Id.* at 282-83 (“Nor is subsection (c) limited to material that legally constitutes child pornography.”).

⁴⁶ *Id.* at 282.

⁴⁷ *Id.* (agreeing with the Appellate Division that the language of the subsection could be construed to criminalize photos of teens at the beach, certain sporting events, etc.).

⁴⁸ *Id.* at 282 (declining to address “the validity of subsections (a) or (b)” because the “[d]efendant was not charged under subsections (a) or (b)” nor did he “challenge subsections (a) or (b) before the trial court or the Appellate Division” and adding that “the State . . . has a ‘compelling interest in protecting children not only from sexual and physical abuse, but also from severe emotional, psychological, and reputational harm’” and “that ‘an image that associates a child with explicit sexual content . . . can haunt the child for years’”).

⁴⁹ *Id.* at 288.

⁵⁰ N.J. STAT. ANN. § 1:1-10 (West 2023) (“If any title, subtitle, chapter, article or section of the Revised Statutes, . . . shall be declared to be unconstitutional, . . . in whole or in part, by a court of competent jurisdiction, such title, subtitle, chapter, article, section or provision shall, to the extent that it is not unconstitutional, . . . be enforced and effectuated,

without the invalid provision, can ‘form[] a complete act within itself.’”⁵¹

New Jersey’s Obscenity Statute, N.J.S. 2C:34-2

The New Jersey obscenity statute, N.J.S. 2C:34-2, defines “obscene material” using the three-pronged standard in *Miller*.⁵² The statute criminalizes the sale, distribution, renting, and exhibition of obscene material.⁵³

N.J.S. 2C:24-4, which criminalizes the creation, possession, and distribution of child pornography, incorporates only part of the *Miller* standard in its definition of “[p]ortray a child in a sexually suggestive manner.”⁵⁴ It also criminalizes causing or permitting “a child to engage in a prohibited sexual act or in the simulation of such an act,” which conforms with the definition of child pornography upheld in *Ferber*.⁵⁵

The inclusion of an incomplete version of the *Miller* standard in N.J.S. 2C:24-4 potentially obscures the goal of that statute. The U.S. Supreme Court has held that states may prohibit mere *possession* of child pornography, as defined by the *Ferber* standard.⁵⁶ On the other hand, the Court’s holding in *Miller* only allows restricting the *distribution* of obscene materials.⁵⁷

New Jersey’s child pornography statute, which prohibits both possession and distribution, incorporates elements from both *Ferber* and *Miller*, which seems to be a unique approach compared to other state statutes.⁵⁸ A review of several state statutes in this area revealed that a more common approach incorporates the *Ferber* standard into statutes criminalizing child pornography specifically, like N.J.S. 2C:24-4, and uses the *Miller* standard in obscenity statutes, keeping the two offenses completely separate.⁵⁹ The New Jersey obscenity statute is designed to prohibit conduct that meets all three prongs of the *Miller* standard.⁶⁰ Therefore, although the *Higginbotham* defendant could not be charged pursuant to subsection (c) of N.J.S. 2C:24-4, the

and no such determination shall be deemed to invalidate or make ineffectual the remaining titles, subtitles, chapters, articles, sections or provisions.”)

⁵¹ *Higginbotham*, 257 N.J. at 281 (citing *Inganamort v. Borough of Fort Lee*, 72 N.J. 412, 423 (1977)).

⁵² N.J. STAT. ANN. § 2C:34-2 (West 2024).

⁵³ *Id.*

⁵⁴ N.J. STAT. ANN. § 2C:24-4(b)(1).

⁵⁵ N.J. STAT. ANN. § 2C:24-4(b)(3) – (5) (criminalizing filming or photographing the same). *See also Higginbotham*, 257 N.J. at 282 (citing *Ferber*, 458 U.S. at 764, 751-53, 762) (upholding statutes that define child pornography as the “portrayal of sexual conduct or sexual acts by children”).

⁵⁶ *Osborne v. Ohio*, 495 U.S. 103, 106-07 (1990).

⁵⁷ *Stanley v. Georgia*, 394 U.S. 568, 589 (1969).

⁵⁸ A review of state statutes in this area suggests that a more common approach uses the *Ferber* standard in child pornography statutes and the *Miller* standard in obscenity statutes, keeping the two offenses completely separate. ILL. COMP. STAT. 720 §§ 5/11-20.1, 5/11-20 (West 2024, 2011); 18 PA.C.S. §§ 6312, 5903 (West 2021, 2022); TEX. PEN. CODE ANN. §§ 43.26, 43.21 (West 2023, 2008); CONN. GEN. STAT. ANN. §§ 53a-196d, 53a-193 (West 2014); KY. REV. STAT. ANN. §§ 531.335, 531.010 (West 2024); NEV. REV. STAT. §§ 200.710, 201.235 (West 2023); R.I.GEN. LAWS §§ 11-9-1.3, 11-31-1 (West 2024); W. VA. CODE ANN. §§ 61-8C-3, 61-8A-1 (West 2014, 2023); LA R.S. §§ 14:81.1, 14:106 (West 2020, 2014); CAL. PENAL CODE §§ 311.11, 311 (West 2015, 2024).

⁵⁹ *Id.*

⁶⁰ N.J. STAT. ANN. § 2C:34-2.

Court noted that his conduct “could be prosecuted under New Jersey’s obscenity statute.”⁶¹

Pending Bills

There are currently nine pending bills that propose amendments to N.J.S. 2C:24-4, but none directly address the constitutionality of subsection (c).⁶² S.B. 976, introduced in the current legislative session, prohibits deepfake pornography and imposes criminal and civil penalties for non-consensual disclosure.⁶³ It targets the emerging phenomenon of “deepfake pornography,” which uses new technology like artificial intelligence to make it appear that the person being depicted has engaged in activity that did not actually occur.⁶⁴ A.B. 4643 creates a penalty for child endangerment through the use of social media.⁶⁵ It would hold accountable parents who post prurient content containing their children on social media sites in exchange for cash payments or other material gain.⁶⁶

The seven other pending bills are also intended to expand the offense of endangering to include additional conduct.⁶⁷ Although these bills do not prohibit the specific types of conduct described in *Higginbotham*, they do indicate that the Legislature is actively working in this area and seems to be responding quickly to relevant technological developments.

Conclusion

Proposed modifications to N.J.S. 2C:24-4, set forth in the Appendix, eliminate subsection (c) in its entirety, in accordance with the holding of the New Jersey Supreme Court in *State v. Higginbotham*.

⁶¹ *Higginbotham*, 257 N.J. at 290.

⁶² S.B. 976, 221st Leg., 2024 Sess. (Jan. 9, 2024) (identical to A.B. 1892) (“[p]rohibit[ing] deep-fake pornography and impos[ing] criminal and civil penalties for non-consensual disclosure”); S.B. 2652, 221st Leg., 2024 Sess. (Feb. 12, 2024) (identical to A.B. 3539) (“[r]evis[ing] statutory terms pertaining to sexual exploitation or abuse of children”); A.B. 4643, 221st Leg., 2024 Sess. (Jun. 25, 2024) (“[c]reat[ing] penalty for child endangerment via use of social media”); S.B. 2673, 221st Leg., 2024 Sess. (Feb. 12, 2024) (“[p]rovid[ing] for jurisdiction for prosecution for certain crimes against minors committed outside New Jersey”); A.B. 1022, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[c]larif[ing] that permitting sexual abusers to reside with a child constitutes endangering welfare of a child”); A.B. 1000, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[p]rovid[ing] that unlawful use, manufacture, or distribution of controlled dangerous substance by parent or caregiver in presence of child constitutes crime of endangering welfare of that child”); A.B. 3320, 221st Leg., 2024 Sess. (Jan. 9, 2024) (proposing the “Better Care Dog Act” which adds negligent or reckless dog supervision that results in the dog attacking a child to the child endangerment statute); A.B. 782, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[p]rovid[ing] that crimes committed outside the State under certain circumstances may be prosecuted in New Jersey”); A.B. 2509, 221st Leg., 2024 Sess. (Jan. 9, 2024) (“[r]evis[ing] child pornography law”).

Although A.B. 2509 proposes significant changes to N.J.S. 2C:24-4, the statute set forth in the pending bill does not match the current statutory language in N.J.S. 2C:24-4. In particular, the definition of “[p]ortray a child in a sexually suggestive manner” does not appear in the pending bill at all.

⁶³ S.B. 976, 221st Leg., 2024 Sess. (Jan. 9, 2024) (identical to A.B. 1892).

⁶⁴ *Id.*

⁶⁵ A.B. 4643, 221st Leg., 2024 Sess. (Jun. 25, 2024).

⁶⁶ *Id.*

⁶⁷ S.B. 2652, 221st Leg., 2024 Sess. (Feb. 12, 2024); S.B. 2673, 221st Leg., 2024 Sess. (Feb. 12, 2024); A.B. 1022, 221st Leg., 2024 Sess. (Jan. 9, 2024); A.B. 1000, 221st Leg., 2024 Sess. (Jan. 9, 2024); A.B. 3320, 221st Leg., 2024 Sess. (Jan. 9, 2024); A.B. 782, 221st Leg., 2024 Sess. (Jan. 9, 2024); A.B. 2509, 221st Leg., 2024 Sess. (Jan. 9, 2024).

Appendix

The proposed modifications to N.J.S. 2C:24-4 are presented with ~~striketrough~~ for deletions.

N.J.S. 2C:24-4 provides, in relevant part that:

Endangering Welfare of Children.

a. (1) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree. . . .

* * *

b. (1) As used in this subsection:

* * *

“Portray a child in a sexually suggestive manner” means:

(a) to depict a child's less than completely and opaquely covered intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or

(b) to depict any form of contact with a child's intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; ~~or~~

~~(c) to otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.~~

* * *

COMMENT

The proposed modification to N.J.S.A 2C:24-4 eliminates subsection (c) altogether. The Supreme Court in *Higginbotham* held that subsection (c) was unconstitutionally overbroad in violation of the First Amendment and thus unenforceable.⁶⁸ The Court additionally found that subsection (c) was severable from the rest of the statute.⁶⁹ Although the Appellate Division found subsections (a) and (b) to be unconstitutionally overbroad, the New Jersey Supreme Court declined to address the constitutionality of those subsections.⁷⁰

⁶⁸ *Higginbotham*, 257 N.J. at 267.

⁶⁹ *Id.* at 288.

⁷⁰ *Id.* at 270.