

No. 99-4183

In the
United States Court of Appeals
For the Fourth Circuit

UNITED STATES OF AMERICA,
Appellee

v.

LAWRENCE C. MATTHEWS,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE HON. ALEXANDER WILLIAMS, JR.,
UNITED STATES DISTRICT JUDGE

BRIEF OF *AMICI CURIAE*
IN SUPPORT OF APPELLANT
SEEKING REVERSAL

Respectfully submitted,

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AMICI CURIAE BRIEF IN SUPPORT OF REVERSAL

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INTERESTS OF *AMICI CURIAE* AND CORPORATE DISCLOSURE

Amici Curiae are organizations that share a deep and abiding commitment to preserving the First Amendment freedoms of the news media. *Amici* have received the consent of all parties to file this brief.

None of the *amici* have interests or affiliations requiring disclosure under FRAP 26.1 or Local Rule 26.1.

Amici are as follows:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information interests of the print and broadcast media.

The Radio-Television News Directors Association is a professional organization comprised of local and network news executives, educators, students and others in the radio, television and cable news business and is devoted to electronic journalism.

National Public Radio, Inc. is the leading radio newsgathering organization in the United States. It produces and distributes news and informational programming, including *Morning Edition*, *All Things Considered*, and *Talk of the*

Nation. NPR news programs are broadcast to millions of listeners every day through over 590 member and affiliated public radio stations throughout the United States. NPR as a non-profit membership corporation is also charged with representing the interests of its member stations, which are news organizations for their local communities, on matters affecting newsgathering and other issues of law and public policy. NPR strongly supports the rights of journalists such as Matthews to gather information to the fullest extent afforded by the First Amendment. NPR, Inc. is a private, non-profit 501(c)(3) corporation organized and incorporated in the District of Columbia. It has no shareholders.

The Society of Professional Journalists is a voluntary non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

STATEMENT OF FACTS

Amici adopt the statement of facts set forth in the Brief of Appellant.

SUMMARY OF ARGUMENT

Confronted with a trial during which he would be barred from presenting a defense under the First Amendment, journalist Larry Matthews pleaded guilty to charges of trafficking in child pornography on the Internet under 18 U.S.C. § 2252(a). But that anti-pornography statute is no different from any other law; when its application conflicts with constitutional rights, the court must give careful consideration to those rights and weigh them against the need to enforce the statute in a given situation. In many cases, the law will be unconstitutionally overbroad as applied. *Amici* ask this court to vacate Matthews' conviction and sentence and allow Matthews to present a First Amendment argument in his defense at trial.

Some of the most important and socially useful stories journalists prepare involve news concerning illegal and dangerous activities and the government's efforts to control them. Is the government doing enough to stop drug trafficking? Are police officers overstepping their bounds during criminal investigations? Are federal agents protecting individuals from financial fraud? Public response to journalistic efforts undertaken to explore the crimes and the criminals, as well as to

examine law enforcement activities, demonstrate the importance of the media's role as a governmental watchdog. That role is not diminished when the journalist must, on rare occasions and as a last resort, engage in activity that may technically violate a criminal statute, particularly when the violation does not cause the harm that the law was intended to prevent. In such cases, journalists do not claim to be above the law; they argue simply that they must be allowed to present a First Amendment defense for consideration by the finder of fact.

Strict application of § 2252 to the gathering of news directly implicates First Amendment rights. Newsgathering clearly is protected by the First Amendment's free press guarantee, and even a statute that may not be unconstitutional on its face and attempts to prevent harms as grave as those that result from child pornography could become unconstitutional in application. Often, reporters have no source for reliable information regarding matters of public interest other than their willingness to see first-hand how this illegal activity occurs, and whether authorities are working effectively to control or eliminate it.

Therefore, *Amici* ask this Court to overturn the decision of the district court and remand the case to allow the presentation of a First Amendment defense at trial.

ARGUMENT

SECTION 2252, AS APPLIED TO A JOURNALIST ENGAGED IN NEWSGATHERING, IS ARGUABLY OVERBROAD AND THEREFORE UNCONSTITUTIONAL, AND THE JOURNALIST MUST BE ALLOWED TO RAISE THAT DEFENSE AT TRIAL.

I. Newsgathering is constitutionally protected.

It is important to begin by noting that the First Amendment's guarantee of press freedom is meaningless if journalists do not possess a concomitant right to gather the news. In *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), the U.S. Supreme Court recognized that the First Amendment's protection of a free press carries with it protection for essential newsgathering.

There can be no doubt that newsgathering, as well as the dissemination of news, deserves protection under the umbrella of the First Amendment. "News must not be unnecessarily cut off at its source," Justice Stewart wrote in 1972, "for without freedom to acquire information the right to publish would be impermissibly compromised." *Branzburg* at 728 (Stewart, J., dissenting, joined by J. Brennan and J. Marshall). See also *Zemel v. Rusk*, 381 U.S. 1 (1965) (recognizing that a right to gather news must exist in some form).

Newsgathering is essential to preserving a free press and the free flow of information, as "freedom of the press can be no broader than the freedom of reporters to investigate and report the news." 28 C.F.R. 50.10 (1998) (Attorney

General's "Policy with regard to the issuance of subpoenas to members of the news media").

II. First Amendment defenses to a prosecution under the law therefore must be allowed at trial.

Although the § 2252 prohibitions on trafficking in child pornography on the Internet are intended to serve an important interest, the statute cannot be exempt from the First Amendment. No statute exists outside the parameters of the Constitution. *See Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961) (holding that no state is "free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech").

Moreover, because an otherwise valid law can conflict with the First Amendment, the court must consider whether it is overbroad as applied in a given situation. As the U.S. Supreme Court has stated:

The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

NAACP v. Button, 371 U.S. 415, 432-33 (1963).

Application of § 2252 to a journalist engaged in the constitutionally protected act of newsgathering demands careful balancing of competing interests

because constitutional freedoms “are delicate and vulnerable, as well as supremely precious in our society.” See *Branzburg, supra*, and *NAACP* at 433. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity” and must take care not to apply statutory provisions in a manner that violates constitutional rights. *Id.*

III. Technical violations of criminal statutes do not negate the need to balance First Amendment interests.

At times, journalists may, as a last resort, find it necessary to employ newsgathering techniques that technically violate statutory provisions in order to obtain information of compelling public interest.¹ Strict application of these

¹It is insufficient to counter, as the district court did below, that there are alternative means of obtaining similar information without violating the statute:

Surely there are other ways of determining the amount of child pornography available on the Internet and whether the images are easy to obtain. While the Court is hesitant to give news gathering tips, the Court agrees with the Government that other, legal avenues of investigation are available. For example, a reporter could study the number of prosecutions brought by the government and examine the public records in those cases. A reporter could develop sources, including victims of child pornography and people already convicted of violations. Finally, a reporter could examine reports to public interest groups that track incidents of child pornography distribution.

United States v. Matthews, 11 F.Supp.2d 656, 663 (D.Md. 1998). Finding that alternatives were available does not address whether a chosen alternative is protected by the First Amendment. Instead, the court found that direct research into a controversial topic is not protected by the First Amendment because there were biased secondary sources, self-interested government officials, and — most surprisingly — convicted felons to rely upon when gathering the news.

statutory provisions to newsgathering, even if they are otherwise valid, can unconstitutionally burden the right of journalists to gather the news. *See Lee v. The Columbian*, 16 Med. L. Rptr. 1261, 1264 (Wash. Super. Ct. Clark County 1988) (accusation that a journalist violated telephone harassment law was rejected because journalist's calls were protected as "routine newsgathering" and liability based on newsgathering "would constitute an unwarranted interference in the newsgathering process in violation of the First Amendment to the United States Constitution").

At least one court has held that when the interests protected by tort laws were not adversely affected by a journalist's newsgathering actions, which themselves might be construed as tortious, the journalist would not be liable for the violation. *Desnick v. American Broadcasting Cos., Inc.*, 44 F.3d 1345 (7th Cir. 1995). The same principle should apply when newsgathering implicates criminal laws, as one dissenting judge found in an Oklahoma case where nine journalists were charged with trespassing while covering a protest. The judge noted that the journalists posed no threat to public order or to the private property rights that the criminal trespass statute aimed to protect and concluded that prosecuting the journalists was unconstitutional:

I would not permit our criminal trespass statute to be used illegitimately and in this manner in order to prevent the public from

knowing what their government is doing. . . . It is inconceivable to me that a contrary conclusion can be sanctioned in our democratic society.

Stahl v. Oklahoma, 665 P.2d 839, 849 (Okla. Crim. App. 1983)(Brett, J., dissenting), *cert. denied*, 104 S.Ct. 973 (1984).

Judge Brett did not conclude that journalists could claim an absolute right to cross any property lines they chose in pursuit of a news story. Rather, he recognized that the public interest demands that the constitutionally protected act of newsgathering — essential to a free press — be taken into account when statutory prohibitions are applied to members of the news media. He recognized that a statute criminalizing certain behavior “cannot be used arbitrarily and unreasonably to exclude the press from their constitutionally protected news gathering role” when the government “does not present a legitimate or important countervailing interest.” *Id.* He further recognized that in this case, the journalists had not interfered with a landowner’s right to the use and enjoyment of private property.

Under certain circumstances, the only available means to test law enforcement is to directly challenge the barriers imposed by criminal statutes. The reporters in *Stahl* trespassed because, otherwise, their reports on a public controversy would have been limited to statements by the opposing parties to the

controversy. Similarly, the following examples illustrate how journalists seeking information about matters of public interest may have to resort to technical violations of a law in order to gather that information first-hand:

- * Recognizing that simply approaching election officials for information about voting fraud would not tell the whole story, a journalist in Idaho successfully registered and voted five times in the same school district trustee election — casting blank ballots all but one time — and then wrote an article about it. As a result of the journalist’s allegedly unlawful activity, the infirmities of an electoral process were exposed both to the public and to the government itself. But the article also alerted authorities to the journalist’s activities, and he was charged with registering to vote illegally. His editor also was charged with inducing him to break the law. Shortly before trial in October 1983, the judge dismissed the complaints. *Idaho v. Hail*, No. 16075 (Dist. Ct. complaint dismissed Oct. 12, 1984 Shoshone County); *see also Ballot Box Scheme Nets Charges Against Reporters and Editors*, THE NEWS MEDIA AND THE LAW (The Reporters Committee for Freedom of the Press, Washington, D.C.) January-February 1984 at 48.
- * In 1977, the news director at WFMY-TV in Greensboro, N.C., noticed that a local toy store openly displayed fireworks on a sales counter. After

verifying with law enforcement officials that it was illegal to use or sell fireworks in North Carolina, except at public fairs or carnivals, the news director sent a reporter and a cameraman to the store to prepare a news report about the availability of the illegal fireworks. The journalists purchased fireworks, then took the fireworks to sheriff's deputies, who then arrested the toy store's owner for illegally possessing and selling fireworks. The journalists filmed the arrest, and WFMY featured it on its 6 p.m. news show.

The journalists subsequently were charged with illegally purchasing and possessing fireworks. Their attorney asserted that they had not intended to violate the law, but rather had intended to expose possible violations of the law. *See Newsmen Arrested for Fireworks Sales Probe*, THE NEWS MEDIA AND THE LAW (The Reporters Committee for Freedom of the Press,

containing fake bombs made of modeling clay, wires, and an alarm clock through three different airlines to test airport security. The packages were delivered to Pan Am, TWA, and Air France at Kennedy International Airport. *See Air Security 'Tests' Net Arrests*, THE NEWS MEDIA AND THE LAW (The Reporters Committee for Freedom of the Press, Washington, D.C.) Winter 1989 at 45.

A TWA employee notified the New York Port Authority Police of receiving a package containing something resembling a bomb, and Port Authority police seized that package, as well as another checked at the Pan Am counter. The package delivered to Air France was not found. *Id.*

The journalists were charged under 18 U.S.C. § 371 with conspiring to lie to airport personnel about the contents of the packages, but the journalists asserted through their lawyer that they never intended to violate the law. *United States v. Chaillou*, No. 89-11M-2 (E.D.N.Y. complaint filed Jan. 5, 1989, dismissed Aug. 16, 1994); *United States v. Frankel*, No. 89-11M-1 (E.D.N.Y. complaint filed Jan. 5, 1989, dismissed Aug. 16, 1994).

* Also shortly after the Pan Am Flight 103 bombing, an ABC reporter and cameraman who were researching a similar story on airport security were arrested for trespassing after they entered a restricted area on the tarmac at

Kennedy International Airport. The charges against the reporter and cameraman ultimately were dismissed. *New York v. Santana*, No. 9-Q-064698 (N.Y. Sup. Ct. complaint dismissed Feb. 1, 1989); *New York v. Wallace*, No. 9-Q-064699 (N.Y. Sup. Ct. complaint dismissed Feb. 1, 1989).

In all of these situations, journalists undertook activities that technically violated the law. They neither received “benefits” as a result of the violations, nor did their acts cause the harm the statutes meant to prevent. Instead, the stories revealed information of vital interest to the public that could have been obtained no other way. Without making that initial decision to step beyond statutory bounds in pursuit of stories of vital public interest, these journalists would have failed in their roles as government watchdogs for the public.

CONCLUSION

No criminal statute can be exempt from the protections of the First Amendment. When applied to journalists engaged in newsgathering, strict application of a criminal statute often will fail to advance the interest government intends to protect. As Justice Sutherland wrote in *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936):

The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon

misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Justice Sutherland recognized that “an informed and enlightened public opinion was the thing at stake” when statutes interfere with First Amendment freedoms. *Id.*

The free flow of information to the public is vital to democracy. The public has a strong interest in knowing both about the prevalence of child pornography on the Internet, and about law enforcement efforts to eradicate it. Arguably, the most effective way to report on these issues is to gain access to the Internet to observe these matters first-hand.

Matthews contends that he was doing just that — engaging in constitutionally protected newsgathering — when he was charged with violating § 2252(a). If his assertions are true, strict application of the statute here would violate the First Amendment. Matthews should be given the opportunity to present his newsgathering defense for consideration by the triers of fact in this case. Otherwise, strict application of the statute in these circumstances will not only fail to serve the government’s goal of eliminating electronic trafficking in child pornography, it will violate the First Amendment’s guarantee of a free press and an informed public. Therefore, *Amici* ask this Court to overturn the conviction and sentencing of Matthews and allow him to present a First Amendment defense to the charges leveled against him under § 2252(a).

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